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The Development of New York Negligence Law

COMMENTS

THE DEVELOPMENT OF NEW YORK NEGLIGENCE LAW

The common law has always exhibited a facility to adapt itself to the fluctuating philosophy and requirements of the age. Its development has followed the times, but, more often than not, change has been studied, deliberate, and delayed so that rash ideas might be exposed to reason and experience. "Perhaps more than any other branch of the law, the law of torts is a battleground of social theory."[1] New York courts in particular have seemed to move more slowly than other jurisdictions in the field of negligence law. Recent decisions by the court of appeals indicate, however, a definite trend to extend the rules of liability.

Impact No Longer Necessary

Sixty-five years ago, in *Mitchell v. Rochester Ry.*,[2] the court of appeals established the rule that in the absence of physical impact a plaintiff could not recover for injuries suffered as the result of fright negligently caused by the defendant. The decision, based on an English case[3] and on an excellent example of *non sequitur*,[4] relied mainly on public policy:

> If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. . . . To establish such a doctrine would be contrary to principles of public policy.[5]

Some impact was demanded as the touchstone of genuineness to deter spurious claims.

Although the rule of *Mitchell* had been weakened by many exceptions,[6] ridiculed by most legal scholars,[7] and repudiated by many other jurisdic-

1. Prosser, Torts 12 (2d ed. 1955).

2. 151 N.Y. 107, 45 N.E. 354 (1896). The plaintiff was a pregnant woman who was waiting to board one of defendant's horse-drawn trolleys when another came charging wildly down the street at her. The rearing horses were stopped inches from the petrified woman. In fact, when the horses halted, she was between the heads of the two lead horses. Plaintiff then fainted, was hospitalized, and subsequently suffered a miscarriage. The court held that since she had not been touched but only frightened by the negligent operation of the defendant, she had no cause of action.

3. Victorian Rys. Comm'rs v. Coultas, 13 App. Cas. 222 (P.C. 1888), overruled by Dulieu v. White & Sons, [1901] 2 K.B. 669.

4. Since "fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom." 151 N.Y. at 109, 45 N.E. at 354.

5. Id. at 110, 45 N.E. at 354-55.

6. See McNiece, Psychic Injury and Tort Liability in New York, 24 St. John's L. Rev. 1, 33-65 (1949) for details of eight exceptions.

7. See Bohlen, Right to Recover for Injury Resulting from Negligence Without Impact, 50 U. Pa. L. Rev. 141 (1902); Campbell, Injury Without Impact, 1951 Ins. L.J. 654; Goodrich, Emotional Disturbance as Legal Damage, 20 Mich. L. Rev. 497 (1922); Hallen, Damages for Physical Injuries Resulting From Fright or Shock, 19 Va. L. Rev. 253 (1933);

tions,[8] it was not until this year that the New York Court of Appeals specifically overruled it. *Battalla v. New York*[9] allowed a cause of action wherein the claimant alleged "severe emotional and neurological disturbances with residual physical manifestations." Recognizing the speculative nature of such damages and the possibility of increased fraudulent claims, Judge Burke, speaking for the court, observed:

> In the difficult cases, we must look to the quality and genuineness of proof, and rely to an extent on the contemporary sophistication of the medical profession and the ability of the court and jury to weed out the dishonest claims. Claimant should, therefore, be given an opportunity to prove that her injuries were proximately caused by defendant's negligence.[10]

It is noteworthy that the trial court in *Battalla*[11] cited the fairly recent "cancerophobia" case of *Ferrara v. Galluchio*[12] in denying the motion to dismiss. In *Ferrara*, the defendant, an X-ray specialist, negligently burned the claimant who was undergoing treatment. The physical damage was slight, but, when told by a dermatologist that the burn might cause cancer, the plaintiff allegedly suffered severe mental anguish for which she sought damages. The wrongdoer was held liable for all the mental suffering which resulted naturally from the physical injury.[13]

Although qualifying under the impact rule, the *Ferrara* claim was actually more vulnerable to attack than the claim in *Mitchell*, where the foreseeability and proximity of cause were more reasonable.[14] If advances in medical science can offer proof that the present injury of the claimant was the result of emotional shock or disturbance induced by the defendant, it is only just, that the trier of fact should decide whether the proof was sufficient.[15] In this vein it

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Magruder, Mental and Emotional Disturbances in the Law of Torts, 49 Harv. L. Rev. 1033 (1936); McNiece, Psychic Injury and Tort Liability in New York, 24 St. John's L. Rev. 1 (1949); Smith, Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli, 30 Va. L. Rev. 193 (1944); Throckmorton, Damages for Fright, 34 Harv. L. Rev. 260 (1920); Wilson, The New York Rule as to Nervous Shock, 11 Cornell L.Q. 512 (1926).

