March, 1932

University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, November to June, by the University of Pennsylvania Law School.

VOL. 80 MARCH, 1932 No. 5

LIABILITY IN PENNSYLVANIA FOR PHYSICAL EFFECTS OF FRIGHT

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In view of certain recent decisions in other jurisdictions,[1] and particularly *Comstock v. Wilson,*[2] it may prove interesting to examine the Pennsylvania cases which concern the problem presented where the injury sustained by the plaintiff results through the internal operation of a fright, shock or other emotional disturbance caused by an admittedly negligent act.

The leading Pennsylvania case is *Ewing v. Pittsburgh, Cincinnati & St. Louis Railway Co.,*[3] wherein cars of a negligently derailed train crashed into the plaintiff's dwelling. Due to the absence of any "accompanying" physical injury recovery was not allowed for a permanent weakening to the plaintiff's health resultant from the ensuing fright. The Supreme Court of Pennsylvania gives three reasons for the result: First, "The scope of what is known as accident cases will be greatly enlarged." Second, there is "no duty to protect from fright". Third, there is not "any reason to anticipate that the result of a collision on its road would so operate on the

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[1] Great Atlantic & Pacific Tea Co. v. Roch, 160 Md. 189, 153 Atl. 22 (1931); Netusil v. Novak, 120 Neb. 751, 235 N. W. 335 (1931); Chiuchiolo v. New England Wholesale Tailors, 150 Atl. 540 (N. H. 1930). *Contra:* Legac v. Vietmayer Bros., 7 N. J. Misc. 685; 147 Atl. 110 (1929); Walton v. Rankin-Whitten Realty Co., 161 S. E. 276 (Ga. 1931). See Block v. Pascucci, 111 Conn. 58, 149 Atl. 210 (1930).

[2] 257 N. Y. 231, 177 N. E. 431 (1931). The plaintiff's automobile in which the plaintiff's testatrix was a passenger came into collision with an automobile operated by the defendant. The collision caused some noise and a fender of the plaintiff's car was loosened. The plaintiff's testatrix stepped from the automobile and started to write down the defendant's name and license number; while doing so she fainted and fell to the sidewalk, fracturing her skull. This occurred within a few minutes after the accident; she died twenty minutes later, and the plaintiff brought action for which recovery was allowed notwithstanding Mitchell v. Rochester Ry. Co., 151 N. Y. 107, 45 N. E. 354 (1896).

[3] 147 Pa. 40, 23 Atl. 340 (1892). See BOHLEN, STUDIES IN THE LAW OF TORTS (1926) 252.

mind of a person who witnessed it, but who sustained no bodily injury thereby, as to produce such nervous excitement and distress as to result in permanent injury" and, therefore, "the accident was not the proximate cause".

The cases cited are *Wyman v. Leavitt*,[4] *Lynch v. Knight*,[5] *Indianapolis R. Co. v. Stables*,[6] *Canning v. Williamstown*,[7] *Johnson v. Wells*[8] and particularly, *Fox v. Borkey*.[9] In only the last of these decisions is there any allegation that the plaintiff had sustained physical harm as the result of the mental distress in which the defendant's conduct had put her. Granting that these cases are authority for the generally accepted doctrine that no action will lie for mere mental distress, they should have no weight as authority where the plaintiff's cause of action is an alleged physical injury, even though the chain of causation through which the physical injury is caused has fright or distress as an essential and necessary link.

In *Fox v. Borkey*[10] the plaintiff claimed that the negligent setting off of a blast at a point eighty yards distant from her had caused a concussion of her spine. The court held that the defendant was not guilty of negligence, but that even if his conduct had been negligent the plaintiff would have been guilty of the "plainest" contributory negligence in subjecting herself to the blast. The court stated, in speaking of the evidence of a physician who had "gravely" testified that the explosion of such a cartridge could so bounce the solid earth as to concuss the spine of a woman eighty yards distant: "One specimen of expert testimony as thin as this was not sufficient to carry such a case to the jury." It will be noted that the plaintiff did not merely allege fright or shock in the sequence of events which brought about her physical injury. She also alleged a physical injury resulting from an immediate disturbance of her bodily structure. Inasmuch as the decision was based on various grounds, *Fox v. Borkey* has little significance in cases of injury due to fright except in so far as this dictum expresses a complete lack of confidence in *ex parte* expert medical testimony.

