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## Injuries From Fright Without Contact

Larry Grean\*

*The Mephistophelian power of a rigid rule . . . is often encountered in tort law. A pernicious example of such a mechanical rule is the so-called "impact" requirement in fright and shock cases.<sup>1</sup>*

MENTAL DISTRESS SITUATIONS occur throughout the field of torts in cases ranging from assault and trespass to seduction, false arrest, slander, malicious prosecution, and others. They occur in intentional and unintentional situations, and in cases where there is willful and wanton negligence. There may be mental distress over one's own predicament or over fear for the safety of a third party. Physical injuries may or may not result from the mental distress and the element of "impact" (contemporaneous physical injury) becomes an additional factor to consider. However, when it comes to the question of recovery for either mental distress alone or physical injuries resulting therefrom, in cases of negligence, the law is still unsettled.<sup>2</sup>

This note will focus on the mental distress situation where a recovery is sought for injuries resulting from *fright* without "impact" (contemporaneous physical injury).<sup>3</sup> Two 1965 cases, one in Delaware<sup>4</sup> and the other in New Jersey<sup>5</sup> are clearly illustrative.

In *Robb v. Pennsylvania*<sup>6</sup> the female plaintiff's auto stalled on the defendant's railroad tracks because a rut had negligently been allowed to form. While she was attempting to move the auto, defendant's train approached. The plaintiff fortunately

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<sup>1</sup> Lambert, Tort Liability for Psychic Injury, 41 B. U. L. Rev. 584 (1961).

<sup>2</sup> Prosser, Torts 346 (3rd Ed. 1964). "One interest which is still a subject of controversy is that in freedom from mental disturbance. No general agreement has yet been reached as to the liability for negligence resulting in fright, shock, or other 'mental suffering' or its physical consequences."

<sup>3</sup> See 64 A. L. R. 2d 100-151 (1959); 52 Am. Jur. 388-431 for good discussion.

<sup>4</sup> *Robb v. Pennsylvania R. R. Co.*, 210 A. 2d 709 (Del. 1965).

<sup>5</sup> *Falzone v. Busch*, 45 N. J. 559, 214 A. 2d 12 (1965). This overrules *Ward v. West Jersey & S. R. Co.*, 65 N. J. L. 383, 47 A. 561 (1900).

<sup>6</sup> *Supra* note 4.

escaped being struck by the train, but was so badly frightened that physical illness developed as a result.<sup>7</sup>

In *Falzone v. Busch*<sup>8</sup> the plaintiff was sitting in her auto when the defendant, through his negligent driving, careened his car towards hers, barely avoiding a collision. Just before this happened the defendant had struck the plaintiff's husband, an event which she witnessed. Plaintiff was affected by this, as well as being placed in fear for her own safety. In allowing recovery the court stressed the fact that she was in the "danger zone" and that she suffered physical injuries from the fright.<sup>9</sup>

Both courts stated that upon adequate proof of injuries the plaintiffs could recover even though they received no "impact." They felt that the "impact rule" was antiquated, and discredited it as having no applicability in a proper determination of whether recovery should be allowed.

Although the fact situations are different, these two cases present important similarities that should be kept in mind when one is dealing with this type of fright case:

1. The plaintiffs were females (this seems to be so in the majority of mental injury cases).
2. The defendants were negligent (ordinary negligence).
3. The plaintiffs were in the immediate zone of danger.
4. The plaintiffs were not touched in any way.
5. The plaintiffs were frightened and claimed bodily injuries as a result of that fright.

The reasoning behind these decisions to allow recovery for injuries from fright in absence of any "impact" will become clear as this note progresses. It is important to note that these two cases add to the weight of jurisdictions that have eliminated the "impact" requirement. Prosser's prophecy that this rule is "destined for ultimate extinction"<sup>10</sup> has been pushed a few steps closer to fulfillment.

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<sup>7</sup> *Robb v. Pennsylvania R. R. Co.*, *supra* note 4, at 710, ". . . the plaintiff was greatly frightened and emotionally disturbed by the accident as the result of which she sustained shock to her nervous system. The fright and nervous shock resulted in physical injuries including cessation of lactation . . ."

