St. Mary's Law Journal

Volume 4 | Number 3 Article 11

12-1-1972

The Right of Bystanders to Recover upon Witnessing Injury or Peril of Third Persons - Damages.

Michael R. Ezell

TORTS—NEGLIGENTLY INFLICTED EMOTIONAL HARM—THE RIGHT OF BYSTANDERS TO RECOVER UPON WITNESSING INJURY OR PERIL OF THIRD PERSONS—DAMAGES. *Whetham v. Bismarck Hospital,* 107 N.W.2d 679 (N.D. 1972).

Tami Lynn Whetham was born to Dixie Whetham on July 28, 1970 in the Bismarck Hospital. An employee of the hospital was in the process of bringing Tami Lynn to her mother and between the door to the room and the bed, the baby was dropped to the tiled floor. Tami Lynn's head struck the floor violently, fracturing her skull. The full residual effects of her injuries were not known. The Whethams brought this action alleging that the employee was negligent and that as a direct and proximate result of that negligence Dixie saw her child fall to the floor, heard the impact, and suffered severe mental and emotional shock. On motion for summary judgment, the trial court dismissed the portion of the complaint seeking damages for mental and emotional shock and this appeal was taken. Held—*Affirmed.* Recovery for shock upon witnessing injury to another can be had only if the negligent act threatened the plaintiff with physical harm or placed her in the zone of danger.

A mother would be denied an opportunity to prove the nature and extent of mental anguish, and any physical consequences thereof, which resulted from observing injury to her child in the majority of American jurisdictions.[1] This rule is indicative of the difficulties which the courts have experienced in dealing with mental injuries and psychic links in the chain of causation of physical injuries.

A number of problems are raised by injuries involving psychic stimuli. The conflict between judicial reluctance to deal with these problems, and the desire to compensate worthy plaintiffs has led to a series of admittedly artificial rules, paradoxes, and inconsistencies in the law of torts, especially in the area of negligence. Recovery was first allowed for negligently inflicted[2] mental injuries as a parasitic[3] element of damages in an action for physical injuries. That such damages were not available when there had been no impact on the person of the plaintiff was initially indicated in an early English case[4] where the

1 RESTATEMENT (SECOND) OF TORTS § 313 (1965); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54, at 333-35 (4th ed. 1971).

2 Recovery has long been allowed for emotional shock and its physical consequences in actions for the commission of intentional torts. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 49, at 49-52 (4th ed. 1971). In recent years independent legal protection has been granted against extreme and outrageous conduct which is likely to cause severe emotional distress. *Id.* at 52-60.

3 Parasitic damages exist when "the law permits elements of harm to be considered in assessing recoverable damages, which cannot be taken into account in determining the primary question of liability." 1 T. STREET, THE FOUNDATIONS OF LEGAL LIABILITY 461 (1906).

4 Victorian Rys. Comm'rs v. Coultas, 13 App. Cas. 222 (P.C. 1888).

negligence of a gatekeeper caused a woman's buggy to be forced between a railroad crossing gate and a fast moving train. The impact requirement was soon adopted in America.[5]

The justification of the impact rule was a fear of a flood of litigation,[6] a fear that false claims could not be detected,[7] and that damages would be speculative.[8] These reasons were not compelling and soon came under attack.[9] "It is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation;' and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the courts too much work to do."[10] In practice the flood has not materialized.[11] Although these damages would be speculative because they would not be subject to precise measurement, this is equally true of many classes of damages which are awarded.[12] The potential for false claims is not so easily dealt with; this is a problem of proof, however, and it is possible to allow recovery only upon the presentation of satisfactory evidence.[13] It has often been stated that this is not a sufficient public policy basis for the denial of recovery to meritorious plaintiffs.[14] The problem of proof is directly related to the state of medical knowledge, but medical advances have rendered this objection less forceful.[15]

---

5 Spade v. Lynn & B.R. Co., 47 N.E. 88 (Mass. 1897); Mitchell v. Rochester Ry., 45 N.E. 354 (N.Y. 1896); Ewing v. Pittsburgh C., C. & St. L. Ry., 23 A. 340 (Pa. 1892).

