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Torts - Emotional Damage - Zone of Danger Test Rejected - Dillon v. Legg, 441 P.2d 912 (Calif. 1968)

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a proposal condominium complex. In protecting the contract purchasers, the court has implemented judicially the legislative desire to encourage the development of condominium projects and, in the same instance, has formulated a progressive standard of statutory construction in an area of law which has profound social and economic implications.

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Torts—EMOTIONAL DAMAGE—"ZONE OF DANGER" TEST REJECTED. Plaintiffs, mother and daughter, brought an action to recover for emotional shock and resulting physical injury occasioned by witnessing the death of a second daughter caused by the negligence of the defendant motorist.[1] The lower court denied defendant's motion for summary judgment as to the plaintiff-daughter who was within the zone of danger, but granted summary judgment against the plaintiff-mother who witnessed the accident while outside the zone of danger.

The Supreme Court of California reversed the superior court in part and awarded recovery to the plaintiff-mother. In overruling the previously controlling California case of *Amaya v. Home Ice, Fuel and Supply Co.*,[2] the court based its decision on the ". . . hopeless artificiality of the zone-of-danger rule" [3] and on the leading English case on this subject, *Hambrook v. Stokes Bros.*,[4] which allowed recovery in analogous circumstances.

Recovery in actions for emotional shock and resulting physical injury due to witnessing the peril, injury, or death of a third person has generally been denied to bystanders,[5] parents,[6] spouses,[7] or children.[8]

1. Dillon v. Legg, — Cal.2d — 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

2. 59 Cal.2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

3. Dillon v. Legg, — Cal.2d — 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

4. 1 K.B. 141 (1925).

5. *See*, Angst v. Great Northern Ry. Co., 131 F. Supp. 156 (D. Minn. 1955); Van Hoy v. Oklahoma Coca-Cola Bottling Co., 205 Okla. 135, 235 P.2d 948 (1951); McMahon v. Bergeson, 9 Wis.2d 256, 101 N.W.2d 63 (1960).

6. *See, e.g.*, Mahaffey v. Official Detective Stories, Inc., 210 F. Supp. 215 (W.D. La. 1962); Rogers v. Hexol, Inc., 218 F. Supp. 453 (D. Ore. 1962); Preece v. Baur, 143 F. Supp. 804 (E.D. Idaho 1956); Southern Ry. Co. v. Jackson, 146 Ga. 243, 91 S.E. 28 (1916); Hayward v. Yost, 72 Idaho 415, 242 P.2d 971 (1952); Cleveland, C.C. & St. L. Ry. Co. v. Steward, 24 Ind. App. 374, 56 N.E. 917 (1900); Vinet v. Checker Cab Co., 140 So.2d 252 (La. App. Ct. 1962); Herrick v. Evening Express Pub. Co., 120 Me. 138, 113 A. 16 (1921); Cote v. Litawa, 96 N.H. 174, 71 A.2d 792 (1950); Brennan v. Biber, 93 N.J. Super. 351, 225 A.2d 742 (1966); Tobin v. Grossman, 291 N.Y.S.2d 227 (1968); Berg v. Baum, 224 N.Y.S.2d 974 (1962); Nuckles v. Tennessee Electric Power Co., 155 Tenn. 611, 299 S.W. 775 (1927).

7. *See, e.g.*, Redding v. United States, 196 F. Supp. 871 (W.D. Ark. 1961); Tyler v.

In those jurisdictions which do allow recovery in such cases under certain conditions, either the impact rule or the zone-of-danger rule is followed. The impact rule, allowing recovery only if the plaintiff was actually struck physically by the negligent defendant, is the minority rule today.[9] The zone-of-danger rule, which allows recovery if the plaintiff was in the area in which he could have been struck and could have feared for his own safety, is now the view of the majority of jurisdictions that have dealt with this question.[10]

Before the instant case, the only jurisdiction in the United States which allowed recovery to a plaintiff who was neither struck himself nor in the area in which he might be struck or might fear for his own safety was Puerto Rico,[11] where such recovery is allowed by statute.[12] A few cases in other jurisdictions have also allowed recovery in such a situation,[13] but they have not altered the general rule that there can be no recovery for mere emotional damage.[14]

Brown Service Funeral Homes Co., 250 Ala. 295, 34 So.2d 203 (1948); Warr v. Kemp, 208 So.2d 570 (Ct. of App. La. 1968); All v. John Gerber Co., 36 Tenn. App. 134, 252 S.W.2d 138 (1952); Carey v. Pure Distributing Corp., 133 Tex. 31, 124 S.W.2d 847 (1939).