The next Pennsylvania decision is *Linn v. Duquesne Borough*.[11] This was an action by a woman to recover damages for permanent injuries to both of her hands. One item for which she sought recovery in addition to the mental suffering caused by the injury was the humiliation and regret that she might thereafter feel because of her inability to attend to her household duties which she had theretofore performed for her husband. The court simply held that "the distress of mind occasioned by regret and dis-

[4] 71 Me. 227 (1880).
[5] 9 H. L. C. 577 (1861).
[6] 62 Ill. 313 (1872).
[7] 55 Mass. 451 (1848).
[8] 6 Nev. 224 (1870).
[9] 126 Pa. 164, 17 Atl. 60 (1889).
[10] *Ibid.*
[11] 204 Pa. 551, 54 Atl. 341 (1902).

appointment arising after [and it may be added, as a result of] the injury was not an element of damage to be considered by the jury". This was the only question which the court had before it. There was no allegation of physical illness brought on by the humiliation and regret which the plaintiff had felt and would thereafter feel. Nonetheless the court thought it necessary to discuss the *Ewing* case and *Spade v. Boston & Lynn R. R. Co.*,[12] with the result that the decision has been time and again relied upon by Pennsylvania courts as authority for denying recovery for the physical consequences of fright. The *dicta* in this case, having been accepted as authoritative, the following language used in the opinion becomes, as will subsequently appear, both interesting and important: "Where a claim is for mental suffering that grows out of, or is connected with, physical injury, however slight, there is some basis for determining its genuineness and the extent to which it affects the claimants. But as the basis of an independent action, mental suffering presents no features by which a court or jury can determine either its existence or its extent, and claims founded on it have generally been regarded as too uncertain and speculative for consideration."

Here is again found a statement of the real reason upon which the *Ewing* case was decided: the fear of fictitious claims. It was, however, left for the decision in *Huston v. Freemansburg Borough*[13] "to settle finally the main question that there can be no recovery of damages from fright or other merely mental suffering unconnected with physical injury". In this case the plaintiff's husband was recovering from typhoid fever. The plaintiff's contention was that the defendant while excavating a hole in the adjacent street negligently performed his blasting operations, causing an explosion so severe as to subject the plaintiff's husband to a shock from which he died within two weeks. In the first part of the opinion the court considered the question "whether there was evidence of negligence and of proximate cause, sufficient to carry the case to the jury". But the court, though refusing "to concede either point" and saying that "this case might be affirmed on either", did not actually place its decision adverse to the plaintiff upon either ground. With admirable frankness it gave two reasons for following the rule in the *Ewing* case, rather than the decisions in other jurisdictions allowing recovery which were cited by the plaintiff's counsel. The first reason was, "All of the cases are of recent and unhealthy growth, and none of them stands squarely on the ancient ways." Obviously this reason alone would not be sufficient to deny recovery in a meritorious case. The argument that no action can be brought unless there is an existing precedent for it would deprive the law of all vitality. It would have made impossible those decisions in which the political right of franchise was given legal protection, the innumerable cases in which a wife has been per-

[12] 168 Mass. 285, 47 N. E. 88 (1897).
[13] 212 Pa. 548, 61 Atl. 1022 (1905).

mitted to recover for loss of her husband's consortium, those in which one not party to a contract has been held liable for inducing one of the parties to break it, and, indeed, many others. The second and real reason was the following: "In the last half century, the ingenuity of counsel, stimulated by the cupidity of clients and encouraged by the prejudices of juries, has expanded the action for negligence until it overtops all others in frequency and importance, but it is only in the very end of that period that it has been stretched to the effort to cover so intangible, so untrustworthy, so illusory and so speculative a cause of action as mere mental disturbance. It requires but a brief judicial experience to be convinced of the large proportion of exaggeration and even of actual fraud in the ordinary action for physical injuries from negligence, and if we open the door to this new invention the result would be great danger, if not disaster to the cause of justice".[14] The language quoted leaves no room for doubt that, even if the Pennsylvania requirements of negligence and proximate cause are satisfied, recovery is to be denied because of the impolicy of permitting it in a class of case which in the opinion of the court is in the main likely to be based on exaggeration or even actual fraud.