6 Mitchell v. Rochester Ry., 45 N.E. 354 (N.Y. 1896); Knaub v. Gotwalt, 220 A.2d 646, 647 (Pa. 1966). "If we permitted recovery in a case such as this, our Courts would be swamped by a virtual avalanche of cases . . . ."

7 Mitchell v. Rochester Ry., 45 N.E. 354 (N.Y. 1896); Victorian Rys. Comm'rs v. Coultas, 13 App. Cas. 222 (P.C. 1888).

8 Mitchell v. Rochester Ry., 45 N.E. 354 (N.Y. 1896).

9 Lambert, *Tort Liability for Psychic Injuries*, 41 B.U.L. REV. 584 (1961); McNiece, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S L. REV. 1 (1949); Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260 (1921); Comment, *Injuries from Fright Without Contact*, 15 CLEV.-MAR. L. REV. 331 (1966).

10 Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 877 (1939).

11 Gulf, C. & S.F. Ry. v. Hayter, 93 Tex. 239, 242, 54 S.W. 944, 945 (1900). "[T]he reported cases would indicate that the litigations arising from injuries inflicted through a mental shock are not so numerous as to cause any considerable increase of litigation. So that this objection, as it seems to us, rests upon imaginary ground." *Accord*, Okrina v. Midwestern Corp., 165 N.W.2d 259 (Minn. 1969); Goodhart, *The Shock Cases and Area of Risk*, 16 MOD. L. REV. 14, 24 (1953), stating that there have been only a handful of cases in England since the impact rule was overruled.

12 C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 88, at 318 (1935). "Translating pain and anguish into dollars can, at best, be only an arbitrary allowance, and not a process of measurement . . . ."

13 W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54, at 328 (4th ed. 1971).

14 Chiuchiolo v. New England Wholesale Tailors, 150 A. 540 (N.H. 1930). "To hold that all honest claims should be barred merely because otherwise some dishonest ones will prevail is not enough to make out a case of public policy." *Id.* at 543; *accord*, Green v. Shoemaker & Co., 73 A. 688 (Md. 1909); Samms v. Eccles, 358 P.2d 344 (Utah 1961).

15 Niederman v. Brodsky, 261 A.2d 84, 86 (Pa. 1970); Havard, *Reasonable Foresight of Nervous Shock*, 19 MOD. L. REV. 478 (1956). *See generally* Smith & Soloman, *Traumatic Neurosis in Court*, 30 VA. L. REV. 87 (1943); Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944).

The impact rule was an arbitrary line drawn on the basis of supposed practicality. It is not surprising that impact has been found in many cases in which the contact was trivial or not a meaningful link in the chain of causation.[16] The impact rule has mechanically denied recovery to deserving plaintiffs who could not find a peg on which to hang their cause of action.[17] Thus where a grandmother collapsed with a heart attack when a neighbor's straying bull bore down on her, no recovery could be had because no impact occurred.[18] The impact rule was often waived in two classes of cases where the circumstances provided special guarantees of the genuineness of the injuries, the negligent transmission of death messages,[19] and the negligent injuries to or handling of corpses.[20] A number of jurisdictions began to allow recovery in cases in which the negligence of the defendant foreseeably compelled the plaintiff or others to react in a manner causing an injury to the plaintiff, and the facts and the physical injuries were accepted as a substitute for impact.[21] The impact rule has rapidly fallen from favor in the last decade[22] so that Dean Prosser could recently say that it might never be

16 Potere v. City of Philadelphia, 112 A.2d 100, 104 (Pa. 1955). "However, where, as here, a plaintiff sustains bodily injuries, even though trivial or minor in character, which are accompanied by fright or mental suffering directly traceable to the peril in which the defendant's negligence placed the plaintiff, then mental suffering is a legitimate element of damages." *Accord,* Porter v. Delaware, L. & W. Ry., 63 A. 860 (N.J. 1906): A span of a railroad bridge, replete with locomotive, dropped to the ground near the plaintiff. Sufficient impact was held to have resulted from dust in the plaintiff's eyes or from something slight which hit the plaintiff on the neck. Christy Bros. Circus v. Turnage, 144 S.E. 680 (Ga. Ct. App. 1928): Horse evacuated bowels into plaintiff's lap. Jones v. Brooklyn Heights R.R., 48 N.Y.S. 114 (App. Div. 1896): A small incandescent light bulb fell from the roof of a car striking plaintiff. Templin v. Erkekedis, 84 N.E.2d 728 (Ind. App. Ct. 1949): Doctor negligently ruptured hymen while conducting an examination. Kenney v. Wong Len, 128 A. 343 (N.H. 1925): Plaintiff found a portion of a mouse in her mouth while eating Chinese food.

