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# Torts -- Emotional Distress -- Negligent Infliction of Fear For Safety of Another

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Since so many married men are out of the continental United States, due primarily to service in the armed forces, a procedure is needed whereby a serviceman's wife owning an interest in real estate may convey the same without it being necessary that the husband assent in person.[27] The method under discussion fills that need.

A positive decision on this matter is needed in North Carolina, both in order to cure the possible defect in titles already transferred in this manner and so that attorneys may confidently recommend this procedure to clients. Since it may take some time for a test case to reach the Supreme Court, it remains for the legislature to fill the gap by enacting legislation authorizing the wife to join on behalf of her husband by his power of attorney, as was done in Florida, Indiana, and Pennsylvania.[28] This would enable a married woman, whose husband is unavailable, to exercise the freedom of transfer which she needs should circumstances arise which make it necessary for her to dispose of her separate interest in real estate.[29]

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**Torts—Emotional Distress—Negligent Infliction of Fear For Safety of Another**

The evolution of recovery for emotional disturbance has been a slow and often illogical process. In order to observe briefly this development, the following categories of cases involving emotional disturbance should be considered: (1) assault on P; (2) intentional infliction of mental disturbance on P; (3) negligence toward P; (4) intentional tort toward another which is treated as negligence toward P; (5) negligence toward another which also is negligence toward P. Assault, as the first stage in this development, recognized a freedom from fear of immediate bodily harm.[1] Today there is a growing recognition of the intentional infliction of emotional distress as a tort in itself; and unlike assault, there is no

[27] It should be noted that N. C. GEN. STAT. § 39-8 (1943, recompiled 1950) permits the husband to join in the deed at a different time and place from the wife, so she may mail him the deed, requesting that he sign and mail it back. This, however, is at best a cumbersome and time-consuming procedure.

[28] See note 9, *supra.*

[29] The practice of permitting the husband to manifest his written assent to his wife's conveyances through his power of attorney provides a method which gives the wife complete freedom of transfer, *if she secures her husband's power of attorney.* A more direct method, and one which would give a married woman *absolute* freedom of transfer, would be provided by eliminating the joinder requirement altogether. In an era of substantially equal rights as between men and women in almost every respect, such a requirement is admittedly outmoded. It is to be hoped that the legislature will soon take the action necessary in order that the constitutional provision which makes the husband's written assent mandatory be submitted to the voters for possible amendment.

[1] I. de S. et ux. v. W. de S., Y. B. Lib. Ass., f. 99, pl. 60 (1348). This "hatchet" case is considered the historical origin of assault.

limitation to fear of immediate bodily harm.[2] In these two categories defendant's conduct is intentional, and the absence of physical consequences does not preclude the recovery of damages. However, generally, in the field of negligent infliction of mental anguish, in the absence of some impact, there must be resulting physical consequences to warrant recovery of damages.[3] A majority of jurisdictions allow P to recover for negligence which causes him mental anguish resulting in illness.[4] D's intentional tort toward another has been treated as negligence toward P where illness followed the shock.[5] As to the fifth category, where D's negligence imperils another for whose safety P fears and suffers mental anguish resulting in physical consequences, American courts are hesitant to award damages.

This hesitancy is illustrated in *Resavage v. Davies*,[6] a recent Maryland decision which affirmed a demurrer to plaintiff's complaint. It was alleged that plaintiff was on her front porch when she saw defendant motorist negligently kill her two children down on the street corner. She suffered mental anguish resulting in physical consequences. The

[2] RESTATEMENT, TORTS § 46 (Supp. 1948). The following cases appear to hold that mental anguish is sufficient in itself without a showing of physical illness: Barnett v. Collection Service Co., 214 Iowa 1303, 242 N. W. 25 (1932); Quina v. Roberts, 16 So. 2d 558 (La. App. 1944); La Salle Extension University v. Fagarty, 126 Neb. 457, 253 N. W. 424 (1934).