The next case in which the rule in the *Ewing* case was applied was *Chittick v. Phila. Rapid Transit Co.*[15] It is difficult to understand why the court regarded that rule as necessary to a denial of recovery. The female plaintiff brought an action against the transit company to recover damages for personal injuries received under the following circumstances: The plaintiff was sitting near an open window of her dwelling house, when two or three hundred feet away the defendant's motorman negligently caused the trolley pole to strike a steel brace. This brought about a violent electrical explosion, a brilliant flash and a blinding light. The plaintiff was thrown or in some manner fell from her chair to the floor, receiving some minor bruises to her person. She was temporarily blinded by the flash, and suffered pain in her eyes, impairment of vision and nervous weakness. It was held that she could not recover for any of these items of damage. The court reasoned that the plaintiff could not recover since her injury was caused by a flash of light and not by some material substance thrown upon her by the explosion. According to the court "a flash of light reflected upon the retina of the eye" could only cause injury through the fright or shock which it occasioned. Without conceding that a modern oculist would agree with this conclusion, the case might well have been decided on the ground which the court mentions only in passing that "the consequences which followed the occurrence were of such an extraordinary character as could not have

[14] The court cited Spade v. Lynn & Boston R. R. Co., *supra* note 12; Mitchell v. Rochester Ry. Co., *supra* note 2; Fox v. Borkey, *supra* note 9; Linn v. Duquesne Borough, *supra* note 11; and the Ewing case.

[15] 224 Pa. 13, 73 Atl. 4 (1909).

been anticipated, as the natural and probable result of the negligent act". We may differ with the implication that a negligent wrongdoer is to be held responsible for only those consequences which are both natural and probable, but the Pennsylvania cases up to that time had in the main adopted this view. Even if the view taken in *Bunting v. Hogsett*[16] were accepted as applicable, and a defendant because he is negligent is held "for what might, in the nature of things, occur in consequence of that negligence, although, in advance, the actual result might have seemed improbable", the particular result of the Chittick case might well be regarded as so extraordinary as not to have occurred in the usual "nature of things". In a word, the case might well have been decided solely on the ground that the defendant's negligence was not the "proximate cause" of the plaintiff's injury, as proximate cause was then understood in Pennsylvania.[17]

Gilliam v. Hogue[18] was the next case in which the problem of the right to recover for the consequences of fright was presented. In that case the defendant negligently drove his car on a public highway and thereby so frightened the plaintiff's horse as to cause it to run away. The horse had previously been quiet, gentle and not afraid of motor vehicles. The fright suffered by the horse made it nervous and frightened of the ordinary incidents of modern travel, rendering it unsafe to drive in the public roads. The plaintiff was allowed to recover for the depreciation thereby caused in the value of the horse. Two reasons are given: First, that it is to be anticipated that a horse would depreciate in value as a result of a severe fright, as to which it may be said that this is no more likely than that a pregnant woman would miscarry or that a man in the crises of typhoid fever would be seriously affected by a sudden and nearby explosion. The second reason, however, may well be decisive if the real reason for denying recovery is fear of fraudulent claims; it is this: "we are not called upon to deal, subjectively, with the effects of fright", but with "the market value of a chattel". The court felt, and probably correctly, that a horse will not pre-

[16] 139 Pa. 363, 21 Atl. 31 (1890).

[17] See Bohlen, *The Probable or the Natural Consequences as the Test of Liability in Negligence*, (1901) 40 AM. L. REG. (N. S.) 79, STUDIES IN THE LAW OF TORTS (1926) 1. In those jurisdictions which like New York (see Palsgraf v. Long Island Ry. Co., 248 N. Y. 339, 162 N. E. 99 (1928)) regard the probability of harm to the particular plaintiff as a question determinative of the defendant's negligence toward him, the same result would be reached. The plaintiff would be regarded as outside the zone of apprehended danger since the motorman would have no reason to suppose that his careful handling of the trolley pole would be necessary for the protection of persons a full city block away. Therefore, in such a jurisdiction the fact that the plaintiff was caused to fall and suffer bodily injury, or was directly and physically injured by the flash of light, would not make the defendant liable since such conduct, though likely to injure persons nearby, would not be recognized as dangerous to people so far away as the plaintiff. Thus, compare Samarra v. Allegheny Valley Street Ry. Co., 238 Pa. 469, 86 Atl. 287 (1912), in which the defendant's negligent operation of its car threw the plaintiff to the floor of the vehicle. The Chittick case was relied upon by the defendant, but the court distinguished it on the ground that the plaintiff was in the car and not three hundred feet away.

