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Negligence -- Physical Injuries Induced By Fright -- Impact Rule

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CASES NOTED

NEGLIGENCE — PHYSICAL INJURIES INDUCED BY FRIGHT — IMPACT RULE

The plaintiff, upon being charged by the defendant's trespassing bull, collapsed from fright which resulted in an attack of coronary insufficiency. At no time was she struck by the bull. *Held*, there can be no recovery of damages for injury resulting from fright unless accompanied by physical injury or impact. *Bosley v. Andrews*, 393 Pa. 161, 142 A.2d 263 (1958).

According to the weight of authority,[1] physical injuries due to fright or shock unaccompanied by any other element of actual damage can be made the basis of recovery in actions of negligence. The landmark Irish case of *Bell v. Great Northern Ry.*[2] initiated this line of reasoning by allowing the plaintiff to prove, in the absence of any physical impact, that his injury was a reasonable consequence of the defendant's negligence. An additional view was announced in the parent American case of *Hill v. Kimball*.[3] The court realized that even though it is more difficult to produce injuries through the operation of the mind than by direct physical means, this does not afford grounds for refusing compensation.[4] Fright and shock are both regarded not as intervening agents, but as natural and probable forces which are but a link in the chain of causation between

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1. *Ala.*: Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916). *Cal.*: Lindley v. Knowlton, 179 Cal. 298, 176 Pac. 440 (1918); *Conn.*: Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941); *Ga.*: Williamson v. Central Ry., 127 Ga. 125, 56 S.E. 117 (1906); *Iowa*: Watson v. Dilts 116 Iowa 249, 89 N.W. 1068 (1902); *Kan.*: Clemm v. Atchison, T. & S. F. Ry., 126 Kan. 181, 268 Pac. 103 (1928); *La.*: Stewart v. Arkansas Southern R.R., 112 La. 764, 36 So. 676 (1904); *Md.*: Bowman v. Williams, 164 Md. 397, 165 Atl. 182 (1933); *Minn.*: Purcell v. St.Paul City R.R., 48 Minn. 34, 50 N.W. 1034 (1892); *Mont.*: Chasin v. Northern P.R.R., 96 Mont. 92, 28 P.2d 862 (1934); *Neb.*: Netusil v. Novak, 120 Neb. 751, 235 N.W. 335 (1931); *N.H.*: Chicchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 Atl. 540 (1930); *N.C.*: Kimberly v. Howland, 143 N.C. 398, 55 S.E. 778 (1906); *Ore.*: Salmi v. Columbia & N.R.R., 75 Ore. 200, 146 Pac. 819 (1915); *R.I.*: Simone v. Rhode Island Co., 28 R.I. 186, 66 Atl. 202 (1907); *S.C.*: Mack v. South Bend R.R., 52 S.C. 323, 29 S.E. 005 (1897); *S.D.*: Sternhagen v. Kozel, 40 S.D. 396, 162 N.W. 398 (1918); *Tenn.*: Memphis St. R.R. Co. v. Bernstein, 137 Tenn. 637, 194 S.W. 902 (1917); *Texas*: Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890); *Va.*: Bowles v. May 159 Va. 419, 166 S.E. 550 (1932); *Wash.*: Cherry v. Gen Petroluem Corp., 172 Wash. 688, 21 P.2d 520 (1933); *W.Va.*: Lambert v. Brewster, 97 W.Va. 124, 125 S.E. 244 (1924); *Wisc.*: Pankopf v. Hinkley, 141 Wis. 146, 123 N.W. 625 (1909); 2 RESTATEMENT, TORTS, § 436 (2) (1934); See PROSSER, TORTS § 37 (2d. ed. 1955).

2. L.R. 26 IR. 428 (1890) The court relied upon the unreported case of Byrne v. Great Southern & Western Ry. Co. where recovery was granted although the plaintiff admitted that not a hair of his head was touched. Contra: Victorian Rys. Comm. v. Coultas, 13 App. Cas. 222, 57 L.J.P.C. 69 (P.C. 1888).

3. 76 Tex.210, 13 S.W. 59 (1890).

