RECOVERY FOR NEGLIGENCE WITHOUT IMPACT

Battalla v. State
10 N.Y.2d 237, 176 N.E.2d 729 (1961)

Carmen Battalla, a nine-year-old girl, was placed alone in a chair lift at a state operated ski center by a state employee who negligently failed to secure the chair's safety bar. She was carried to the bottom with the bar open and became hysterical. A claim was brought against the state which alleged "severe emotional and neurological disturbances with residual physical manifestations."[1] The New York Court of Appeals affirmed the decision of the lower courts,[2] overruled *Mitchell v. Rochester Ry.*,[3] and held that the plaintiff's claim stated a cause of action against the state.

It seems fairly well established that if the defendant has merely been negligent, there can be no recovery for mental disturbance if it neither results from, nor leads to, some kind of bodily injury.[4] However, if the emotional injury is so severe as to result in physical injury, state courts are split as to whether the plaintiff is entitled to recover. The trend seems to be that if the defendant's conduct is negligent and the plaintiff's injuries are the direct result of such conduct, there may be recovery even though the injuries result through fright.[5] However, a large number of jurisdictions have refused to permit recovery unless there has been a physical impact with the plaintiff's person. Nevertheless, most of these courts accept even the slightest contact to permit an action.[6] If the impact occurs at the same point of time as the fright, recovery will usually be allowed whether the ultimate injuries were caused by the concurrence of the impact and fright or by the fright alone.[7] In Ohio the rule is stricter. Impact is not enough; there must be a contemporaneous physical injury.[8] In the majority of jurisdictions the requirement of contact between the

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1 Battalla v. State, 17 Misc. 2d 548 (Ct. Cl. 1959).

2 With three members dissenting.

3 151 N.Y. 107, 45 N.E. 354 (1896).

4 Annot., 64 A.L.R.2d 103, 117 (1959); II Harper & James, Law of Torts 1031 (1956).

5 Annot., 64 A.L.R.2d 103, 110 (1959).

6 Steverman v. Boston Elevated, 205 Mass. 508, 91 N.E. 879 (1910), clothing burnt; Homans v. Boston Elevated, 180 Mass. 456, 62 N.E. 737 (1902), plaintiff thrown against seat in railroad collision; Porter v. Delaware, 73 N.J.L. 405, 63 Atl. 860 (1906), dust in eye; Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931), bumped car in which plaintiff was a passenger.

7 N.Y. Law Revision Comm'n "Recommendation of Law Revision Commission to the Legislature Relating to Liability for Injuries Resulting from Fright or Shock," 425 (1936).

8 16 Ohio Jur. 2d, "Damages," 85 (1955). See Davis v. Cleveland, 135 Ohio St. 401, 21 N.E.2d 588 (1939), the court could easily have found impact when a bus door closed on the plaintiff, but it held this was not sufficient.

plaintiff and the defendant is ignored if there is some immediate, visible physical reaction to the situation caused by the defendant.[9]

The jurisdictions which refuse recovery in the absence of impact have advanced various reasons in support of their position. In *Mitchell v. Rochester Ry.* the court said that since recovery is not permitted when fright is caused by negligence, there can be no recovery for the results of fright. These results only show the seriousness of the fright. The right of action must still depend on whether recovery may be had for fright. The fallacy in this argument is that it is based on the assumption that fright is alleged as the cause of action, and the physical consequences are claimed merely in aggravation. In fact, the plaintiff alleges the physical injury as the ground for recovery. The fright is just a link in the causal connection between the defendant's negligence and the plaintiff's injury. The reason there is no recovery for "mere" fright is that fright in itself is not considered a legal injury. However, physical injuries are legal injuries, and the courts should permit recovery if they are a direct result of defendant's negligence.[10]

It is also said that such injuries are too remote; that they could not have been foreseen as the result of defendant's act.[11] The test of foreseeability should not be used to determine whether a defendant is responsible for the results of his negligent act. Foreseeability is the test used to determine whether the act was negligent. When the conduct is found to be negligent, the actor is liable for all damages resulting therefrom in an unbroken chain of causation.[12]