17 2 F. HARPER & F. JAMES, LAW OF TORTS § 18.4, at 1031-33 (1956).

18 Bosley v. Andrews, 142 A.2d 263 (Pa. 1958). Judge Musmanno in a capable and satirical dissenting opinion states, "It seems to me that it is a violation of the living spirit of the law to adhere to an ancient rule which has no pragmatic application to realities of today." *Id.* at 274. *But see* Potere v. City of Philadelphia, 112 A.2d 100 (Pa. 1955), where a truck driver was forced to jump from his cab due to road construction problems and suffered a hernia. Recovery was allowed for mental anguish accompanying physical injury.

19 W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54, at 329 (4th ed. 1971).

20 *Id.* at 330; *cf.* McNiece, *Psychic Injury and Tort Liability in New York,* 24 ST. JOHN'S L. REV. 1, 33-37 (1949).

21 Twomley v. Central Park N.&E.R.R.R., 69 N.Y. 158 (1877): The plaintiff was injured when he jumped from one of the defendant's horse cars which the driver had negligently driven in front of a train. Comstock v. Wilson, 177 N.E. 431 (N.Y. 1931). A woman fainted and fractured her skull resulting in death after an automobile accident which also involved a minor impact. The court indicated that the reason for the impact rule was the fear for false claims which was not present when the injury occurred immediately after the defendant's negligent act, regardless of impact. Cohn v. Ansonia Realty Co., 148 N.Y.S. 39 (App. Div. 1914): When the plaintiff saw her children going up in an elevator without an attendant, she fainted and fell into the open elevator shaft.

22 The major industrial states from which the impact rule was first derived have capitulated in this period. Daley v. LaCroix, 179 N.W.2d 390 (Mich. 1970); Battalla v.

applied again.[23]

The majority rule today is the zone of danger rule.[24] A duty extends to all those people who may be placed in danger of physical impact or injury by a negligent act. A breach of this duty renders the defendant liable for any foreseeable injuries, including those resulting from emotional shock.[25] This is substantially a return to general negligence principles.[26]

The zone of danger rule is, however, a mechanical limitation on the application of negligence principles when it is applied to bystanders who witness injuries to others. In one of the first decisions to overrule the impact requirement,[27] it was stated that shock, to be compensable, must have been the result of fear for one's own safety and not for that of a third person.[28] The requirement that the plaintiff must have feared primarily for his own safety was soon held not to apply to bystanders who were in the zone of danger but feared for the safety of another.[29] The classic American decision is *Waube v. Warrington*[30] where a mother suffered severe shock and soon died after watching from a position of safety as her child was run over and killed. The court purported to follow the rule of *Palsgraff v. Long Island R.R.*[31] and found no breach of duty towards the mother, but went on to state that the duty of the defendant should not "be extended to any recovery of physical injuries sustained by one out of the range of ordinary

State, 176 N.E.2d 729 (N.Y. 1961); Falzone v. Busch, 214 A.2d 12 (N.J. 1965); Niederman v. Brodsky, 261 A.2d 84 (Pa. 1970).

23 W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54, at 332 (4th ed. 1971).

24 Alabama Fuel & Iron Co. v. Baladoni, 73 So. 205 (Ala. Ct. App. 1916); Purcell v. St. Paul City Ry., 50 N.W. 1034 (Minn. 1892); Chiuchiolo v. New England Wholesale Tailors, 150 A. 540 (N.H. 1930); Mack v. South Bound R.R., 29 S.E. 905 (S.C. 1897).

25 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 18.4, at 1034-35 (1956).

