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Negligence - Damages - Fear for Third Person's Safety

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RECENT CASES

NEGLIGENCE — DAMAGES — FEAR FOR THIRD PERSON'S SAFETY — Plaintiff claimed damages for physical injuries caused by fright or nervous shock when she observed the defendant's truck negligently run over her child. The trial court dismissed the action. The District Court of Appeal ruled that the mother could recover.[1] The Supreme Court of California in vacating the District Court decision *held*, three Justices dissenting, that liability could not be predicated on fright or nervous shock with consequent bodily illness induced solely by fear for the safety of a third person. *Amaya v. Home Ice, Fuel and Supply Co.*, 29 Cal. Rptr. 33, 379 P.2d 513. (1963).

Alabama[2] and Texas[3] have permitted recovery for mental pain and suffering although the plaintiff was in no danger. A few jurisdictions have allowed recovery where such fear caused actual physical injury.[4] Recovery has also been allowed for parents' mental anguish when their child ate poison.[5] Courts have granted recovery when the act against the third person has been intentional[6] or wanton.[7]

Some courts have allowed recovery when one fears for another's safety if the plaintiff was himself endangered;[8] without this element, policy reasons have barred recovery.[9]

The leading case denying recovery when one does not fear for his own safety but for the safety of a third person

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1. Amaya v. Home Ice, Fuel and Supply Co., 23 Cal. Rptr. 131 (1962).
2. Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (1912).
3. Gulf, C & S. F. Ry. Co v. Coopwood, 96 S.W. 102 (Tex. Civ. App. 1906).
4. Rasmussen v. Benson, 135 Neb. 232, 280 N.W. 890 (1938); Cohn v. Ansonia Realty Co., 162 App. Div. 791, 148 N.Y.S. 39 (1914). (Plaintiff's small children entered elevator and started it upward after the operator had negligently left his controls. Fear for children cause mother to faint and fall into elevator shaft).
5. Holland v. St. Paul Mercury Ins. Co., 135 So. 2d 145 (La. 1962).
6. Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890). (Plaintiff suffered miscarriage after seeing defendant's battery upon two men).
7. Missouri K. & T. Ry Co. of Texas v. Hawkins, 50 Tex. Civ. App. 128, 109 S.W. 221 (1908). (Emotional distress caused by defendant's negligent mutilation of corpse).
8. Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933); Frazee v. Western Dairy Prods., 182 Wash. 578, 47 P.2d 1037 (1935).
9. Klassa v. Milwaukee Gas Light Co., 273 Wis. 176, 77 N.W.2d 397 (1956).

is *Waube v. Warrington*.[10] This holding is accepted by most jurisdictions, including California.[11] New Hampshire recently rejected the intermediate court's holding in the instant case[12] by declaring the defendant owed no duty to a third person.[13]

For many years the leading case of *Mitchell v. Rochester Ry. Co.*[14] was not only authority for denying recovery for injuries sustained in fearing for a third person's safety, but also for any mental suffering without physical contact. The concept fostered in the *Mitchell* case became known as the "impact rule".[15] A recent decision has discarded the impact rule and has deemed it obsolete.[16]

The principal case held that the impact rule did not prevail in California,[17] basing this comment on an early decision.[18] Fright has long been considered an element of damage in California.[19]

North Dakota by implication, appears to abide by the impact rule.[20] If impact is required, certainly no recovery would be upheld in North Dakota for an injury sustained through fear for a third person's safety.

However, it is submitted that the "impact rule" is too harsh. The principal case represents the soundest view by allowing recovery for fright or shock when the claimant himself is injured while fearing for his own safety.

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10. 216 Wis. 603, 258 N.W. 497 (1935). (The court held there was no duty to a third person).

11. Beaty v. Buckeye Fabric Finishing Co., 179 F. Supp. 688 (Ark. D.C. 1959); **E.g.,** Reed v Moore, 156 Cal. App. 2d 43, 319 P.2d 80 (1957); Strazza v. McKittrick, 146 Conn. 714, 156 A.2d 149 (1959); Mahaffey v. Official Detective Stories Inc., 210 F. Supp. 251 (W.D. La. 1962).

12. **Supra** note 1.

13. Barber v. Pollock, 187 A.2d 788 (N.H. 1963). (A wife saw her husband involved in accident with the negligent defendant and later suffered a mental breakdown when told he died).

14. 151 N.Y. 107, 45 N.E. 354 (1896).

15. **Id.** at 355 ". . . no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury."

16. Battalla v. State, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961).

17. Amaya v. Home Ice, Fuel and Supply Co., 29 Cal. Rptr. 33, 35, 379 P.2d 513, 515 (1963).

18. Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, 44 P. 320, 322 (1896). ". . .if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect, through some action upon the mind."

19. Easton v. United Trade School Contracting Co., 173 Cal. 199, 159 Pac. 597 (1916).

20. Wilson v. Northern Pac. Ry. Co., 30 N.D. 456, 153 N.W. 429 (1915). (Held that injury was not caused by fear of fire but from fighting same).

Allowing recovery in circumstances analogous to the instant case would extend potential recovery out of logical proportion. Eventually such a rule would extend to mere bystanders.

LYNN GARRETT

HOMICIDE — FELONY — MURDER RULE — CO-FELON KILLED BY ROBBERY VICTIM—The defendants (Austin and Bell) and the deceased, Rowe, agreed to commit an armed robbery. During the attempted perpetration of the crime, the intended robbery victim shot and killed Rowe. The defendants were charged with first degree murder but were granted a motion to quash the information on the theory that Rowe's death was a justifiable homicide, and therefore no murder was committed. The Michigan Supreme Court affirmed the lower court in a 5-2 decision. *People v. Austin*, 370 Mich. 12, 120 N.W.2d 766 (1963).

At Common Law to be convicted of murder the killing had to fall into one of two categories: (1) an unlawful killing of another with malice aforethought, express or implied;[1] or (2) a killing which falls within the terms of the felony-murder rule.[2] The basis of this rule is that in the commission of a dangerous felony the perpetrator should foresee a possible death since he invites dangerous resistance.[3]

The vast majority of jurisdictions have adopted some statutory form of the common law felony-murder rule.[4] The Michigan statute[5] is similar to other states. Generally

1. Commonwealth v. Buzard, 365 Pa. 511, 76 A.2d 394 (1950); 4 BLACKSTONE'S COMMENTARIES 195 (Lewis' ed. 1897).

2. See PERKINS, CRIMINAL LAW 36 (1957). The felony-murder rule is stated as follows: "Homicide is murder if the death ensues in consequence of the perpetration or attempted perpetration of some other felony unless such other felony was not dangerous of itself and the method of it perpetration or attempt did not appear to involve any appreciable human risk."

3. See Commonwealth v. Moyer, 357 Pa. 181, 53 A.2d 736 (1947) (dictum).

4. See Arent and MacDonald, **The Felony-Murder Doctrine And Its Application Under The New York Statutes,** 20 Cornell L. Q. 288, 294 (1934-35) for a complete survey of state statutes.

5. Mich. Comp. Laws § 750.316 (1948). "All murder . . . which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be murder of the first degree; . . ."