

TORTS: NEW YORK ALLOWS CLAIM FOR INJURIES RESULTING FROM FRIGHT NEGLIGENTLY INDUCED AND REPUDIATES ITS "IMPACT" RULE

SINCE the leading case of *Mitchell v. Rochester Ry.* in 1897,¹ New York courts have refused to allow recovery for physical and mental injuries resulting from negligently-induced fright unless the fright was accompanied by an actual physical "impact."² In the recent case of *Battalla v. State*,³ however, the New York Court of Appeals, in a four to three opinion expressly overruling *Mitchell*, held that an allegation that plaintiff was caused to suffer "severe emotional, neurological disturbance with residual physical manifestations"⁴ stated a cause of action; therefore recovery could be obtained for the physical and mental injuries resulting from fright if the plaintiff could prove her injuries were proximately caused by defendant's negligence.⁵

When English courts were first presented with claims for damages allegedly caused by mental disturbance, they took the position that normal persons do not suffer injury from fright or shock. Therefore if such injuries did in fact occur they were held to be too remote as a matter of law.⁶ *Mitchell v. Rochester Ry.*⁷ was one of the first major

¹ 151 N.Y. 107, 45 N.E. 354 (1896).

² See Annot., 34 A.L.R.2d 98, 134 (1959).

³ 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

⁴ 176 N.E.2d at 729. Plaintiff, a nine-year old girl, alleged that she boarded a chair ski-lift at its top terminal. Due to the alleged negligence of an attendant-employee, the safety belt was not properly secured and locked. As a result of this negligence, the plaintiff claimed that she became frightened and hysterical during the descent, with consequential injuries.

⁵ 176 N.E. at 732.

⁶ See *Victorian Rys. Comm'rs v. Coultas*, 13 App. Cas. 222, 57 L.J.P.C. 69 (P.C. 1888). The court in the *Coultas* case took the position that physical injuries could not be the natural and probable consequence of psychic stimulation. However, England very early repudiated this extreme position. In *Dulieu v. White*, [1901] 2 K.B. 669, the court held that physical injury could be proximately caused by fright, but qualified their holding by the statement that "the shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself." *Id.* at 675. Later, in *Hambrook v. Stokes Bros.*, [1925] 1 K.B. 141 (C.A.), even this qualification was ignored, and recovery was allowed for the miscarriage and ultimate death of a mother resulting from fear that her child had been injured by a runaway lorry. England, therefore, has moved a long way from the *Coultas* case, although the exact status of the English law seems to be in doubt. See *King v.*

American decisions on the subject.⁸ The defendant's employee in the *Mitchell* case allegedly drove his horse car so negligently that the plaintiff, a pregnant woman waiting to board the car, was put in extreme peril of being run down. Although plaintiff was not touched by the horses, they came so close that she was standing between their heads when they were finally reined up. The plaintiff was terrified and shortly thereafter had a miscarriage. The court held that plaintiff could not recover for the physical consequences of her fright.

From the *Mitchell* holding, the rule developed that there could be no recovery for physical injury resulting from mental distress unless there was, coincident in time and place with the occasion producing the mental stress, some physical impact resulting from defendant's fault.⁹ This "impact" requirement soon became the majority American rule.¹⁰

From the beginning, however, dissatisfaction with the harsh results

Phillips, [1952] 2 All E.R. 459, 2 T.L.R. 277 (Q.B.D.), *aff'd* [1953] 1 All E.R. 617 (C.A.), 69 L.Q. REV. 347 (1953); Hay v. Bourhill, [1943] A.C. 92.

⁷ 151 N.Y. 107, 45 N.E. 354 (1896).

⁸ See Annot., 64 A.L.R.2d 100, 135 (1959). See also note 11, *infra*.

⁹ *Id.* at 134.

¹⁰ See Annot., 64 A.L.R.2d 100, 134 (1959). See also 11 HARV. L. REV. 202 (1897). Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 208 (1944), states: "Three early decisions have been lighthouse cases in the development of American law on the subject." Besides the *Mitchell* case, 151 N.Y. 107, 45 N.E. 354 (1896), Smith cites *Spade v. Lynn & Boston R.R.*, 168 Mass. 285, 47 N.E. 88 (1897), and *Hill v. Kimball*, 76 Tex. 210, 13 S.W. 59 (1890). In the *Spade* case a conductor caused a young lady passenger to become sick from fright occasioned by the manner in which he ejected a drunken passenger. The court, in denying recovery, recognized that real injury could be caused by fright but reasoned that where there is no injury to the person from without, it would be unreasonable to hold defendants bound to anticipate and guard against fright and the consequences thereof. The court frankly admitted that the real reason for denying recovery was the fear of fraudulent claims.

