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Recent Decisions

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RECENT DECISIONS

CONSTITUTIONAL LAW—DISMISSAL OF PUBLIC SCHOOL TEACHER—REFUSAL TO ANSWER QUESTIONS AS TO COMMUNIST ACTIVITY.

Beilan v. Board of Education (U.S. 1958)

The petitioner, a public school teacher, was discharged by the local school board for incompetency¹ because of his continued refusal, after warning that failure to answer might lead to his dismissal, to answer a question of his superintendent as to his membership in a Communist political association. The petitioner had also invoked the fifth amendment in refusing to answer similar questions asked him by a congressional subcommittee. The United States Supreme Court, in affirming the Supreme Court of Pennsylvania, *held* that the due process clause was not violated by petitioner's discharge on the ground of incompetency, evidenced by his refusal to grant the superintendent's request for information as to the petitioner's loyalty and his activities in certain subversive organizations. *Beilan v. Board of Education*, 357 U.S. 359 (1958).²

A state or its governmental subdivisions may not, without violating the due process clause, dismiss a public employee pursuant to a statute which is patently discriminatory or arbitrary and thus a state may not exclude persons from public employment pursuant to a statute which permits such solely on the basis of organizational memberships without regard to knowledge of the unlawful character of the organizations.³ A state may, however, dismiss public employees who, after proper notice and hearing, are found to advocate the overthrow of the government by un-

1. Section 1122 of the Pennsylvania Public School Code provides that: "The only valid causes for termination of a contract heretofore or hereafter entered into with a professional employee shall be immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, persistent and wilful violation of the school laws of this Commonwealth on the part of the professional employee." PA. STAT. ANN. tit. 24, § 1122 (Supp. 1957).

Incompetency has been construed by the Pennsylvania courts as subject to a broad interpretation and has been held to embrace not only a lack of substantive knowledge of the subjects to be taught, but also a want of physical ability as well as a loss of standing in the community resulting from conduct outside the classroom. *Horosko v. Mount Pleasant Township School Dist.*, 335 Pa. 369, 6 A.2d 866 (1939); *West Mahoney Township School Dist. v. Kelly*, 156 Pa. Super. 601, 41 A.2d 344 (1945); *Appeal of Schuer*, 36 Pa. D. & C. 531 (C.P. 1939). See 2 VILL. L. REV. 418-19 (1957) for a discussion of the Pennsylvania Supreme Court's statutory interpretation.

2. *Beilan v. Board of Education*, 357 U.S. 359 (1958).

3. *Wieman v. Updegraff*, 344 U.S. 183 (1952).

lawful means or who are unable to explain satisfactorily membership in organizations found to have that objective.⁴ Similarly, it may inquire of public employees as to matters which relate to their continued fitness to serve as public employees, including past and present membership in the Communist Party and similar organizations, and may discharge employees who fail to disclose pertinent information which the supervising authorities may require.⁵ However, a state may not infer guilt and discharge public employees solely because they exercise their constitutional privilege under the fifth amendment before a congressional investigating committee.⁶ The dismissal of the petitioner here, however, was not based upon his refusal to answer during the hearing before the congressional subcommittee but was, instead, based on a finding that he had refused to answer questions relating to his fitness during an interview with his administrative superior.⁷

Mr. Justice Brennan, in his dissent, states that the findings of state courts should be reviewed by the Supreme Court when the state court refuses to recognize what has in fact occurred.⁸ He indicates that what has in fact occurred here is that the petitioner was dismissed on the grounds of disloyalty.⁹ The Pennsylvania Supreme Court, however, unambiguously declares that the cause for the dismissal was not disloyalty but was, instead, incompetency, reasoning that the failure to answer the questions asked displayed a lack of frankness and candor on the part of the petitioner, and the qualities of frankness and candor are traits desirable in a teacher.¹⁰ Despite the fact that the question asked of the petitioner related to his loyalty, the issue as to whether refusal to answer such a question would be included under the statutory definition of incompetency¹¹ would seem to be peculiarly the function of the courts of Pennsylvania.¹² Granting, however, that petitioner was not dismissed because of inferences of disloyalty drawn from his failure to answer questions concerning his loyalty, Mr. Justice Brennan suggests that the community will believe that peti-

4. *Adler v. Board of Education*, 342 U.S. 485 (1952).

5. *Garner v. Board of Public Works*, 341 U.S. 716 (1951).

6. *Slochower v. Board of Education*, 350 U.S. 551 (1956).