<sup>8</sup> *Supra* note 5.

<sup>9</sup> *Falzone v. Busch*, *supra* note 5, at 13. "As a direct result she became ill and required medical attention."

<sup>10</sup> Prosser, *op. cit. supra* note 2, at 351.

### Historical Background

In an early American case<sup>11</sup> the plaintiff (female) was negligently put off the defendant's train beyond her station. The result was "anxiety and suspense of mind"<sup>12</sup> causing injuries to her health. Recovery was denied on the theory that if fright caused by negligence was not actionable, the consequences of such fright similarly were not actionable.

A few years later, when the English courts were faced with the same problem in *Victorian Railways Commissioners v. Coultas*,<sup>13</sup> they set forth principles for denying recovery that were subsequently followed in some jurisdictions in the United States. Several years later the *Victorian* case was overruled in England,<sup>14</sup> but unfortunately its impact remained in America. The *Victorian* case stated that there could be no recovery for injuries resulting from fright unless there was "impact" (contemporaneous physical injury), the reasoning being that:

1. There was no precedent in English law.
2. Damages are too remote and physical injuries are not the ordinary consequences of fright.
3. Problems of proof would be too difficult.
4. There would be an increase in litigation accompanied by many fictitious claims.

In 1890 the American case of *Hill v. Kimball*<sup>15</sup> allowed recovery for injuries from fright resulting from defendant's negligence (almost willful and wanton). There, the court recognized that a causal relation existed between the fright and the physical injuries which occurred.<sup>16</sup> Other jurisdictions were soon to fol-

<sup>11</sup> *Trigg v. St. Louis, K. C. & N. R. Co.*, 74 Mo. 147, 41 Am. Rep. 305 (1881).

<sup>12</sup> *Id.* at 148.

<sup>13</sup> (1883) 13 App. Cas. 222, overruled by *Dulieu v. White & Sons* (1901) 2 K. B. 669. In the *Victorian* case the plaintiff (female) and her husband came to the defendant's railway crossing. Defendant's employee negligently let them pass while a train approached. They narrowly escaped but plaintiff was severely shocked with the result that her health and memory were impaired plus a resulting injury to her eyesight. Recovery denied.

<sup>14</sup> In *Dulieu v. White*, *supra* note 13, the plaintiff (female) suffered a miscarriage as a result of fright when the defendant's van was negligently driven into a room where she was sitting. Recovery was allowed and the "impact rule" was finished in England. See note 3, 64 A. L. R. 2d 145.

<sup>15</sup> 76 Tex. Rep. 210, 13 S. W. 59 (1890).

<sup>16</sup> *Id.* at 59. "That a physical personal injury may be produced through a strong emotion of the mind there can be no doubt."

low in allowing recovery;<sup>17</sup> but the weight of the *Victorian* case was felt in three landmark American cases decided some time after.

*Ewing v. Pittsburgh*,<sup>18</sup> *Mitchell v. Rochester*<sup>19</sup> and *Spade v. Lynn*<sup>20</sup> reflected the influence of the *Victorian* case and developed the "impact" philosophy in this country.<sup>21</sup> These cases contain the notable similarities of *Robb* and *Falzone* cases mentioned above, and follow the reasoning of the *Victorian* case.

The *Ewing* case, in denying recovery, held that the injuries were too remote and not foreseeable, and accordingly did not meet the court's idea of "proximate cause":

In determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been seen by the wrongdoer as likely to flow from his act.<sup>22</sup>

The *Mitchell* case denied recovery on these grounds:

1. Since no recovery could be allowed for mere fright, there could be no recovery for its consequences.
2. The miscarriage was not the proximate result of the defendant's negligence but came about by other circumstances.