A possible explanation for the refusal of some courts to accept physical injuries as the legal result of the fright may be their inability to see any connection between conduct causing mental disturbance and physical injuries. Great advances have been made in the field of psychosomatics, and it is now well established that physical injuries can result from an emotional disturbance.[13] However, most courts which require impact considered the problem long before these advances were made.[14]

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[9] Conley v. United Drug, 218 Mass. 238, 240, 105 N.E. 975 (1914), plaintiff fainted; Lowery v. Manhattan Ry., 99 N.Y. 158, 1 N.E. 608 (1885), a third person, frightened by defendant's negligence, injured the plaintiff in an attempt to escape; Weinberg v. N.Y. Rapid Transit Corp., 9 N.Y.S.2d 423 (App. Div. 1938), the defendant negligently left the gates raised while a train was approaching. The plaintiff started to cross, saw the train, became frightened, and caught her foot; Cohn v. Realty Co., 162 App. Div. 791, 148 N.Y.S. 39 (1914), plaintiff fainted; Lewis v. Woodland, 101 Ohio App. 442, 140 N.E.2d 322 (1955), defendant, as a practical joke, placed a rubber lizard on plaintiff's lap. The plaintiff jumped up and down, causing her to break her back.

[10] Bohlen, Studies in the Law of Torts 265-66 (1926).

[11] Mitchell v. Rochester Ry., *supra* note 3; Miller v. Balt. & Ohio S.W.R.R., 78 Ohio St. 309, 85 N.E. 499 (1908; Ewing v. Pitt C. & St. L. Ry., 147 Pa. 41, 23 Atl. 340 (1892).

[12] Throckmorton, "Damages for Fright," 34 Harv. L. Rev. 260, 270-71 (1921).

[13] See Rosch, "Stress—Its Relation with Illness," III Traumatic Medicine and Surgery for Attorneys 328 (1960); Smith, "Relation of Emotions to Injury and Disease," 30 Va. L. Rev. 193, 216 (1944).

[14] N.Y. Law Revision Comm'n *op. cit. supra* note 5. Only three states adopted the rule in this century.

Another objection is that the resulting damages are too speculative.[15] This is not a defect peculiar to injuries resulting from emotion. Despite the benefits of medical advances over the years there is some uncertainty as to damages in almost every action for personal injuries. However, this objection is more properly addressed to the degree of proof to be required of the plaintiff than to his right of action. When it is shown that the plaintiff has suffered injuries, difficulty in assessing damages should not prevent his right of recovery.

The argument against the rule in the instant case with the most force is that based on public policy. The other reasons for requiring impact are little more than "make weight" arguments. Massachusetts bases its holdings on policy alone,[16] and the New York courts appeared to reject all other reasons.[17] The argument based on public policy assumes that if the impact rule were overruled, a flood of litigation would result, and the courts would be exposed to the danger of fabricated claims. The fear of being "flooded" with litigation may be unfounded,[18] and even if true, it is not very compelling. It would seem that it is the duty of the courts to remedy all wrongs which deserve redress even at the expense of an increase in litigation.[19]

The danger of fabrication of claims is a very real one, especially in the populous states.[20] There is a chance that a sick plaintiff, coached by his attorney, will search for a time when he was frightened and with the help of a partisan expert witness, attribute his present illness to that fright.[21] The medical legal problems in the field of internal medicine are often different from those in any other field of medicine, and there are differences of opinion among sincere and honest physicians.[22] Thus, a dishonest litigant may be able to find expert support for his case. It would then be up to a jury of laymen to choose between them. However, the ability of the dishonest claimant to deceive a court may be overrated.[23] Even assuming that the courts cannot distinguish between valid and in-

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15 Mitchell v. Rochester Ry., *supra* note 3; Miller v. Balt. & Ohio, *supra* note 11.

16 Homans v. Boston Elevated, *supra* note 6; Spade v. Lynn and B. R. Co., 168 Mass. 285, 47 N.E. 88 (1897).

17 Ferrara v. Galluchio, 5 N.Y.2d 16, 152 N.E.2d 249 (1960); Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931).

18 Annot. 64 A.L.R.2d 103, 112 (1959). "As far as the volume of litigation is reflected, it does not seem that courts in those jurisdictions which recognize a right of action have suffered substantially more flooding than the conservative courts."