[18] 39 Pa. Super. 547 (1908).

tend even in the interest of his master. The court also felt that the damages to a dumb animal can be more accurately estimated than to a human being. However, this may or may not be so. If so, it is a reason not only for refusing recovery where no other harm is sustained than that which results through the effect of fright upon the physical well-being of a plaintiff, but also, where there being some other actionable damage, the effect of fright is to be taken into account as admittedly it is in estimating the damages recoverable. This case is distinguishable from those involving injuries similarly resulting to human beings only upon this purely practical ground; namely, the fear of fabricated claims in the one case and the absence of such fear in the other.[19]

So much for the cases in which the only physical injury suffered results solely through the internal operation of the fright or shock to which the plaintiff has negligently been subjected. It remains to consider the cases in which the defendant's negligence not only caused injury through the slow and internal effects of the fright or shock but also directly brought about an injury which was by itself actionable and where, therefore, the question is not the plaintiff's right to recovery but the amount of damages which are recoverable.

The cases which have been decided in the Supreme and Superior Courts of Pennsylvania require not only immediate impact with or jarring or other physical disturbance of the plaintiff's body but also that such impact, jarring or disturbance shall cause immediate and substantial harm. If there is such harm the plaintiff is permitted to recover not only for it but for physical injury brought on by the shock of the accident. No distinction, such as that which appears in many New York cases [20] prior to *Comstock v. Wilson,*[21] is made between shock resulting from the actual injury and shock caused by the fear of receiving it or fear of some other injury threatened by the negligence which caused the actionable injury. Whether or not this

[19] *Contra* to this case is Lee v. Burlington, 113 Iowa 356, 85 N. W. 618 (1901), wherein it was also sought to recover for the death of a horse due to fright. The Iowa court expressly applied the rule previously adopted with reference to human beings, denying recovery for the loss of the horse. Accord with Iowa, see Chicago B. & O. Rd. v. Gelvin, 238 Fed. 14 (C. C. A. 8th, 1916). An early New York case is in accord with Pennsylvania: Moshier v. Utica *etc.* Ry., 8 Barb. 427 (1850).

[20] In Hack v. Dady, 142 App. Div. 510, 127 N. Y. Supp. 22 (1911), which has been cited in New York cases quite as often as Mitchell v. Rochester Ry. Co., *supra* note 2, it was stated: "I think that a recovery may not be had in an action for negligence for consequences attributable to fright alone, or to shock alone, merely upon proof that there was a bodily injury coincident with that fright or that shock, but it must appear that there was some causal relation between the bodily injury and the fright or shock. Otherwise the recovery would rest upon the fright or shock alone, which would be against the rule noted. For example, could it be logically said, in the case at bar, that if the personal injuries were attributable alone to fright or shock consequent to the explosion, the plaintiff could not recover for fright or shock, or their physical consequences, if she had been unscathed in any way, and yet again she could recover therefor because a bit of lead from the explosion lighted upon her hand to burn it slightly before she brushed it away?" See also Jones v. Brooklyn Heights R. R. Co., 23 App. Div. 141, 48 N. Y. Supp. 914 (1897): Powell v. Hudson Valley Ry. Co., 88 App. Div. 133, 84 N. Y. Supp. 337 (1903).

[21] *Supra* note 2.

distinction, repudiated in *Comstock v. Wilson*,[22] will be taken remains to be seen.[23] However, if the Pennsylvania courts continue to keep in mind that the only reason for denying recovery is fear of fraudulent claims there seems little reason to fear that they will put themselves in opposition to this recent New York decision.