7. *Beilan v. Board of Education*, 386 Pa. 82, 94, 125 A.2d 327, 333 (1956); *aff'd* 357 U.S. 359 (1958). In the following cases, Massachusetts, New York and New Jersey, respectively, have dismissed teachers under similar circumstances: *Faxon v. School Comm.*, 331 Mass. 531, 120 N.E.2d 772 (1954); *Adler v. Wilson*, 282 App. Div. 418, 123 N.Y.S.2d 655 (3d Dep't 1953); *Laba v. Board of Education*, 23 N.J. 364, 129 A.2d 273 (1957).

8. *Beilan v. Board of Education*, 78 Sup. Ct. 1311, 1329 (1958) (dissent).

9. *Beilan v. Board of Education*, *supra* note 8 at 1331.

10. "If the appellee had been charged with being a subversive, it may be conceded that the Loyalty Act should have been employed, but this was not the charge. Appellee was charged with incompetency based on his refusal to respond to a pertinent inquiry as to his fitness to be a teacher." *Beilan v. Board of Education*, 386 Pa. 82, 88, 125 A.2d 327, 330 (1956); *aff'd* 357 U.S. 359 (1958) (Emphasis of the court).

11. See *supra* note 1.

12. See *Barsky v. Board of Regents*, 347 U.S. 442, 448 (1954). *Chicago, M., St. P. & P. Ry. v. Risty*, 276 U.S. 567, 570 (1928).

tioner was discharged for disloyalty thereby stamping him with a "badge of infamy"¹³ which would hinder his opportunity to earn a living in the profession for which he is trained. In the instant case, however, the questions were asked in privacy and the superintendent's records do not indicate that the petitioner was considered to be disloyal.¹⁴ Furthermore, the label placed on the petitioner is that of incompetent rather than disloyal.¹⁵ Assuming, however, that the petitioner will be stamped with a "badge of infamy" as a result of his dismissal, it would still be necessary to show that he was not accorded due process in order to compel the finding that he was improperly dismissed. In determining whether due process was accorded petitioner, it is necessary to consider whether the privilege against self-incrimination is necessary to due process in this situation.¹⁶ Despite the difference of opinion as to the use of the privilege,¹⁷ it would seem that all would agree that it was not designed to excuse a teacher from being candid where the teacher is being questioned in private by his administrative superior with regard to whether he is competent.¹⁸ The Court has recognized this in the instant case in acknowledging that Pennsylvania may dismiss a teacher who fails to adhere to the high standards which the Commonwealth demands of its teachers, one of these standards being that of frankness and candor. If *Konigsberg v. State Bar*,¹⁹ a case which involved a similar refusal to answer a question concerning Communist Party activity, can be considered to have held that unfavorable inferences concerning truthfulness and candor can not be drawn from the refusal to answer such a question itself, where that refusal was in good faith because based on the belief that the United States Constitution prohibited such type of inquiry,²⁰ then that decision should be seriously reconsidered in light of the decision in the instant case.

David H. Moskowitz

13. *Wieman v. Updegraff*, 344 U.S. 183, 190-91 (1952).

14. See Record, pp. 81a, 88a (Opinion of Superintendent of Public Instruction, Commonwealth of Pennsylvania, as to Haas, November 18, 1954).

15. *Compare with* *Lerner v. Casey*, 357 U.S. 468 (1958) (subway conductor was dismissed under New York's Security Risk Law).

16. See *Ullman v. United States*, 350 U.S. 422 (1956), where the Court indicates that it will not broaden the interpretation of the self-incrimination provision to include anything more than protection against actual prosecution.

17. For attacks upon the use of the self-incrimination privilege, see *Hook, COMMON SENSE AND THE FIFTH AMENDMENT* (1957); *Williams, Problems of the Fifth Amendment*, 24 *FORDHAM L. REV.* 19 (1955); and *Baker, Self-Incrimination: Is the Privilege an Anachronism*, 42 *A.B.A.J.* 633 (1956). For defenses of the use of the privilege against self-incrimination, see *GRISWOLD, THE FIFTH AMENDMENT TODAY* (1955); and *Griswold, The Fifth Amendment Today*, 39 *MARQ. L. REV.* 148 (1955-56).

18. See *supra* note 16. *Ass'n of Am. Law Schools, Proceedings* 111 (1953); *Ass'n of Am. Law Schools, Proceedings* 115 (1954); *Ass'n of Am. Law Schools, Program and Reports of Committees* 41 (1956); *Academic Freedoms and Tenure in the Quest for National Security*, 42 *A.A.U.P. BULL.* 49 (1956).