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<sup>17</sup> *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, 50 N. W. 1034 (1892); *Sloane v. Southern California Ry. Co.*, 111 Cal. 668, 44 P. 320 (1896); *Mack v. South-Bound R. Co.*, 52 S. C. 323, 29 S. E. 905 (1898); *Kimberly v. Howland*, 143 N. C. 398, 55 S. E. 778 (1906); *Green v. T. A. Shoemaker & Co.*, 111 Md. 69, 73 Atl. 688 (1909); *Alabama Fuel & Iron Co. v. Baladoni*, 15 Ala. App. 316, 73 So. 205 (1916); *O'Meara v. Russel*, 90 Wash. 557, 156 P. 550 (1916).

<sup>18</sup> 147 Pa. 40, 23 A. 340 (1892). Through defendant's negligent act the plaintiff (female) became "sick and disabled, and continued to be sick and disabled from attending to her usual work and duties, and suffered and continues to suffer great mental and physical pain and anguish, and is thereby permanently weakened and disabled."

<sup>19</sup> 151 N. Y. 107, 45 N. E. 354 (1896) overruled by *Battalla v. State*, 10 N. Y. 2d 237, 219 N. Y. S. 2d 34, 176 N. E. 2d 729 (1961).

<sup>20</sup> 168 Mass. 285, 47 N. E. 88 (1897).

<sup>21</sup> *Ward v. West Jersey & S. R. Co.*, *supra* note 5; *St. Louis I. M. & S. R. Co. v. Bragg*, 69 Ark. 402, 64 S. W. 226 (1901); *Miller v. Baltimore & O. S. W. R. Co.*, 78 Ohio St. 309, 85 N. E. 499 (1908); *Alexander v. Pacholek*, 222 Mich. 157, 192 N. W. 652 (1923); *Lyons v. Zale Jewelry Co.*, 246 Miss. 139, 150 So. 2d 154 (1963). Here the court would allow recovery only when there was gross or malicious negligence.

<sup>22</sup> *Supra* note 18, at 340.

3. Recovery without "impact" would be contrary to public policy. Injuries could be feigned and the courts would be flooded with litigation.
4. Damages would be too hard to determine.

The *Spade* case recognized that injuries could flow from fright;<sup>23</sup> but decided against recovery on the ground that if such injuries were actionable, then recovery for fright must be permitted. This they did not wish to permit and avoided this problem by invoking the "impact" rule.

The logical vindication of this rule is that it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright, and that this would open the door for unjust claims which could not successfully be met.<sup>24</sup>

### The Why and Meaning of Impact

It is not difficult to imagine the predicament of early judges who were called upon to decide mental injury claims. Medical knowledge had not come very far in the area of mental distress and its consequences. There was little "expert" testimony available. The possibility of fictitious claims was an important factor for disallowing recovery. However, instead of resting their reasoning on the lack of medical knowledge, the courts went astray in trying to find reasons for denying recovery.

In attempting to rationalize the "impact" rule, the causal relation is not much help because courts have allowed recovery where the impact was not substantial,<sup>25</sup> or where the impact occurred after the fright.<sup>26</sup> The majority of courts merely demand

<sup>23</sup> *Supra* note 20, at 89.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Homans v. Boston Elevated Ry. Co.*, 180 Mass. 456, 62 N. E. 737 (1902) (slight blow against a seat); Her emotional reactions produced physical injuries. *Porter v. Delaware, L & W. R. Co.*, 73 N. J. L. 405, 63 A. 860 (1906). Through the defendant's negligence a bridge with an engine on it fell nearly hitting the plaintiff (female). Dust from the crash got into her eye. This was held to be sufficient for an "impact." *Christy Bros. Circus v. Turnage*, 38 Ga. App. 581, 144 S. E. 680 (1928). Here the "impact" was no more than a horse of the defendant's "evacuating" his bowels into the plaintiff's lap. *Morton v. Stack*, 122 Ohio St. 115, 170 N. E. 869 (1930) (inhalation of smoke). *Zelinsky v. Chimics*, 196 Pa. St. 312, 175 A. 2d 351 (1961): "Where it is definitely established that injury and suffering were proximately caused by an act of negligence and any degree of physical impact, however slight, can be shown . . ."