The third "lighthouse" case, *Hill v. Kimball*, however, is said to have "presaged the ultimate trend of American law." Smith, *supra* at 209. In *Hill* the defendant landlord, aware of his tenant's pregnancy and susceptibility to injury through excitement, came onto the premises and violently attacked two Negroes in her presence, causing the tenant to suffer a miscarriage. Justice Gaines recognized that no precedent existed for allowing recovery, but held that lack of precedent alone was not sufficient reason to bar a claim. He stated: "That a physical personal injury may be produced through strong emotion of mind there can be no doubt. The fact that it is more difficult to produce such an injury through the operation of the mind than by direct physical means affords no sufficient ground for refusing compensation in an action at law when the injury is intentionally or negligently inflicted. It may be more difficult to prove the connection between the alleged cause and the injury, but if it be proved, and the injury be the proximate result of the cause, we cannot say that a recovery should not be had." *Hill v. Kimball*, *supra* at 215.

occasioned by applications of the new rule¹¹ led many courts either to limit¹² or to repudiate it.¹³ The major limitation was created by the

¹¹ The kind of results obtained by the use of an "impact" requirement are graphically pictured in the following example. "If A, by his negligence, brushes slightly against B, a pregnant woman, and while doing her no injury by the impact, yet frightens her so badly that a nervous shock results from the fright—not from the impact—and the nervous shock causes B to have a miscarriage, it is admitted that she may recover from A for the physical pain and suffering endured by her in the shock and miscarriage. But, it is said, if A is driving negligently on the street, and stops his horse within a few inches of impact with B, but frightens her just as badly as in the former case, with the resultant nervous shock and miscarriage, B may not recover from A, albeit her physical injury is just as great as before and just as much due to A's fault. A rule of liability so highly technical, so completely without foundation in reason, is not out of place in a primitive system of jurisprudence, but is unworthy of any system based on the theory of granting redress for every substantial wrong." Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260, 278 (1921).

In the narrow area of miscarriage allegedly caused by fright or shock, an interesting note in 15 U. CHI. L. REV. 188 (1947), contends that according to the overwhelming weight of medical opinion, miscarriage cannot be caused by fright alone.

¹² Probably the two most important limitations are:

1) The impact does not need to be inflicted directly on the plaintiff by the defendant. *Lord v. Manchester St. Ry.*, 74 N.H. 295, 67 Atl. 639 (1907); *Twomley v. Central Park N. & E.R.R.*, 69 N.Y. 158 (1877) (defendant's negligent conduct caused plaintiff to jump for his life); *Comstock v. Wilson*, 257 N.Y. 231, 177 N.E. 431 (1931); *Cohn v. Ansonia Realty Co.*, 162 App. Div. 791, 148 N.Y. Supp. 39 (1914) (plaintiff fainted and fell); *Freedman v. Eastern Mass. St. Ry.*, 299 Mass. 246, 12 N.E.2d 739 (1938) (impact rule does not preclude recovery for injury sustained from the jump or the fall, even where the injury comes from a wrenching of the body rather than from external contact). See *Smith*, *supra* note 10 at 317, for a more extensive collection of similar cases.

2) The rule is satisfied by the most trivial of impacts. *Homans v. Boston El. R.R.*, 180 Mass. 456, 62 N.E. 737 (1902) (slight bump against seat); *Spade v. Lynn & B.R.R.*, 172 Mass. 488, 52 N.E. 747 (1899) (second trial) (slight blow); *Porter v. Delaware L. & W.R.R.*, 73 N.J.L. 405, 63 Atl. 860 (1906) (dust in eyes); *Morton v. Stack*, 122 Ohio St. 115, 170 N.E. 869 (1930) (inhalation of smoke).

Other limitations are 1) the burial right cases, 2) the contract relationship cases, 3) the immediate physical injury cases, 4) the workmen's compensation cases, 5) the food cases, 6) the wilful or wanton injury cases, and 7) the right of privacy cases. For an exhaustive treatment of these limitations see McNiece, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S L. REV. 1, 32-65 (1949). See also 2 HARPER & JAMES, TORTS § 18.4 at p. 1033 (1956).

The New York Court of Appeals in the case of *Dixon v. New York Trap Rock Corp.*, 293 N.Y. 509, 58 N.E.2d 517 (1944), used the label "nuisance" in permitting recovery, without ever mentioning "impact."

