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THE RECOGNITION OF BYSTANDER RECOVERY

Clarence Greenwood

INTRODUCTION

A mother standing some distance from her young child witnesses the negligent killing of her child. As a result, the mother suffers severe mental trauma and resultant physical injury. The injuries are caused solely by the mother's apprehension for her child's safety. Will the mother be allowed to prosecute a claim for relief for the mental distress and physical consequences she suffered?[1]

Welsh v. Davis[2] involved a bystander claim for relief similar to the classic case posed above. This note will review the Montana federal district court's analysis of the Montana law on bystander recovery in *Welsh*. It will discuss the common law, the impact and the zone of danger rules which have traditionally barred bystander recovery for severe mental distress and resultant physical injury. The note will then turn to an analysis of two recent cases which abandoned the traditional rules and allowed a bystander to recover. Finally, the policy considerations underlying denial and support of recovery will be discussed and the proper rule recommended.

The *Welsh* case involved a husband's claim for relief for mental distress and resultant physical injury incurred when he witnessed an automobile accident in which his wife was injured. The defendant moved to dismiss the plaintiff's claim for relief. The federal district court, under the Erie doctrine,[3] granted the dismissal. In doing so, Judge Smith noted that Montana appeared to have adopted the zone of danger rule.[4] There was no evidence, however, that the Montana supreme court would adopt the rule of reasonable foreseeability as the California supreme court had done.[5]

THE HISTORICAL DENIAL OF BYSTANDER RECOVERY

Courts have generally denied bystander recovery for mental distress and resultant physical injury, when caused solely by the witnessing of

[1]Amaya v. Home Ice, Fuel & Supply Co., 59 Cal.2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963); Dillion v. Legg, 60 Cal.2d 208, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); Tobin v. Grossman, 24 N.Y.2d 598, 249 N.E.2d 419, 201 N.Y.S.2d 554 (1969); Neiderman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970).

[2]Welsh v. Davis, 307 F. Supp. 416 (W.D. Mont. 1969) [hereinafter referred to as Welsh].

[3]Erie v. Tomkins, 304 U.S. 64, 78 (1938).

[4]The Montana supreme court has never directly ruled on an issue of bystander recovery. It has ruled that fright can cause physical injury which is actionable. Cashin v. Northern Pacific R. Co., 96 Mont. 92, 28 P.2d 862, 866 (1934). It later affirmed that position by in effect stating the zone of danger rule. Kelly v. Lowney & Williams, Inc., 113 Mont. 385, 126 P.2d 486, 488 (1942).

[5]Dillion v. Legg, *supra* note 1.

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negligent injury to another.[6] The reason for this denial is traceable to the common law reluctance to recognize mental peace as a protectable interest[7] and the duty doctrine which evolved therefrom.[8]

The common law rule is exemplified by Lord Wensleydale's statement, "Mental pain or anxiety the law cannot value, and does not pretend to redress when the unlawful act complained of causes that alone. . . ."[9] The common law did allow recovery for mental distress, however, as a "parasitic" damage.[10] Mental distress has since been recognized as an interest worthy and capable of legal protection, when the act is purposely committed to cause mental distress.[11] Where the act causing the mental distress is merely negligent, however, the law has extended only hesitant protection.[12] Recovery in these cases is limited to those involving severe physical consequences.[13] Further, the plaintiff must demonstrate that the defendant breached a duty owed to him. The impact rule and zone of danger rule have traditionally been used to define the scope of the duty owed a plaintiff.

The impact rule[14] denies recovery to a plaintiff, who suffered severe mental distress and resultant physical injury from a negligent act, unless there was simultaneously some physical touching of the plaintiff—however slight.[15] Although the impact rule enjoyed a majority position at one time, it has been unanimously repudiated in the recent case law.[16]

The zone of danger rule denies recovery to a plaintiff, who suffers severe mental trauma and resultant physical injury from a negligent act, unless the plaintiff was so near the accident that it can be alleged that the fright was caused by the plaintiff's apprehension for his own immediate physical safety.[17] Recovery by a plaintiff beyond

[6]W. PROSSER, LAW OF TORTS 333 (4th ed. 1971) [herinafter cited as Prosser].