<sup>26</sup> *Comstock v. Wilson*, 257 N. Y. 231, 177 N. E. 431, 76 A. L. R. 676 (1931). After the occurrence of fright, the plaintiff (female) fainted and fell fracturing her skull.

that the impact occur and do not look at its magnitude or examine the question of whether the impact caused the injury. The rule appears to be merely a superficial device to cover up judicial uncertainty.

### Rejection of Impact

As indicated above, the necessity of a contemporaneous physical impact was not accepted in all jurisdictions.<sup>27</sup> The idea that since there could be no recovery for fright alone the consequences would not be actionable<sup>28</sup> was rejected on the ground that the consequences are different from fright.<sup>29</sup> The theory being that they are an injury to the body and should be afforded redress as are other types of bodily injury. The idea that public policy should stand in the way of recovery because a flood of litigation would erupt<sup>30</sup> was rejected<sup>31</sup> on the basis that, where a material injury can be shown, justice should prevail. The actual flood has never materialized, there being more litigation in states that follow the *Mitchell* case.<sup>32</sup> Difficulty of proof and fear of imaginary and fictitious claims<sup>33</sup> gave way on the grounds that these are not sound principles of law for denying a legal remedy.<sup>34</sup> The proximate cause argument, which denied liability because of the so-called "remoteness" of the injury,<sup>35</sup> gave way to the idea that the negligence, fright, and resulting injury run in an unbroken chain.<sup>36</sup> In a 1916 case<sup>37</sup> where the court grappled with causation, they stated:

Are damages the proximate result of the negligence or of the fright? The primary cause is none the less the proximate cause because it happens to operate through successive in-

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<sup>27</sup> *Supra* note 17. Also see 52 Am. Jur. 388.

<sup>28</sup> *Mitchell v. Rochester*, *supra* note 19.

<sup>29</sup> *Purcell v. St. Paul*, *supra* note 17.

<sup>30</sup> *Mitchell v. Rochester*, *supra* note 19; *Miller v. Baltimore*, *supra*, note 21.

<sup>31</sup> *Mack v. South-Bound*, *supra* note 17; *Green v. Shoemaker*, *supra* note 17.

<sup>32</sup> *Lambert*, *op. cit. supra* note 1 at 592.

<sup>33</sup> *Mitchell v. Rochester*, *supra* note 19; *Spade v. Lynn*, *supra* note 20.

<sup>34</sup> *Alabama Fuel & Iron v. Baladoni*, *supra* note 17.

<sup>35</sup> *Ewing v. Pittsburgh*, *supra* note 18.

<sup>36</sup> *Hill v. Kimball*, *supra* note 15; *Sloane v. Southern California*, *supra* note 17; *Kimberly v. Howland*, *supra* note 17; *Green v. Shoemaker*, *supra* note 17.

<sup>37</sup> *Alabama Fuel & Iron v. Baladoni*, *supra* note 17.

strumentalities; that is to say, where the injury naturally and probably ensues in unbroken sequence, uninfluenced or uncontrolled by an independent, intervening, efficient cause, the injury is referred to the primary as the proximate cause.<sup>38</sup>

A majority of the states that have ruled on this question allow recovery for physical injuries resulting from fright without contact. Since the turn of the century, with the increase in medical knowledge, the "impact rule" has seen a steady decline.<sup>39</sup> There are, however, those few jurisdictions which still cling to the past and cannot seem to rid themselves of this legal stumbling block. Ohio,<sup>40</sup> Pennsylvania<sup>41</sup> and Massachusetts<sup>42</sup> are notable examples of these.

The reasoning of the *Victorian* case is only partly followed. Two years after the *Spade* case in Massachusetts another case in that jurisdiction explained that the real reason for denying recovery could not be found in logic but out of practical necessity.<sup>43</sup> Only recently the Pennsylvania Supreme Court, in *Bosley v. Andrews*,<sup>44</sup> reaffirmed its original position in the *Ewing* case, cited *Huston v. Borough of Freemansburgh*.<sup>45</sup> Here the court placed the emphasis on public policy as a reason for denying recovery. It's obvious from the decision that the court arbitrarily refused to re-examine its former position, even though the case contained clearly proved elements of negligence, resulting fright and physical injury, and though denial of recovery worked a real hardship on the plaintiff. Precedent was the key, whether good or bad.