In three cases[24] the plaintiff was allowed to recover damages which seem to have included not only the actual harm immediately caused but also illness resulting from a shock received at the same time. In each case the recovery was allowed solely because there was evidence from which in the opinion of the court the jury might reasonably find that there was not only an impact with or jarring of the plaintiff's body but also that the impact or jar did immediate substantial harm. The evidence in all of the cases was somewhat tenuous but at least the court did require that there should be

[22] The court expressly stated that "it is impracticable to go further and to inquire whether the shock comes through the battery or along with it", following the opinion of Chief Justice Holmes in Homans v. Boston Elevated Ry. Co., 180 Mass. 456, 62 N. E. 737 (1902).

[23] In Samarra v. Allegheny Valley St. Ry., *supra* note 17, the court stated: "It is next complained that the trial judge erred in his answer to the following points submitted on behalf of the defendant: 'There can be no recovery for conditions produced by nervous shock or fright.' The answer was: 'There can be no recovery for nervous shock unaccompanied by physical injury. But if the nervous shock follows as a result of physical injury, then the nervous shock is a part of the physical injury, and the plaintiff is entitled to recovery for that.' Having regard to the admitted facts of the case, the instruction was entirely correct." Of course this does not preclude a broader rule where different facts are presented. Similarly, see Boyle v. Phila. Rapid Transit Co., 286 Pa. 536, 134 Atl. 446 (1926).

[24] In Hess v. American Pige Mfg. Co., 221 Pa. 67, 70 Atl. 294 (1908) the Supreme Court had before it the first case in which recovery was allowed for the physical consequences of fright where there was also a physical injury caused by direct impact; the defendant's negligent blasting threw the plaintiff against a chair and broke window panes causing particles of glass to strike her face.

In Applebaum v. P. R. T. Co., 244 Pa. 82, 90 Atl. 462 (1914), the court sustained a verdict for the plaintiff, who had been thrown against the side of the car but whose body showed no bruises, on the testimony of the physician that she was suffering from traumatic hysteria following an injury or "accident of some kind" and that such cases are not unusual where there are no bruises or marks on the body. The Court seems to have attached a significance to the physician's evidence which is extraordinary in view of the tendency to distrust expert medical testimony.

In Kramer v. Pittsburgh Ry. Co., 247 Pa. 352, 93 Atl. 461 (1914), although there was a collision so severe as to throw some of the passengers to the floor it did not appear that the plaintiff was so thrown. Her testimony that at the time she felt a disturbance of her internal organs followed by severe pains in her back and side, and that of her physician that two weeks later he had found discolorations on the surface of some parts of her body and symptoms which indicated spinal injury, was held sufficient proof of an immediate physical injury to warrant recovery and to sustain a verdict for the plaintiff. The court held that the jury was entitled to find a verdict for the plaintiff unless the injuries "were the result of nervous shock and fright alone". From this it is not improper to infer that the permitted recovery included that the plaintiff could recover for injuries which were the result of the bodily harm and the concurrent fright.

An earlier lower court case is North German Lloyd Steamship Co., 18 Pa. Super. 488 (1901), wherein an action was brought by the company upon a check of which the defendant had stopped payment; a counterclaim alleged as damages arising from the plaintiff's breach "that in consequence of the discomforts of the [state-] room and the disturbance occasioned by the movement and noise of the machinery, defendant was able to sleep but very little during the entire voyage, and in consequence suffered nervous sickness, causing her much pain and suffering." Held, at 494: "The nervous system is a part of the physical organization, and this affidavit sufficiently alleges a physical injury", thus distinguishing the Ewing case. See Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. (1922) 497. Since the case arose upon the pleadings, and since all subsequent decisions totally ignore it, it is of little weight in the light of the Reardon and Morris cases, *infra* notes 25, 26.

some evidence justifying the jury in finding immediate and substantial harm. In two cases recovery was denied, the court being of the opinion that the evidence permitted no reasonable inference other than that the only harm done was illness caused by the shock. This, notwithstanding the fact that there was in the one case [25] unconsciousness which lasted considerably; in the other [26] a jarring of the plaintiff's body by negligently running the car in which she was a passenger into an open switch, which jars could well have caused plaintiff's miscarriage.

