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Torts—Recovery for Death from Fright Without Impact

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TORTS — RECOVERY FOR DEATH FROM FRIGHT WITHOUT IMPACT

A trusty working on a prison farm escaped due to the negligence of the guards, and forced decedent to drive him to a neighboring city. Decedent suffered from diabetes and hypertension, and died within twenty-four hours of a subarachnoid hemorrhage induced by fright. In a suit by the executor against the state for conscious pain and suffering and wrongful death, *Held*: recovery allowed. *Williams v. State,* 204 Misc. 843, 126 N. Y. S. 2d 324 (Ct. Cl. 1953), *aff'd per curiam* 284 App. Div. 1027, 134 N. Y. S. 2d 857 (4th Dep't 1954). The trial court found that the conduct of the prisoner was both wanton and intentional, and that there was no impact.

The impact doctrine holds that there may be no recovery for negligently caused mental distress in the absence of a physical touching. In New York this was first adopted in *Mitchell v. Rochester Railway Co.,* 151 N. Y. 107, 45 N. E. 354 (1896), in which a runaway horse-drawn street car was stopped without having touched the plaintiff, though so close to her that she stood between the heads of the horses. Since there was no "impact", recovery for subsequent injuries brought about by her fright was not allowed.

This holding was adopted in many other states, and rejected by still more (for a list of majority, minority and uncommitted jurisdictions see McNiece, *Psychic Injury and Tort Liability in New York,* 26 St. John's L. Rev. 1, 14 n. 40, 16 n. 43 (1949). All states which contain cities of over a million in population, except for California, have retained this requirement, Smith & Prosser, *Cases on Torts* 523 (1st ed. 1952). Legal scholars seem to be unanimously of the opinion that the doctrine has outlived whatever usefulness it might have had, Throckmorton, *Damages for Fright,* 34 Harv. L. Rev. 260 (1921); Smith, *Relation of Emotions to Injury and Disease,* 30 Va. L. Rev. 193 (1944), and the trend is clearly away from requiring this element. It has been riddled with exceptions, notably in the telegraph, *Western Union Tel. Co. v. Redding,* 100 Fla. 495, 129 So. 743 (1930), burial, *Klumbach v. Silver Mount Cemetery Ass'n,* 242 App. Div. 843, 275 N. Y. Supp. 180 (2d Dep't 1934), and food cases, *Carroll v. New York Pie Baking Co.,* 215 App. Div. 240, 213 N. Y. Supp. 553 (2d Dep't 1926), see Wilson, *The New York Rule as to Nervous Shock,* 11 Cornell L. Q. 512, 516-518 (1926); for other exceptions see 1936 Law Revision Comm. 375, 423 *et seq.,* and the quantum of impact necessary to sustain the burden of a parasitic tort has become increasingly slight, Smith, *op. cit. supra* at 792, n. 79. Since the doctrine con-

cerns only cases of negligence, it is inapplicable when the conduct complained of is wanton or intentional, *Beck v. Libraro,* 220 App. Div. 547, 221 N. Y. Supp. 737 (2d Dep't 1927).

In New York the *Mitchell* case was qualified in *Comstock v. Wilson,* 257 N. Y. 231, 177 N. E. 431 (1931), in which the defendant's car collided with that of decedent, who got out of her car, fainted and fell. The court found sufficient impact in the collision of the cars, which in itself caused no injury to decedent but which the court viewed as a concurrent cause of the injury. Cases of this sort are to be distinguished from those involving attempted escape from negligently caused peril, *Twomley v. Central Park. N. & E. R. R. Co.,* 69 N. Y. 158 (1877), and those which involve negligent conduct apart from that which caused the fright, *Cohn v. Ansonia Realty Co.,* 162 App. Div. 791, 148 N. Y. Supp. 39 (1st Dep't 1914), where the injuries complained of are not *directly* induced by the fright (but see PROSSER, TORTS 218, n. 84 (1st ed. 1941), although an element of fear is present somewhere in the chain of causation; the impact rule has no application in such cases. For a concise discussion of the general area, see James, *Scope of Duty in Negligence Cases,* 47 NW. U. L. REV. 778, 789-796 (1953), esp. 790 n. 64 for bibliography. In addition to the case law on impact, in 1936 the Law Revision Commission suggested a statute, *op. cit. supra* at 377, to abolish the impact rule, but the bill was rejected.

Concerning the question of causation, the lower court in the instant case found no negligence in making the prisoner a trusty, but only in guarding him. In escape cases questions of proximate cause and forseeability depend upon the facts of the individual cases. Where a moron who had a history of "eloping" and was supposed to be kept under surveillance escaped from a state institution with a box of matches which by institution rules were supposed to be kept under lock and key, and to keep warm lit a fire which accidentally burned down a barn, *Held:* not forseeable, although he was thinly clad and the temperature was below zero. *Excelsior Ins. Co. of N. Y. v. State,* 296 N. Y. 40, 69 N. E. 2d 553 (1946). In a home for juvenile delinquents, where it was known to the authorities that two boys were on bad terms and one of them took the bottle of acid from a fire extinguisher and poured it on the other while he was asleep, *Held:* not forseeable, *Flaherty v. State,* 296 N. Y. 342, 73 N. E. 2d 543 (1947). But where two men in an insane asylum were known to be enemies, and one escaped from his restraining sheet and blinded the other, *Held:* forseeable; insane victim allowed to recover. *Scolavino v. State,* 187 Misc. 253, 62 N. Y. S. 2d 17, *modified* 271 App. Div. 618, 67 N. Y. S. 2d 202, *aff'd* 297 N. Y. 460, 74 N. E. 2d 174 (1947).

The trial court in the instant case distinguished the first two cases, but even if the distinctions are accepted the impact rule is still to be reckoned with. As was said in *Comstock v. Wilson, supra,* "Serious consequences from mere mental disturbance unaccompanied by physical shock cannot be anticipated . . .". Because this suit was against the state, it would seem that recovery would have to be predicated upon negligence rather than wantonness, though the decision was apparently based on imputing the wantonness of the prisoner to the state. There seems to be no precedent for this device; analogy with the line of cases involving the escape of dangerous instrumentalities appears to be farther from the point than the Agency cases in which wanton conduct removes the actor from the scope of his employment, or where such activity is regarded as an independent intervening cause, a point which was argued in *Flaherty v. State, supra,* though not discussed by the court. Thus, though the decision in this case may be hailed as realistic, it appears to be erroneously grounded and incompatible with the prior decisions in this state.

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