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Torts - Damages - "Impact Rule"

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TORTS—DAMAGES—"IMPACT RULE"—The Pennsylvania Supreme Court has held that plaintiff could recover for physical injuries resulting from fright and shock without showing a physical impact if plaintiff was in danger of physical impact because of the direction of a negligent force against him.

Niederman v. Brodsky, — Pa. —, 261 A.2d 84 (1970).

The instant case involved a negligence action based upon the reckless operation of a motor vehicle. Plaintiff alleged that the auto skidded onto the sidewalk knocking over a fire hydrant, a litter pole and basket, a newstand and plaintiff's son. The car did not strike plaintiff. However, plaintiff charged that he was so frightened that he suffered chest pain almost immediately, and that upon examination in the hospital where he was confined for five weeks, he was diagnosed as suffering "acute coronary insufficiency, coronary failure, angina pectoris and possible myocardial infarction."[1]

The trial court reluctantly dismissed the suit based on the rule that there can be no recovery for damages resulting from fright and shock negligently inflicted if there was no physical impact.

On appeal to the Pennsylvania Supreme Court, Justice Roberts announced the decision of the majority to abandon the impact rule. The court decided that plaintiff deserved at least a "chance" to present his case to a jury.

The majority believed that each and every objection raised in the past to allowing a recovery in the absence of impact can now be answered. There were three basic objections: (1) that medical science could not prove that the claimed damages were caused by fright; (2) that abandoning the rule would result in fraudulent and exaggerated claims; and (3) that a new rule would invite a flood of litigations.[2]

Roberts presented the majority's answer to these objections. The objection based on medical sciences' difficulty in proving causation between fear and injuries is unfounded today because medical science has made phenomenal advances in the last 80 years, since Pennsylvania first adopted the impact rule.[3] Also, it appears completely inconsistent to argue that the medical profession is absolutely unable to establish a causal connection in the case where there is no impact at all, but the

1. — Pa. —, 261 A.2d 84 (1970).
2. *Id* at 85.
3. The Court cites Ewing v. Pittsburgh C. and St. L. Railway Co. 147 Pa. 40, 23 A 340 (1892) as the first Pennsylvania case adopting the impact rule.

slightest impact . . . suddenly bestows upon our medical colleagues the knowledge and facility to diagnose the causal connection between emotional states and physical injuries."[4] Further, the Justice points out that Delaware abandoned the impact rule and faced "no insuperable difficulty in tracing causal connection between the wrong doing and the injury via fright!"[5] In any event, Roberts concludes, the difficulty of proof should not bar plaintiff from the opportunity to prove this claim.

The opinion next answered the objection that fraudulent claims would follow the abandonment of the impact rule. Every court considering the problem has faced this challenge, Roberts reflected. "The virtually unanimous response has been that (1) the danger of illusory claims in this area is no greater than in cases where impact occurs and that (2) our courts have proven that any protection against such fraudulent claims is contained within the system itself . . .".[6] The court quoted favorably a Delaware decision stating, "Public policy requires that courts with the aid of the legal and medical professions, find ways and means to solve satisfactorily the problems thus presented—not expedient ways to avoid them."[7]

The last argument against abandoning the impact rule is that a flood of litigation will follow. The majority, however, question the reliability of this prediction; it is not at all clear to them, based on the studies in non-impact jurisdictions, that the flood will occur.[8] Second, even if the flood occurs, "It is the business of the law to remedy wrongs that deserve it, even at the expense of a flood of litigation . . ."[9]

Having answered the three basic objections to its satisfaction the majority concludes,

> Since appellant's complaint alleges facts which if proven will establish that the negligent force was aimed at him and put him in personal danger of physical impact, and that he actually did fear the force, this case must proceed to trial.[10]