19. 353 U.S. 252 (1957). See 3 *VILL. L. REV.* 93 (1957).

20. *Konigsberg v. State Bar*, *supra* note 19 at 270. It is questionable whether the Court's statement on this problem was dictum or whether it was necessary to the holding.

CONSTITUTIONAL LAW—FREEDOM TO TRAVEL—BELIEFS AND ASSOCIATIONS NO BASIS FOR DENYING PASSPORTS.

Kent v. Dulles (U.S. 1958)

Separate actions were instituted against the Secretary of State by Rockwell Kent and Walter Briehl in the District Court for the District of Columbia for declaratory judgments that plaintiffs were entitled to passports.¹ Both complaints were dismissed, and the dismissals were upheld by the court of appeals. The Supreme Court granted certiorari and heard both cases together. In each case petitioner had been denied a passport because of alleged Communist affiliations and for failure to supply an affidavit as to whether he was then or ever had been a Communist. With four justices dissenting, the Supreme Court reversed the holding of the court of appeals and *held* that Congress had not given the Secretary of State authority to withhold passports from citizens because of their beliefs and associations.² *Kent v. Dulles*, 357 U.S. 116 (1958).³

Freedom to travel within the United States is recognized as a fundamental right of national citizenship and a liberty guaranteed by the Constitution.⁴ Freedom to travel outside the United States has also been found to be a protected personal liberty;⁵ so that it has been held to be a violation of due process to deny a United States citizen permission to leave the Canal Zone after he had complied with all the regulations for departure.⁶ These decisions, however, did not resolve the question of whether the right to travel includes the right to a passport.⁷ Previously, when most

1. Kent wanted to visit England and attend a meeting of an organization known as the "World Council of Peace." Briehl, a psychiatrist, wished to attend a psycho-analytic congress in Geneva and a World Mental Health Organization Congress in Istanbul.

2. The applicable statutory provisions are: "The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe . . . and no other person shall grant, issue or verify such passports." 44 STAT. 887, 22 U.S.C. § 211a (1926); "When the United States is at war or during the existence of any national emergency proclaimed by the President . . . it shall . . . be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport." 66 STAT. 190, 8 U.S.C. § 1185 (1952). The proclamation necessary to implement the restrictions of this Act was issued by President Truman on January 17, 1953. 67 STAT. c31, Proc. No. 3004 (1953).

3. *Kent v. Dulles*, 357 U.S. 116 (1958).

4. *Edwards v. California*, 314 U.S. 160 (1941); *Williams v. Fears*, 179 U.S. 270 (1900); *Crandal v. Nevada*, 73 U.S. (6 Wall.) 35 (1868).

5. *Schachtman v. Dulles*, 225 F.2d 938, 941 (D.C. Cir. 1955); *Bauer v. Acheson*, 106 F. Supp. 445, 451 (D.D.C. 1952). See also UNIVERSAL DECLARATION OF HUMAN RIGHTS, art. 13, ¶ 2: "Everyone has the right to leave any country, including his own, and to return to his country." *Contra*, Note, 3 STAN. L. REV. 312 (1952), in which the constitutional right to international travel is denied.

6. *Walker v. Chief Quarantine Officer*, 69 F. Supp. 980 (D. Canal Zone 1943).

7. For an interesting article affirming this right by the attorney who argued the *Kent* case, see Boudin, *The Constitutional Right to Travel*, 56 COLUM. L. REV. 47 (1956).

countries did not require a passport for exit or entry,⁸ a passport was merely a request to foreign governments to allow the bearer to pass safely through their territory; as such, a passport was a political document entirely within the discretion of the Secretary of State to grant or refuse.⁹ Today, however, when foreign travel is impossible without a passport,¹⁰ a refusal by the Secretary of State to grant a passport is subject to judicial review, because it interferes with freedom of travel.¹¹ Using this power of review, the court of appeals has declared a refusal by the Secretary of State to grant a passport to an applicant because he was chairman of an organization on the Attorney General's subversive list to be a violation of due process.¹² Similarly, the revocation of the passport of an American correspondent working in France was struck down because she had not been granted a proper hearing.¹³ Prior to the passage of section 211a in 1926, passports had been refused principally for two reasons: lack of allegiance to the United States, and illegal conduct. Although the discretionary power over passports granted to the Secretary of State in section 211a is expressed in broad terms, the Court in the present case held that the only grounds for refusal authorized by this act are those established by previous administrative practice; and that this discretionary power has not been extended by section 1185 which makes a passport necessary for departure and authorizes the Secretary of State to issue them.¹⁴

