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Physical Injury without Impact

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of the reasons for the application of the doctrine of res ipsa is that the plaintiff is not in a position to know the facts constituting the negligence or causing the injury and the facts are not accessible to him.[17] This is especially true in malpractice cases since the patient generally submits himself to the treatment or operation having no knowledge of the medical and scientific effects and consequences. Also, it has been suggested by some courts that it is difficult for the plaintiff to persuade one member of the medical profession to testify against another.[18] These factors relate to the difficult burden cast upon the plaintiff in a malpractice suit. Thus it may be argued as a matter of policy that the courts would be justified in requiring the physician or surgeon to explain away a presumption or inference of negligence, in view of the fact that he has knowledge of the facts attending the injury and can more readily invoke the aid of expert testimony.

A contrary policy, and one which the courts have adopted generally, is that expressed by Justice Taft: "A physician is not a warrantor of cures. If the maxim, 'Res ipsa loquitur', were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the 'ills that flesh is heir to'."[19]

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PHYSICAL INJURY WITHOUT IMPACT

The new owner of an apartment house designated his two daughters manager and assistant-manager of the business. Three days later the plaintiff found her key would not open her apartment door as it had been bolted from the inside and she went to the office to complain. The assistant manager leaned against the door blocking the way while the owner and manager yelled and screamed at plaintiff that the O.P.A. could not run the apartment house and that they would select their own tenants. No bodily contact took place between the parties but plaintiff was not permitted to leave at will. The court found, upon ample evidence, that the conduct of defendants caused plaintiff to become frightened, and a proximate result thereof, to suffer an upset of her glandular condition, causing shortness of breath, nervousness, headaches, loss of sleep, and inability to carry on her normal activities. The plaintiff sought damages for loss of personal property and for personal injuries. The lower court allowed damages as prayed for. *Held,* that the defendants intentionally and unreasonably subjected the plaintiff to severe mental stress causing physical injuries as a proximate result thereof and for which

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17. Ybarra v. Spangard, 25 Cal. (2d) 486, 154 P. (2d) 687, 162 A. L. R. 1258 (1944).
18. Christie v. Callahan, 124 F. (2d) 825 (App. D. C. 1941); Simon v. Freidrich, 163 Misc. 112, 296 N. Y. S. 367 (N. Y. City Ct. 1937); Coleman v. McCarthy, 53 R. I. 266, 165 Atl. 900 (1933); Johnson v. Winston, 68 Neb. 425, 94 N. W. 607 (1903); Reynolds v. Struble, 128 Cal. App. 716, 18 P. (2d) 690 (1933).
19. Ewing v. Goode, 78 Fed. 442, 443 (C. C. S. D. Ohio 1897).

damages will properly lie even though no physical impact was present. Judgment affirmed. *Emden v. Vitz et al,* 198 P. (2d) 696 (Cal. 1948).[1]

"In respect of the right to maintain an action for a bodily enjury or illness resulting from a mental or emotional disturbance, the authorities are in a state of dissension probably unequaled in the law of torts!"[2] In 1888, England[3] and the United States[4] declared there could be no recovery for physical injuries resulting from mental disturbance when no actual physical impact was present. Recovery was denied in *Victorian Railways Commissioners v. Coultas*[5] on the grounds that there was no precedent for such a recovery; that such claims are very difficult of proof; that damages are too remote; that such a recovery would open the field to imaginary claims. The New York court[6] denied recovery on the ground of no precedent. Two years later an Irish court[7] declined to follow these cases and allowed recovery. In the United States two miscarriage cases[8] followed and in both jurisdictions fright was said to be the proximate cause of the miscarriage and recovery was allowed. Massachusetts,[9] New York,[10] Pennsylvania,[11] and the United States Circuit Court of Appeals for the Fifth Circuit[12] threw their weight in favor of a denial of recovery within a period of five years. A split of authority had already developed.

The case of *Dulieu v. White and Sons,*[13] decided by the King's Bench in 1901, expressly refused to follow *Victorian Railways Commissioners v. Coultas* and is considered to be a turning point in law and recovery for injuries occasioned through fright. This case however was a premature birth case and is analogous to miscarriage cases[14] in which recovery is usually allowed. Courts are much more prone to allow recovery in miscarriage cases and have allowed recovery even though the fright was aroused by fear for the safety of a third person.[15] Recently