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4. 261 A.2d at 87.
5. *Id* at 87, citing Robb v. Pa. R.R. Co., 210 A.2d 709, 712 (Del. 1965).
6. 261 A.2d at 88.
7. 261 A.2d 88-89, citing Robb v. Pa. R.R. Co., 210 A.2d 709, 714 (Del. 1965).
8. 261 A.2d 89 (1870), citing: McNeice, *Psychic Injury and Tort Liabilities in New York*, 24 ST. JOHN L. REV. 132 (1949); Lambert. *Tort Liability for Psychic Injuries*, 41 BOSTON U. L. REV. 592 (1961).
9. 261 A.2d 89 (1970), citing Prosser, *Intentional Infliction of Mental Suffering; a New Tort*, 37 MICH. L. REV. 844 (1939).
10. — Pa. —, 261 A.2d at 90.

Justice Bell, dissenting, sees grievous errors in overruling Pennsylvania's impact rule; the decision will produce a "Pandora's Box," a "Judicial Guessing Game,," and the burial of "stare decisis."[11] Justice Bell is not convinced that medical science is able to prove medical and legal causation with any certainty, especially in the emotional disturbance and heart disease fields. As a result, by abandoning the impact rule the majority invites a medical guessing game. From the legal perspective no one has come up with a clear standard; the majority's vague standard of "the direction of a negligent force so near a plaintiff that he feared a dangerous physical impact," will certainly involve a judicial guessing game in its application.[12] Finally, Justice Bell sees nothing in the majority's opinion to justify ignoring stare decisis. This is not one of those "rare cases where the Supreme Court is convinced that the reason for the law undoubtedly no longer exists, and modern circumstances and justice combine to require or justify a change, and no one's present personal rights or vested property interests will be injured by the change . . ."[13]

Since 1889 Pennsylvania cases have taken the view that the unreliability of testimony necessary to establish the causal relation between fright and injury makes it proper for the courts, as a matter of administrative policy, to refuse to hold the actor liable for harm brought about by negligence which did not result in impact.[14] The *Niederman v. Brodsky* decision is an attempt to alleviate the harsh results flowing from this ironclad rule.[15] The court certainly has had

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11. *Id* at 90.
12. *Id* at 90.
13. *Id* at 94.
14. *See* Fox v. Borkey, 126 Pa. 164, 17 A. 604 (1889), Ewing v. Pittsburgh, C. and St. L. Ry. Co., 147 Pa. 40, 23 A. 340 (1892).
15. Dissenting in Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263, 271-2 (1958), Justice Musmanno described the harsh results flowing from the impact rule as follows:

A brief recital of the facts in some of the cases decided by this Court on the subject under discussion will demonstrate that not all the decisions commend themselves to the goddess of Justice.

I quote verbatim the Majority's reference to one of the cases:

In Fox v. Borkey, 126 Pa. 164, 17 A. 604, supra, plaintiff was husking with her husband. An explosion occurred which was caused by defendant's blasting; the earth trembled and dirt blew over them as if it were hail. Plaintiff fell to the ground, trembling all over with shock; she became very nervous and had heart trouble and 'was reduced to a physical wreck by the grossly negligent, if not intentional, misconduct of the defendant.' "

In that case the jury returned a verdict for the plaintiff but this Court reversed. Under the Majority's own summation it can scarcely be said that the reversal was just.

In Morris v. Lackawanna & Wyo. Val. R. Co., 228 Pa. 198, 77 A. 445, the plaintiff suffered a miscarriage as the result of the derailment of the railway car in which she was riding, the derailment being caused by defendant's negligence.

adequate time to consider the issue[16] and there is a wealth of literature discussing the impact rule.[17] In the court's opinion as well as the literature, the implications of abandoning the rule are clear; numerous questions remain unanswered.

For example, once the court decides that an actor has a duty to avoid negligent conduct which will cause injury to another, via fright and shock without impact, it is difficult to define the scope of the duty.[18] First, does the actor owe a duty to everyone in the "zone

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It was admitted that the miscarriage resulted from the nervous shock occasioned by the car bumping over the track at an open switch. Nevertheless this Court affirmed a judgment of non-suit.