The instant case marks the first time that the Supreme Court has expressly recognized that the crucial function of a passport is control over exit, that the right of exit is included in the liberties protected by the fifth amendment, and that the denial of a passport must be for reasons sufficient to satisfy the requirements of due process.¹⁵ By ruling that Congress has not given the Secretary of State authority to refuse passports to Kent and Briehl on the basis of their beliefs and associations, the Court has left unanswered the question of whether Congress can constitutionally delegate such authority to the Secretary of State. However,

8. Prior to World War I only Persia, Roumania, Russia and Serbia required a passport for exit or entry. 12 DEP'T. STATE BULL. 1066 (1945).

9. *Urtetiqui v. D'Arbel*, 34 U.S. (9 Pet.) 692 (1835); 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW, § 268 (1941); 2 HYDE, INTERNATIONAL LAW § 401 (2d rev. ed. 1947); 23 OP. ATTY. GEN. 509 (1901); 13 OP. ATTY. GEN. 90 (1869).

10. See note 2 *supra*. Even if the United States were to drop its passport requirements, it would still be impossible to enter most foreign countries without a passport. See Comment, 61 YALE L.J. 171 n. 3 (1952).

11. *Perkins v. Elg*, 307 U.S. 325 (1938); *Kraus v. Dulles*, 235 F.2d 840 (D.C. Cir. 1956); *Boudin v. Dulles*, 235 F.2d 532 (D.C. Cir. 1956); *Schachtman v. Dulles*, 225 F.2d 938 (D.C. Cir. 1955); *Bauer v. Acheson*, 106 F. Supp. 445 (D.D.C. 1952).

12. *Schachtman v. Dulles*, 225 F.2d 938 (D.C. Cir. 1955).

13. *Bauer v. Acheson*, 106 F. Supp. 445 (D.D.C. 1952).

14. *Kent v. Dulles*, 78 Sup. Ct. 1113, 1119 (1958).

15. *Kent v. Dulles*, *supra* note 14 at 1118. The letter sent to Rockwell Kent informing him that his passport application had been denied because "the Department is not willing at this time to grant you passport facilities to any countries for any purposes," illustrates the need for some judicial restraint on the Secretary of State's discretionary power.

the Court's warning that it would be faced by serious constitutional questions if it were to hold that sections 1185 and 211a¹⁶ had given the Secretary of State authority to refuse passports for ideological reasons, should not be interpreted as casting doubt on Congress' power to deny passports on such grounds or to delegate such power to the Secretary of State. The serious constitutional questions referred to by the Court were undoubtedly whether sections 1185 and 211a contained adequate standards to guide the Secretary of State in applying the broad discretionary powers delegated to him. This is evident from the Court's observation that the right of exit can be regulated only by Congress, that any delegation of such authority must contain standards adequate to meet constitutional requirements, and that there are no express provisions in sections 1185 and 211a authorizing passport refusals on ideological grounds.¹⁷ Although the four dissenting justices felt that the war-time powers were applicable in the instant case because of the present cold war,¹⁸ it would not appear that Communism, although a serious menace, poses such an imminent threat to our nation today as was present in *Korematsu v. United States*,¹⁹ where the Supreme Court allowed citizens of Japanese ancestry to be excluded from their homes during World War II because there was a showing of the gravest imminent danger to the public safety. Furthermore, it would not seem that our national security requires that the Secretary of State be allowed to refuse passports on ideological grounds, since our national security can be adequately protected under the existing laws which permit the Secretary of State to deny a passport to any applicant engaging in activity which would violate the laws of the United States.²⁰ There would appear to be little reason why any citizen, even though a Communist, should be prevented from going abroad on business which would be perfectly legal for him to perform in the United States. If there is to be a limitation upon constitutionally protected rights in the name of national security, there should first be a clear indication that the exercise of these rights will in some way affect our national security.

Patrick M. Ryan

16. See note 2 *supra*.

17. *Kent v. Dulles*, *supra* note 14 at 1120.

18. *Kent v. Dulles*, *supra* note 14 at 1126 (dissent).

19. 323 U.S. 214 (1942).

20. See *Kent v. Dulles*, *supra* note 14 at 1119.

CONTRACTS—IMPLIED OFFER FOR A UNILATERAL CONTRACT—
SUBSTANTIAL BREAK IN NEGOTIATIONS PRECLUDES RECOVERY
OF COMMISSIONS BY INDUSTRIAL BROKER.

