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Right of Recovery in Kentucky for Emotional Disturbance Occasioned by Negligence

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RIGHT OF RECOVERY IN KENTUCKY FOR EMOTIONAL DISTURBANCE OCCASIONED BY NEGLIGENCE

The Kentucky court has developed two rules governing the right of recovery for emotional disturbance occasioned by negligence. In social telegram or public carrier cases where duty is based on the contract a recovery is permitted where the injury alleged is emotional disturbance or has come about by reason of an emotional disturbance. In the absence of such a contractual duty, a recovery is denied in personal injury cases where there is no contemporaneous physical impact even where there is an emotional disturbance followed by serious physical consequences.

The typical carrier case is that of *Dawson* v. *L. & N. R. R. Company*,[1] wherein the court said that there could be a recovery for mental suffering by a sick passenger who was carried past his station and rudely treated. A right of recovery has also been recognized for emotional disturbance resulting from the negligent delay in the transportation of a corpse[2] and for the refusal of the servants of a carrier to stop objectionable and obscene remarks and conduct of a fellow passenger resulting in humiliation, mortification, annoyance, discomfort and mental pain.[3]

Chapman v. *Western Union Telegraph Company*[4] is a good illustration of the social telegram case. A telegram informing the plaintiff of the serious illness of his father and a subsequent one notifying him of the latter's death were not delivered due to the negligence of the defendant company. The court in holding he might recover for emotional disturbance said, "It seems to us that both reason and public policy require that it [the telegraph company] should answer for all injury resulting from its negligence, whether it be to the feelings or the purse, subject only to the rule that it must be the direct and proximate consequence of the act."[5] Although the contract here is between the sender and the telegraph company, the court recognizes an interest of the plaintiff to be secure from emotional disturbance and gives a redress for the defendant's violation of it.

In view of the above decisions recognizing an interest of the plaintiff in freedom from emotional disturbances, especially when it is noted that in a majority of courts recovery is denied in the tele-

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[1] 4 Ky. L. Rep. 801 (1883)

[2] L. & N. R. R. Co. v. Hull, 24 Ky. L. Rep. 375, 68 S.W 433 (1902).

[3] L. & N. R. R. Co. v. Bell, 166 Ky. 400, 179 S.W 400 (1915).

[4] 90 Ky. 265, 13 S.W 880 (1890) *Accord*, Western Union Telegraph Company v. Van Cleave, 22 Ky. L. Rep. 53, 54 S.W 827 (1900).

[5] 90 Ky 265, 271, 13 S.W 880, 881 (1890).

gram cases,[6] it seems illogical that recovery should be denied for emotional disturbances where they cause a serious physical result solely because there is no contemporaneous physical impact.

The case best illustrating the position of the Kentucky court is *McGee* v. *Vanover*. In this case the plaintiff's husband, who was attending church with her, was called out by McGee who commenced an attack on him. The plaintiff, a pregnant woman, became very alarmed and rushed out to where they were fighting. Someone having separated the two, the plaintiff and her husband were leaving when another attack was made, in which Evans, a relative of McGee, joined him. In the second attack Evans by accident slightly brushed the plaintiff who later suffered a miscarriage. The Court of Appeals upheld the verdict against Evans but reversed the verdict against McGee, saying that there could be no recovery for an emotional disturbance without physical impact. Here obviously the defendant who brushed the plaintiff in the affray was less responsible, at least in the moral sense, for the injury complained of than was the other. It was the emotional disturbance occasioned by witnessing the attack on her husband, and not the physical impact, which resulted in the miscarriage suffered by the plaintiff. If there had been no contact at all, the court would have left the woman with no remedy, an obvious injustice.

The *McGee* case was not without precedent as the issue had previously been presented in the case of *Morse* v. *C. & O. Ry. Co.*[8] In the Morse case, where a train came within fifteen feet of the plaintiff's yard causing great emotional disturbance, the court in refusing recovery said, " damages can not be recovered for mental suffering alone in an action for personal injuries based on negligence, unaccompanied by some direct contemporaneous injury to person or property or growing out of some contract relation between the parties."[9] In its decision the court quoted extensively from *Mitchell* v. *Rochester Ry. Co.*[10] which denied recovery for a miscarriage suffered by a plaintiff who became frightened by the approach of the defendant's team which was so negligently driven that when it was stopped she was standing between the horses' heads. The New York court assigned as reasons that since the fright afforded no basis for an action, its consequences could not; that it would result in a flood of litigation in cases where the injury complained of could be feigned without detection and where the damages would rest on mere con-

[6] PROSSER, TORTS (1941) 216.
[7] 148 Ky. 737, 147 S.W 742 (1912).
[8] 117 Ky. 11, 77 S.W 360 (1903).
[9] 117 Ky. 11, 16, 77 S.W 360, 362 (1903).
[10] 151 N.Y. 107, 45 N.E. 354, 34 L. R. A. 781, 56 Am. St. R. 604 (1896). *But see* Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931), where the court refused to instruct that if the jury found at the time of the collision only shock or fright without physical injury they must find for the defendant, and held that recovery depended on whether a legal right had been violated.

jecture or speculation; that such a recovery would be contrary to public policy; that the negligence could not be said to be the proximate cause of such an injury; and that for recovery there must be a violation of some duty and there is no obligation to protect when unaccompanied by a legal duty. As Green points out in his article,[11] the basis of the court's decision in the *Morse* case is a lack of duty on the part of the defendant under the particular facts rather than a blanket rule disallowing recovery to the plaintiff, and while there might be disagreements with the result reached there could be none with the legal principle applied. The rule received further support in the dictum in *Reed* v. *Ford*[12] in which the court, while holding that the defendant was not negligent, quoted the rule and stated that the "damages sought to be recovered were too remote and speculative;" that "the injury was more sentimental than substantial;" and that "being easy to simulate and hard to disprove," the injury had "no standard by which it could be justly, or even approximately, compensated." [13] In its decision of *Reed* v. *Maley*,[14] the court said, "The objection to a recovery for injury occasioned without physical impact is the difficulty of testing the statements of the alleged sufferer, the remoteness of the damages, and the metaphysical character of the injury considered apart from physical pain."