¹³ *Kaufman v. Western Union Tel. Co.*, 224 F.2d 723 (5th Cir.), *cert. denied*, 350 U.S. 947 (1955) (Texas law applied); *Alabama Fuel & Iron Co. v. Baladoni*, 15 Ala. App. 316, 73 So. 205 (1916); *Mahnke v. Moore*, 197 Md. 61, 77 A.2d 923 (1951); *Cash in v. Northern P.R. Co.*, 96 Mont. 92, 28 P.2d 862 (1934); *Chiuchiolo v. New England Wholesale Tailors*, 84 N.H. 329, 150 Atl. 540 (1930).

New York Court of Appeals itself in *Comstock v. Wilson*¹⁴ where it was held that the slightest impact would be sufficient to satisfy the rule.¹⁵ Other courts, ignoring *Mitchell* and its misbegotten progeny altogether, adopted a more enlightened approach and proceeded to allow recovery on general tort doctrines of negligence and proximate cause.¹⁶ In recent years most jurisdictions have taken this position.¹⁷

Three major reasons were given by the New York Court of Appeals for its holding in the *Mitchell* case. First the court said that since the plaintiff could not recover for mere fright, she could not recover for injuries resulting therefrom. This is plainly non-sequitur reasoning.¹⁸

¹⁴ 257 N.Y. 231, 177 N.E. 431 (1931). For other cases adopting this limitation see note 12 *supra*.

¹⁵ Plaintiff was sitting in her husband's car when it was negligently struck from behind by the defendant. The collision was minor, causing a moderate noise or "grating sound." Mrs. Comstock was only jarred by the trivial impact. She got out of the car to take defendant's name and license number. She then fainted and fell to the sidewalk and died within twenty minutes from a fractured skull. *Ibid*.

¹⁶ "A number of courts have held, and it is probably now the accepted rule in a majority of the jurisdictions where the question has been passed upon, that where definite and objective physical injury is produced as a result of emotional stress wrongfully caused by the defendant, he may be held liable for such physical consequences notwithstanding the absence of any physical impact upon the plaintiff at the time of the mental shock." Annot., 64 A.L.R.2d 100, 143 (1959). This recent annotation then proceeds to list all the jurisdictions following this majority rule, and the leading cases in each jurisdiction.

¹⁷ See note 16, *supra*. The RESTATEMENT, TORTS § 436(2) (1931) adopted the present majority rule, but added the following caveat: "The Institute expresses no opinion that the unreliability of testimony necessary to establish the causal relation between the actor's negligence and the other's illness or bodily harm may not make it proper for the court of a particular jurisdiction to refuse, as a matter of administrative policy, to hold the actor liable for harm to another which was brought about in the manner stated in the Subsection." However, in the 1948 Supplement the caveat to § 436(2) was deleted, the drafters stating that § 436(2) should now be accepted without reservation because of the trend toward allowing recovery and the insubstantial reasons supporting the "impact" rule.

American courts have been much slower than the English courts to allow recovery for injuries induced by fear for another. Compare *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935) with *Bowman v. Williams*, 164 Md. 397, 165 Atl. 182 (1933). One commentator suggests that, "once accepting the view that a plaintiff threatened with an injurious impact may recover for bodily harm resulting from shock without impact, it is easy to agree with Atkin, L. J., that to hinge recovery on the speculative issue whether the parent was shocked through fear for herself or for her children 'Would be discreditable to any system of jurisprudence.'" Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1039 (1936), quoting from *Hambrook v. Stokes*, [1925] 1 K.B. 141, 157.

¹⁸ "The doctrine of *Mitchell v. Railway* that since fear negligently caused is not actionable, consequences of such fear are not compensable, is a complete non-sequitur,

Second, it was said that no proximate cause can be shown between the fright and the physical injury. This argument has long since been disproved.¹⁹ The last reason given by the court in *Mitchell* and the only one that retains any life today is the public policy argument that the "impact" requirement is a guard against a flood of fraudulent claims.²⁰ The dissent in *Battalla* would have reaffirmed *Mitchell* on this ground.²¹ What evidence there is, however, indicates that this

devoid of legal vitality." Smith, *supra* note 10 at 211. Smith explains his conclusion as follows: "This erroneous argument proceeds as follows: First, the court assumes correctly that mere fright negligently caused is not actionable; *ergo* injury which is a consequence of fright being one step further removed from defendant's conduct is *a fortiori* too remote to be compensable. But the true reason for not compensating simple fright is that it involves no measurable damage and this reason vanishes if physical injury ensues." *Id.* at 208 n.34. See also Magruder, *supra* note 17 at 1036.