Another case cited by the Majority Opinion is equally insupportable in justice. In Ewing v. Pittsburgh, C. & St. L. Ry. Co., 147 Pa. 40, 23 A. 340, 14 L.R.A. 666, the plaintiff averred in her statement of claim that the defendant railroad company, through negligence, ran a train of cars into another car and, in the resulting collision, one of the cars was catapulted to and on her house. Although she sustained no bone fractures or bleeding wounds, the plaintiff, because of the fear of imminent death, suffered nervous shock, she "Became sick and disabled," and "continues to suffer great mental and physical pain." The lower Court sustained a demurrer, and this Court upheld the demurrer. In its Per Curiam opinion this Court asked the rhetorical question: "What duty did the company owe this plaintiff?" The answer is a simple one. It owed the plaintiff the duty of keeping its cars on the railroad track and not hurling them on to her house.

Raising the same irrelevant and exaggerated alarm in the Ewing case which the Majority is raising here, the Court said there:

> "If mere fright, uaccompanied with bodily injury, is a cause of action, the scope of what are known as 'accident cases' will be very greatly enlarged; for in every case of a collision on a railroad the passengers, although they may have sustained no bodily harm, will have a cause of action against the company for the 'fright' to which they have been subjected."

But Mrs. Ewing was not a passenger. She was in her house when the sky began to rain railroad cars.

16. Pennsylvania first adopted the impact rule in 1889; *see* note 14, *supra*.

17. *See* generally: Brody, *Negligently Inflicted Psychic Injuries: A Return to Reason*, 7 VILL. L. REV. 232 (1961); Goodrich. *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922); McNeice, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S L. REV. 1 (1949), Smith, *Relations of Emotions to Injury and Disease: Legal Liability for Psychi Stimuli*, 30 VA. L. REV. 193 (1944); Smith and Solomon, *Traumatic Neurosis in Court*, 29 VA. L. REV. 87 (1943); Comment, *Negligently Inflicted Mental Distress: The Question of Bystander Recovery*, 14 BUFFALO L. REV. 499 (1965); Comment, *Injuries from Fright Without Contact*, 15 CLEVE-MAR. L. REV. 331 (1966); Comment, *Negligently Caused Mental Distress Should Recovery Be Allowed?* 123 S.D. L. REV. 402 (1968); Comment, *Emotional Distress Negligently Inflicted Upon Spectator Plaintiff*, 1969 UTAH L. REV. 396; Comment, *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases*, 35 U. CHI. L. REV. 512 (1968).

18. In Ewing v. P.C. St. L. Ry. Co. 147 Pa. 40, 23 A. 340 (1892), a case often cited to support the impact rule, the court discussed the problem of defining the duty:

> What duty did the company owe this plaintiff? It owed her the duty not to injure her person by force or violence; in other words, not to do that which, if committed by an individual, would amount to an assault upon her person. But it owed her no duty to protect her from fright, nor had it any reason to anticipate that the result of a collision on its road would so operate on the mind of a person who witnessed it, but who sustained no bodily injury thereby, as to produce such nervous excitement and distress as to result in permanent injury; and, if the injury was not likely to result from the collision, and one which the company could not have reasonably forseen, then the accident was not the proximate cause. The rule on this subject is as follows: "In determining what is proximate cause, the true rule

of physical danger";[19] to all toward whom the negligent force was directed;[20] to all close enough to the event to perceive the danger who might be reasonably expected to experience fright and shock, i.e., a close relative, friend or average spectator observing another in danger;[21] or even, to the spectator who while not observing the defendant's negligent conduct, arrives in time to observe the results of the accident?[22]

Second, what kind of negligent conduct constitutes a breach of the duty? Should a breach be limited to conduct which places one in danger of physical impact, or should it extend to conduct which involves no danger of physical impact but presents an obvious danger of causing fright or shock to the spectator.[23]

Third, what kind of injuries flowing from fright must a defendant foresee before a cause of action for mental distress is made out? If a defendant must foresee "bodily harm" or "physical" injuries to the plaintiff, as most courts have held,[24] what kind of injuries are properly characterized as "physical"?[25]

The Pennsylvania Supreme Court's approach to this problem, as

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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:" Pittsb. S. Ry. Co. v. Taylor, 104 Pa. 306; West Mahanoy Tp. v. Watson, 112 Pa. 574. Tested by this rule, we regard the injury as too remote.