Canaday v. Brainard (Del. 1958)

In 1950, defendant Canaday, who was president of Willys-Overland Motors, requested an industrial broker, Vance, to find a buyer for his stock in the company, but did not say at what price he would sell. In 1951, Brainard became associated with Vance, and after meeting with defendant, began making efforts to produce a purchaser. Brainard thought a sale of the stock could be made if Willys would first merge with the Kaiser-Frazer Company, with whom defendant had negotiated in 1950, these negotiations having failed because defendant insisted on a firm commitment to buy his holdings. Brainard told Kaiser that defendant was interested in a merger, and Kaiser contacted defendant. Defendant encouraged Brainard to negotiate with Kaiser, but shortly thereafter told him not to pursue it any further. Defendant and Kaiser met in September, 1951, and had a general discussion on the possibility of merger, but the discussions went no further at that time because of Kaiser's dissatisfaction with the sales prospects of Willys' new car. In January, 1953, Kaiser submitted a plan to defendant, and the sale of Willys' assets to a subsidiary of Kaiser-Frazer resulted, defendant subsequently disposing of his stock for a sum probably exceeding seventeen million dollars. Brainard's representative, and Vance, brought this action to recover either commissions, alleging performance of an agreement that defendant would pay them if they found a purchaser for his holdings, or, the reasonable value of their services, alleging that they were wrongfully prevented by defendant from consummating a sale — Vance, because defendant would never put a price upon the stock, and Brainard, because he was instructed not to follow up the Kaiser-Frazer deal. Plaintiffs were awarded a verdict for commissions, from which the defendant appealed. The Delaware Supreme Court reversed and *held* that there was not sufficient evidence to justify the finding that there was no substantial break in negotiations started by Brainard and resulting in the sale, and therefore Brainard could not have been the procuring cause of the sale as was required for recovery. Further, the court found that the defendant had not prevented performance because he was not bound to name a price to a prospect under the terms of his offer to Vance, and that Brainard could not recover for his alleged discharge in bad faith without showing that a sale was consummated as the result of his efforts. *Canaday v. Brainard*, 144 A.2d 240 (Del. 1958).¹

A contract of employment, either express or implied, is necessary to entitle a broker to compensation for services rendered.² A prerequisite to

1. *Canaday v. Brainard*, 144 A.2d 240 (Del. 1958).

2. *Ford v. Gibson*, 191 Va. 96, 59 S.E.2d 867 (1950).

the existence of such a contract is an offer, definite and certain in its terms.³ Since no express contract was made in the instant case, one had to be implied from the circumstances before the plaintiff could recover. Before the court can infer an offer to a broker, however, there is a question whether the offer is definite and certain where the broker is not given the essential terms upon which a sale is to be made. In cases where the broker is given all of the essential terms upon which the seller wishes to sell, the offer impliedly requests the broker to produce a buyer who is ready, willing, and able to buy on those terms.⁴ However, such can not be inferred where the essential terms are not given. One court has held, therefore, that no offer was made to a real estate broker who was not given the terms on which to find a buyer.⁵ Another court has held, however, that there may be an offer where all of the terms are not disclosed upon which a sale is to be made, the terms of the offer being that the broker is to produce a prospective purchaser who subsequently shall meet the owner's terms.⁶ Whether the offer requests a return promise or an act is another element to be determined from the circumstances, the court in the instant case finding that there was an offer for a unilateral contract. In many cases of offers for unilateral contracts, part performance has been held to constitute acceptance of the offer, resulting in either a bilateral contract,⁷ or a unilateral contract with completion of performance as a condition precedent to the offeror's duty to perform.⁸ However, the offer in the instant case was found to call for a non-exclusive, independent agency relationship⁹ rather than for ordinary employment, and few courts have held that a doctrine of partial performance applies to such offers of non-exclusive, independent agencies.¹⁰ Most courts have held, as the court in the instant case, that the offer is revocable until the broker fully performs.¹¹ Once an offer for employment, such as that in the instant case, is established, before the broker is entitled to commissions, he must show that he was the procuring cause of the result for the accomplishment of

3. *General Motors Corp. v. Keener Motors, Inc.*, 194 F.2d 669 (6th Cir. 1952). This case held that an offer must be so definite in its terms that promises and performances to be rendered by each party are reasonably certain.

4. *Simmons v. Libbey*, 53 N.M. 362, 208 P.2d 1070 (1949).