[7]Lynch v. Night, 11 Eng. Rep. 854 (1861); Comment, *Bystander Recovery for Mental Distress*, 37 FORDHAM L. REV. 429 (1969).

[8]Note, 43 N.Y.U. L. REV. 1252 (1968).

[9]Lynch v. Knight, *supra* note 7.

[10]PROSSER, *supra* note 6 at 331; T. STREET, THE FOUNDATION OF LEGAL LIABILITY 460 (1906).

[11]RESTATEMENT OF TORTS 2D § 46 (1965).

[12]There has been a general denial of recovery for the negligent infliction of mental distress unaccompanied by physical consequences with the exception of the telegraph and corpus cases. PROSSER, *supra* note 6 at 329; Note, 21 CORNELL L. REV. 166 (1935).

[13]PROSSER, *supra* note 6 at 330.

[14]Spade v. Lynn & B. R. Co., 168 Mass. 285, 47 N.E. 88 (1897); Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896).

[15]For a collection of case examples see PROSSER, *supra* note 6 at 331.

[16]Daley v. La Croix, 384 Mich. 4, 179 N.W.2d 390 (1970); Whetham v. Bismarck Hospital, 197 N.W.2d 678 (N.D. 1972); Neiderman v. Brodsky, *supra* note 1; Battalla v. State of New York, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); Stewart v. Gilliam, 271 So.2d 466 (Fla. 1973); Hughes v. Moore, 214 Va. 27, 197 S.E.2d 214 (1973).

[17]Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935); Tobin v. Grossman, *supra* note 1; Amaya v. Home Ice, Fuel & Supply Co., *supra* note 1.

the zone of danger is barred on the theory that the defendant breached no duty[18] owed to the plaintiff.

Correlative to the impact and zone of danger rules is the rule that a bystander cannot recover for fright induced physical injury, when the fright is caused by fear for the safety of another.[19] The theory, again, is that the defendant has breached no duty owned to the plaintiff and therefore is not liable to the bystander in a jurisdiction requiring some physical touching of the plaintiff.[21] The denial of bystander recovery in jurisdictions following the zone of danger rule is not so clear.[22] The zone of danger theory is premised upon the idea that fright can cause severe mental trauma and physical injury. Accepting this latter proposition, it seems quite arbitrary to distinguish fright induced mental trauma and resultant physical injury when caused by fear for oneself from fright induced mental trauma and resultant physical injury when caused by fear for a loved one's safety.[23] Yet, this is what the courts have done.

THE RULE OF REASONABLE FORESEEABILITY FIRST CALIFORNIA—NOW MICHIGAN?

As discussed above, the courts have been very hesitant to recognize mental peace as an interest worthy and capable of legal protection. Even today the fear of fraudulent claims[24] has lead the majority of courts to use exceptions[25] from the traditional tort rules in analyzing mental distress cases.[26] Recently, the California supreme court[27] and the Michigan court of appeals[28] both allowed a mother (bystander) to recover for mental trauma and resultant physical injuries caused by her witnessing the negligent killing of her young child. In doing so, both courts rejected the zone of danger rule and adopted the general tort rule of reasonable foreseeability in defining the duty owed the mother.[29]

[18]PROSSER, *supra* note 6, § 54.

[19]*Id.* at 333.

[20]*Id.*

[21]*Id.*

[22]*Id.*

[23]"Once accepting the view that a plaintiff threatened with an injurious impact may recover for bodily harm resulting from shock without impact . . . 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. R. 1033, 1039 (1936).

[24]Note, 43 N.Y.U. L. REV. 1252 (1968).

[25]Either the impact rule or zone of danger rule.

[26]This is despite heavy criticism of the exceptions by the legal writers, most of whom favor a resort to the traditional rules of tort analysis. PROSSER, *supra* note 6 at 334; 2 HARPER & JAMES, LAW OF TORTS 1036 (1956); Amdursky, *The Interest in Mental Tranquility,* 13 BUFFALO L. REV. 339 (1963); Magruder, *supra* note 23.