19. Connecticut and Delaware use this concept to define the duty. Connecticut refers to "one who is within the range of ordinary physical danger," Orlo v. Conn. Co. 128 Conn. 231, 21 A.2d 402; Delaware uses the "immediate area of physical danger," Robb v. Pa. R.R. Co., 210 A.2d 709 (Del. 1965).

20. The Pennsylvania Supreme Court in the instant case said that the duty extends to one placed in danger by "the direction of a negligent force against him." It is unclear as to what respect, if any, Pennsylvania's test differs from the "zone of danger" test used in Delaware and Connecticut.

21. Recently, the California Supreme Court held in Dillon v. Legg, 89 Cal. Rptr. 72 441 P.2d 912, (1965) that a mother's complaint asserting emotional trauma and physical injury from the witnessing, in close proximity, of the death of her child as a result of defendant motorist's negligent operation of an auto alleged a sufficient prima facie case.

22. There are apparently no cases extending the duty this far.

23. Note that this reference to "placing one in danger of physical impact" focuses not upon the scope of defendant's duty, but upon the characterization of his conduct. The inquiry is whether or not there is a character of conduct which should make defendant liable for negligently inflicted emotional injuries, despite the fact that the conduct did not place plaintiff in any actual danger of physical impact. For a development of this point, see discussion note 30 *infra*.

24. *See*, generally, 38 AM. JUR. 2d 17 (1938) and 28 A.L.R.2d 1062 (1953).

25. For example, consider the following, 64 A.L.R.2d 128 (1953).

"Various symptoms such as nervousness, sleeplessness, headache, nausea, and loss of appetite, must frequently be placed on the borderline between the 'physical' and the 'mental.' It is probably true that some such symptoms are present in all cases of severe mental or emotional upset, and it probably depends largely on the liberality with which the court regards recovery in the general situation here discussed, whether they will be regarded as characterizing a physical or a mental injury."

announced in *Niederman v. Brodsky*, deserves extensive criticism. On the favorable side, it is good that "impact" has been removed as an absolute prerequisite to recovery. Beyond this, there is little to approve in the decision. The rule announced, that a party can recover for *physical* injuries resulting from fright and shock evoked by the direction of a negligent force placing the party in *danger of physical impact*, it is vague and illogical; it will enjoy a short life.

The fatal elements in the rule are: (1) the requirement that plaintiff be in danger of physical impact, and (2) the limitation of recovery to "physical injuries". Both phrases represent a futile and illogical attempt to protect against fraud. Both phrases contradict the courts earlier assertion that "any protection against such fraudulent claim is contained within . . . the integrity of our judicial process, the knowledge of expert witnesses, the concern of juries and the safeguards of our evidentiary standards."[26]

The requirement that plaintiff must have been "in danger of physical impact" rests on the court's concern for fraud. It recognizes the danger of persons outside the scope of physical danger—such as spectators—faking claims.[27] The requirement should, however, be qualified. Otherwise its application will promote a superficial characterization of defendant's conduct as non culpable in all instances where there was no danger of physical impact despite the unreasonableness of defendant's conduct and the gravity of plaintiff's injury. Courts and juries will be precluded from the issue of whether defendant's conduct—despite a lack of danger of a physical impact—was negligent and wrongful as to the plaintiff in that it was reasonably foreseeable that it would produce fright and shock in plaintiff. Consider the case where defendant gets into a taxi and informs the driver to drive slowly because defendant has a bad heart. If the taxi driver ignores defendant and drives fast and careless, it is reasonably foreseeable that his negligent conduct will produce fright and shock and consequent injuries—even though plaintiff is never placed directly in danger of a

26. 261 A.2d at 88.

