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Torts -- Negligence -- Proximate Cause

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demurrer was sustained to a count alleging that feme plaintiff was being treated in her home by a physician about 2 a.m. when the electric current was cut off, so that the physician was unable to assist her, to her damage, and that defendant could have notified her of its intention to suspend the service by the exercise of reasonable care and diligence.

PEYTON B. ABBOTT, JR.

Torts—Negligence—Proximate Cause

The plaintiff, an engineer on the defendant's railway, was scalded by a steam plug being blown from the engine boiler and was forced to jump from his cab. He landed between the rails of an adjacent track, suffering a broken leg and other severe injuries. While thus incapacitated, and before aid could reach him, he was further terrified by the approach of an engine upon the track on which he lay. Also, he heard other employees shouting "Stop 67!", which increased his fear of immediate death. The engine was stopped only a few feet from the plaintiff. Plaintiff sued for damages because of physical injuries and nervous shock, and recovered on both counts. The decision was affirmed.[1]

The unique feature of the case is that damages were allowed for nervous shock which occurred subsequent to the physical injury. The negligent omission, the physical injury, and the nervous shock, occurred in sequence. In allowing a recovery for nervous shock, the court treats it as proximately caused by the same negligence that caused the physical injury, and said that each forms a part of the natural and indivisible result.[2] From the reported facts, it appears that the real cause of the nervous shock was the approach of "67" and the shouts of the spectators.

The decision of the case is to be recognized as an extension of the recovery for nervous shock. There are yet states that require an actual impact, causing a contemporaneous nervous injury, and a subsequent physical injury, to permit a recovery for fright.[3] Others have recognized that such an impact, however slight, is a mere legal peg[4] upon which to hang a recovery when there is a nervous shock

[1] Baltimore & O. R. Co. v. McBride, 36 F. (2d) 841 (C. C. A. 6th, 1930).
[2] *Supra* note 1 at 842.
[3] Mitchell v. Rochester R. Co., 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 731 (1896) (Court is afraid of: (1) Fictitious and fraudulent litigation; (2) Difficulty of ascertaining damages; (3) Recovery against public policy). Spade v. Lynn & Boston R. Co., 168 Mass. 285, 47 N. E. 88 (1897).
[4] Throckmorton, *Damages for Fright* (1921) 34 HARV. L. REV. 260, 273.

followed by a consequent physical illness.[5] All allow a recovery when nervous shock and physical injury happen together, and when each aggravates the other.[6] Few jurisdictions allow a recovery for mental anguish alone. These recoveries are generally limited to the telegraph cases.[7]

The apparent weakness of the principal case is seen in the mechanical method utilized in reaching the decision. The doctrine of "foreseeability," as a test of causal connection, has been limited[8] and criticised[9] in recent years. The jury, in determining negligence, reviews and connects the known facts, and is not called upon to "foresee" the unknown. It deals with "past actualities and not future probabilities."[10] Also, the question of recovery for nervous shock should not be, "Was the negligent act too remote?" but, "Have the courts extended the right of recovery for fright to take in the facts of this case?"[11] It is submitted that the true test is whether

[5] Purcell v. St. Paul, etc. R. Co., 48 Minn. 134, 50 N. W. 1034 (1892); Mack v. South Bound R. Co., 52 S. C. 323, 29 S. E. 905 (1897); Kimberly v. Howland, 143 N. C. 398, 404, 55 S. E .778 (1906) ("If the fright and nervousness is the natural and direct result of the negligent act of the defendant, and if the fright and nervousness directly cause an impairment of the health or loss of power, then this would constitute an injury . . .); Pankopf v. Hinkley, 141 Wis. 146, 123 N. W. 625, 24 L. R. A. (N. S.) 1159 (1909).

The English rule is laid down in Hambrook v. Stokes Bros. (1925) 1 K. B. 141, 41 L. T. R. 125. According to D. Hughes Parry, *Nervous Shock as a Cause of Action in Tort* (1925) 41 L. Q. Rev. 297, the plaintiff may recover in an action for damages for nervous shock suffered as the result of a wrongful act by the defendant, provided such shock has caused physical injury to the plaintiff as its direct, or contemplated, result. The "act" may assume forms: physical impact; spoken words; or, conduct causing fright to the plaintiff. E. F. Albertsworth, *Recognition of New Interests in the Law of Torts* (1925), 10 Calif. L. Rev. 461, 487 et seq.

[6] Stutz v. Chicago & N. W. R. Co., 73 Wis. 147, 40 N. W. 653 (1888); Warren v. Boston & Me. R. Co., 163 Mass. 484, 40 N. E. 895 (1895); Consolidated Trac. Co. v. Lambertson, 59 N. J. Law 297, 36 Atl. 100 (1896); Denver & R. G. R. Co. v. Roller, 100 Fed. 738, 49 L. R. A. 77 (C. C. A. 9th, 1900); Illinois Cent. R. Co. v. Nelson, 212 Fed. 69 (C. C. A. 8th, 1914); Penn. R. Co. v. White, 242 Fed. 437 (C. C. A. 6th, 1917).

[7] A case comment in (1928-29) 3 St. John's L. Rev. 285, discussing Gibbs v. Western U. Teleg. Co., 196 N. C. 516, 146 S. E. 209 (1929) gives a list of the states allowing a recovery for mental anguish caused by failure to deliver death messages. These states are: Texas (1881); Tenn. (1888); Ala. (1890); N. C. (1890); Iowa (1895); Kentucky (1900); Nevada (1904). Recovery is denied in all the other states and in the Federal courts.

[8] Kimberly v. Howland, *supra* note 5, at 402. Throckmorton, *Damages for Fright* (1921) 34 Harv. L. Rev. 260, 271.

[9] Albert Levitt, *Proximate Cause and Legal Liability* (1920) 90 Cent. L. Jr. 188; Green, Rationale of Proximate Cause.

[10] Levitt, *op. cit. supra* note 9 at 194.

[11] Throckmorton, *op. cit. supra* note 8, at 268-272; D. Hughes Parry, *op. cit. supra*, note 5.

the negligence of the defendant was a substantial contributing factor to the plaintiff's injury.[12] The defendant's negligence in the principal case set the stage for the totality of the plaintiff's injuries, whether their occurrence was contemporaneous or consecutive.

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[12] Levitt, *op. cit. supra* note 9, at p. 194 *et seq.;* Milwaukee & St. Paul R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256 (1896). This case sets up the "foreseeability" test, but bases its decision on the answer to the question, "Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?" A consideration of the decision of the case on the facts will sustain the test advocated in this comment.