[27]Dillion v. Legg, *supra* note 1.

[28]Toms v. McConnell, 45 M.C.A. 647, 207 N.W.2d 140 (1973).

[29]HARPER & JAMES, *supra* note 26, at 1018; RESTATEMENT OF TORTS 2D § 435 (1965).

In *Dillon v. Legg* a mother and two young daughters were crossing a street when one daughter was struck by an auto and killed. The California supreme court, in a four to three opinion, ruled the mother's claim for relief was sufficient to withstand a motion to dismiss despite the fact that she was not in the zone of danger.[30] In the process, the California supreme court artfully portrayed the arbitrariness of the distinction between fright caused by fear for oneself and fright caused by fear for another:

> The case thus illustrates the fallacy of the rule that would deny recovery in one situation and grant it in the other. In the first place, we can hardly justify relief to the sister for trauma which she suffered upon apprehension of the child's death and yet deny it to the mother merely because of a happenstance that the sister was some few yards closer to the accident.[31]

The California court also graphically illustrated the confusion which exists in other jurisdictions[32] as a result of the reluctance to recognize mental distress as an interest capable of legal protection:

> The history of the cases does not show the development of a logical rule, but rather a series of changes and abandonments. Upon the argument in each situation the courts draw a Maginot Line to withstand an onslaught of false claims, the cases have assumed a variety of postures. At first they insisted that there be no recovery for emotional trauma at all. . . . Retreating from this position they gave relief for such trauma only if physical iimpact occurred. . . . They then abandoned the requirement for physical impact but insisted that the victim fear for her own safety, holding a mother could recover for fear for her child's safety if she simultaneously entertained a personal fear for herself.[33]

The California supreme court, however, stopped short of complete reliance upon the rule of reasonable foreseeability in defining the duty owed a bystander. The fear of fraudulent claims and inability to limit the extent of liability led the court to adopt three guidelines to aid in determining the duty owed: (1) whether the plaintiff was located near the scene of the accident . . . (2) whether the shock resulted from a direct emotional impact upon plaintiff from sensory and contemporaneous observance of the accident . . . and (3) whether plaintiff and victim were closely related. . . .[34] These standards have been critized on the basis that they inherently contain the possibility of mechanical application—the very thing the court was trying to overcome by rejecting the mechanical zone of danger rule.[35] The subsequent California case law, however, has shown this fear to be unfounded.[36]

[30]Dillion v. Legg, *supra* note 1 at 915.

[31]*Id.*

[32]*See, dissent* Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Comment, *Bystander Recovery for Mental Distress*, 37 FORDHAM L. REV. 429, 441 (1969).

[33]Dillion v. Legg, *supra* note 1 at 924.

[34]*Id.* at 920.

[35]Note, 43 N.Y.U. L. REV. 1252 (1968).

[36]Archibald v. Braverman, 275 Cal. App.2d 253, 79 Cal. Rptr. 723, (Court of Appeals, 3d Cir. 1969); Capeloute v. Kaiser Foundation Hospitals, 7 Cal.3d 889, 500 P.2d 880, 103 Cal. Rptr. 856 (1972).

The Michigan court of appeals was presented with a similar situation in *Toms v. McConnell.*[37] There a mother, while standing in the family home, witnessed the negligent killing of her young daughter outside. As a result, she suffered severe mental distress and resultant physical injury. The Michigan court of appeals, noting that the Michigan supreme court had recently rejected the iimpact rule,[38] upheld the mother's claim for relief. Unlike California, the Michigan court of appeals fully relied upon the rule of reasonable foreseeability in defining the duty owed.[39] In so doing, the Michigan court of appeals would seem to have taken the final step in giving full recognition to mental distress as an interest that is not only worthy of complete protection, but one which the law is capable of fully protecting.[40]