27. The "danger of physical impact" requirement could not stand as a policy judgment that a negligent defendant's conduct, no matter what its character, is never wrongful as to persons outside of the physical zone of danger. For there is certainly a character of negligent conduct which is wrongful to a spectator, even though the spectator is not within the zone of physical danger—i.e., defendant driving his auto 75 m.p.h. in a 20 m.p.h. zone runs onto a curb crushing plaintiff's son, while plaintiff looks on. It is reasonable to expect a severe emotional reaction, resulting in injury, to the mother spectator. There is nothing in the situation to exculpate defendant. If we disallow recovery it is because we recognize the danger of fraud.

physical impact,[28] using hindsight, it may be clear that plaintiff, during the course of the ride was never in danger of impact; yet, defendant's behavior may have been unreasonable as towards the plaintiff. The jury should be permitted to consider this issue. Otherwise, in cases such as this, where the equities are so heavily weighted on the side of the injured plaintiff, he as well as the judge and jury will be forced to stretch their interpretation of the facts to find a "danger of physical impact" in order to reach a just result.[29]

The Restatement (Second) offers a desirable approach. It cites two separate situations for fright and shock recovery in negligent actions. The question whether defendant was negligent as to plaintiff is answered thus: if defendant carelessly placed plaintiff in danger of physical impact he was obviously negligent; if defendant's careless conduct did not place plaintiff in danger of physical impact but was unreasonable to the extent that it was reasonably foreseeable that plaintiff's fright and shock would be the probable result of the conduct, defendant was negligent.[30]

While the Restatement clarifies the issue of when defendant's conduct is culpable, it, like *Niederman*, falls down on the second problem

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28. *See* RESTATEMENT (SECOND) OF TORTS 313, comment b and illustration 1.

29. Many older Pennsylvania cases have struggled to find "impact," no matter how slight, in order to avoid the compelled harsh results of the ironclad "impact rule"; these cases should serve as a caveat to the court in this area.

30. The approach of the RESTATEMENT (SECOND) OF TORTS is outlined in § 436. The authors refer to two distinct duties: (1) "to protect another from a fright or other emotional disturbance" and (2) to protect another from bodily harm:

> (1) If the actor's conduct is negligent as violating a duty of care designed to protect another from a fright or other emotional disturbance which the actor should recognize as involving an unreasonable risk of bodily harm, the fact that the harm results solely through the internal operation of the fright or other emotional disturbance does not protect the actor from liability.
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> (2) If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to another otherwise than by subjecting him to fright, shock, or other similar and immediate emotional disturbance, the fact that such harm results solely from the internal operation of fright or other emotional disturbance does not protect the actor from liability.
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> (3) The rule stated in Subsection (2) applies where the bodily harm to the other results from his shock or fright at harm or peril to a member of his immediate family occurring in his presence.

In a comment on subsection (1) the authors explain,

> It applies only when the fright or emotional disturbance to which the actor intends to subject the other or to which he should realize the other is likely to be subjected, is such because of its severe character, that a reasonable man would realize the likelihood that it might produce harmful physical consequence (*see* §§ 306, 312, and 313).
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> Section 306 describes "acts likely to cause bodily harm through mental disturbance": An act may be negligent, as creating an unreasonable risk of bodily harm to another, if the actor intends to subject, or realizes or should realize what his act involves.

of characterizing the damages essential to the cause of action. In both situations discussed above—(1) where defendant's conduct is culpable because he placed plaintiff in danger of impact and (2) where his liability results from conduct which the actor should recognize as involving an unreasonable risk of bodily harm via fright and shock —the Restatement limits recovery to "bodily harm."[31] As previously noted, *Niederman v. Brodsky* also limits recovery to "physical injuries."[32] Again the motivation is fear of fraud. The requirement of "physical injuries" will not, however, protect against fraud. As under the old "impact rule" where the courts and plaintiffs struggle to find "impact" to avoid injustice,[33] the same will occur in a struggle to show some "physical injuries".[34] Such confusion and strain detracts from the credibility of the legal system and should be avoided by leaving the question of the fact and extent of plaintiff's injuries (whether physical or purely emotional) to expert testimoy scrutinized by a jury.