Other cases seem to regard physical illness as essential to the cause of action. See Clark v. Associated Retail Credit Men, 70 App. D. C. 183, 105 F. 2d 62 (1939); Kirby v. Jules Chain Stores Corp., 210 N. C. 808, 188 S. E. 825 (1936); Carrigan v. Henderson, 192 Okla. 254, 135 P. 2d 330 (1943).

In other cases illness resulted. See State Rubbish Collectors Assn. v. Siliznoff, 240 P. 2d 282 (Cal. 1952); Bowden v. Spiegel, Inc., 96 Cal. App. 2d 313, 216 P. 2d 571 (1950); Emden v. Vitz, 88 Cal. App. 2d 313, 198 P. 2d 696 (1948); Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920); Wilkinson v. Downton, 2 Q. B. 57 (1897).

[3] Rasmussen v. Benson, 135 Neb. 232, 280 N. W. 890 (1938); Chiuchiluo v. New England Wholesale Tailors, 84 N. H. 329, 150 Atl. 540 (1930); Lambert v. Brewster, 97 W. Va. 124, 125 S. E. 244 (1924). Exceptions to the general rule are: (1) *Telegraph Cases*, that is, the negligent transmission of death messages which indicate on their face that mental anguish may result. See Telegraph Co. v. Redding, 100 Fla. 495, 129 So. 743 (1930); Mentzer v. Telegraph Co., 93 Iowa 752, 62 N. W. 1 (1895); Russ v. Telegraph Co., 222 N. C. 504, 23 S. E. 2d 681 (1942). (2) *Negligent Mishandling of Corpses*. Recovery in these cases is based on a quasi-property right in the body of a dead person. See Klumbach v. Silver Mount Cemetery Assn., 242 App. Div. 843, 275 N. Y. Supp. 180 (1934); Morrow v. Cline, 211 N. C. 254, 190 S. E. 207 (1937). See also, for discussion of quasi-property right, Note, 30 N. C. L. REV. 299 (1952).

[4] Netusil v. Novak, 120 Neb. 751, 235 N. W. 335 (1931); Chiuchiolo v. New England Wholesale Tailors, 84 N. H. 329, 150 Atl. 540 (1930); Kimberly v. Howland, 143 N. C. 398, 55 S. E. 778 (1906); Watkins v. Kaolin Mfg. Co., 131 N. C. 536, 42 S. E. 983 (1902); RESTATEMENT, TORTS §§ 313, 436 (1934).

[5] Hill v. Kimball, 76 Tex. 210, 13 S. W. 59 (1890), Hallen, *Hill v. Kimball—A Milepost in the Law*, 12 TEX. L. REV. 1 (1933); Martin v. Spencer, 221 N. C. 28, 18 S. E. 2d 703 (1942); Duncan v. Donnell, 12 S. W. 2d 811 (Tex. Civ. App. 1929); Lambert v. Brewster, 97 W. Va. 124, 125 S. E. 244 (1924). See also Jeppsen v. Jensen, 47 Utah 536, 155 Pac. 429 (1916), which presents the theory of "transferred intent" rather than negligence.

[6] 86 A. 2d 879 (Md. 1952).

court declared there was no duty to plaintiff and consequently no negligence since she herself was in no immediate peril.

Those courts allowing recovery for the physical consequences of "fear for the safety of another" negligently imperiled, do so on the theory of negligence toward the plaintiff. Another Maryland case[7] allowed damages for a father's fear for his children and fear for himself. However, the fact that he himself was imperiled was the basis for the duty to him. Therefore, damages may be awarded against a negligent defendant for "fear for the safety of another" when there is "fear for self" at the same time.[8] "There is neither logic nor reason to hold . . . that a distinction is to be taken so that, if a party suffer an injury, as loss of health, of mind, or of life, through fear of safety for self, a recovery may be had for the negligent act of another; but may not recover under similar circumstances, if the fear be of safety for another.[9]

In the above cases "fear for self" might be regarded as a peg for recovery for "fear for the safety of another", that is, a basis for establishing negligence toward the plaintiff.[10] "It is predicted that if we require the plaintiff to be in danger of . . . fear for his own safety, many courts will be equally quick to find these elements."[11] It seems that this element of constructive peril for self was found in *Webb v. Lewald Coal Co.*,[12] where plaintiff was on the second floor of a building when defendant's vehicle ran into the ground floor underneath her. She suffered mental anguish and testified that she "felt sure he [the driver] would be killed." The court inferred a "fear for oneself" and allowed recovery rather than order a new trial so that upon cross examination, the jury might determine whether she actually feared for herself.