THE POLICY ARGUMENTS

Although numerous policy arguments are advanced for and against the adoption of the rule of reasonable foreseeability,[41] the controversy revolves around two basic premises. The policy basis for the traditional rules is that, although mental peace is worthy of legal protection, it is not an interest which the courts are capable of protecting because of the threat of a flood of fraudulent claims.[42] The policy argument in favor of the rule of reasonable foreseeability is that where a substantial wrong is done a remedy should be provided by the legal system.[43]

The threat of a flood of fraudulent claims is a real one.[44] For that reason most agree that recovery should not be allowed for trivial emotional disturbance.[45] But where the mental distress is severe enough to cause physical injuries, the threat of fictitious claims palls in light of the advances in medical science.[46] The leading recent case denying bystander recovery admitted as much in dictum: ". . . mental traumatic causation can now be diagnosed almost as well as physical traumatic causation."[47] A second weakness of the fraudulent claims argument is the artificial distinction it draws between types of fright-induced physical injury. Jurisdictions, which follow the zone of danger rule, are admitting that they can distinguish fraudulent claims of mental traumatic causa-

[37]Toms v. McConnell, *supra* note 28.

[38]Daley v. La Croix, *supra* note 16.

[39]Toms v. McConnel, *supra* note 28 at 144.

[40]For a discussion of the steps the courts have taken in recognizing mental distress as an interest which is worthy and capable of legal protection see Amdursky, *supra* note 26.

[41]PROSSER, *supra* note 6 at 327.

[42]Waube v. Warrington, *supra* note 17; Amaya v. Home Ice, Fuel & Supply Co., *supra* note 1; Tobin v. Grossman, *supra* note 1.

[43]Amaya v. Home Ice, Fuel & Supply Co., *supra* note 1 at 520, 531; Dillion v. Legg, *supra* note 1 at 917, 922; Tobin v. Grossman, *supra* note 1 at 422.

[44]PROSSER, *supra* note 6 at 328.

[45]*Id.*

[46]*Id.*

[47]Tobin v. Grossman, *supra* note 1 at 421.

tion from legitimate ones, when severe mental trauma is caused by fear for one's own physical safety.[48] These same jurisdictions, by denying bystander recovery, are holding that they cannot draw this distinction when the fright induced physical injury is caused by fear for a loved one's safety.[49] The incongruity of this is patent. Third, the threat of fraudulent claims is simply a theoretical argument—a fear.[50] There is no factual evidence that the courts in jurisdictions allowing bystander recovery have been or will be faced with a rash of fraudulent claims with which they cannot cope.[51]

The policy argument, that where a substantial wrong exists the courts should provide a remedy, is in the best of the common law tradition.[52] This argument discounts the threat of fraudulent claims in light of modern advances in medical science and the practical experience of jurisdictions allowing bystander recovery. Continued adherence to the traditional rules, according to this argument, leaves an interest deserving protection unprotected,[53] fails to make allowance for aggravated circumstances,[54] and denies any remedy for substantial wrongs.[55]

CONCLUSION

The law with regard to bystander recovery is clearly unsettled. Traditionally a bystander has been denied the right to recover for severe mental distress and resultant physical injury. The reason proffered is that the interest in mental peace is not protectable because of the inability of courts to distinguish fraudulent claims from legitimate ones.

It now appears, because of advances in medical science and the practical experience of jurisdictions allowing some bystander recovery, that the fraudulent claims fear is groundless. It is submitted that in the future courts should recognize the negligent infliction of severe mental distress upon a bystander as a wrong not only worthy of legal redress, but one which the courts are capable of handling through use of traditional tort principles.[56]

[48]Magruder, *supra* note 23.
[49]*Id.*
[50]Note, 15 STAN. L. REV. 740 (1963).
[51]Archibald v. Braverman, *supra* note 36 at 725; Note, 15 STAN. L. REV. 740 (1963).
[52]Battalla v. State of New York, *supra* note 16 at 240.
[53]Amdursky, *supra* note 26.
[54]Hopper v. United States, 244 F. Supp. 314, 318 (D. Colo. 1965).
[55]Dillion v. Legg, *supra* note 1 at 917, 922.
[56]Amdursky, *supra* note 26 at 353.