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Torts -- Negligently Induced Fright Causing Physical Injury to Hypersensitive Plaintiff

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Thus it appears that the North Carolina court recognizes that disclaimers may be effective.

It is apparent, however, that a disclaimer would not preclude a recovery of the purchase price by the buyer should the seller furnish non-merchantable goods. In *Williams v. Dixie Chevrolet Co.*,[25] involving the sale of an automobile, the court stated that the purchaser could recover for want of consideration if the car were not fit for its intended use due to the defect. The court said, "The refusal to warrant against worthlessness would fall with the balance of the supposed contract for want of consideration."[26] Of course, if the terms of the disclaimer apply only to quality, it will in no way affect an implied warranty of merchantability.[27]

The New Jersey court appears to be the first to declare this standard automobile disclaimer void.[28] Courts of other jurisdictions have given the disclaimer its full effect[29] and have held that it does not violate public policy.[30] It would seem, however, that the prior cases have not met the real problem as seen by the New Jersey court—that while a disclaimer of warranty should be available to parties who choose so to contract, the imposition of these conditions by virtually all automobile manufacturers does not result in a freely bargained for and fairly obtained agreement. It is submitted that the solution to this problem can only be found by invoking the doctrine of public policy.

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Torts—Negligently Induced Fright Causing Physical Injury to Hypersensitive Plaintiff.

In *Williamson v. Bennett*[1] the defendant negligently drove her automobile into that of the plaintiff; plaintiff did not see what had struck her, but thinking that she had killed a child on a bicycle[2] she became frightened. Plaintiff came to a stop and then saw that an automobile and not a child had collided with her. Though plaintiff suffered no immediate

[25] 209 N.C. 29, 182 S.E. 719 (1935).
[26] *Id.* at 31, 182 S.E. at 721.
[27] Hall Furniture Co. v. Crane Mfg. Co., 169 N.C. 41, 85 S.E. 35 (1915).
[28] Another provision of the warranty has been attacked. In Mills v. Maxwell Motor Sales Corp., 105 Neb. 465, 181 N.W. 152 (1920), the court stated, in a dictum, that it was against "every conception of justice" to allow the manufacturer to be the sole judge as to whether parts were so defective as to be replaceable.
[29] Shafer v. Reo Motors, 205 F.2d 685 (3rd Cir. 1953); L. R. Cooke Chevrolet Co. v. Culligan Soft Water Serv., 282 S.W.2d 349 (Ky. 1955); Hall v. Everett Motors, Inc., 165 N.E.2d 107 (Mass. 1960).
[30] Brokerick Haulage, Inc. v. Mack-International Motor Truck Corp., 1 App. Div. 2d 649, 153 N.Y.S.2d 127 (Sup. Ct. 1926).

[1] 251 N.C. 498, 112 S.E.2d 48 (1960).
[2] About a month before the accident plaintiff's brother-in-law had killed a child on a bicycle when she rode into the side of his car. 251 N.C. at 500, 112 S.E.2d at 49.

physical injury, later in the day she became nervous and otherwise mentally upset, which condition became steadily worse. She subsequently complained that the corner of her mouth was drawn, her tongue swollen, her left side numb, and her swallowing and sleeping impaired. A psychiatrist testified that her condition was a conversion reaction[3] caused by the accident; he further stated that prior to this the plaintiff had a more than ordinary proneness to neurosis.[4] The jury found that defendant's negligence had proximately caused plaintiff's injury and awarded her $4,000 damages. In reversing the award the supreme court held that defendant's negligence was not the proximate cause of plaintiff's harm.

Courts in the United States have enunciated a variety of reasons for denying recovery for physical injury induced by fright. Some courts[5] have held that the physical consequences of fright were not the proximate result of defendant's negligence because those consequences were not foreseeable. The better rule would appear to be that it need only be shown that defendant's negligent act was likely to cause harm to the plaintiff. When such is the case, defendant should be liable not only for foreseeable injuries but for all harm resulting therefrom in an unbroken chain of causation.[6] The negligent defendant should take his victim as he finds him;[7] thus whether the injury results directly, as through contact, or indirectly, as through fright, liability would ensue.