8. *See, e.g.*, Beaty v. Buckeye Fabric Finishing Co., 179 F. Supp. 688 (E.D. Ark. 1959); Curry v. Journal Publ. Co., 41 N.M. 318, 68 P.2d 168 (1937).

9. *See* Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961), for a leading example of a major state discarding the impact rule. The impact rule has been retained in force in the following jurisdictions: Oblatore v. Brauner, 283 F. Supp. 761 (W.D. Mo. 1968); Beaty v. Buckeye Fabric Finishing Co., 179 F. Supp. 688 (E.D. Ark. 1959); Greenberg v. Stanley, 51 N.J. Super. 90, 143 A.2d 588 (1958); Knaub v. Gotwalt, 422 Pa. 267, 220 A.2d 646 (1966).

10. See, Hopper v. United States, 244 F. Supp. 314 (D. Col. 1965) applying 28 U.S.C. § 1346(b) (1964) which requires that state law be followed. Colorado law allows plaintiff to recover only if he was within the zone of danger. *See, e.g.*, State *ex rel.* Gaegler v. Thomas, 173 F. Supp. 568 (D. Md. 1959); Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916); Strazza v. McKittrick, 146 Conn. 714, 156 A.2d 149 (1959); Lessard v. Tarca, 20 Conn. Supp. 295, 133 A.2d 625 (1957); Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951); Jelley v. La Flame, 108 N.H. 471, 238 A.2d 728 (1968); Barber v. Pollock, 104 N.H. 379, 187 A.2d 788 (1963); Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34, (1961); Frazee v. Western Dairy Products Co., 182 Wash. 578, 47 P.2d 1037 (1935); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).

11. *Accord,* Commercial Union Ins. Co. v. Gonzalez Rivera, 358 F.2d 480 (1st Cir. 1966).

12. The Puerto Rican statute applied is 31 L.P.R.A. § 5141.

13. Three older cases which differ from the recent weight of authority are: Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (1912); Cohn v. Ansonia Realty Co., 162 N.Y. App. Div. 791, 148 N.Y. Supp. 39 (1914); Gulf, C. & S.F.R.R. Co. v. Coopwood, 96 S.W. 102 (Tex. Civ. App. 1906). Valence v. Louisiana Power & Light Co., 50 So.2d 847 (Ct. of App. of New Orleans 1951) appears to be the sole Louisiana case which allowed recovery on this point of law, in direct opposition to the weight of case law of that state.

In California, the first case to deal directly with this issue denied recovery to a mother for shock and emotional damage caused by witnessing the death of her son in an automobile accident in which she was also injured.[15] Later cases have allowed recovery only when the plaintiff was in the zone of danger or could have feared for his own safety.[16] It has been well settled in California case law that the impact rule is not in force in that state.[17] A lack of duty to the plaintiff by the defendant and practical considerations of public policy involving an anticipated flood of fraudulent claims based upon an indefinable liability concept have been discussed as the basis of this point of law in California.[18]

The decision in the instant case, by allowing the recovery of the plaintiff-mother, departs from the majority view in the United States and from the ruling case law of California. This court found that the defendant owed a duty to the plaintiff on the basis of foreseeability,[19] and that it was the duty of the courts to handle future cases in a manner that would prevent a flood of fraudulent liability cases.[20] In discussing the problem of defining the liability of the defendant in such cases, the court suggested the following guidelines: what distance the plaintiff was from the scene of the accident; whether the shock to the

Another case frequently cited as allowing recovery similar to the instant case is Rasmussen v. Bensen, 133 Neb. 449, 275 N.W. 674 (1937) in which the emotional damage related only incidentally, if at all, with the peril to third persons.

14. The force and weight of this majority rule in the United States today can be seen by the deletion of a caveat found in RESTATEMENT OF TORTS 313 (1934) which sought to encourage the allowing of recovery to a plaintiff such as the mother in the instant case. In explaining this deletion, the Reporter's Notes of the RESTATEMENT (SECOND) OF TORTS 313 (1965), attributed the action to the great weight of recent case authority.