5. *McCoy v. Wachovia Bank & Trust Co.*, 204 N.C. 721, 169 S.E. 644 (1933).

6. *Strout Loan Agency, Inc. v. De Forest*, 192 App. Div. 790, 183 N.Y. Supp. 119 (3d Dep't 1920).

7. *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654, 67 Pac. 1086 (1902); *Abbott v. Stephany Poultry Mkt.*, 44 Del. 513, 62 A.2d 243 (1948).

8. *Harris v. McPherson*, 97 Conn. 164, 115 Atl. 723 (1922); *Frank v. Myers*, 232 Mo. App. 681, 109 S.W.2d 54 (1937); *Hutchison v. Dobson-Bainbridge Realty Co.*, 217 S.W.2d 6 (Tenn. App. M.S. 1946) (a case involving an offer for an exclusive agency); *RESTATEMENT, CONTRACTS* § 45 (1932).

9. A non-exclusive, independent agent is one who is employed to achieve a result, and his compensation is contingent upon his accomplishing this result, though he is given no exclusive rights to achieve it. See, *MECHEM OUTLINES AGENCY* § 563 (4th ed. 1952).

10. For a case appearing to adopt such a theory see *Grossman v. Calonia Land & Improvement Co.*, 103 N.J.L. 98, 134 Atl. 740 (1926).

11. See *Wood v. Hutchison Coal Co.*, 85 F. Supp. 1010 (N.D. W. Va. 1949).

which the owner had promised to pay him.¹² Procuring cause is generally defined to mean that the broker's initial efforts in calling the buyer's attention to the property shall have set in motion a series of events which, without a break in their continuity, eventually culminate in the accomplishment of the objective of the employment of the broker.¹³ Whether the broker is the procuring cause of sale is said to depend on the particular circumstances of each case, and is normally a question of fact for the jury,¹⁴ the court in the instant case holding that since the only inference possible was that there was a substantial break in negotiations, as a matter of law, the plaintiff could not have been the procuring cause of the sale.¹⁵

Although the court in the instant case might have held that plaintiffs were not entitled to compensation because there was no offer of employment definite in its terms, it found that price in itself was merely a term of the offer for the sale of the stock and it was in defendant's discretion to set the terms for the prospect. This would appear proper since the owner of the stock was also president of the corporation, and better able to bargain as to a merger, or as to the value of the stock itself. Furthermore, because of the particular facts of the brokerage situation, the doctrine of partial performance should have no application here, although it had been previously adopted in the jurisdiction.¹⁶ In brokerage situations such as the one involved here, the prospective commission is usually far out of proportion to the reasonable value of the efforts involved; therefore, in addition to there being no restitutionary interest until the sale is consummated, there is no reliance interest to be protected as in cases where there is a detriment incurred which is substantial in proportion to the promised compensation.¹⁷ In addition, it would appear that the only inference that could be drawn from the facts was that, as a matter of law, there was a substantial break in negotiations. The determination by the court that whether there is a substantial break in the negotiations depends more on the chain of circumstances than on lapse of time is particularly important in cases such as the instant one where the owner is to negotiate rather than the broker, as the owner could easily simulate a lapse of time by prolonging negotiations. If the court had wished to allow plaintiffs to recover for efforts made, it could have done so by finding an offer for

12. *Slaughter v. Stafford*, 141 A.2d 141 (Del. 1958).

13. *Clark v. Ellsworth*, 66 Ariz. 119, 184 P.2d 821 (1947); *Hoke v. Marcis*, 127 N.E.2d 54 (Ohio 1955).

14. "Ordinarily this is a question of fact for the jury, since its resolution must often depend on a choice of possible inferences." *Canaday v. Brainard*, 144 A.2d 240, 244 (Del. 1958).

15. The court said: "Whether there was a substantial break in the negotiations depends not so much on lapse of time as upon the chain of circumstances — the question of causation." *Canaday v. Brainard*, 144 A.2d 240, 244 (Del. 1958).

16. *Abbott v. Stephany Poultry Mkt.*, 44 Del. 513, 62 A.2d 243, 246 (1948), where the court held that before applying the doctrine, it is necessary to weigh the equities.

17. See note 16 *supra*, where the offeree incurred a detriment clearly substantial in proportion to the expected compensation.

ordinary employment rather than independent agency and commissions, though it would have had to strain to do so since such relief could not have been sought by plaintiffs on appeal, and most brokerage agreements are on a commission basis.