Some courts[8] have held that since there can be no recovery for fright alone there can be none for the consequences of fright. However, as stated previously, if the defendant's conduct is negligent, *i.e.*, if it was

[3] This is a reaction where emotional and psychological nervousness or anxiety is so intense that it is converted into a physical symptom. The reaction can also be described as a post-traumatic neurosis, *i.e.*, the neurosis will appear after the trauma. Trauma in this sense need not be a physical injury but may be a forceful psychological effect. Humphreys v. Delta Fire & Cas. Co., 116 So. 2d 130 (La. 1959).

[4] The doctor said further that the plaintiff's symptoms were typically those of a conversion reaction and that the plaintiff was not malingering.

[5] *E.g.*, Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898); Mitchell v. Rochester R.R., 151 N.Y. 107, 45 N.E. 354 (1896).

[6] Pankopf v. Hinkley, 141 Wis. 146, 123 N.W. 625 (1909). Seitz, *Duty and Foreseeability Factors in Fright Cases*, 23 MARQ. L. REV. 103, 108-09 (1939); Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260, 270-72 (1921); *cf.* Reynolds v. Murph, 241 N.C. 60, 84 S.E.2d 273 (1954); Hart v. Curry, 238 N.C. 448, 78 S.E.2d 170 (1953). *Contra*, Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897); Oehler v. Bamberger & Co., 4 N.J. Misc. 1003, 135 Atl. 71 (Sup. Ct.), *aff'd*, 103 N.J.L. 703, 137 Atl. 425 (Ct. Err. & App. 1926).

[7] Nelson v. Black, 266 P.2d 817 (Dist. Ct. App.), *rev'd on other grounds*, 43 C.2d 612, 275 P.2d 473 (1954); Flood v. Smith, 126 Conn. 644, 13 A.2d 677 (1940); see Padgett v. Colonial Wholesale Distrib. Co., 232 S.C. 593, 103 S.E.2d 265 (1958). *Contra*, Spade v. Lynn & Boston R.R., *supra* note 6; Oehler v. Bamberger & Co., *supra* note 6.

[8] St. Louis, I.M. & S. Ry. v. Bragg, 69 Ark. 402, 64 S.W. 226 (1901); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896). *Contra*, Chiuchiolio v. New England Tailors, 84 N.H. 329, 150 Atl. 540 (1950).

reasonably foreseeable that injury would result, then the character of the causal connection should be irrelevant.[9]

Other courts have denied recovery on policy grounds; they have stated that a flood of litigation would result if a cause of action were recognized.[10] Notwithstanding these warnings the expected flood of cases has not developed in those jurisdictions which recognize an action,[11] and the overwhelming majority of recent decisions have rejected this argument.[12]

As some opinions state[13] the apprehension of fraud is probably the reason motivating most courts which deny recovery.[14] This policy would be just only if *all* the claims were fictitious. If any claims are meritorious, it is the duty of the courts to furnish a remedy for them.[15] The ultimate answer to the fraud argument must lie in the courts' belief in the ability of our juries to distinguish true from fraudulent claims.[16]

North Carolina has had few cases involving negligently inflicted fright with resulting physical injury. Several cases have involved injury resulting from fright induced by negligently executed dynamite

[9] "The fundamental vice of the court's opinion is that it assumes that the plaintiff is alleging her fright as the ground for her recovery, and is alleging the physical consequences merely in aggravation of the damages to be recovered, whereas the fact is that she has alleged and proved her physical injury as her ground of action and . . . the fright merely to show the causal-connection between . . . negligence and her physical injury. The opinion shows a complete inability to distinguish between fright as the injury . . . and fright as a necessary link in the chain of causation . . . ." BOHLEN, TORTS 265-66 (1926).