8. See McNiece, supra note 7 at 15; Note, 61 Harv. L. Rev. 113, 138 (1947).

9. 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); See Note, 30 Fordham L. Rev. 199 (1961).

10. Id. at 242, 176 N.E.2d at 731-32, 219 N.Y.S.2d at 38.

11. 17 Misc. 2d 548, 184 N.Y.S.2d 1016 (Ct. Cl. 1959).

12. 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958).

13. Following the Mitchell rule, once the immediate physical injury is proven, claimant is allowed to recover damages not only for the physical injury itself and the pain and suffering attendant thereon, but also for the mental anguish such as fright or shock produced by his emotional response.

14. The time interval between the negligence of the defendant and the alleged mental anguish was much greater in Ferrara and might allow more time for fraudulent scheming.

15. See Klimas v. Trans Caribbean Airways, Inc., 10 N.Y.2d 209, 176 N.E.2d 714, 219 N.Y.S.2d 14 (1961) where the court held, in a workman's compensation proceeding, that death from a heart attack occasioned solely by mental disturbances and emotional strain resulting from employment was compensable. Note, 30 Fordham L. Rev. 385 (1961).

would seem that the rule in *Battalla* would be equally logical if the requirement that psychic damage be accompanied by "residual physical manifestations" was deleted. The problem would still be one of fact.

Cause of Action for Prenatal Injuries

The advance of medicine has also been responsible for New York courts recognizing as valid the claim of an infant for injuries sustained, while *en ventre sa mere,* as a result of the negligence of someone other than its parent.[16] In *Woods v. Lancet,*[17] the court of appeals for the first time[18] allowed such a suit provided that the foetus be viable at the time of the injury, and that it later be born alive. Barely two years later, in 1953, the Appellate Division of the Supreme Court extended the *Woods* decision by omitting the requirement that, at the time of the injury, the foetus be capable of extrauterine existence.[19] This was the first case which sustained a cause of action for *prepartum* injuries to a non-viable embryo. It heeded the light of findings by modern embryologists that the human embryo is *in esse* and biologically separable from its mother from the time of its conception.[20] The decision was consistent with New York Decedent Estate Law[21] and Penal Code[22] both of which recognize that a non-viable foetus has a legal personality.

In this line of cases, the role of medical progress is extremely crucial, but as yet not too advanced. The difficulty lies in tracing the connection between the negligence of the defendant and whatever abnormality is suffered by the newborn baby. Very little is known of the causes of congenital abnormalities;[23] many interrelated factors are known to be involved somehow, but usually one expert theory is as good as another. The younger the embryo, the greater is the problem of tracing causation. Yet, as in cases of injury from purely psychic sources, should a legal right be denied from the outset merely because the causal connection is difficult to prove? Perhaps, as in several other states,[24] the

16. As to a parent, a child has no cause of action for personal injuries negligently inflicted. Sorrentino v. Sorrentino, 248 N.Y. 626, 162 N.E. 551 (1928).

17. 303 N.Y. 349, 102 N.E.2d 691 (1951).

18. The leading American case for denial of action for prenatal injuries was Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884). In New York, Woods overruled Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921).

19. Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (3d Dep't 1953). For discussion of this case see Note, 39 Cornell L.Q. 542 (1954); Note, 23 Fordham L. Rev. 217 (1954); Note, 29 N.Y.U.L. Rev. 1154 (1954).

20. Griesheimer, Physiology and Anatomy 738 (5th ed. 1945); Patten, Human Embryology 181 (1946).

21. N.Y. Dec. Est. Law § 83(12) (descendant or distributee of decedent, begotten before decedent's death but born thereafter, shall take in same manner as if he were born within decedent's lifetime and had survived him).