Charles C. Keeler

LABOR LAW—SECONDARY BOYCOTT—DEFENSE BASED ON
“HOT CARGO” CLAUSE.

Local 1976, United Brotherhood of Carpenters, AFL v. N.L.R.B.
(U.S. 1958)

Members of Local 1976, United Brotherhood of Carpenters, AFL, had a collective bargaining contract with a general contractor which contained a “hot cargo” clause,¹ and under the terms of that clause, the union workers refused to hang non-union doors which had been delivered to the construction site, by a local distributor. The distributor instituted proceedings before the National Labor Relations Board on the grounds that the union, representing the employees of the general contractor, had violated the secondary boycott provisions of Section 8(b)(4)(A) of the National Labor Relations Act.² The Board held that there was a violation under this section, and the court of appeals enforced the Board’s cease and desist order. The Supreme Court in affirming the judgment held that though the National Labor Relations Act did not bar the inclusion of a “hot cargo” clause in the collective bargaining contract, such a clause did not constitute a valid defense for the union against the charge of secondary boycott under section 8(b)(4)(A), since the secondary employer, here the general contractor, at the time the non-union doors were to be hung, did not agree to comply with the “hot cargo” provision. *Local 1976, United Brotherhood of Carpenters, AFL v. N.L.R.B.*, 78 Sup. Ct. 1011 (1958).³

The Supreme Court has long recognized a basic distinction between a primary boycott and a secondary boycott; the former being a refusal to deal, or peacefully to persuade others not to deal, directly with complainant; the latter being the exercise of coercive pressure upon the customers in order to cause them to withhold or withdraw patronage from the com-

1. “Hot cargo” clauses are provisions of collective bargaining agreements by which an employer agrees that his employees shall not be required to handle non-union goods. *Douds v. Milk Drivers and Dairy Workers*, 133 F. Supp. 336 (N.J. 1955).

2. 61 STAT. 136, 141 (1947), 29 U.S.C. § 158(b)(4)(A) (1952).

3. *Local 1976, United Brotherhood of Carpenters, AFL v. N.L.R.B.*, 78 Sup. Ct. 1011 (1958).

plainant.⁴ Primary boycotts, both by employers⁵ and by labor,⁶ if peacefully carried on, have been held legal, the theory being that the right of an individual to refuse to deal with another is generally as absolute as the right of an individual to quit work in order to secure higher wages or better working conditions. Initially under the Sherman Act,⁷ and later the Clayton Act,⁸ secondary boycotts either by employers,⁹ or by labor,¹⁰ were found illegal where they interfered with interstate commerce, the courts reasoning that such boycotts obstruct a free and open market, and further that an innocent third party in an industrial conflict should not be made, against his will, the ally of one party to the destruction of the other.¹¹ However, the Supreme Court in *United States v. Hutcheson*,¹² substantially modified the effect of previous decisions which had brought union boycott activity within the prohibitions of anti-trust legislation. The Court in that case felt that Section 4 of the Norris-LaGuardia Act,¹³ and a fair construction of Section 20 of the Clayton Act,¹⁴ made secondary boycotts by unions generally unenjoinable.¹⁵ However, the Court in applying Section 8(b)(4)(A) of the National Labor Relations Act has ruled that secondary boycotts by unions are illegal and may be enjoined.¹⁶ Though the so-called "hot cargo" clause, a particular kind of secondary boycott, has been held illegal under the Sherman Act as being against public policy,¹⁷ the instant case is the first ruling on the application of Section 8(b)(4)(A) of the National Labor Relations Act to such clauses by the Supreme Court.

In the instant case the Court rests its decision on a rather narrow interpretation of the purpose of Congress in enacting Section 8(b)(4)(A) of the National Labor Relations Act. The majority takes the view that the evil aimed at is the coercion of neutral or secondary employers who are not involved in a primary labor dispute. The Court is concerned that the "hot cargo" agreement itself may have been forced initially upon the

4. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

5. *Federal Trade Comm'n v. Raymond Bros.-Clark Co.*, 263 U.S. 565 (1924); *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

6. *Edelstein v. Gilmore*, 35 F.2d 723 (2d Cir. 1929), *cert. denied*, 280 U.S. 607 (1929).

7. 26 STAT. 209 (1890), 15 U.S.C. §§ 1-7 (1952).

8. 38 STAT. 730 (1914), 15 U.S.C. § 20 (1952).

9. *Eastern States Retail Lumber Ass'n v. United States*, 234 U.S. 600 (1914); *Aikens v. Wisconsin*, 195 U.S. 194 (1904).