4. Lindly v. Knowlton, 179 Cal. 298, 176 Pac. 440 (1918); Sloanne v. Southern Cal. Ry., 111 Cal. 668, 44 Pac. 320 (1896); 128 Conn. 321, 21 A.2d 402 (1941); See Smith, H.W. *Relations of Functions to Injury and Diseases: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944).

the wrong and the injury.[5] The courts have not hesitated to deny recovery where negligence results fright alone[6] thus insisting upon ensuing physical injuries in order to guarantee the merits of the claim.[7] The present view of the majority is reflected by Chief Justice Maltbie in the leading case of *Orlo v. Connecticut Co.*[8]

> It is, then, well within the logic of law that where results which are regarded as proper elements of recovery as a consequence of physical injury are caused by fright or nervous shock due to negligence, recovery should be permitted . . . . Certainly it is a very questionable position for a court to take, that because of the possibility of encouraging fictitious claims compensation should be denied those who have actually suffered serious injury through the negligence of another.[9]

Some decisions have modified this liberal rule by insisting that in order to give rise to a right of action grounded on negligent conduct, the shock must be occasioned by fear of personal injury to a person sustaining the shock, and not fear of injury to property or to the person of another.[10]

A minority of jurisdictions,[11] including Florida,[12] still insist that the plaintiff prove a contemporaneous physical impact as a necessary condition

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5. Alabama Fuel & Iron Co., v. Baladoni, 15 Ala. 316, 73 So. 205 (1916); Purcell v. St. Paul R.R., 48 Minn. 34, 50 N.W. 1034 (1892).

6. *E.g.*, Bachilder v. Morgan, 179 Ala. 339, 60 So. 815; Williamson v. Central of Georgia R.R., 127 Ga. 125, 56 S.E. 119; Braun v. Craven, 175 Ill. 401, 51 N.E. 657; See, 17 C.J. *Damages* § 158 n. 93 (1919); 25 C.J.S. *Damages* § 70 n. 93 (1941).

7. Green v. T.A. Shoemaker & Co., 111 Md. 69, 73 Atl. 668 (1909); Purcell v. St. Paul City R.R., 48 Minn. 134, 50 N.W. 1034 (1892); Chicchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 Atl. 540 (1930); Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941); Simone v. Rhode Island Co., 28 R.I. 186, 66 Atl. 202 (1907); See Restatement, Torts § 313 (1934). But see 2 Restatement, Torts, 436 (2) Caveat as to possible unreliability of testimony.

8. 128 Conn. 231, 21 A.2d 402 (1941).

9. Id. at 238, 239, 21 A.2d 402 at 405.

10. Goddard v. Watters, 14 Ga. App. 722, 82 S.E. 304 (1914); Cleveland, C.C. & St. L. R.R., v. Stewart, 24 Ind. App. 274, 56 N.E. 917 (1900); McGee v. Vanover, 148 Ky. 737, 147 S.W. 742 (1912); Sanderson v. Northern R.R., 28 Minn. 162, 92 N.W. 542 (1902); Nuckles v. Tenn. Electric Power Co., 155 Tenn. 611, 299 S.W. 775 (1927); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935); *Contra*: Bowman v. Williams, 164 Md. 397, 165 Atl. 182 (1933); Watson v. Dilts, 116 Iowa 249, 89 N.W. 1069 (1902); Rasmussen v. Bensin, 133 Neb. 449, 275 N.W. 674 (1937); Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890); Lambert v. Browster, 97 W. Va. 124, 125 S.E. 244 (1924); Handbrook v. Stokes Bros., [C.A. 1925] 1.K.B. 141 (viewing the problem from the standpoint of proximate cause rather than duty).

11. *U.S.*: Haile's Curator v. Texas & Pacific Ry., 60 Fed. 557 (C.C.A. 5th (1894); *Ark.*: St. Louis v. Brass, 69 Ark. 402, 64 S.W. 226 (1901); *Ill.*: Braun v. Craven, 175 Ill. 401 51 N.E. 657 (1898); *Ind.*: Kalen v. Terre Haute & I.R.R., 18 Ind. App. 202, 47 N.E. 694 (1897); *Ky.*: McGee v. Vanover, 148 Ky. 737, 147 S.W. 472 (1912); *Maine*: Herrick v. Evening Publishing Co., 120 Me. 138, 113 Atl. 16 (1921); *Mass.*: Spade v. Lynn & B.R.R., 168 Mass. 285, 47 N.E. 88 (1897); *Mich.*: Nelson v. Cranford, 122 Mich. 466, 81 N.W. 335 (1899); Mo.: McArdle v. Pack Dry Goods Co., 191 Mo. App. 263, 177 S.W. 1095 (1915); *N.J.*: Ward v. West Jersey & S. R.R., 65 N.J.L. 383, 47 Atl. 561 (1900); *N.Y.*: Mitchell v. Rochester Ry., 515 N.Y. 107, 45 N.E. 354 (1896); *Ohio*: Miller v. Baltimore R.R., 78 Ohio St. 309, 85 N.E. 499 (1908); *Pa.*: Ewing v. Pittsburgh, C. & St. L. Ry., 147 Pa. 40, 23 Atl. 340 (1892).