[10] Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896). Other cases have allowed recovery and have controverted this statement: Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 43 So. 205 (1916); Green v. T. A. Shoemaker & Co., 111 Md. 69, 73 Atl. 688 (1909); Simone v. Rhode Island Co., 28 R.I. 186, 66 Atl. 202 (1907).

[11] Hambrook v. Stokes Bros., [1925] 1 K.B. 141, 158; Goodhart, *The Shock Cases and Area of Risk,* 16 MODERN L. REV. 14, 24 (1953); Smith, *Relation of Emotions to Injury and Disease; Legal Liability for Psychic Stimuli,* 30 VA. L. REV. 193, 211 n.47 (1944).

[12] "The fear of the successful prosecution of fraudulent claims . . . has not impressed the majority of judges . . . as is evidenced by the fact that of the twenty jurisdictions which considered this problem for the first time during the present century, seventeen have granted the right of recovery." Second Annual Report of the Law Revision Commission, *Act, Recommendation and Study Relating to Liability for Injuries Resulting from Fright or Shock,* State of New York 375, 379-80 (1936).

[13] Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897); Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931); Huston v. Freemansburg Borough, 212 Pa. 548, 61 Atl. 1022 (1905).

[14] See generally Note, *Fright and the Court's Fear of Fraud,* 23 PENN. B.A.Q. 203 (1952).

[15] Dulieu v. White & Sons, [1901] 1 K.B. 669, 681; Note, *Mental Disturbance in the Law of Torts—A Problem of Legal Lag,* 6 WES. RES. L. REV. 384, 386 (1955); 15 CHI.-KENT L. REV. 323, 326 (1937).

[16] Alabama Fuel & Iron Co. v. Balodoni, 15 Ala. App. 316, 73 So. 205 (1916); Seitz, *Relational Fact Situation and Emotional Make-Up as Holding Solution to Problems in Fright Cases,* 20 B.U.L. REV. 676, 679 (1940); see Nelson v. Black, 266 P.2d 817 (Dist. Ct. App.), *rev'd on other grounds,* 43 C.2d 612, 275 P.2d 473 (1954); Dimmick v. Follis, 123 Ind. App. 701, 111 N.E.2d 486 (1953).

blasting.[17] Though these cases contain language[18] that would logically apply to the fact situation in *Williamson,* the court in *Williamson* distinguished the dynamite cases on the basis of the strict liability imposed on one using a dangerous instrumentality. The court has allowed recovery for mental anguish with resulting physical injury in cases of willful infliction of mental anguish,[19] browbeating bill collectors,[20] negligent handling of dead bodies,[21] and negligent transmission of death messages.[22] *Williamson,* however, did not discuss these cases.[23]

The holding in *Williamson* probably was based on the established North Carolina position that one cannot recover damages for mental anguish arising from fear for the safety or well-being of another.[24] The cause of plaintiff's conversion reaction was fear for the safety of a non-existent[25] child. The North Carolina rule, however, heretofore has been based on the situation where the physical injury *precedes* the mental anguish and the mental anguish is sought to be established as an element of damages—as where the plaintiff is physically injured and worries over his inability to support his children. Decisions in other jurisdictions[26] are in conflict as to whether recovery should be allowed for injury caused by fear for the safety of another where the mental anguish is not an element of damages for a concededly compensable injury but is rather the vehicle which creates the injury itself.

It also seems possible that in *Williamson* the court denied recovery on the theory that the plaintiff's neurosis was an intervening cause which

[17] Arthur v. Henry, 157 N.C. 438, 73 S.E. 211 (1911); Kimberly v. Howland, 143 N.C. 399, 55 S.E. 778 (1906); Watkins v. Kaolin Mfg. Co., 131 N.C. 536, 42 S.E. 983 (1902).