1. The mere temporary emotion of fright not resulting in physical injury is no injury in contemplation of law and no recovery can be had thereon unless the emotion was caused by wilfulness, wantoness or inhumanity. Fright, as used in the text of this article, refers to that type of fright which produces a resulting physical injury. The following resultant injuries have been held by various courts to be the basis of sustainable action: physical weakness, physical pain, loss of appetite, insomnia, nervous convulsions, nervous prostration, fever, vomiting, loss of memory, neurasthemia, insanity, undue fatigue, glandular defects and abnormalities, suffering from cold and wet.
2. 52 Am. Jur. 399.
3. Victorian Railways Commissioners v. Coultas, 13 App. Cas. 222 (1888).
4. Lehman v. Brooklyn City Railway, 47 Hun. 355 (N. Y. 1888).
5. Victorian Railways Commissioners, supra.
6. Lehman v. Brooklyn City Railway, supra.
7. Bell v. Great Northern Railway, L. R. 26 Ir. 428 (1890).
8. Hill v. Kimball, 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618 (1890); aff'd, Gulf, C. & S. F. Ry. v. Hayter, 93 Tex. 239, 54 S. W. 944, 47 L. R. A. 325, 77 Am. St. Rep. 856; Purcell v. St. Paul City Ry., 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203 (1892).
9. Spade v. Lynn & Boston Ry., 168 Mass. 285, 47 N. E. 88 (1897).
10. Mitchell v. Rochester Railway, 151 N. Y. 107, 45 N. E. 354 (1896).
11. Ewing v. Pittsburgh C. C. & St. L. Ry., 147 Pa. St. 40, 23 Atl. 340 (1890).
12. Hailes' Curator v. Texas & Pacific Ry., 60 Fed. 557 (C. C. A. 5th 1894).
13. Dulieu v. White & Sons, 2 K. B. 669 (1901), 70 L. J. K. B. (N. S.) 837 (1901).
14. Whitsel v. Watts, 98 Kan. 508, 159 Pac. 401, L. R. A. 1917A, 708 (1916); Holdorf v. Holdorf, 184 Iowa 1370, 169 N. W. 737 (1918); Hanford v. Omaha & C. B. Street Ry., 113 Neb. 423, 203 N. W. 643, 40 A. L. R. 970 (1925); Hambrook v. Stokes, 1 K. B. 141 (1925); Mitnick v. Whalen Bros. Inc., 115 Conn. 650, 163 Atl. 414 (1932).
15. Engle v. Simmons, 148 Ala. 92, 41 So. 1023, 7 L. R. A. (N. S.) 96, 121 Am. St. Rep. 59, 12 Ann. Cas. 740 (1906); Alabama Fuel & Iron Co. v. Baldoni, 15 Ala. App. 316, 73 So. 205 (1916).

doubt as to the validity of such claims has developed as obstetrical research has resulted in the medical view that fright cannot cause abortion.[16]

"Whenever it is possible to do so without too obvious pretense, the effort has been to find a technical battery, an assault, a false imprisonment, a trespass, or an invasion of the 'right of privacy;' but in a number of recent cases where the court was faced squarely with the issue, it has proceeded to discard all pretexts and hold the defendant liable for the infliction of mental suffering alone."[17] In the Western States the tendency toward liberality and recovery in such cases has been strong. California has been a leader in this field of law. As early as 1889 recovery was allowed a woman who suffered a three month illness as a result of fright induced by a forcible trespass on her land.[18] Later recovery was allowed a woman who was removed from a train although she had paid full fare to her destination.[19] An attack by a marauding chimpanzee on a woman and her children was also held to be sufficient basis for recovery for injuries sustained through fright.[20] Montana has allowed recovery for negligent blasting[21] with resulting fright. Damages were allowed in South Dakota[22] when the court decided that fright was the proximate cause of the injury. The Supreme Court of Kansas has given recovery in the typical miscarriage situation[23] and in a case in which the body of the plaintiff's husband was delayed while on route to burial.[24] Nebraska allowed recovery in a miscarriage suit[25] and Oklahoma gave damages for ills induced by threats to a husband.[26] Utah has allowed a woman to recover for fear that her husband would be shot.[27] In 1933 Washington denied recovery on the theory that the injury was too remote[28] but in 1935 allowed damages in a miscarriage case.[29] It appears that the Western States have repudiated the old rule which required a physical impact as a door to recovery.