26 *Id.* at 1034-35.

27 Dulieu v. White & Sons [1901], 2 K.B. 669: The defendant's servant negligently drove a two horse van into a public house causing the plaintiff to give premature birth. The court found that a rigid impact requirement was unreasonable when the negligent act was the proximate cause of the injury complained of.

28 *Id.* at 675. Kennedy, J., stating: "The shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself. A. has, I conceive, no legal duty not to shock B.'s nerves by the exhibition of negligence towards C. . . . ."

29 Hambrook v. Stokes [1925], 1 K.B. 141 (C.A. 1924): A mother sent her children off to school around a bend in the road and immediately thereafter a driverless lorry came around the bend from that direction and crashed into a wall near her. The mother miscarried and died. The court noted that the rule that a plaintiff who was in the zone of danger must also fear primarily for himself would result in recovery for the mother who feared for herself, but not for one who feared for her children first.

30 258 N.W. 497 (Wis. 1935); *accord*, Resavage v. Davis, 86 A.2d 879 (Md. 1952).

31 162 N.E. 99 (N.Y. 1928), in which Judge Cardozo stated: "In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury. [Citation omitted.] The plaintiff sues in her own right . . . and not as the vicarious beneficiary of a breach of duty to another." *See also* Prosser, *Palsgraff Revisited*, 52 MICH. L. REV. 1 (1953).

physical peril as a result of the shock of witnessing another's danger."[32] The court did not consider the possibility that a plaintiff who qualified under *Palsgraff* might not qualify under the zone of danger rule.

The English courts were the first to recognize the distinction between the zone of physical risk and the zone of emotional risk. In *Bourhill v. Young*[33] a fishwife heard a highway accident and saw the gory results moments later. She alleged that this was the cause of a stillbirth one month later. Recovery was denied, Lord Porter saying that "to establish a duty towards herself, the appellant must still show that the cyclist should reasonably have foreseen *emotional injury* to her . . . ."[34] In *King v. Phillips*[35] the lack of foreseeability of shock was the basis of denying recovery to a mother who heard her child scream and looked out to see his tricycle under a taxicab. Lord Singleton stated, "I find it difficult to draw a distinction between damage from physical injury and damage from shock; prima facie, one would think that, if a driver should reasonably have foreseen either, and damage resulted from the one or from the other, the plaintiff would be entitled to succeed."[36]

This reasoning did not take hold in the United States and recovery was mechanically denied to bystanders who were without the zone of danger until the California Supreme Court case of *Dillon v. Legg*.[37] In that case a mother saw her child struck down by a car while standing just outside the zone of danger. A second daughter was closer and may have been in the zone. It was stated that these facts "exposed the hopeless artificiality of the zone-of-danger rule."[38] The court discussed the traditional reasons for denying recovery in mental shock cases concluding that most of them had been rendered moot and stated the additional burden placed on the activities of defendants by imposing liability in bystander cases would not be excessive. It was held that if the injury through shock was foreseeable, there was a duty to refrain from inflicting such shock. Three factors were listed as guidelines to assist trial courts in determining whether such injuries were foreseeable: (1) the plaintiff's physical proximity to the accident, (2) whether the shock resulted from observance of the accident or learning of it from others, and (3) the closeness of the relationship between the plaintiff and the victim. The result is that the defendant's duty and liability extend to the perimeters of the zone of emotional danger. Three dis-

32 Waube v. Warrington, 258 N.W. 497, 501 (Wis. 1935).
33 [1943] A.C. 92 (Scot. 1942).
34 *Id.* at 119 (emphasis added). Lord Wright commented, "The lawyer likes to draw fixed and definite lines and is apt to ask where the thing is to stop. I should reply it should stop where in the particular case the good sense of the jury or the judge decides." *Id.* at 110.
35 [1953] 1 Q.B. 429 (C.A.).
36 *Id.* at 437.
37 69 Cal. Rptr. 72 (1968).
38 *Id.* at 75.

senting justices favored the court's previous ruling in *Amaya v. Home Ice, Fuel & Supply Co.*,[39] in which the zone of danger rule had been adopted, and stated that the majority was "embarking upon a first excursion into the 'fantastic realm of infinite liability.' "[40] It was thought that no stopping point could be found since the majority's guidelines would break down under analysis. It can be argued that this prophecy was fulfilled one year later when a father was allowed to recover for shock with physical consequences when he observed an injury to his son moments after it occurred,[41] but the guidelines were intended as aids in determining foreseeability and not as rigid rules.