12. Crane v. Loftin, 70 So.2d 574 (Fla. 1954) (there must be wilful and wanton negligence in order to recover). For decisions involving other forms of emotional distress see Note, 13 U. MIAMI L. REV. 116 (1958).

for the recovery of damages for physical injuries induced by fright. The minority doctrine rests upon three principles: (1) since there can be no recovery for fright, there can be no recovery for the consequences of fright;[13] (2) the physical consequences of fright are too remote and are not the proximate result of the negligence;[14] (3) public policy demands that recovery be denied in order to prevent unjust claims.[15] The judicial policy in these states is to allow recovery: if the plaintiff can prove the slightest contact[16] either prior to or after the shock;[17] for physical damages sustained when fright leads the plaintiff to react instinctively to an apparent peril;[18] and without impact under their respective workmen's compensation statutes.[19]

In the instant case, the court refused to change Pennsylvania's firmly entrenched[20] non-liability rule, rather than adopt the view of the weight of authority. Justice Bell, speaking for the majority said:

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13. St. Louis I.M. & S. R.R., v. Bragg, 69 Ark. 402, 64 S.W. 226 (1901); Spade v. Lynn & B. R.R., 168 Mass. 285, 47 N.E. 88 (1897); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.Y. 354 (1896).

14. Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898); Ward v. West Jersey & S. R.R., 65 N.J.L. 383, 47 Atl. 561 (1900); Mitchell v. Rochester Ry., supra note 13; Miller v. Baltimore R.R., 78 Ohio St. 309, 85 N.E. 499 (1908); Ewing v. Pittsburgh C. & St. L. R.R., 147 Pa. 40, 23 Atl. 340 (1892).

15. Braun v. Craven, *supra* note 14; McGee v. Vanover 148 Ky. 737, 147 S.W. 742 (1912); Spade v. Lynn & B.R.R., 168 Mass. 285, 47 N.E. 88 (1897); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896).

16. McArdle v. George B. Peck Dry Goods Co., 191 Mo. App. 263, 177 S.W. 1095 (1915) (slight jar); Porter v. Delaware, L. & W.R.R., 73 N.J.L. 405, 63 Atl. 860 (1906) (dust); Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931) (slight jar); Morton v. Stack, 122 Ohio 115, 170 N.E. 869 (1930) (smoke).

17. Impact prior to fright: Chespeake & Ohio Ry. v. Robinett, 151 Ky. 778, 152 S.W. 976 (1913); McCarthy v. Boston El. Ry., 222 Mass. 568, 212 N. E. 235 (1916) (thrown to floor by collision); Comstock v. Wilson, *Supra* note 16. Impact after fright: Conley v. United Drug Co., 218 Mass. 238, 105 N.E. 195 (1914); Driscoll v. Gaffey, 207 Mass. 102, 92 N.E. 1010 (1910); Cameron v. New Eng. Tel. & Tel. Co., 182 Mass. 310, 65 N.E. 385 (1902); Howarth v. Adams Express Co., 269 Pa. 280, 112 Atl. 536 (1921); Hess v. American Pipe Mfg. Co., 221 Pa. 67, 70 Atl. 294 (1908).

18. Freedman v. Eastern Mass. Street Ry., 299 Mass. 246, 126 N.E. 2d 739 (1938) (passenger jumped at sound of slight collision); Chastain v. Winston, 152 S.W. 2d 165 (Mo. 1941) (pedestrian threw up his hand causing object to rebound from taxi-cab); Tuttle v. Atlantic City R.R., 66 N.J.L. 327, 49 Atl. (1901) (fell while escaping from speeding derailed freight car); Buchannan v. West Jersey R.R., 52 N.J.L. 265, 19 Atl. 254 (1890) (dropped to platform to escape from timber protruding from car); Comstock v. Wilson 232 N.Y. 231, 177 N.E. 431 (1931) (fell after alighting from car involved in collision).