<sup>38</sup> *Id.* at 207.

<sup>39</sup> *Laird v. Natchitoches Oil Mill, Inc.*, 10 La. App. 191, 120 So. 692 (1929); *Cashin v. Northern Pac. Ry. Co.*, 96 Mont. 92, 28 P. 2d 862 (1934); *Orlo v. Connecticut Co.*, 128 Conn. 231, 21 A. 2d 402 (1941); *Battalla v. State*, *supra* note 19; *Kaufman v. Western Union Tel. Co.*, 224 F. 2d 723 (5th Cir. 1955) (cert. den. 1956), 350 U. S. 947, 76 S. Ct. 321; *Colla v. Mandella*, 1 Wis. 2d 594, 85 N. W. 2d 345 (1957); *Penick v. Mirro*, 189 F. Supp. 947 (D. C. Va. 1960); *Robb v. Pennsylvania Rail Co.*, *supra* note 4; *Falzone v. Busch*, *supra* note 5.

<sup>40</sup> *Miller v. Baltimore & O. S. W. R. Co.*, *supra* note 21.

<sup>41</sup> *Ewing v. Pittsburgh R. Co.*, *supra* note 18.

<sup>42</sup> *Spade v. Lynn & B. R. Co.*, *supra* note 20.

<sup>43</sup> *Smith v. Postal Telegraph Cable Co.*, 174 Mass. 576, 55 N. E. 380 (1899).

<sup>44</sup> *Bosley v. Andrews*, 393 Pa. 161, 142 A. 2d 263 (1958). Defendant's bull chased plaintiff (female) and almost ran her down. She collapsed and had an attack of coronary insufficiency. Since the bull did not touch her recovery was denied. Note the dissent by Musmanno, J.

<sup>45</sup> 212 Pa. 548, 61 A. 1022 (1905).



In the *Falzone* and *Robb* cases the courts clearly faced their responsibilities and recognized that injuries could result from fright. Fictitious claims and difficulties of proof would be problems, but to deny recovery on these grounds alone would be to commit injustice. The tremendous advances in medicine have greatly decreased these possibilities, and medical expert opinion,<sup>46</sup> once non-existent, is now readily available.<sup>47</sup>

### Causation

In many of the early cases recovery was denied because any injuries resulting from fright were thought of as too remote or not foreseeable;<sup>48</sup> and yet, where there was "impact," even though it might not be a direct cause of the fright, the result was different.<sup>49</sup> Add to this the fact that in most cases of the type being discussed, substantial injuries occur only in persons who have "pre-existing impairments" or "subnormal resistance"<sup>50</sup> and one is left with doubts about a proper formula for causation.

To help lift the confusion let us suppose, through a hypothetical example, that defendant negligently loses control of his car while driving downtown.<sup>51</sup> What will probably happen? No doubt he will lose control of his vehicle or fail to stop for a light or a stop sign. Next, suppose the car smashes into another car or a utility pole. There is also a chance that the auto will run

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<sup>46</sup> *Falzone v. Busch*, *supra* note 5 at 14. "The Court (*Ward v. West Jersey & S. R. Co.*, *supra* note 5) there first stated that it is not 'probable or natural' for persons of normal health to suffer physical injuries when subjected to fright, and that since a person whose acts cause fright alone could not reasonably anticipate that physical harm would follow, such acts cannot constitute negligence as to the frightened party. It appears that the court decided as a matter of law an issue which we believe is *properly determinable by medical evidence.*" (emphasis added).

<sup>47</sup> Smith, *Relation of Emotions to Injury and Disease*. Note, *Legal Liability for Psychic Stimuli*, 30 Va. L. Rev. 193 (1943); Smith & Soloman, *Traumatic Neuroses in Court*, 30 Va. L. Rev. 87 (1943); Smith, *Problems of Proof in Psychic Injury Cases*, 14 Syracuse L. Rev. 586 (1963); Keschner, *Stimulation of Nervous and Mental Disease*, 44 Mich. L. Rev. 715 (1946); Havard, *Reasonable Foresight of Nervous Shock*, 19 Mod. L. Rev. 478 (1956); Cantor, *Psychosomatic Injury, Traumatic Psychoneurosis, and Law*, 6 Clev.-Mar. L. Rev. 428 (1957); Wasmuth, *Psychosomatic Disease and the Law*, 7 Clev.-Mar. L. Rev. 34 (1958); Symposium on *Mental Injury Damages*, 15 Clev.-Mar. L. Rev. 1-57 (1966).