Two jurisdictions soon rejected *Dillon*. In *Guilmette v. Alexander*[42] the defendant passed a stopped school bus at a high rate of speed and struck the plaintiff's daughter as plaintiff watched from across the street. The court refused to impose a duty saying that liability could not be brought within manageable limits. In *Tobin v. Grossman*[43] a mother saw her child shortly after it was struck by an automobile. The court cited a number of public policy factors which must be balanced against the interest in freedom from emotional disturbance, and determined that the weight did not favor the creation of a duty.

A favorable reaction to *Dillon* came from the Hawaiian Supreme Court in *Rodrigues v. State*.[44] There, failure to keep a culvert clear resulted in the flooding of the plaintiff's home and recovery for mental anguish was allowed. The court considered the public policy factors discussed in *Tobin* and stated that "the interest in freedom from negligent infliction of serious mental distress is entitled to independent legal protection."[45] The court ruled that general tort principles would determine liability in the future. The Washington Supreme Court has recently evidenced a willingness to follow *Dillon*.[46]

One English decision is directly in point with the present analysis. In *Boardman v. Sanderson*[47] the defendant backed his automobile out of a repair stall knowing that the plaintiff was inside the service station

39 29 Cal. Rptr. 33 (1963): A mother watched her 17-month-old son run over by a truck while she was close by.

40 Dillon v. Legg, 69 Cal. Rptr. 72, 86 (1968).

41 Archibald v. Braverman, 79 Cal. Rptr. 723 (Dist. Ct. App. 1969).

42 259 A.2d 12 (Vt. 1969); *accord*, Jelley v. LaFlame, 238 A.2d 728 (N.H. 1968).

43 249 N.E.2d 419 (N.Y. 1969).

44 472 P.2d 509 (Hawaii 1970).

45 *Id.* at 520.

46 Schurk v. Christensen, 497 P.2d 937 (Wash. 1972): The defendants advised the plaintiffs that their teenage son was a capable babysitter knowing that he had molested young girls, including his own sister. The son molested the plaintiffs' daughter, and the court stated: "We do not hold that the strict application of the general rule against recovery for mental anguish and distress in tort liability cases should not be reexamined." *Id.* at 940. The court went on to say that this was not the case for it since the parents did not qualify under the three way test of Dillon v. Legg, 69 Cal. Rptr. 72 (1968). A three judge dissent thought that this was the proper case for such a ruling.

47 [1964] 1 W.L.R. 1317 (C.A. 1961).

and that the plaintiff's young son was playing outside. Recovery was allowed for the mental anguish of the father which resulted from his hearing the boy scream and helping to release his foot from underneath a tire. Foreseeability of the mental injury was found from the knowledge that the father was in the immediate vicinity.

In *Whetham v. Bismarck Hospital*,[48] the court quoted extensively from *Dillon* and *Amaya*. It considered *Tobin* and the *Restatement (Second) of Torts* section 313 (1965),[49] which restates the zone of danger rule, and noted the illustration that under this rule a mother who watches her child run down from a position of safety could not recover for mental anguish even though it resulted in physical injuries such as a heart attack.[50] The court without additional discussion or dissent concluded, "It is our view that the plaintiff herein could recover only if the defendant's negligent act had threatened the plaintiff herself with harm or placed her within what is termed the zone of danger."[51]

The court did not mention that the original *Restatement of Torts* section 313 (1934) carried a caveat that no opinion was expressed on the situation where a parent observed his child negligently exposed to peril and suffered shock with resulting physical injuries. This caveat was stricken in *Restatement (Second) of Torts*, but in a Note to the Institute it was stated that " '[t]he Advisers are unanimous in wishing to retain the Caveat, for its possible effect upon the courts—although it must be conceded that it has thus far had no effect.' "[52]

The negligent infliction of emotional harm to bystanders is an area of the law in which the continuing evolution of the common law can be plainly seen and in which the balancing of conflicting social interests by the common law courts is classically demonstrated. Protection has gradually been expanded through a series of mechanical rules and *sui generis* exceptions. The trend has been towards the application of general tort principles and independent protection. A number of reasons originally assigned to deny liability have been discredited. The recent cases have narrowed the controversy to the final issue of whether freedom from the negligent infliction of emotional harm, and its consequences, is more important to the society than the burden which

48 197 N.W.2d 678 (N.D. 1972).