19. Charon's Case 321 Mass. 694, 75 N.E. 2d 511 (1947); Klein v. Len H. Darling Co., 217 Mich. 485, 187 N.W. 400 (1922); Van Ness v. Borough of Haledon, 136 N.J.L. 623, 56 A.2d 888 (1948); Pickerell v. Schumacher, 215 App. Div. 745, 212 N.Y. Supp. 899 (3d Dep't. 1925), *aff'd.* 242 N.Y. 577, 152 N.E. 434 (1926); (The absence of a jury might be responsible for this attitude).

20. Fox v. Borkey, 126 Pa. 164, 17 Atl. 604 (1889); Ewing v. Pittsburgh, C. & St.L. Ry., 147 Pa. 40, 23 Atl. 340 (1892); Huston v. Freemansburg Borough, 212 Pa. 548, 61 Atl. 1022 (1905); Morris v. Lackawanna & Wyoming Valley, R.R., 228 Pa. 198, 77 Atl. 445 (1910); Horwarth v. Adams Express Co., 269 Pa. 280, 112 Atl. 536 (1921); Koplin v. Louis K. Liggett Co., 322 Pa. 333, 185 Atl. 744 (1936); Hess v. Philadelphia Transp. Co., 358 Pa. 144, 56 A.2d 89 (1948); Potere v. City of Philadelphia, 380 Pa. 581, 112 A.2d 100 (1935); Gefter v. Rosenthal, 384 Pa. 123, 119 A.2d 250 (1956).

> To allow recovery for fright . . . with all the disturbances and illnesses which accompany or result therefrom where there has been no physical injury or impact, would open a Pandora's box . . . for every wholly genuine and deserving claim there would likely be a tremendous number of illusive or imaginative or fake ones.[21]

The case of *Potere v. Philadelphia*[22] was distinguished from the instant case. In that case recovery was allowed for mental suffering and fright associated with bodily injuries. The plaintiff in *Hess v. Philadelphia Transp. Co.*[23] was allowed to recover damages for physical injuries and neurosis created by fright which resulted from an *electric* shock. In refusing to apply the non-liability rules, the court reasoned that an electric shock was a physical assault as distinguished from a mere nervous shock.

In a long, powerful dissent, Justice Musmanno humorously but logically destroyed the court's contentions. If the court was afraid to allow the plaintiff to submit her case to the jury because of the likelihood of an onslaught of faked claims, he declared, our basic judicial system is worthless and should be altered. Admitting that the Pennsylvania courts have consistently denied recovery in fright cases does not mean, that the courts *must* continue to do so. His metaphor eloquently pleads:

> Stare decisis is the viaduct over which the law travels in transporting the precious cargo of justice. Precedence and . . . safety dictates that the piers of that viaduct should be examined . . . to make certain that they are sound, strong and capable of supporting the weight above.[24]

In reviewing *Huston v. Freemansburg*,[25] a supporting pillar of the non-liability doctrine, the dissent, with the aid of hindsight, condemns the theories of the case. Over fifty years ago, Chief Justice Mitchell reasoned that since there is exaggeration and fraud in the *ordinary* negligence cases, disaster would fall upon our courts if recovery were to be allowed in fright cases. Justice Musmanno's opinion acidly suggests that the courts that allow recovery for mental disorders from fright, despite the absence of any impact, are still functioning properly. A review of the facts of the cases cited by the majority[26] also leads Musmanno to resolve that the "viaduct" is on shaky pillars because the cases are unsupportable in the eyes of justice.

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21. Bosley v. Andrews, 393 Pa. 161, ——, 142 A.2d 263, 266 (1958).
22. 380 Pa. 581, 112 A.2d 100 (1956).
23. 358 Pa. 144, 56 A.2d 89 (1948).
24. Bosley v. Andrews 393 Pa. 161, ——, 142 A.2d 263, 280 (1958).
25. 212 Pa. 548, 61 Atl. 1022 (1905).
26. Fox v. Borkey, 126 Pa. 164, 17 Atl. 604 (1889) (grossly negligent blasting caused plaintiff to fall to the ground and sustain a heart attack); Morris v. Lackawanna & Wyoming Valley R.R., 228 Pa. 198, 77 Atl. 445 (1910) (passenger sustained a miscarriage due to fright induced by derailed car); Ewing v. Pittsburgh, C. & St. L. Ry., 147 Pa. 40, 23 Atl. 340 (1892) (derailed car crashed into house causing nervous shock).

The case of *Samara v. Allegheny Valley St. Ry.* [27] was allowed to go the jury. There, the plaintiff was seeking damages for neuritis occasioned by fright created by a street car leaving its tracks. Her case was established by the fact that she was thrown to the floor of the car. This case and the instant case are indistinguishable in principle and logic. Justice Musmanno reasoned that there should be no difference in being thrown to the floor of a wild street car and collapsing to the ground in the path of a charging bull. In neither case was there any contact between the victim and the defendant's instrumentality.