¹⁹ "All these objections have been demolished many times, and it is threshing old straw to deal with them." PROSSER, TORTS, § 37, at 176-177 (2d ed. 1955), citing in n.88: Bohlen, *The Right to Recover for Injury Resulting from Negligence Without Impact*, 41 AM. L. REG. 141 (1902); Campbell, *Injury Without Impact*, 1951 INS. L.J. 654; Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922); Green, "Fright" Cases, 27 ILL. L. REV. 761, 873 (1933); Hallen, *Damages for Physical Injuries Resulting from Fright or Shock*, 19 VA. L. REV. 253 (1932); Harper & McNeely, *A Re-examination of the Basis for Liability for Emotional Distress*, 1938 WIS. L. REV. 426; Magruder, *supra* note 17; McNiece, *supra* note 12; Smith, *supra* note 10.

²⁰ "It is now more or less generally conceded that the only valid objection against recovery for mental injury is the danger of vexatious suits and fictitious claims, which has loomed very large in the opinion as an obstacle." *Id.* at 177. See Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 725, 733 (1937); Wilson, *The New York Rule as to Nervous Shock*, 11 CORNELL L.Q. 512, 513 (1926); Annot., 64 A.L.R.2d 100, 113 (1959). Holmes, in *Smith v. Postal Tel. Cable Co.*, 174 Mass. 576, 55 N.E. 380 (1899), said the "impact" rule was not put as a logical deduction from general principles of liability in tort, but as a limitation of those principles on purely practical grounds. In *Huston v. Borough of Freemansburg*, 212 Pa. 548, 61 Atl. 1022 (1905), the court predicted terrible results if recovery for anything as speculative as mental distress were allowed. And as late as 1958, the Pennsylvania Supreme Court stated that to allow recovery ". . . would open a Pandora's box." *Bosley v. Andrews*, 393 Pa. 161, 168, 142 A.2d 263, 266 (1958).

²¹ "Illogical as the legal theoreticians acknowledge this rule to be, it was Justice Holmes who said that the life of the law has not been logic but experience." Van Voorhis, J., dissenting in *Battalla v. State*, 176 N.E. 2d at 732. The dissent continues: "These statements in the *Mitchell* opinion are not archaic or antiquated, but are even more pertinent today that when they were first stated. At a time like the present, with constantly enlarging recoveries both in scope and amount in all fields of negligence law, and when an influential portion of the Bar is organized as never before to promote ever-increasing recoveries for the most intangible and elusive injuries, little imagination is required to envision mental illness and psychosomatic medicine as encompassed by the enlargement of the coverage of negligence claims to include this fertile field. . . . Courts and juries become prone to accept as established fact that fright has been the

argument is also inadequate. In those jurisdictions not requiring any impact, the courts have not been flooded with a deluge of claims, and there is no authority to indicate that any substantial amount of fraud has occurred.²²

In abandoning *Mitchell* and its rationale, the New York Court of Appeals has given effect to the sound principle that "it is fundamental to our common law system that one may seek redress for every substantial wrong."²³ To deny recovery for a substantial injury out of fear that to allow recovery would open the door to a flood of fraudulent claims shows a distrust in the ability of the law to test the validity of a plaintiff's claim.²⁴ As the court in *Battalla* states:

. . . the question of proof in individual situations should not be the arbitrary basis upon which to bar all actions In the difficult cases, we must look to the quality and genuineness of proof, and rely to an extent on the contemporary sophistication of the medical profession and the ability of the court

cause of mental or physical consequences which informed medical men of balanced judgment find too complicated to trace. Once a medical expert has been found who, for a consideration, expresses an opinion that the relationship of cause and effect exists, courts and juries tend to lay aside critical judgment and accept the fact as stated." *Id.* at 732, 733.

²² "In so far as the volume of litigation is reflected in the published reports, it does not seem that the courts in those jurisdictions which recognize the right of action have suffered substantially more 'flooding' than the conservative courts." Annot., 64 A.L.R.2d 100, 112 n.7 (1959). See 2 HARPER & JAMES, *op. cit. supra* note 12 at 1034; McNiece, *supra* note 12 at 30-31. *But cf.* Smith, *supra* note 10 at 303, contending that the net balance of justice from the years 1880 to 1944 would have been greater had redress been denied in all cases of alleged injury from psychic stimuli.