49 Emotional Distress Unintended.

(1) If the actor unintentionally causes emotional disturbance to another, he is subject to liability to the other for resulting illness or bodily harm if the actor

(a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person . . . .

50 RESTATEMENT (SECOND) OF TORTS § 313(2), comment *d* (1965).

51 Whetham v. Bismarck Hosp., 197 N.W.2d 678, 684 (N.D. 1972).

52 RESTATEMENT (SECOND) OF TORTS § 313 (1965) (Tent. Draft No. 5 at 9, 1960), *quoted in* Amaya v. Home Ice, Fuel & Supply Co., 29 Cal. Rptr. 33, 39 n.7 (1963).

will be entailed by holding the public to a standard of conduct which will avoid such injuries.[53]

This final issue of the burden of liability has been clouded, however, by misgivings concerning the ability to determine a stopping point for liability which will limit liability to manageable dimensions.[54] In short, infinite liability is feared.[55] It may prove unfortunate that *Dillon* attempted to provide guidelines for determining when a duty is owed to bystanders. They have been attacked as flimsy barricades against the onslaught of infinite liability.[56] It is submitted that the general principles of negligence law, which the courts have been applying to an immense diversity of situations for over a hundred years, are sufficient to thwart any such onslaught. This conclusion is supported by the American experience with the independent protection of mental tranquility from intentional invasion[57] and by the long English experience of treating mentally induced injuries by the same standards that are used for physical injuries.[58]

Once a duty is recognized, the law of negligence requires that the plaintiff affirmatively prove the nature and extent of his injuries and that they were caused by the act of the defendant.[59] It must then be established that the act created an unreasonable danger of harm, physical or mental, to normally constituted persons in the class of people of which the plaintiff is a member.[60] While it has been argued that friends and distant relatives may be shocked by the death of any given person,[61] it can not be seriously maintained that severe[62] injury is foreseeable to normally constituted individuals who do not have very strong emotional ties to the deceased or who are not intimately associated with the accident. In fact, the results of the application of this standard in England have not differed greatly from those under the zone of danger rule.[63] When the burden of liability issue is stripped of the fear of

---

53 W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 53, at 325 (4th ed. 1971). "The statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct."

54 Tobin v. Grossman, 249 N.E.2d 419, 422 (N.Y. 1969); Guilmette v. Alexander, 259 A.2d 12, 14 (Vt. 1969); Waube v. Warrington, 258 N.W. 497, 500 (Wis. 1935).

55 Dillon v. Legg, 69 Cal. Rptr. 72, 86 (1968) (dissenting opinion).

56 Tobin v. Grossman, 249 N.E.2d 419, 424 (N.Y. 1969).

57 RESTATEMENT (SECOND) OF TORTS § 46(1) (1965); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12, at 55-60 (4th ed. 1971); Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40 (1956).

58 Goodhart, *The Shock Cases and Area of Risk*, 16 MOD. L. REV. 14 (1953).

59 W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30, at 143 (4th ed. 1971).

60 *Id.* § 43; 2 F. HARPER & F. JAMES, LAW OF TORTS § 18.4, at 1035 (1956).

61 Tobin v. Grossman, 249 N.E.2d 419, 422 (N.Y. 1969); Dillon v. Legg, 69 Cal. Rptr. 72, 86 (1968) (dissenting opinion).

62 It has never been urged that injuries which are not severe should be compensated. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54, at 334-35 (4th ed. 1971).

63 Goodhart, *The Shock Cases and Area of Risk*, 16 MOD. L. REV. 14 (1953).