Mr. Prosser in commenting on the reasons assigned by the various courts in denying a recovery for emotional disturbance in absence of a physical impact says:

> "All these objections have been demolished many times Mental suffering is no more difficult to estimate in financial terms, and no less a real injury than 'physical' pain; it is not an independent, intervening cause, but a thing brought about by the defendants' negligence itself, and its consequences follow in unbroken sequence from that negligence; it is the business of the courts to make precedent where a wrong calls for redress, even if law suits must be multiplied, and by this time there is precedent enough, and no such increase in litigation is to be observed The problem is one of adequate proof and it is not necessary to deny a remedy in all cases because some claims may be false." [15]

In spite of the insufficiency of the reasons for the doctrine, however, Kentucky still adheres to it, but the court has been extremely liberal in deciding what constitutes an impact.

In the abstract of the decision of *City Transfer Co.* v. *Robinson*[16] it is reported: "Though the right to recover for mental suffering is

[11] Green, *"Fright" Cases* (1933) 27 ILL. L. R. 761, 764.
[12] 129 Ky. 471, 475, 112 S.W 600, 601 (1908)
[13] *Ibid.*
[14] 115 Ky. 816, 819–820, 25 Ky. L. Rep. 209, 210, 74 S.W 1079, 1080 (1903).
[15] PROSSER, TORTS (1941) sec. 34, pp. 211, 213. *See,* Note (1935) 24 KY. L. J. 69.
[16] 12 Ky. L. Rep. 555 (1890)

recognized only in cases where there is also physical injury the extent of the injury is immaterial; a slight injury may be sufficient. While the plaintiff in this case says in his testimony· 'I was not hurt,' yet the facts as he details them show that he did sustain physical injury and that he meant that he sustained no serious physical injury, the court did not err in telling the jury that they might consider the mental suffering as an element of the damage." The court has also said "by a violent jolt or jar a physical injury may be done though the flesh is not bruised and there is little externally to indicate it."[17] In *Kentucky Traction Co.* v. *Roman's Guardian*[18] a recovery of $15,000 was allowed for paralysis resulting from emotional disturbance caused by the emission of sparks from a broken trolley wire on a car in which the plaintiff was riding, although the only contemporaneous injury was a slight burn from the wire the court saying, "If there was contact with the wire, no matter how slight the burns, the plaintiff has a cause of action." [19]

From the above decisions it is obvious that, while the Kentucky court states the rule in its narrowest form, its application is liberal. In allowing recovery in right of privacy cases, breach of promise suits, slander and libel actions, and for pain in physical injury actions, the court has demonstrated that it considers that emotional disturbance is a legal wrong for which redress should be given. Having a right for which redress is given in other actions it would seem to be the much better view to allow recovery for injuries resulting from emotional disturbance without insisting on an impact, irrelevant in itself, as a foundation on which to base the action. To hold otherwise permits a real injury to be inflicted by the negligence of another with impunity. If Kentucky were to adopt the more liberal rule she would join a very respectable minority of courts[20] who, while permitting recovery, seemingly have not encountered the difficulties assigned by the Kentucky court as reasons for its rejection.

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[17] Kentucky Traction & Terminal Co. v Bain, 161 Ky. 44, 47, 170 S.W 499, 501 (1914).

[18] 232 Ky. 285, 23 S.W 2d 272 (1929).

[19] 232 Ky 285, 292, 23 S.W 2d 272, 275 (1929). Quare: Could not she have recovered without impact under the carrier rule?

[20] Alabama Fuel and I. Co. v Baladoni, 15 Ala. App. 316, 73 So. 205 (1916) Green v Shoemaker & Co., 111 Md. 69, 73 Atl. 688 (1909), Purcell v. St. Paul City Ry. Co., 48 Minn. 134, 50 N. W 1034 (1892), Watkins v. Kaolin Mfg. Co., 131 N. C. 536, 42 S. E. 983 (1902) Simone v. R. I. Co., 28 R. I. 186, 66 Atl. 202 (1907), Mack v. So. Bound Ry Co., 52 S. C. 323, 29 S. E. 905 (1898), Sternhagen v. Kozel, 40 S. D. 396, 167 N. W 398 (1918) Memphis St. Ry. Co. v. Bernstein, 137 Tenn. 637, 194 S.W 902 (1917), Hill v. Kimball, 76 Tex. 210, 13 S.W 59 (1890), Oliver v. LaValle, 36 Wis. 592 (1875), Dulieu v White (1901) 2 K. B. 669; Bell v. Gt. No. Ry. of Ore. (1890) 26 L. R. Sc. 428 Gilligan v Robb Sc. 856 (1910)