Smith, *supra* note 10 at 300 n.296, points out that the "impact" requirement does have some relevancy but only as an evidentiary factor bearing upon the reasonableness of the plaintiff's physis response.

²³ 176 N.E.2d at 730.

²⁴ "To their credit let it be said that the courts have been entirely frank in stating their reasons for departing from the customary rule. Uniformly, these statements show a basic distrust of the legal machinery as a measuring device. Ordinarily it is not indicated whether the distrust arises from the supposed credulity of the jury, or from the similar liability that the jury will be unduly swayed by their own emotions, or possibly from the feeling that in such a case no reliance may safely be placed upon the word of interested litigants, who know it will be impossible to impose any effective check upon their testimony. But there usually is the unequivocal assertion that there is no guarantee of the actuality of causation in such a case, and that therefore the customary tests for fixing responsibility must be disregarded. In other words, legal theory must yield to practical experience. The rule therefore is purely pragmatic, and finds justification only to the extent that it is necessary to invoke such an exception to keep the machinery of the law from working harm." Wilson, *supra* note 20 at 513. See PROSSER, *op. cit. supra* note 19 at 177; Bohlen, *supra* note 20 at 733; Annot., 64 A.L.R.2d 100, 113 (1959).

and jury to weed out the dishonest claims. Claimant should, therefore, be given an opportunity to prove that her injuries were proximately caused by defendant's negligence.²⁵

Even if it is granted that there is a danger of fraudulent claims, it is just as likely, if not more so, that there will be fraudulent claims under the "impact" rule as it exists today.²⁶ As to the argument that already crowded dockets will be swamped with an alarming number of new suits, it is sufficient to say that increased litigation "is no reason for a court to eschew a measure of its jurisdiction"²⁷ when there are wrongs that need remedying.²⁸

²⁵ 176 N.E.2d at 731-32.

"Policing of proof has been the primary need, and the neglected task, in judicial handling of cases involving alleged injury from psychic stimuli. . . . Purity of proof can be protected, and the scales of justice balanced if courts will take judicial notice of the requirements of scientific proof. . . ." Smith, *supra* note 10 at 303-304. See *Alabama Fuel & Iron Co. v. Baladoni*, 15 Ala. App. 316, 73 So. 205 (1916); *McNiece supra* note 12 at 73-74; Annot., 64 A.L.R.2d 100, at 113 (1959).

²⁶ "While the rule was designed to defeat fabricators, now with all the available exceptions, it is possible for any fabricator to succeed in his case by merely including the one necessary magic element to come within the bounds of an exception. The only one who is defeated is the honest litigant who will not falsify, and who, if he does not come squarely within an exception, will not obtain redress for an injury which everyone agrees was foreseeable and culpably caused by another." *McNiece, supra* note 12 at 80-81. 2 HARPER & JAMES, *op. cit. supra* note 12 at 1035, claims that the "impact" rule has come to lack substance and invite easy circumvention by the very litigants whose fraud it was designed to guard against. The 1936 REPORT OF THE NEW YORK LAW REV. COMM., 379, 450 states that there is good ground for believing that the limitations to the "impact" rule breed dishonest attempts to mold the facts so as to fit them within the grooves leading to recovery. In *Battalla*, the court asserted that "not only, therefore, are claimants in this situation encouraged by the Mitchell disqualification to perjure themselves, but constant attempts to either come within an old exception, or establish a new one, lead to excess appellate litigation." 176 N.E.2d at 731.

²⁷ 176 N.E.2d at 731.

²⁸ "The increase in litigation argument is not persuasive. Courts are created to right wrongs, and if a plaintiff is otherwise entitled to redress, an increase in the burden of the court is no sufficient reason for refusal." Hallen, *Hill v. Kimball—A Milepost in the Law*, 12 TEXAS L. REV. 1, 6 (1933). "It is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation'; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the court too much work to do." Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 877 (1939). See remarks of Holt, C.J., in *Ashby v. White* [1703] 2 Ld. Raym. 939, 955, 92 Eng. Rep. 126, 137: ". . . it is no objection to say, that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too; for every man that is injured ought to have his recompense."

New York had advanced significantly by joining the large majority of states that treat the tort of negligent infliction of mental disturbance resulting in physical injury as any other tort. The *Mitchell* decision, the leading decision in the major state upholding the minority view, along with its limitations, has been soundly repudiated. It is hoped that the remaining states still adhering to the "impact" requirement will once again follow New York's lead and recognize that justice cannot be done by rigid adherence to an anachronistic rule of thumb.