22. N.Y. Penal Law § 1050 (the wilful killing of an unborn quick child by injury committed on the person of the mother is manslaughter in first degree); N.Y. Penal Law §§ 80, 81 (wilful abortion, not to save mother or child, is a felony).

23. See Patten, Human Embryology 227-32 (1946).

24. At least nine states have allowed recovery for the wrongful death of a stillborn

New York requirement of a "quick birth" will also be discarded, thereby allowing an administrator to recover under wrongful death statutes if the foetus would have had a cause of action at birth.

The Blasting Rule

In *Schlansky v. Riegel, Inc.*,[25] the New York rule concerning damage caused by blasting was once again reviewed. The plaintiffs owned homes which were damaged by vibration and concussion from the blasting operations of the defendant's construction work on an adjacent lot. The trial court set aside a plaintiffs' jury verdict for failure of proof, but ordered new trials. The appellate division held the deficiency in proof required dismissal of the complaints:

> Such owner is not liable for damage to his neighbors' structures caused by a concussion generated by the blasting, in the absence of proof of negligence in the performance of the blasting. Despite the injury to neighboring property, such blasting, without proof of negligence, is *damnum absque injuria*. This rule is based upon the public policy of promoting "the building up of towns and cities and the improvement of property."[26]

The plaintiffs pressed for a "reexamination and reappraisal of the New York case law which imposes strict liability for blasting damage when there is physical trespass but insists on proof of negligence in the blasting when no flying debris is cast onto a plaintiff's premises." [27] The court of appeals deftly sidestepped the request to bring New York into line with the "almost universally" held rule that a blaster is absolutely liable for any damage he causes.[28] Referring to the rather slim evidence on the record, the court found that there *was* enough to establish a prima facie case which the defendant had failed to rebut, and hence, it reinstated the jury verdict.

Schlansky forbears the conclusion that New York is not yet willing to go "all all the way" to absolute liability against blasters, but, given a case wherein there is *no* evidence of negligence presented, other than the damage by concussion or vibration, it is very likely that the burden will be placed on the blaster to prove the absence of negligence on his part. In short, the concussion damage will probably be sufficient to establish a prima facie case.

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infant resulting from prepartum injuries. See Prates v. Sears, Roebuck & Co., 19 Conn. Sup. 487, 118 A.2d 633 (Super. Ct. 1955); Worgan v. Greggo & Ferrara, Inc., 50 Del. 258, 128 A.2d 557 (1956); Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955); Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955); Valence v. Louisiana Power & Light Co., 50 So. 2d 847 (La. 1951); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); Stidam v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959).

25. 9 N.Y.2d 493, 174 N.E.2d 730, 215 N.Y.S.2d 52 (1961).

26. 11 App. Div. 2d 787, 788, 205 N.Y.S.2d 154, 157 (2d Dep't 1960).

27. 9 N.Y.2d at 496, 174 N.E.2d at 731, 215 N.Y.S.2d at 53.

28. Ibid.

Warranty and Privity

The New York Court of Appeals, in *Greenberg v. Lorenz*,[29] while acknowledging that there can be no warranty without privity, held that "at least as to food and household goods, the presumption should be that the purchase was made for all the members of the household."[30]

This decision brings New York into accord with the prevailing view.[31] After carefully tracing the history of food warranty cases in New York, and listing a partial bibliography of the many attacks on its unfair restriction to the purchaser, Chief Judge Desmond noted significantly that "about 20 States have abolished such requirements of privity the latest being Virginia and New Jersey."[32] Both the Virginia and New Jersey cases, of which the court wrote, involved defendant manufacturers rather than food retailers or processors. The case of *Henningsen v. Bloomfield Motors Inc.*[33] went so far as to impose strict liability in an automobile case in the absence of privity. Hence, it is reasonable to revive Judge Cardozo's observation that "the assault on the citadel of privity is proceeding in these days apace."[34] While New York, until now, has not joined fully in the attack on privity, other than in the sphere of food and drug warranty,[35] the broad dicta in *Greenberg*[36] and the allowance of the cause of action in *Blessington v. McCrory Stores Corp.*[37] are strong indications that the court may be ready to discard the doctrine as unsound and unjust under contemporary marketing circumstances.