[18] *"The nerves are as much a part of the physical system as the limbs, and in some persons are very delicately adjusted, and when 'out of tune' cause excruciating agony.* We think the general principles of torts support a right of action for physical injuries resulting from negligence, *whether wilful or otherwise,* none the less strongly because the physical injury consists of a wrecked nervous system instead of lacerated limbs. Injuries of the former class are frequently more painful and enduring than those of the latter . . . ." Kimberly v. Howland, 143 N.C. 398, 403-04, 55 S.E. 778, 780 (1906). (Emphasis added.)

[19] May v. Western Union Tel. Co., 157 N.C. 416, 72 S.E. 1059 (1911).

[20] Kirby v. Jules Chain Stores Corp., 210 N.C. 808, 188 S.E. 625 (1936).

[21] Morrow v. Cline, 211 N.C. 254, 190 S.E. 207 (1937). See also, for a discussion of quasi-property rights, 30 N.C.L. REV. 299 (1952).

[22] Russ v. Western Union Tel. Co., 222 N.C. 504, 23 S.E.2d 681 (1943).

[23] For an excellent discussion of similar cases see PROSSER, TORTS 43-44 (2d ed. 1955).

[24] Hinnant v. Tide Water Power Co., 189 N.C. 120, 126 S.E. 307 (1925); Ferebee v. Norfolk So. R.R., 163 N.C. 351, 79 S.E. 685 (1913), *aff'd,* 238 U.S. 269 (1915).

[25] This would seem to be a step beyond fear for the safety of another person.

[26] Denying recovery: Southern Ry. v. Jackson, 146 Ga. 243, 91 S.E. 28 (1916); Nuckles v. Tennessee Elec. Power Co., 155 Tenn. 611, 299 S.W. 775 (1927); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935). Allowing recovery: Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916); Bowman v. Williams, 164 Md. 397, 165 Atl. 182 (1933); Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890).

broke the connection between defendant's negligence and plaintiff's injuries. The court stated that "the defendant's negligence was not that cause which 'in natural and continuous sequence, unbroken by any new and independent cause,' produced plaintiff's injury."[27] The more logical view would seem to be that even if the neurosis were an intervening cause it was not a controlling cause; defendant's negligence was the actual cause of plaintiff's fright, but for which fright plaintiff's latent neurosis would not have resulted in injury.[28]

At least one court has stated[29] that a defendant is under no duty to foresee that a person is extraordinarily susceptible to injury. Another court[30] has made liability depend on whether or not the defendant had knowledge of plaintiff's abnormal susceptibility. The majority of those jurisdictions[31] which allow recovery, however, have held that if defendant's negligent conduct was likely to injure an average person then defendant also would be liable for injury to the specially susceptible.

Although the opinion in *Williamson* discussed the entire area of damages for mental anguish and physical injuries resulting therefrom, pointing out the confusion and contradictions among other courts,[32] it

[27] 251 N.C. at 507, 112 S.E.2d at 54.

[28] Hall v. Excelsior Steam Laundry Co., 5 La. App. 6 (1925); Simone v. Rhode Island Co., 28 R.I. 186, 66 Atl. 202 (1907); Padgett v. Colonial Distrib. Co., 232 S.C. 593, 103 S.E.2d 265 (1958); *cf.* Hanford v. Omaha & C.B. St. Ry., 113 Neb. 423, 203 N.W. 643 (1925); Hall v. Coble Dairies, Inc., 234 N.C. 206, 67 S.E.2d 63 (1951); Riggs v. Akers Motor Lines, 233 N.C. 160, 63 S.E.2d 197 (1951).

[29] Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897).

[30] Oehler v. Bamberger & Co., 4 N.J. Misc. 1003, 135 Atl. 71 (Sup. Ct. 1926), *aff'd*, 103 N.J.L. 703, 137 Atl. 425 (Ct. Err. & App. 1926).

[31] Flood v. Smith, 126 Conn. 644, 13 A.2d 677 (1940); Humphries v. Delta Fire & Cas. Co., 116 So. 2d 130 (La. 1959); Hall v. Excelsior Steam Laundry Co., 5 La. App. 6 (1925); Sutton Motor Co. v. Crysel, 289 S.W.2d 631 (Tex. 1956); Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 260-61 (1944). See generally, 22 ST. JOHN'S L. REV. 135 (1947).