In short, a fair rule would allow recovery in negligence cases for all "objectively ascertainable"[35] personal injuries (physical and mental) flowing from fright and shock caused by a fear of physical impact where plaintiff proves either: (1) that he was actually placed in danger of physical impact by defendant's negligence, or (2) that the defendant's conduct was so reckless and wanton towards him under the circumstances as to make it reasonably foreseeable that plaintiff would suffer fright and shock likely to produce "bodily harm". It is submitted that

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31. *See* RESTATEMENT (SECOND) OF TORTS § 436 A.

32. *See* 261 A.2d at 90.

33. For example, *see* Potere v. City of Philadelphia 380 Pa. 581, 112 A.2d 100 (1955); Jones v. Brooklyn Heights R.R. Co., 23 App. Div. 141, 48 N.Y.S. 914 (1897). Penick v. Merro, 189 F. Supp. 947 (E.D. Va. 1960).

34. *See* RESTATEMENT (SECOND) OF TORTS § 436 A. Comment (C) purporting to clarify the category of injuries compensable.

> *c.* The rule stated in this Section applies to all forms of emotional disturbance, including temporary fright, nervous shock, nausea, grief, rage, and humiliation. The fact that these are accompanied by transitory, non-recurring physical phenomena, harmless in themselves, such as dizziness, vomiting, and the like, does not make the actor liable where such phenomena are in themselves inconsequential and do not amount to any substantial bodily harm. On the other hand, long continued nausea or headaches may amount to physical illness, which is bodily harm; and even long continued mental disturbance, as for example in the case of repeated hysterical attacks, or mental aberration, may be classified by the courts as illness, notwithstanding their mental character. This becomes a medical or psychiatric problem, rather than one of law.

35. This approach is suggested in 64 ALB2d 127 n.7 (1953). "For practical purposes, the question should probably not be whether the consequence is "physical" but whether it is "objectively ascertainable."

under this rule, in both situations, the defendant's negligence rests upon his engaging in conduct which created an unreasonable risk of "bodily harm"; a reasonable man under the circumstances would have recognized the risk and refrained from such conduct. The defendant who chooses to engage the risk is liable to the injured plaintiff for all "objectively ascertainable" personal injuries flowing from the conduct.

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CRIMINAL PROCEDURE—PLEA BARGAINING—The Supreme Court of Pennsylvania has held that any participation by a trial judge in the plea bargaining process prior to trial is forbidden.

Commonwealth v. Evans, 434 Pa. 52, 252 A.2d 689 (1969).

Petitioner was charged with five crimes on which indictments had been returned against him—one count of assault and battery and four counts of aggravated robbery. Before trial, petitioner's lawyer met with the prosecuting attorney and the trial judge in two side bar conferences and in the judge's chambers. Following these meetings, the three parties came to an agreement as to concurrent sentences on the five indictments. Petitioner agreed to plead guilty to all counts in exchange for concurrent sentences of one to five years. All five counts resulted from a single series of events involving five victims.

After he was sentenced, petitioner filed a petition under the Pennsylvania Post Conviction Hearing Act[1] alleging that his earlier plea had been involuntary because of the trial judge's participation in the plea bargaining process. The petition was dismissed by the Court of Quarter Sessions of Philadelphia County. The Superior Court affirmed the dismissal and the Pennsylvania Supreme Court granted allocatur to review the decision.

The Pennsylvania Supreme Court reached the conclusion that a procedure which includes the trial judge in the plea bargaining process "is not consistent with due process and that a plea entered on the basis

1. PA. STAT. ANN. tit. 19, § 1180 (1970).