One thing is clear: the Pennsylvania courts do not regard as sufficient the fact that the actuality and severity of the fright or shock is practically guaranteed by some immediate and perceptible effect upon the plaintiff. In *Reardon v. Phila. Rapid Transit Co.*,[27] the plaintiff was made unconscious either by falling, fainting or being thrown down by the accident and did not recover consciousness until she was removed to a hospital. This attitude may explain why it is that the Pennsylvania courts have not been as astute as the courts of other jurisdictions in finding some direct consequence of the defendant's negligence to be an actionable injury although no substantial harm was done and so letting in as an item of parasitic damages the illness brought on by the preceding fright or accompanying shock.[28] We do not find the Pennsylvania courts, like the courts of other jurisdictions which adhere to a rule of non-liability for the physical consequences of fright, regarding the slightest disturbance of the body, no matter how harmless, as actionable batteries.[29]

As in all those jurisdictions which deny recovery in situations like that presented in the *Ewing* case, the decisions are often contradictory. On one hand they express distrust of medical testimony; on the other they permit recovery for illness the connection of which with the defendant's misconduct is largely if not entirely provable only by such testimony. This they do without a qualm where the defendant's negligence causes some injury other than, and in addition to, the illness brought on by fright or shock. The other reason for distrust of such cases, the danger that the plaintiff herself will exaggerate the fright or shock experienced, standing alone might well be regarded as eliminated where there is some immediately marked and easily observable effect exhibited by the plaintiff at the very time of the alleged shock. However, Pennsylvania does not always attach such significance to this effect.

[25] Reardon v. Phila. Rapid Transit Co., 43 Pa. Super. 344 (1909).
[26] Morris v. Lackawanna & W. Va. Ry. Co., 228 Pa. 198, 77 Atl. 445 (1910).
[27] *Supra,* note 25.
[28] A most vivid example is Comstock v. Wilson, *supra* note 2. Said the court: "The collision itself, the consequent [harmless] jar to the passengers in the car, was a battery and an invasion of their legal right. Their cause of action is complete when they suffered consequent damages."
[29] Homans v. Boston Elevated Ry. Co., *supra* note 22; Porter v. Del. L. & W. Ry. Co., 73 N. J. L. 405, 63 Atl. 860 (1906); Kentucky Traction & Terminal Co. v. Roman's Guardian, 232 Ky. 285, 23 S. W. (2) 272 (1929).

The cases in other jurisdictions which extend the concept of actionable battery seem to regard this fear of exaggeration as the primary reason for denying recovery. In many of the cases in which the concept of battery has been stretched to permit recovery the plaintiff had also fainted, fallen or otherwise exhibited some conspicuous outward sign of the fright or shock; but there are many cases in which the immediate effect on the plaintiff's person gives no such outward assurance of any severe emotional disturbance. In other jurisdictions we find a curious anomaly in the latter class of cases: the courts constantly speak of the danger of permitting recovery where there is no immediate injury; yet, on the other hand, they go to the very limit in regarding as injuries interferences with the plaintiff's body which would normally not be sufficient to support a right of action and this for the purpose of allowing a recovery which they themselves regard as dangerous. Pennsylvania at least is not guilty of this contradiction.

The Pennsylvania courts have been more strict in their application of the rule in the *Ewing* case than have courts of other jurisdictions which have adopted a similar rule. They have not, like the other courts, been astute to find some ground upon which they can let in, as an element of damage, an injury which they deny to be sufficient as a ground of recovery if it stood by itself. As has been seen, they have not, as have other courts, called any interference with the plaintiff's body an actionable battery although no substantial harm was done by it. It is interesting to note further that they have not extended the idea of trespass by giving to all occupiers of a house a right to the quiet and undisturbed enjoyment thereof.[30]

Perhaps the difference in attitude lies primarily in this: The other jurisdictions by so acting indicate that their principal fear of fabricated claims lies less in the unreliability of expert testimony than in the danger that one suffering from nervous disorder or a miscarriage will search her past history to find some incident in which a defendant's negligence has caused her fright or other emotional disturbance. The experience of Workmen's Compensation boards in hernia cases shows that there is a real danger of just this sort of thing. A workman after hernia has developed is naturally prone to look back through his work-life, and, if he is engaged in heavy labor, he can always remember a time when he felt some pain while lifting a heavy object. This he may do without any really fraudulent intent. His mind, once centered on his disability, may readily seize on any incident which he believes capable of causing it. The *Pennsylvania Workmen's Compensa-*