<sup>48</sup> 64 A. L. R. 2d 100 (1959).

<sup>49</sup> *Comstock v. Wilson*, *supra* note 26.

<sup>50</sup> Smith, *Relation of Emotions to Injury and Disease*; *supra* note 47 at 285.

<sup>51</sup> Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev., 1033 at 1036, 1037 (1936).

a pedestrian down or even come very close. This person might be scared to such an extent that injuries are suffered; or he might be an individual with some pre-existing impairment which is aggravated or worsened by the ordeal.

The first question that must be asked is about *duty*. The defendant has a clear duty to drive his car safely and not subject others to the hazards of unsafe driving.<sup>52</sup> The duty extends to those who might be endangered,<sup>53</sup> those in the "zone" of risk. The next question is that of proximation. Was there a "continuous sequence" unbroken by any independent cause? If the chain is not broken, then the defendant's breach of duty is complete.<sup>54</sup>

When dealing with the "idiosyncratic plaintiff," there is no problem and the defendant cannot limit his liability because of idiosyncrasies on the theory that the normal person would have been affected less.<sup>55</sup> The average person of normal health<sup>56</sup> is the standard to be used insofar as the "duty" relation goes; and when a defendant has done an act that he could foresee as endangering a normal person of average health, the fact that the plaintiff turns out to have some pre-existing infirmity will be of no avail; he must take his victim as he finds him.<sup>57</sup>

<sup>52</sup> McCormick, *Damages*, § 74 at 264, 265 (1935); Smith, *Relation of Emotions to Injury and Disease*, *supra* note 47, at 305.

<sup>53</sup> 2 Harper & James, *Torts*, 1136 (1956). "The view currently prevailing in this country, however, does limit the scope of duty to do or refrain from doing a given act to (1) those persons or interests that are likely to be endangered by the act or omission, and (2) harm (to such person or interest) from a risk the likelihood of which made the act or omission negligent." *Robb v. Pennsylvania R. R. Co.*, *supra* note 4; *Falzone v. Busch*, *supra* note 5.

<sup>54</sup> 1 Shearman & Redfield, *Negligence*, § 34 at 92 (1941). Also see Prosser, *op. cit. supra* note 2, Chapter 9, Proximate Causation.

<sup>55</sup> Amdursky, *The Interest In Mental Tranquillity*, 13 *Buffalo L. Rev.* 339 at 352 (1963-4).

<sup>56</sup> *Id.* at 352, 353. Also see Smith, *Relation of Emotions to Injury and Disease*, *supra* note 47 at 305; Prosser, *op. cit. supra* note 2 at 352.

<sup>57</sup> Amdursky, *supra* note 55, at 352, 353; Also see *Hill v. Kimball*, *supra* note 15 (miscarriage); *Purcell v. St. Paul City Ry. Co.*, *supra* note 17 (miscarriage); *Sloane v. Southern California Ry. Co.*, *supra* note 17 (Recurrence of insomnia and paroxysms); *Kimberly v. Howland*, *supra* note 17 (miscarriage); *Alabama Fuel & Iron Co. v. Baladoni*, *supra* note 17 (miscarriage); *Orlo v. Connecticut Co.*, *supra* note 39 (a condition of diabetes and arteriosclerosis was aggravated by the fright); *Kaufman v. Western Union Tel. Co.*, *supra* note 39 (P. had high blood pressure and a "sensitive nervous temperament"); *Colla v. Mandella*, *supra* note 39 (Plaintiff was suffering from a mild heart ailment. When the crash occurred the fright caused heart failure and resulted in death); *Penick v. Mirro*, *supra* note 39 (aggravation of an old arthritic condition).

