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Torts - Mental Distress - Recovery by Third Persons - Archibald v. Braverman, 275 Cal. App. 2d 290, __ P. 2d __, 79 Cal. Rptr. 723 (1969)

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that even if the contract could have made the settlement provisional, the bank had not complied with the Code's requirement of prompt return of the item and had lost its right to charge the item back to defendant's account.[22]

The conclusions of the court, operating entirely under the provisions of the U.C.C., are patterned closely after the law developed prior to the Code's adoption. The cash payment of negotiable paper by the drawee is final as between the parties to the payment, and if the drawer's funds prove insufficient the drawee cannot then collect from the payee. It is the responsibility of the drawee to know the state of the drawer's account and he finalizes payment at his own risk.

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Torts—MENTAL DISTRESS—RECOVERY BY THIRD PERSONS. *Archibald v. Braverman*, 275 Cal. App. 2d 290,—P.2d—, 79 Cal. Rptr. 723 (1969).

Plaintiff's son was seriously injured by an explosive allegedly due to defendant's negligence in selling the son explosive materials. Plaintiff brought an action to recover damages for emotional trauma and mental illness, which required institutionalization as a result of viewing her son's injuries within moments after the explosion. Summary judgment was granted for the defendant and the plaintiff appealed.[1]

The District Court of Appeals of California reversed, holding that even though the mother did not actually witness the explosion, she would be entitled to recover if negligence of the defendant were proved.[2] The court in *Archibald*, following the rationale of *Dillon v. Legg*,[3]

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responsibility beyond its exercise of due care. All items are credited subject to final payment and to receipt of proceeds of final payment in cash or solvent credits by this bank at its own office.

Id. at 93 n.6, 168 S.E.2d at 277 n.6.

22. UNIFORM COMMERCIAL CODE §§ 4-212(3), 4-301 provide that in order to revoke a settlement, the payor bank before its midnight deadline must return the item or send written notice of dishonor or nonpayment if return is unavailable.

1. The Superior Court of Riverside County hearing this case in February, 1968, based its decision on Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963), where a mother was denied recovery for injuries sustained as a result of emotional shock and mental disturbance received upon witnessing the defendant's truck run over her infant child.

2. 275 Cal. App. 2d at 290, P.2d , 79 Cal. Rptr. at 723.

3. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). *Dillon*, decided prior to the appeal in *Archibald*, overruled *Amaya v. Home Ice, Fuel & Supply Co.*, and became new precedent. In determining whether the defendant should reasonably

reasoned that the shock sustained by the mother viewing her child's injuries immediately after the explosion was so "contemporaneous" as to satisfy the "observance" factor.[4]

At common law, courts were reluctant to allow recovery for injury resulting from "mental disturbance" or "emotional shock" caused by negligent conduct.[5] After recognizing the validity of certain claims arising from mental distress and emotional trauma,[6] the courts placed strict limitations on recovery in cases where a bystander suffered mental or emotional distress as a result of witnessing a negligently inflicted injury.[7] While the impact rule, which requires actual physical injury resulting from the mental distress, was repudiated in most United States jurisdictions,[8] recovery by a person who suffered injury as a result of witnessing the negligent conduct was nevertheless denied unless that person feared for his own safety or was within the zone of danger.[9]

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foresee the injury to the plaintiff the *Dillon* court considered the following factors: (1) whether the plaintiff was located near the scene of the accident; (2) whether the shock resulted from a direct emotional impact upon the plaintiff from the contemporaneous observance of the accident; and (3) whether the plaintiff and the victim were closely related. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

4. 275 Cal. App. 2d at 292, — P.2d at —, 79 Cal. Rptr. at 725.

5. *E.g.*, Southern Express Co. v. Byers, 240 U.S. 612 (1915); Kaufman v. Western Union Tel. Co., 224 F.2d 723 (5th Cir. 1955), *cert. denied*, 350 U.S. 947 (1956); Beaty v. Buckeye Fabric Finishing Co., 179 F. Supp. 688 (E.D. Ark. 1959).

6. *See, e.g.*, Southern Tel. Co. v. King, 103 Ark. 160, 146 S.W. 489 (1912), where there is another element of recoverable damages upon which a cause of action might be based; Smith v. Gowdy, 196 Ky. 281, 244 S.W. 678 (1922), where the presence of another legal injury might lead to recovery; Spade v. Lynn & Boston R.R., 172 Mass. 488, 47 N.E. 88 (1898), where the emotional disturbance is accompanied by a bodily impact; Studebaker v. Pittsburgh Ry., 260 Pa. 79, 103 A. 532 (1918), where there is attending or ensuing injury to person or body of plaintiff.

7. Of course in "impact" states recovery is denied outright to one who suffers only mental injury by witnessing the negligent injury of a third person. Oblatore v. Brauner, 283 F. Supp. 761 (W.D. Mo. 1968); Duet v. Cheramie, 176 So. 2d 667 (La. Ct. App. 1965); Knaub v. Gotwalt, 422 Pa. 267, 220 A.2d 646 (1966). However, even in other states a negligent person historically has not been liable to one who witnessed the accident even though it caused severe mental distress resulting in illness or physical injury. *E.g.*, Maury v. United States, 139 F. Supp. 532 (N.D. Cal. 1956); Koontz v. Keller, 52 Ohio App. 265, 3 N.E.2d 694 (1936); Van Hoy v. Oklahoma Coca-Cola Bottling Co., 205 Okla. 135, 235 P.2d 948 (1951).

8. Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941); Purcell v. St. Paul City R. Co., 48 Minn. 134, 50 N.W. 1034 (1892); Lewis v. Woodland, 101 Ohio App. 422, 140 N.E.2d 322 (1955); *See generally* Annot., 64 A.L.R. 2d 100, 143 (1959).

9. *E.g.*, Hopper v. United States, 244 F. Supp. 314 (D. Colo. 1965) (zone of danger); Amaya v. Home Ice, Fuel, & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963) (zone of danger); Lindley v. Knowlton, 179 Cal. 289, 176 P. 440 (1918) (fear for own safety); Strazza v. McKittrick, 146 Conn. 714, 156 A.2d 149 (1959) (both);

Fear of fraudulent claims was one of the principle reasons given for the limitations placed upon such recovery,[10] and before *Dillon* there were few exceptions to this rule.[11]

The court in *Dillon* opened the door to increased liability. Criticizing the artificial limitations and their justifications,[12] and setting its own standards more along the lines of reasonable foreseeability,[13] the court established three criteria merely as guidelines to determine the degree of a defendant's foreseeability.[14] Thus, a finding of reasonable foreseeability would be guided by the following factors: (1) whether the plaintiff was located near the scene of the accident; (2) whether the shock resulted from a direct emotional impact upon the plaintiff from the contemporaneous observance of the accident; and (3) whether the plaintiff and the victim were closely related.[15] In recognition of its judicial importance, the decision has been criticized and praised,[16] though its effect other than in *Archibald* is still speculative.[17]

Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952) (zone of danger); Frazee v. Western Dairy Prod., 182 Wash. 578, 47 P.2d 1037 (1935) (both); Klassa v. Milwaukee Gas Light Co., 273 Wis. 176, 77 N.W.2d 397 (1956) (both); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935) (both).

10. Waube v. Warrington, 216 Wis. 603, 613, 258 N.W. 497, 501 (1935). *But see* 15 STAN. L. REV. 740, 749 n.40 (1963). One rationale, more consistent with tort theory, is that there is no duty of care owed to the plaintiff since substantial distress resulting from fear for the safety of a third person is not foreseeable. Resavage v. Davies, 199 Md. 479, 484, 86 A.2d 879, 881 (1952). Another rationale asserted is that the negligent act is not a proximate cause, the injury being a remote and speculative consequence. Strazza v. McKittrick, 146 Conn. 714, 718-19, 156 A.2d 149, 151-52 (1959); Williamson v. Bennet, 251 N.C. 498, 508, 112 S.E.2d 48, 55 (1960). *But see* J. FLEMING, INTRODUCTION TO THE LAW OF TORTS 54 (1967); F. HARPER & F. JAMES, THE LAW OF TORTS 1039 (1956); W. PROSSER, THE LAW OF TORTS 353-54 (3rd ed. 1964).

11. Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (1912); Cohn v. Ansonia Realty Co., 162 App. 791, 148 N.Y.S. 39 (1914); Gulf, C. & S. F. Ry. v. Coopwood, 96 S.W. 102 (Tex. Civ. App. 1906). The leading case in England is Hambrook v. Stokes Brothers, [1925] 1 K.B. 141. Though often criticized *Hambrook* was affirmed in Boardman v. Sanderson, [1964] 1 W. L. R. 1317. Moreover, through legislation, New South Wales, in enacting the Law Reform Act of 1944, § 4(1)(b), extended liability of the negligent person to any member of the family of the victim who suffers injury from mental or nervous shock who was within the sight or hearing of such victim which would encompass the instant case.

12. 68 Cal. 2d at —, 441 P.2d at 917-19, 69 Cal. Rptr. at 77-79.

13. *Id.* at —, 441 P.2d at 919-21, 69 Cal. Rptr. at 79-81.

14. *Id.* at —, 441 P.2d at 921, 69 Cal. Rptr. at 81.

15. 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

16. *See* 18 BUFFALO L. REV. 201 (1969); CATHOLIC U.L. REV. 258 (1968); 37 FORDHAM L. REV. 429 (1969); 38 U. CINC. L. REV. 185 (1969); 1969 WIS. L. REV. 661 (1969); 10 WM. & MARY L. REV. 764 (1969).