[30] Under facts parallel to the Ewing case, recovery has been allowed in many jurisdictions which generally deny recovery for physical injuries arising out of emotional disturbance. However, liability has been based upon the trespass to land. Chicago & Northwestern Ry. Co. v. Hunerberg, 16 Ill. App. 387 (1885); Morse v. Chesapeake etc. Ry. Co., 117 Ky. 11, 77 S. W. 361 (1903); see Mollman v. Union Elec. L. & P. Co., 206 Mo. App. 253, 227 S. W. 264 (1921). See also Lesch v. Great Northern Ry. Co., 97 Minn. 503, 106 N. W. 955 (1906).

tion Act has been amended [31] to provide for this situation. In hernia cases compensation now can not be recovered unless "conclusive proof is offered that the hernia was immediately precipitated by such sudden effort or severe strain" that there was actual pain "immediately noticed by the claimant and communicated to the employer, or a representative of the employer, within forty-eight hours after the occurrence of the accident". In many other jurisdictions the Compensation Acts contain similar provisions, and in other states in which the Acts do not contain such provisions administration boards have adopted rules which require similar proof. Apparently it is this danger, rather than the distrust of expert testimony, which leads courts other than Pennsylvania to deny recovery in cases of the *Ewing* type. If so, it is natural that wherever there is some immediate and perceptible outward effect upon the plaintiff which guarantees the actuality and severity of the fright and shock such courts should go far to permit recovery, even though, in so doing, they are forced to do some violence to the normal conception of what constitutes an actionable battery or a trespass on land. Apparently both fears operate on the Pennsylvania courts and they, therefore, are not satisfied that the mere presence of outward and visible signs of the emotional disturbance are a sufficient protection against fraudulent claims.

Pennsylvania today does not deny recovery merely because the fright is one link in the chain of events which brings about an almost immediate physical injury.[32] It is only where the physical injury is the result of the internal operation of the fright upon the physical structure of the plaintiff's body and, particularly, where that operation is slow and gradual, that recovery is denied. The Pennsylvania courts allow recovery where the fright causes the plaintiff to act or react externally to his substantial injury. In *Howarth v. Adams Express Co.*,[33] the defendant negligently caused another's truck to bump into the plaintiff's house. The "crash" of the collision caused her to fall. Her injuries were sustained by the fall and she was permitted to recover. So too, in *Goldberg v. Phila. Rapid Transit Co.*,[34] the plaintiff was permitted to recover under the following circumstances: There was an electrical explosion in the car in which the plaintiff was a passenger. In her fright she rushed out of the car and bumped herself, causing immediate physical illness which ultimately led to a miscarriage. This case, in holding the defendant liable, follows the almost universal weight of decision.[35]

[31] 1927 P. L. 186.

[32] In Linn v. Duquesne Borough, *supra* note 11, it was conceded that "the exemption from liability is based not on the ground . . . that physical effects may not be directly traceable as a consequence"; to this extent one reason for the rule of the Ewing case has been repudiated.

[33] 269 Pa. 280, 112 Atl. 536 (1921).

[34] 13 Del. County 231 (Pa. 1914).

[35] Tuttle v. Atlantic City R. Co., 66 N. J. L. 327, 49 Atl. 450, (1901); Twomley v. Central Park, etc. R. R., 69 N. Y. 158 (1877); Pennsylvania Company v. White, 242 Fed. 437 (C. C. A. 6th, 1917); see Vallo v. United States Exp. Co., 147 Pa. 404, 23 Atl. 594 (1892).