But when the act or omission is negligence as to any and all passengers, well or ill, any one injured by the negligence must be entitled to recover to the full extent of the injury so caused, without regard to whether, owing to his previous condition of health, he is more or less liable to injury.<sup>58</sup>

A proper formula for liability in this general type of case would appear to include the following elements:

1. Ordinary negligence of the defendant.
2. Presence of plaintiff in the "zone of danger."
3. Fright and resulting physical injuries with no intervening cause.
4. Presence of pre-existing injury is immaterial.

### Medical Problem

Unfortunately, medical knowledge in this area has lagged behind the development of legal principles. Nevertheless many of the early courts did not let this factor stand in the way. They saw the causal relation between fright and the resulting injuries,<sup>59</sup> although sometimes in their attempts to understand the relation, erroneous assumptions were made.<sup>60</sup> Those courts denying recovery felt that medical proof was inadequate to warrant a recovery, an assumption that was correct,<sup>61</sup> but, instead of stopping here, they confused things by relying on the "impact" theory.

In a remarkable and thorough study of fright cases from 1850 to 1944, Smith<sup>62</sup> came up with some very important observations:

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<sup>58</sup> Purcell v. St. Paul City Ry. Co., *supra* note 17, at 1035. See also Orlo v. Connecticut Co., *supra* note 39, at 404, where the court said: "The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. . . . By that is not meant that one charged with negligence must be found actually to have foreseen the probability of harm or that the particular injury which resulted was foreseeable, but the test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?"

<sup>59</sup> Mack v. South-Bound R. Co., *supra* note 17, at 909; Kimberly v. Howland, *supra* note 17, at 780; Sloane v. Southern California Ry. Co., *supra* note 17.

<sup>60</sup> Smith, Relation of Emotion to Injury and Disease, *op. cit. supra* note 47, at 212 criticizes the Sloane case for assuming that nervous shock involves a direct physical injury to the nerves.

<sup>61</sup> Smith, Relation of Emotions to Injury and Disease, *op. cit. supra* note 47, at 285.

<sup>62</sup> *Op. cit. supra* note 47.

1. The earlier courts were justified in denying recovery on the grounds that adequate medical proof was lacking.<sup>63</sup>
2. The law departed from science and in effect did injustice. If those courts that allowed recovery for injuries from fright had denied recovery, then more justice would have been done this way.<sup>64</sup>
3. Fright does not usually produce physical injuries in an average person.<sup>65</sup>
4. In the majority of cases studied the injured party had some pre-existing infirmity.<sup>66</sup>

The value in this study and the observations made help to relate the meaning of the gap that existed between the law and science. We can better understand the fears that existed about the possible increase in fictitious claims if recovery were to be allowed. Today these possibilities have been greatly minimized through medical science's abilities in detection.<sup>67</sup>

A continuing problem that will have to be dealt with is the occurrence of non-willful exaggeration of symptoms and disabilities. The problem exists when litigation is imminent, more than when it is not.<sup>68</sup>

These apprehensions about the oncoming trial are due partially to fears that their injury will be disbelieved or held in contempt for want of objective lesions. Also, the self-serving mechanisms involved in neurosis invariably cause some degree of unconscious exaggeration or malingering in respect to symptoms, as the neurotic desires to be believed and wants his complaints to be convincing. Suggestions made by relatives and lawyers and the continuance of disability payments are additional extrinsic factors which cause neurotic symptoms to be aggravated or exaggerated.<sup>69</sup>

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<sup>63</sup> *Id.* at 285.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 302. See also Havard, *supra* note 47 at 482. "The consensus of modern medical opinion is that lasting damage does not occur in 'normal' individuals as a result of emotional shock, however severe."

<sup>66</sup> Smith, *Relation of Emotions to Injury and Disease*, *op. cit. supra* note 47, at 303.

<sup>67</sup> Cantor, *op. cit. supra* note 47, at 435, 436, 437.

<sup>68</sup> Keschner, *op. cit. supra* note 47, at 718.