Immunity for Charitable Institutions Ended

The court in *Greenberg* was well aware of its power to reexamine, and perhaps revise, outworn case law.[38] As two recent examples of such corrections, it cited *Woods v. Lancet*,[39] and *Bing v. Thunig*.[40] In the latter, the New York

29. 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961).

30. Id. at 200, 173 N.E.2d at 776, 213 N.Y.S.2d at 42.

31. See Prosser, Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960) for an excellent study of the status of immunity due to lack of privity. The Uniform Commercial Code § 2-318 extends the retailer's warranty to all members of the buyer's household.

32. Greenberg v. Lorenz, 9 N.Y.2d 195, 199, 173 N.E.2d 773, 775, 213 N.Y.S.2d 39, 41 (1961).

33. 32 N.J. 358, 161 A.2d 69 (1960). See Note, 29 Fordham L. Rev. 183 (1960).

34. Ultramares Corp. v. Touche, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931) (Cardozo, C.J.).

35. The rule for drugs has always gone along with that for food. E.g., Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (1852).

36. 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961).

37. 305 N.Y. 140, 111 N.E.2d 421 (1953).

38. "But the present rule which we are being asked to modify is itself of judicial making since our statutes say nothing at all about privity and in early times such liabilities were thought to be in tort. . . . Alteration of the law in such matters has been the business of the New York courts for many years. . . ." 9 N.Y.2d at 199-200, 173 N.E.2d at 775, 213 N.Y.S.2d at 42.

39. 303 N.Y. 349, 102 N.E.2d 691 (1951).

40. 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957).

court finally overruled the last vestiges of the ancient dogma that charitable institutions were immune from liability due to the negligence of their employees.[41] The court swept aside the fanciful division of patient care into "administrative" as opposed to "medical,"[42] and determined, realistically, that the patient comes to the hospital to be treated and cured. The patient does not come there, as to a hiring hall, to select independent contractors; he puts his confidence in the *hospital* as the instrument through which help will come. Hence, the hospital should be held liable to the same extent as any other employer for its employees' negligence. This was but another instance where changing conditions[43] required a new approach to what had been a settled issue. As Judge Fuld said, the courts must revise those of its decisions which are "out of tune with the life about us, at variance with modern-day needs and with concepts of justice and fair dealing."[44]

CONCLUSION

In the recent past, the courts of New York have made some major renovations in the field of negligence law. Apart from the fact that the trend swings New York into line with the majority, much can be said for the courts' logic. The idea common to all these changes is that liability should follow closely upon negligence.

Advances in medical science have permitted new causes of action to arise, and have gone far in eliminating serious problems in those previously existing —notably, the establishment of the causal connection in, and the degree of, mental and prenatal injuries. With further medical developments certain, the law must continue to progress to keep pace.

In blasting and warranty cases,[45] New York is still lagging behind other juris-

41. Prosser, Torts 785 (2d ed. 1955) describes "the rather curious New York theory that a charity merely furnishes the facilities for services rendered by individuals, assuming no responsibility except for the selection of competent persons, who are therefore to be considered independent actors or contractors."

42. Schloendorff v. Society of the New York Hosp. 211 N.Y. 125, 105 N.E. 92 (1914) (hospital liable for "administrative" negligence of its employees, but immunity granted for "medical" negligence).

43. The development of liability insurance, whereby hospitals could protect themselves and spread the cost over many, was one such condition which made the immunity doctrine more unreasonable. Prosser, Law of Torts 786 (2d ed. 1955).

44. Bing v. Thunig, 2 N.Y.2d 656, 667, 143 N.E.2d 3, 9, 163 N.Y.S.2d 3, 11 (1957). The leading American case to deal the fatal blow to immunity for charitable hospitals, and with which New York is now in accord, is Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942).

45. "It is just as unfair to hold liable a retail grocery man, as here, who is innocent of any negligence or wrong, on the theory of breach of warranty, for some defect in a canned product which he could not inspect and with the production of which he had nothing to do, as it is to deny relief to one who has no relationship to the contract of purchase and sale, though eating at the purchaser's table. As Justice Steuer aptly observed at the Appellate Term, 'it may be odd that the purchaser can recover while others cannot, but it is odder still that one without fault has to pay at all.'" 9 N.Y.2d at 201, 173 N.E.2d at 776, 213 N.Y.S.2d at 43 (Froessel, J., concurring).