Such cases show clearly that it is impossible to base the denial of recovery, in such situations as the *Ewing* case, upon the ground that the defendant's conduct is not the proximate cause of the plaintiff's injury; at least, if the term proximate cause has any relation to the sequence of events and is not merely a convenient way of saying that the result is such as to make the court feel that it is proper to permit recovery. If we grant the truth of a plaintiff's story that she has received a severe shock and assume that the medical testimony which ascribes her miscarriage thereto is reliable (and this assumption is in accord with the ordinary man's limited medical knowledge) the injury is certainly more immediate and direct than where an additional link in the chain of causation is supplied by some act inspired by her fright. In a word, to say that the defendant's act is the proximate cause of the injury in the first case and not in the second is only another way of saying that the court does not believe that liability should be imposed where the fright operates slowly and internally and does not cause some immediate external reaction which is itself injurious.

The same question of liability for physical effects of fright has been presented in Workmen's Compensation cases. There have been two decisions: one [36] by the Workmen's Compensation Board, from which no appeal was taken, and another [37] by the Washington County Court on appeal from the Board. In each there was no immediate bodily harm; in each there was no impact or other disturbance of the body; in each the death was caused purely by the internal operation of the fright, in the former not until seventeen days later, the employee remaining at work during the interim; in both compensation was allowed and in neither was the *Ewing* case cited or discussed. In respect to these cases it may be said that since the purpose of the Act is to give compensation for all such injuries as in fact result from a work-accident, the liability may well extend further than where it is imposed as a penalty for moral or social delinquency. Furthermore, the fact that such cases are not tried by a jury, but by referees whose business it is to constantly hear such cases, affords some protection against the danger of fraud or exaggeration.[38]

In contrasting the action of the Pennsylvania courts with those of other states which have denied recovery under circumstances similar to those in the *Ewing* case, two things are apparent. The Pennsylvania courts

[36] Brooks v. Universal Film Exchange, 14 Dept. Rep. 233 (1928). It was held, at 235, that "it seems to us too clear for argument that the case is compensable if it be shown that fright, occurring accidently, caused a disease which resulted in death."

[37] Palmer v. Vesta Coal Co., 5 Wash. Co. 77 (Pa. 1924).

[38] Accord: McGlinchy et al. v. Fidelity & Casualty Co., 80 Me. 251, 14 Atl. 13 (1888); Pickerell v. Schumacher, 242 N. Y. 577, 152 N. E. 434 (1926). For an interesting conflict of opinion, see the discussions in O'Connell v. Adirondack Elec. Power Co., 193 App. Div. 582, 185 N. Y. Supp. 455 (1920) and Thompson v. Binghamton, 218 App. Div. 451, N. Y. Supp. (1926) wherein Justice H. T. Kellogg comments upon the Pickerell case as "clearly in conflict with the decision in Mitchell v. Rochester Ry. Co., *supra* note 2.

have been very frank in acknowledging that the actual reason for denying recovery is fear of fabricated claims. No court has more frequently or more emphatically stressed this danger. As in all other jurisdictions there are further reasons which are from time to time given, but analysis shows that they are make-weights and not the actual ground of the decisions.

Second, the Pennsylvania courts have not had the same lack of confidence in this reason as other courts betray. They have in general been consistent and logical. The Pennsylvania courts are not, as courts of many other jurisdictions, astute to find some rather fanciful injury which can be regarded as actionable so as to allow recovery for the physical effects of fright or shock in the guise of parasitic damages, as Professor Street so graphically describes them in his "Foundations of Legal Liability"; there is no tendency to regard a slight and harmless impact upon or jarring of the plaintiff's body as a sufficient battery to justify such damages.[39] There is no effort to extend the concept of negligence of trespass on land to include a right of every occupier of a home to his peaceful enjoyment of it. We find, therefore, no such anomaly as is found in other jurisdictions of courts denying recovery for fear of fraud and still stretching legal concepts to admit liability.[40]

[39] The following language of the *Linn* case *supra* note 11, must be relegated to the category of forgotten *dicta:* "Where a claim is for mental suffering that grows out of, *or* is connected with, physical injury, *however slight*, there is some basis for determining its genuineness and the extent to which it affects the claimants", entitling the plaintiff to recover.

[40] Where the defendant's conduct is intentional or willful, the courts of Pennsylvania conform with the almost universal rule permitting recovery. Dumee v. Regal, 17 Pa. Dist. 1012 (1908); see Thomas v. Southern Pa. Traction Co., 270 Pa. 146, 112 Atl. 918 (1921).