<sup>69</sup> Smith & Soloman, *op. cit. supra* note 47, at 125.

When litigation is over many of these symptoms will disappear.<sup>70</sup>

It is understandable that if the courts are to allow recovery for the injuries from fright they should be shown that the claimant was really injured. The importance of the medical examiner cannot be overlooked for it will largely depend on him to provide the answers. Through his examination of the claimant he will be able to pick out the signs and symptoms.<sup>71</sup> The signs are objective and through examination techniques they can be detected regardless of any statement from the claimant. Symptoms, on the other hand, are subjective and only known to the patient. Here, the problems of proof become extremely difficult.

Complications will increase when the courts are faced with situations where the complainant claims that the fright has produced headaches, loss of appetite, nervousness, etc. Can these come under the heading of true physical injuries?<sup>72</sup> Unfortunately medical science cannot supply all the answers in mental injury cases.<sup>73</sup> Much has been learned about fright and its consequences but even today medical testimony is often no more than medical judgment.<sup>74</sup>

Most courts allowing recovery for physical injuries resulting from fright, where there has been ordinary negligence, will not grant recovery for mere fright alone.<sup>75</sup> They feel that fright is

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<sup>70</sup> *Id.*

<sup>71</sup> Smith, Problems of Proof in Psychic Injury Cases, *op. cit. supra* note 47, at 593.

<sup>72</sup> 64 A. L. R. 2d 100 (1959).

<sup>73</sup> Wasmuth, *op. cit. supra* note 47, at 49; Smith, Problems of Proof in Psychic Injury Cases, *supra* note 47, at 604. "While one must be circumspect and guarded in trying to determine what is only hypothesis and what is demonstrable clinical fact, if there is substantial evidence of causal connection, there should be no resentment on the part of the defendant, or society, if the claimant seeks and obtains compensation."

<sup>74</sup> Wasmuth, *op. cit. supra*, note 47 at 35.

<sup>75</sup> *Kimberly v. Howland, supra* note 17; *Green v. T. A. Shoemaker & Co., supra* note 17; *Mahnke v. Moore*, 197 Md. 61, 77 A. 2d 923 (1951) at 927 ". . . clearly apparent and substantial physical injury as manifested by an external condition or symptom clearly indicative of a resultant pathological, physiological, or mental state"; *Alabama Fuel & Iron Co. v. Baladoni, supra* note 17, at 207 where the court says: "Damages, when confined to fright alone, is dealing with a metaphysical, as contradistinguished from a physical, condition, with something subjective instead of objective, and entirely within the realm of speculation." *O'Meara v. Russel, supra* note 17; *Penick v. Mirro, supra* note 39 at 947; *Robb v. Pennsylvania R. R. Co., supra* note 4; *Falzone v. Busch, supra* note 5.

too subjective in nature and is dependent upon the uncorroborated statements of the claimant.

Where the defendant's negligence causes only mental disturbance, without accompanying physical injury or physical consequences, or any independent basis for tort liability, there is still general agreement that in the ordinary case there can be no recovery.<sup>76</sup>

In the *Falzone* case<sup>77</sup> the court said that "fright is too lacking in seriousness and too speculative to warrant imposition of liability where it does not cause substantial bodily injury or sickness." In the *Robb* case<sup>78</sup> it was stated that ". . . it is accepted as settled that there can be no recovery for fright alone, not leading to bodily injury or sickness, arising from the negligence of another."

### Conclusion

Where the plaintiff can clearly prove in court, through medical testimony, that physical injuries were caused by fright in a case of ordinary negligence, recovery should be allowed. To deny this on the basis of the reasoning behind the "impact rule" is to do injustice to the aggrieved party. There are, however, those jurisdictions that still adhere to the old rule, and it can only be hoped that they will strike it down when it is next brought before them. With the advent of the *Robb* and *Falzone* cases this goal has come closer to being realized.

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<sup>76</sup> Prosser, *op. cit. supra* note 2, at 348.

<sup>77</sup> *Falzone v. Busch*, *supra* note 5, at 12.

<sup>78</sup> *Robb v. Pennsylvania*, *supra* note 4, at 711.