This trend of liberality has long prevailed and has not been restricted to the Western States alone. Some courts have allowed the plaintiff relief for the resulting injury merely if the act was negligent and was the proximate cause of the injury,[30] or the injury followed as a natural consequence of the fright.[31] Others have held there can be no action for mere fright alone but award damages when a physical ill results.[32] One case said damages could be awarded for mere fright alone if the act was willful or wanton but negligence would sustain a re-

16. 15 U. Chi. L. R. 188.
17. Prosser, Torts 61 (1941).
18. Razzo v. Varni, 181 Cal. 289, 22 Pac. 848 (1889).
19. Sloane v. Southern Cal. Ry., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193 (1896).
20. Lindley v. Knowlton, 179 Cal. 298, 176 Pac. 440 (1918).
21. Cashin v. Northern Pac. Ry., 96 Mont. 92, 28 P. (2d) 862 (1934).
22. Sternhagen v. Kozel, 40 S. D. 396, 167 N. W. 398 (1918).
23. Whitsel v. Watts, supra.
24. Clemm v. Atchinson, T. & S. F. Ry., 126 Kan. 181, 268 Pac. 103 (1928).
25. Hanford v. Omaha C. B. Street Ry., supra.
26. Carrigan v. Henderson, 192 Okla. 254, 135 P. (2d) 330 (1943).
27. Jeppsen v. Jensen, 47 Utah 536, 155 Pac. 429, L. R. A. 1916D, 614 (1916).
28. Cherry v. General Petroleum Corp. of Cal., 172 Wash. 698, 21 P. (2d) 520 (1933).
29. Frazee v. Western Dairy Products, 182 Wash. 578, 47 P. (2d) 1037 (1935).
30. Yoakum v. Kroeger, 27 S. W. 953 (1894); Spaugh v. Atlantic Coast Line Ry., 158 S. C. 25, 155 S. E. 145 (1930).
31. Simone v. Rhode Island Co., 28 R. I. 186, 66 Atl. 202, 9 L. R. A. (N. S.) 740 (1907).
32. Arthur v. Henry, 157 N. C. 438, 73 S. E. 211 (1911); Memphis St. Ry. v. Bernstein, 137 Tenn. 637, 194 S. W. 902 (1917).

covery if a physical ill followed.[33] Many courts have given relief when the act was willful or wanton.[34] The doctrine of foreseability is still applied occasionally in some jurisdictions.[35] All courts have not yet adopted this modern spirit and a few insist on clinging to the old rule of necessity of impact.[36] The majority of the cases certainly indicate that the trend is liberal and spreading in its scope. The old restrictions laid down in *Victorian Railways Commissioners v. Coultas* and *Lehman v. Brooklyn City Railway* have been impliedly overruled by numerous courts and expressly by others,[37] and they should be considered as no longer valid in modern law.

The instant case would seem to have been correctly decided in view of the modern tendencies to award a redress for every actionable wrong regardless of the source or cause of the injury. All the necessary elements of recovery were found to exist in the present litigation. Certainly no sound reason can be given why injuries resulting from an impact should be held to permit recovery and those not so resulting be precluded from the same consideration. The courts have a duty to provide redress for every actionable wrong and cannot be said to be properly ministering justice while yet espousing falacious reasoning established by a few tribunals over a half a century ago. The reasoning set down at that time was clearly erroneous and can certainly have no just application in modern law. Courts should rid themselves of these shackles and afford a remedy for fright cases whenever the merits of the particular case warrant such.

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SUBROGATION UNDER THE FEDERAL TORTS CLAIMS ACT

An army plane crashed into a building insured by plaintiff insurance company. The owner brought suit against the United States under the Federal Torts Claims Act.[1] Plaintiff insurance company having paid for the loss, moved for leave to intervene as a subrogee to the insured's rights. The District Court denied on the grounds the act does not expressly grant consent to suit by subrogees, and that the act being a relinquishment of sovereign immunity, it must be strictly construed. *Held,* the claim exists on account of damage to the property and there is no need to resort to the rule of strict construction of statutes in derogation of sovereign immunity where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions. *Employers Fire Insurance Company v. United States,* 167 F. (2d) 655 (C. A. 9th 1948).

33. Hines v. Evans, 5 Ga. App. 829, 105 S. E. 59 (1920).
34. Janvier v. Sweeney, 2 K. B. 316 (1919), 88 L. J. K. B. 1231 (1919); Johnson v. Sampson, 167 Minn. 203, 208 N. W. 814, 46 A. L. R. 772 (1926); Continental Casualty Co. v. Garrett, 173 Miss. 676, 161 So. 753 (1935); Marcelli v. Teasley, 72 Ga. App. 421, 33 S. E. (2d) 836 (1945).
35. Orlo v. Connecticut Co., 128 Conn. 231, 21 Atl. (2d) 402 (1941); Houston Electric Co. v. Dorsett, 145 Tex. 95, 194 S. W. (2d) 546 (1946).
36. State ex. rel. & to Use of Renz v. Dickens, 95 S. W. (2d) 847 (1936).
37. Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (1912); Alabama Fuel & Iron Co. v. Baldoni, supra; Simone v. Rhode Island Co., supra.

1. 60 Stat. 842, 28 U. S. C. Sec. 921 (1946), as amended, 61 Stat. 722 (1947), 28 U. S. C. Sec. 931 (Supp. 1948).