[32] Jurisdictions which deny recovery for negligently inflicted fright with resulting physical injury, in the absence of some exception to their general rule, include: Arkansas—Rogers v. Williard, 144 Ark. 587, 223 S.W. 15 (1920); Illinois—Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898); Iowa—Kramer v. Ricksmeier, 159 Iowa 48, 139 N.W. 1091 (1913); Kentucky—Morse v. Chesapeake & Ohio Ry., 117 Ky. 11, 77 S.W. 361 (1903); Maine—Herrick v. Evening Express Pub. Co., 120 Me. 138, 113 Atl. 16 (1921); Massachusetts—Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897); Michigan—Alexander v. Pacholek, 222 Mich. 157, 192 N.W. 652 (1923); Missouri—Strange v. Missouri Pac. Ry., 61 Mo. App. 586 (1895); New Jersey—Legac v. Vietmeyer Bros., 7 N.J. Misc. 615, 147 Atl. 110 (1929); New York—Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896); Ohio—Miller v. Baltimore & O. R.R., 78 Ohio St. 309, 85 N.E. 499 (1908); Pennsylvania—Ewing v. Pittsburgh, C., C. & St. L. Ry., 147 Pa. 40, 23 Atl. 340 (1892).

States allowing recovery for negligent infliction of fright with resulting physical injury are: Alabama—Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916); California—Lindley v. Knowlton, 179 Cal. 298, 176 Pac. 440 (1918); Connecticut—Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941); Georgia—Goddard v. Walters, 14 Ga. App. 722, 82 S.E. 304 (1914); Kansas—Clemm v. Atchison, T. & S.F. Ry., 126 Kan. 181, 268 Pac. 103 (1928); Louisiana—

is doubtful that the court's holding can be interpreted as firmly placing North Carolina in the list of jurisdictions denying recovery for a physical injury resulting from negligently inflicted fright.

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Laird v. Natchitochas Oil Mill Inc., 10 La. App. 191, 120 So. 692 (1929); Maryland—Bowman v. Williams, 164 Md. 397, 165 Atl. 182 (1933); Montana—Cashin v. Northern Pac. Ry., 96 Mont. 92, 28 P.2d 862 (1934); Nebraska—Netusil v. Novak, 120 Neb. 751, 235 N.W. 335 (1931); New Hampshire—Chiuchiolio v. New England Wholesale Tailors, 84 N.H. 329, 150 Atl. 540 (1930); Oregon—Salmi v. Columbia & N. R.R., 75 Ore. 200, 146 Pac. 819 (1915); Rhode Island—Simone v. Rhode Island Co., 28 R.I. 186, 66 Atl. 202 (1907); South Carolina—Padgett v. Colonial Wholesale Distrib. Co., 232 S.C. 593, 103 S.E.2d 265 (1958); South Dakota—Sternhagen v. Kozel, 40 S.D. 396, 167 N.W. 398 (1918); Tennessee—Memphis St. Ry. v. Bernstein, 137 Tenn. 637, 194 S.W. 902 (1917); Texas—Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890); Virginia—Bowles v. May, 159 Va. 419, 166 S.E. 550 (1932); Washington—Cherry v. General Petroleum Corp., 172 Wash. 688, 21 P.2d 520 (1933); West Virginia—Lambert v. Brewster, 97 W. Va. 124, 125 S.E. 244 (1924); Wisconsin—Pankopf v. Henkley, 141 Wis. 146, 123 N.W. 625 (1909). This footnote is a corrected version of the state by state breakdown found in Second Annual Report of the Law Revision Commission, *Act, Recommendation and Study Relating to Liability for Injuries Resulting from Fright or Shock,* State of New York 375, 392 n.34, 406 n.80 (1936), and in McNiece, *Psychic Injury and Tort Liability in New York,* 24 ST. JOHN'S L. REV. 1, 14 n.40, 16 n.43 (1949).