The evidence in the *Hess* case indicated that even though the plaintiff received an electric shock the psycho-neurosis resulted from fear. The dissent indicated that an inconsistent position was taken by the court when recovery was allowed in the absence of any impact.

Even assuming that the majority's supporting cases were correct in law, today the whole problem should be reappraised in the light of the technical advancements in the field of medicine. In *Collins v. Chartiers Valley Coal* Co.,[28] a case involving water contamination and not negligence, the court as early at 1890 took judicial notice of the existing scientific progress. Analogizing the principles in this and the instant case, Justice Musmanno said, "It seems to me that it is a violation of the living spirit of the law to adhere to an ancient rule which has no pragmatic application to the realities of today."[29]

The dissent contended that the jury in the instant case could have determined whether Mrs. Bosley's heart attack was occasioned by her fear of being gored just as easily as the jury in the *Potere* case decided that a nervous disturbance was caused by the plaintiff's fear of falling, and not by his sprained ankle. Heart ailments are physical injuries which are to be differentiated from sentimental grief. It is evident to the dissent that physical injuries can be created by the forces that do not physically touch the body. The medical evidence offered and the proof thereof, in cases of people blinded, and deafened by explosions, is similar to the problems in the instant case.

The majority of the court refused to confer liability upon the defendant because fifteen feet of space existed between the horns of Mr. Andrews' bull and the prone body of Mrs. Bosley. Justice Musmanno agrees with the arguments set forth in the dissenting opinion of Judge Ervin of the Superior court:[30] (1) the plaintiff could have recovered damages for her heart attack if the bull had grazed her slightly; (2) the plaintiff could have recovered damages for any physical injuries, such as a broken leg, sustained in evading the bull's chase; (3) the distinction made by the

27. 238 Pa. 469, 86 Atl. 287 (1913).
28. 131 Pa. 143, 18 Atl. 1012 (1890).
29. Bosley v. Andrews, 393 Pa. 161, ——, 142 A.2d, 263, 274 (1958).
30. Bosley v. Andrews, 184 Pa. Super. 396, 135 A.2d 101 (1957).

court, that the plaintiff cannot recover because she ran and fell and then suffered a heart attack, is without merit.

An interesting inconsistency in the law of Pennsylvania is illustrated by the case of *Gillam v. Hague*[31] where damages were recovered for the loss in value of a horse frightened by an automobile. The dissent inferred, that since similar evidentiary and causal problems appear in both this and the instant case, *Mr. Bosley would have recovered damages if his horse, and not his wife, had collapsed.*

Justice Musmanno concluded that, since the majority admits: (1) medical evidence proved that Mrs. Bosley's heart disability was a direct result of the bull's chase; (2) Mr. Andrews was a *trespasser* by the actions of his cattle; then, under the law of *quare clausum fregit*, liability should follow for all ensuing damages.

Mr. Andrews owed a duty to his neighbors to keep his cattle off their land. The breach of this duty resulted in Mrs. Bosley sustaining a heart attack. It is difficult to see why the proximate cause of the injury was anything *but* the fright created by the bull's chase. Certainly it was forseeable that wild cattle might frighten those who attempted to constrain them. Applying their predecessors' reasoning, the court refused the plaintiff the right to redress at law because *she was fortunate enough not to be struck by the defendant's bull.* Proof of impact has always been required by the Pennsylvania courts in order to enable the plaintiff to take his case to the jury. The only reason presented by the court for denying recovery was the fear of setting a precedent that would eventually create a flood of unjust claims. The practical experience gained from observing the records of jurisdictions allowing recovery, unquestionably wrecks any possible foundation for maintaining this view. Our judicial system is mature enough to separate the wheat from the chaff before any damage can be done. A blind adherence to the doctrine of stare decisis destroys the very basis of judge-made tort law. The judicial policy of our modern courts must be flexible in order to conform to the needs and advancements of society.

LAWRENCE J. SHONGUT

GUEST STATUTE — CHANGE OF STATUS

Plaintiff, a passenger in defendant's automobile, was injured after protesting about defendant's improper driving and demanding to be let out. *Held*, plaintiff's reasonable protest and demand to leave the automobile changed her status from guest to that of a *passenger against her will.* There-

31. 39 Pa. Super. 547 (1909).