19 Prosser, Law of Torts, 39 (2d ed. 1955).

20 At the time of the instant case all American jurisdictions having a city with a population in excess of one million had adopted the impact rule with the exception of California, and California adopted its rule before Los Angeles became a great city. See McNiece, "Psychic Injury in New York," 24 St. John's Law Rev. 1 at 32 (1949).

21 Bohlen and Polikoff, "Liability in New York for the Physical Consequences of Emotional Disturbance," 32 Col. L. Rev. 409, 416 (1932).

22 Leas, Trauma and Disease, Medical Facts for Legal Truth, 20 (1961).

23 See Bosley v. Andrews, 393 Pa. 161, 175; 142 Atl. 263, 270 (1958) (Dissent).

valid claims, a requirement of impact is a poor safeguard. The type of litigant who would make a false claim would probably have no qualms about lying further to show impact. The only claims which would be weeded out would be those by honest persons who were frightened but refuse to perjure themselves.[24]

The court in the instant case might have distinguished *Mitchell* had it so desired. A finding of contact when plaintiff was placed in the chair or a shaking or rocking of the lift on the way down would have been sufficient. Instead they overruled *Mitchell*, thereby abolishing the impact requirement in New York. Overruling the impact rule should give a greater degree of certainty to the New York law because the rule of *Mitchell* was riddled with exceptions.[25]

In jurisdictions which require impact there is a possible danger that once the court finds impact, or its equivalent, it will be used as a substitute for negligence. The concept of impact fails to distinguish between experiences which would cause serious psychic consequences in a normal person and those which would only affect an unduly sensitive person. The basis of liability for negligence is behavior which a reasonably prudent man would recognize as involving an unreasonable danger to others. Since the standard of care is measured by the reaction to be expected of a normal person, the distinction should turn on the severity of the emotional invasion without regard to whether the invasion was physical or mental.[26] In the absence of knowledge of the plaintiff's condition or of actions so outrageous as to border on intentional harm, the defendant should not be held answerable for conduct which only endangers one who is exceptionally sensitive.[27] Allowing recovery without regard to physical contact should prevent any possible overemphasis of impact at the expense of more basic principles.

It has been suggested that the problem could be solved most justly by

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[24] De Angelus, "Doctrine of Public Policy as Applied to Injuries Resulting from Negligence in the Absence of Immediate Physical Injury," 24 Albany L. Rev. 404, 411 (1960).

[25] In Ferrara v. Galluchio, *supra* note 17, defendant-physician, was negligent in giving X-ray treatments, causing scabs, blisters and peeling skin on plaintiff's shoulder. The plaintiff was allowed to recover for resulting cancerophobia; In Boyce v. Greeley Square Hotel, 228 N.Y. 106, 126 N.E. 647 (1920), plaintiff was a guest at defendant's hotel. Defendant's servant entered plaintiff's room, addressed her in vile, insulting language and arrested her husband. Plaintiff was allowed to recover for physical pain or illness resulting from her humiliation; Garrison v. Sun Printing & Publishing Co., 207 N.Y. 1, 100 N.E. 430 (1912), plaintiff allowed to recover for loss of services of his wife due to her sickness resulting from defendant's publication of libel; Mitran v. Williamson, 197 N.Y.S.2d 689, 21 Misc. 2d 106 (App. Div. 1960), plaintiff allowed to recover for mental distress resulting from indecent proposals made by the defendant; Pukaluk v. Ins. Co. of No. Amer., 179 N.Y.S.2d 173 (App. Div. 1958), plaintiff allowed to recover for a heart attack resulting from fright; Seider v. Reid Ice Cream, 211 N.Y.S. 582 (App. Div. 1925), plaintiff allowed to recover for sickness caused by seeing a cockroach in her food.

[26] II Harper & James, Law of Torts 1038039 (1956).

[27] Restatement, Torts, § 313, comment b (1934).

applying general principles of duty and negligence.[28] There does not appear to be a compelling reason for treating injuries caused through mental disturbance differently from other injuries resulting from negligence. Basing the liability of the defendant on whether the utility of his conduct was outweighed by the risk of harm created appears to be more just and much more logical than a mechanical rule of thumb based upon the concept of impact.

[28] II Harper & James, *op. cit. supra* note 26.