17. There are no cases prior to *Archibald* expressly following the minority view

Archibald has opened the door still wider in its liberal interpretation of the factors of foreseeability set forth in *Dillon*,[18] by allowing recovery where in fact the plaintiff did not actually witness the negligently caused occurance.[19] While *Dillon* removed the arbitrary limitation that the plaintiff must be within the zone of danger, *Archibald* has now removed the limitation that plaintiff actually witness the occurance caused by the negligence of the defendant.[20]

Development of the law in this area has shown a trend away from the rigid restrictions against recovery for emotional distress.[21] *Dillon*

adopted in *Dillon*. Some consideration has been given to the effect *Dillon* might have in New York. New York, once an impact state, Mitchell v. Rochester R.R., 151 N.Y. 107, 45 N.E. 354 (1896), later adopted the majority position. Battella v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961). Tobin v. Grossman, 30 App. Div. 2d 229, 291 N.Y.S.2d 227 (1968), denied recovery to a mother who witnessed the defendant's vehicle strike and injure her infant son causing ensuing mental and physical suffering, though two earlier decisions which allowed recovery, Bond v. Smith, 52 Misc. 2d 186, 274 N.Y.S.2d 534 (Sup. Ct. 1966); Haight v. McEwen, 43 Misc. 2d 582, 251 N.Y.S.2d 839 (Sup. Ct. 1964), have led to the view that New York still awaits a more determinative decision. *See* 18 BUFFALO L. REV. 201, 207-08 (1969); 37 FORDHAM L. REV. 429, 441-43 (1969).

18. In applying the factor of "direct emotional impact from sensory and contemporaneous observance of the accident" the court said that "the shock of seeing a child severely injured immediately after the tortious event may be just as profound as that experience in witnessing the accident itself. Consequently, the shock sustained by the mother herein was 'contemporaneous' with the explosion so as to satisfy the 'observance' factor." 275 Cal. App. at —, P.2d at —, 79 Cal. Rptr. at 725.

19. The leading case under a similar fact situation is Cote v. Litawa, 96 N.H. 174, 71 A.2d 792 (1950). The only case allowing recovery can be factually distinguished from the instant case. Blanchard v. Brawley, 75 So. 2d 891 (La. Ct. App. 1954).

20. *Archibald* will undoubtedly invite comment from those who have already voiced an opinion in this area of recovery where plaintiff did not specifically witness the tortious act. Prosser, who has stated "that when a child is endangered, it is not beyond contemplation that its mother will be somewhere in the vicinity, and will suffer serious shock," has also recognized the need for even the arbitrary and somewhat unjustifiable limits to the extension of liability, including that the shock be fairly contemporaneous with the accident or peril rather than when plaintiff is informed at a later time. W. PROSSER, LAW OF TORTS, 353-54 (3rd ed. 1964). Professor Amdursky, while admitting "from the standpoint of foreseeability of mental anguish, there seems little to choose between the case where a mother sees her child negligently run down by an automobile and a case where after the accident, discovers the injured and bleeding body," has said "/r/ecovery should be confined to those plaintiffs who have actually witnessed the injury first hand." Amdursky, *The Interest in Mental Tranquility*, 13 BUFFALO L. REV. 339, 348 (1964). *See also* Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033 (1936).

21. Even the majority of states, which would deny recovery to the bystander in abandoning the impact rule which ultimately denied recovery to the bystander, have eased their limitation to liability in adopting the prevailing zone of danger or fear for personal safety views. *See supra* note 10, *See also* Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260 (1921).

was the initial step in the removal of arbitrary limitations, though recognizing the need for some guidelines in the area of bystander recovery. *Archibald*, in liberally construing these guidelines, has accelerated the trend. With the possibility of New York supplying additional momentum,[22] one might look forward to the gradual acceptance of this more equitable though challenging approach in the area of recovery for emotional and mental distress.

ROBERT L. WALKER

Criminal Law—DOUBLE JEOPARDY—*Benton v. Maryland*, 89 S. Ct. 2056 (1969).

The defendant was tried in a Maryland state court on charges of burglary and larceny. He was acquitted of larceny, but convicted of burglary. Due to a defect in the composition of the grand and petit juries, the defendant was forced to waive the former jeopardy of larceny, and was retried and convicted on both counts.[1] Upon appeal the Supreme Court in reversing the larceny conviction held that freedom from double jeopardy is a fundamental constitutional right[2] that is imposed upon the states through the fourteenth amendment.[3]

The underlying rationale of double jeopardy is that the state should not be permitted to make repeated attempts to convict an individual to embarrass him and compel him to live in a continuous state of anxiety and insecurity.[4] Prior to adoption of the fourteenth amendment, the Supreme Court in *Fox v. Ohio* held that double jeopardy was largely a federal concern, and in no way applied to the states.[5] While the Bill of Rights already contained the double-jeopardy clause, many states never-

22. *See supra* note 17.

1. Benton v. Maryland, 89 S.Ct. 2056 (1969). Because the grand and petit juries had been unconstitutionally selected under a section of the state constitution that demanded jurors to swear their belief in the existence of God, the Maryland Court of Appeals remanded the case to the trial court where defendant was given the "option" of serving his ten-year sentence for burglary, or demanding reindictment and a new trial.

2. U.S. CONST. amend. V ". . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

3. Maryland argued one cannot be placed in jeopardy by a void indictment. The Supreme Court found that only by accepting a new trial could the former indictment and sentence be set aside. There was really no choice or option involved and one cannot be forced to waive his rights of former jeopardy.

4. Green v. United States, 355 U.S. 184, 187-88 (1957).

5. Fox v. Ohio, 46 U.S. (5 How.) 410 (1847).