*Hambrook v. Stokes Bros.*[13] is the leading case for the proposition that one might recover purely on the grounds of "fear for the safety of another". A mother on the sidewalk saw a driverless truck running away due to defendant's negligence. Realizing it had come from the direction her children were traveling, she turned back and ran uphill to the scene of the accident. From there she went to the hospital, and the shock of seeing her child in a critical condition caused her subsequent

[7] Bowman v. Williams, 164 Md. 397, 165 Atl. 182 (1933). (". . . the nervous shock or fright sustained by the plaintiff was based on reasonable grounds for apprehension of an injury to the plaintiff and his children.").

[8] *Id., accord,* Webb v. Lewald Coal Co., 214 Cal. 182, 4 P. 2d 532 (1931); Lindley v. Knowlton, 179 Cal. 298, 176 Pac. 440 (1918).

[9] Bowman v. Williams, 164 Md. 397, 401, 165 Atl. 182, 183 (1933).

[10] An analogy may be drawn between this peg and the outmoded and forsaken peg of impact, which in the past served as a basis for allowing recovery for "fear for self".

[11] Hallen, *Damages For Physical Injuries Resulting From Fright or Shock,* 19 VA. L. REV. 253, 271 (1933), quoted in, Rasmussen v. Benson, 135 Neb. 232, 240, 280 N. W. 890, 893 (1938).

[12] 214 Cal. 182, 4 P. 2d 532 (1931).

[13] 1 K. B. 141 (1925).

miscarriage and death. The King's Bench Division ordered a new trial on the grounds that it was not necessary for the jury to determine that the mother's shock was produced by fear for herself. Thereby a cause of action was established against a negligent defendant for "fear for another's safety". Although it may be argued that the plaintiff in this case was in possible danger to herself, this was not the opinion of the dissent nor was there any mention of "fear for one's own safety" except to say that it was unnecessary. Also, in other cases in accord,[14] plaintiff could not possibly have been subjected to the same danger as the one for whom she feared.

The courts which allow recovery for "fear for the safety of another" impose certain limitations. Who may recover—a parent, child, spouse, or total stranger? In all the cases cited with the exception of two,[15] the plaintiff was a parent. The *Restatement of Torts* seemingly would limit recovery to parents and spouses.[16] Recovery beyond immediate relatives would be an unreasonable extension of duty.[17] When may one recover—when he hears about the accident from others or hears or sees it himself? The cases cited limit recovery to seeing the peril or, as *Hambrook v. Stokes Bros.* put it, ". . . that the shock resulted from what the plaintiff's wife either saw or realized by her own unaided senses, and not from something which some one told her. . . ".[18] Such witnessing or seeing must be simultaneous with the accident or peril and not several hours later. As to how serious the peril or accident must be there is no judicial authority.[19] Clearly it should be such that plaintiff as a reasonable person would suffer mental anguish.

North Carolina has yet to decide whether there is a cause of action for "fear for the safety of another" based on defendant's negligent conduct. It is hoped that once confronted with the situation of the principal

[14] Rasmussen v. Benson, 135 Neb. 232, 280 N. W. 890 (1938); Cohn v. Ansonia Realty Co., 162 App. Div. 791, 148 N. Y. Supp. 39 (1914). In these cases since there was no mention of "fear for self" and there was no apparent danger of direct physical harm, there is an inference that the duty to plaintiff was not to subject her to the mental anguish and resulting illness which she suffered. *Compare Hambrook v. Stokes Bros.* with Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (1912); Alabama Fuel Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916), although D's conduct was intentional, it was negligent toward the one for whom P feared.