15. Claugh v. Steen, 3 Cal. App.2d 392, 39 P.2d 889 (1934); *accord,* Munro v. Dredging & Reclamation Co., 84 Cal. 515, 24 P. 303 (1890).

16. Maury v. United States, 139 F. Supp. 532 (N.D. Cal. 1956); Minkus v. Coca-Cola Bottling Co., 44 F. Supp. 10 (N.D. Cal. 1942); *see* Vanoni v. Western Airlines, 247 Cal. App.2d 793, 56 Cal. Rptr. 115 (1967); Reed v. Moore, 156 Cal. App.2d 43, 319 P.2d 80 (1957); Zeller v. Reid, 38 Cal. App.2d 622; 101 P.2d 730 (1940); Kelly v. Fretz, 19 Cal. App.2d 356, 65 P.2d 914 (1937); Kalleg v. Fassio, 125 Cal. App. 96, 13 P.2d 763 (1932); Webb v. Francis J. Lewald Coal Co., 214 Cal. 182, 4 P.2d 532 (1931); Lindley v. Knowlton, 179 Cal. 298, 176 P. 440 (1918).

17. *Accord,* Cook v. Maier, 33 Cal. App.2d 581, 92 P.2d 434 (1939); Sloane v. So. Cal. Ry. Co., 111 Cal. 668, 44 P. 320 (1866).

18. These reasons were discussed at great length in Amaya v. Home Ice, Fuel and Supply Co., 59 Cal.2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

19. Dillon v. Legg, — Cal.2d —, —, 441 P.2d 912, 920, 69 Cal. Rptr. 72 (1968).

20. *Id.,* 441 P.2d at 918, 69 Cal. Rptr. at —.

plaintiff was caused by sensory and contemporaneous observance of the accident; and whether the plaintiff and the victim were closely related.[21] It is likely that this opinion will provide the foundation for the development of a new trend in the law favoring recovery for emotional disturbances.

SUSAN BUNDY COCKE

Eminent Domain—CONSEQUENTIAL DAMAGES—NOISE ELEMENT. In upstate New York the scenic wooded property of the Dennisons lay in the path of a projected highway. The property and homestead were "entirely secluded, quiet and peaceful." The state condemned a portion of the land and built the highway across this portion, necessarily destroying the view, privacy, peacefulness, and a part of the wooded area in the process.

The Dennisons brought suit against the state, claiming consequential damages to the remaining property and demanding compensation for the loss in value due to future traffic noise among other factors.[1] The case was decided in favor of the claimants in the lower courts[2] and was appealed to the Court of Appeals of New York[3] where the state contended that it was error to consider noise as a factor affecting the award of consequential damages.[4] The court of appeals ruled that there was no error in considering traffic noise as an element of consequential damages where there had been a partial taking of property, of the kind present here, for the construction of a highway.[5]

About one-half the states have eminent domain provisions in their

21. *Id.*, 441 P.2d at 920, 69 Cal. Rptr. at —.

1. The claim was based on loss of privacy and seclusion, loss of view, traffic noise, lights, and odors resulting from the highway construction and use.

2. Dennison v. State, 48 Misc.2d 778, 265 N.Y.S. 2d 671 (Ct. Cl. 1965) *aff'd.*, 28 N.Y. App. Div. 2d 28, 281 N.Y.S.2d 257 (3d Dept. 1967).

3. Dennison v. State, 22 N.Y.2d 409, 239 N.E.2d 708 (1968).

4. The state maintained that, although damages normally are allowed when there has been a partial taking of land, noise damage should not be considered because it is suffered by the general public.

5. The opinion contained much verbiage to the effect that the impracticability of separating the noise element from a group of other, concededly proper, elements of consideration militated against reversing and remanding the case for a new trial. Though confusedly written, the references to this impracticability could at best be considered dicta, although applicability of such dicta is unclear. The court, having ruled that consequential noise damage is compensable, had no need to go into the practicality of separating it from the other factors. The courts below did not err in considering noise, integrated with the elements of loss of view, seclusion and privacy.