[15] Webb v. Lewald Coal Co., 214 Cal. 182, 4 P. 2d 532 (1931) (Fear for a stranger. The case was decided on the basis of "fear for self".); Rasmussen v. Benson, 135 Neb. 232, 280 N. W. 890 (1938) (A business man's fear for safety of customers.).

[16] RESTATEMENT, TORTS § 313, Caveat (1934).

[17] Several states, by statute in wrongful death actions, allow recovery to a close relative for the relative's own mental anguish as distinguished from that possibly suffered by the deceased. FLA. STAT. ANN. § 768.03 (1941); LA. REV. STAT. art. 2315 (West 1952) (note 324); S. C. CODE ANN. § 412 (1942); VA. CODE ANN. § 8-636 (1950); W. VA. CODE ANN. § 5475 (1949).

[18] 1 K. B. 141, 152 (1925).

[19] See note 17 *supra.*

case involving a parent seeing the negligent killing of her children, our court will allow recovery for such mental anguish and resulting illness of the parent.

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**Torts—Independent Tort Feasors—Joint and Several Liability**

A recent Texas decision[1] has evidenced once again the difficulty which has faced the court over the years in deciding whether the acts of two or more wrongdoers are such as to make them jointly and severally liable for the damages resulting from their combined acts. There *A,* an oil company, and *B,* a salt water disposal company, negligently permitted their respective pipe lines, running adjacent to plaintiff's land, to break on or about the same day. Salt water from *B's* pipes and a salt water-oil mixture from *A's* pipes flowed into a stream, thence emptying into plaintiff's fishing lake, killing the fish and causing other damage. The court held the two companies liable jointly and severally as joint tort feasors although there had been no unity of purpose or design, and each had acted independently in conducting its business.

[1] Landers v. East Texas Salt Water Disposal Co., 248 S. W. 2d 731 (Tex. 1952).

The cases presenting the problem of joint and several liability may be analyzed into two major categories: (1) Where the acts of two or more wrongdoers combine to produce a single harmful result, the act of one being in itself insufficient to produce the injury, and (2) Where the acts of two or more wrongdoers combine to produce a single harmful result, the act of one alone being sufficient to produce the injury.

The general rule applied to factual situations typifying the first category is that causes of action arising from the acts of independent tort feasors each of which inflicts some damage, absent concert of action and common intent, create no joint and several liability but each is responsible only for that portion of the injuries due to his negligence.[2]

[2] Glenn v. Chenowth, 71 Ariz. 271, 226 P. 2d 165 (1952); Miller v. Highland Ditch Co., 87 Cal. 430, 25 Pac. 550 (1891); Symmes v. Pebble Phosphate Co., 66 Fla. 27, 63 So. 1 (1913); Harley v. Merrill Brick Co., 83 Iowa 73, 48 N. W. 1000 (1891); Garret v. Garret, 228 N. C. 530, 46 S. E. 2d 302 (1948); Rice v. McAdams, 149 N. C. 29, 62 S. E. 774 (1908); Sun Co. v. Wyatt, 48 Tex. Civ. App. 349 (1908).

With the exception of Kansas[3] and Oklahoma,[4] this rule has been most frequently applied by all jurisdictions in the pollution, diversion, obstruction, or flooding of a stream by various independent proprietors,[5]

[3] Mosby v. Manhattan Oil Co., 52 F. 2d 364 (8th Cir.), *cert. denied,* 284 U. S. 667 (1931). McDaniel v. Cherryvale, 91 Kan. 40, 136 Pac. 899 (1913).

[4] Tidal Oil Co. v. Pease, 153 Okla. 137, 5 P. 2d 389 (1931) (and cases cited therein).

[5] Veryheyen v. Dewey, 27 Idaho 1, 146 Pac. 1116 (1915) (flooding of property); Watson v. Pyramid Oil Co., 198 Ky. 135, 248 S. W. 227 (1923); Simmons v. Everson, 124 N. Y. 319, 26 N. E. 911 (1891); Boulger v. Northern Pac. Ry., 41 N. D. 316, 171 N. W. 632 (1918); Sun Co. v. Wyatt, 48 Tex. Civ. App. 349