10. *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n*, 274 U.S. 37 (1927); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

11. *Pacific Typesetting Co. v. International Typographical Union*, 125 Wash. 273, 216 Pac. 358 (1923).

12. 312 U.S. 219 (1941).

13. 47 STAT. 70 (1932), 29 U.S.C. §§ 101-15 (1952).

14. 38 STAT. 730 (1914), 29 U.S.C. § 52 (1952).

15. However the dicta implies that the Court was still willing to apply the Sherman Act to labor activities, if such activiting could be considered part of an illegal combination with non-labor groups in restraint of trade.

16. *Local 74 United Brotherhood of Carpenters v. N.L.R.B.*, 341 U.S. 707 (1951); *N.L.R.B. v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951).

17. *United States v. Brims*, 272 U.S. 549 (1926).

employer by strikes or other coercion, and, in effect, be a method whereby the union can accomplish indirectly against the secondary employer that which it cannot accomplish directly, thereby defeating the purpose of Congress. Therefore, since the purpose of the act is the protection of the neutral or secondary employer, the Court found that he cannot waive this protection by way of collective bargaining contracts. It should be noted, however, that nothing appears in the language of the act, or in the congressional debates¹⁸ which preceded its passage, which would indicate that Congress felt that an employer needed protection against his own collective bargaining agreements. Indeed, it is the essence of collective bargaining that there may be threats of coercion, and yet the results of such bargaining, as incorporated into the contract, should be, and generally are, enforced, if not otherwise illegal under the act.¹⁹ As the dissenting opinion points out, the holding of the instant case is capricious in that it deems a secondary boycott lawful where an employer agrees to abide by his contract, but unlawful if he reneges.²⁰ The effect of this decision is to make such collective bargaining agreements illusory since the union may be denied its bargained for consideration, *i.e.*, the protection from non-union competition that "hot cargo" provisions were meant to provide. Further, as the dissent argued, the decision may well lay the foundation for an expansion of industrial strife, as the employer's refusal to observe the terms of the contract may be met with employee walkouts or other reprisals. The basis for this inconsistent position appears to be the Court's desire to preserve for the employer the same commercial freedom he has at all times absent such agreements.²¹ It would seem that the rationale of the majority would be more compelling had it interpreted Section 8(b)(4)(A) of the National Labor Relations Act in connection with the broader foundation of Section 1(b) of the Labor Management Relations Act of 1947,²² which provides that the purpose and policy of that act is to promote the full flow of commerce and protect the rights of the public. Clearly, if the Labor Management Relations Act of 1947 were aimed at the protection of the public and of the market, the "hot cargo" agreements with the union could not be enforced because the secondary employer cannot waive the rights of others. Thus, it would follow that "hot cargo" clauses would be illegal per se as against public policy, thereby providing the protection for the public and the market which has been missing since the *Hutcheson* case. Such a ruling would afford protection for the neutral employers and their freedom of boycott with which the ma-

18. 93 CONG. REC. 4198 (1947).

19. *Hotel & Restaurant Employees Int'l Alliance v. Greenwood*, 249 Ala. 265, 30 So. 2d 696 (1947).

20. *Local 1976, United Brotherhood of Carpenters, AFL v. N.L.R.B.*, 78 Sup. Ct. 1011, 1022 (1958) (dissenting opinion).

21. Where the secondary employer refuses to handle the goods of the primary employer the relationship between these parties is one of primary boycott, and such boycotts have been held legal. See note 5 *supra*.

22. 61 STAT. 136 (1947), 29 U.S.C. 141(b) (1952).

jority seems concerned; and finally, though the unions would lose the benefits afforded by such clauses, they would at least be protected from the effect of illusory contracts as they would know clearly that all such agreements would not be enforced.

William B. Colsey, III

SALES—IMPLIED WARRANTY IN SALE OF FOOD—NECESSITY FOR
PRIVITY BETWEEN INFANT AND VENDOR WHERE
MOTHER IS THE PURCHASER.

Parish v. Great Atlantic & Pacific Tea Co. (N.Y. Munic. Ct. 1958)

This was an action for negligence and breach of warranty brought by plaintiff, individually and as guardian ad litem for her two infant daughters. Plaintiff purchased a sealed jar of jam from defendant which allegedly contained worms, and when she and her two daughters ate the worms they sustained injuries. When purchasing the jam, plaintiff did not disclose to the defendant the fact that she was making the purchase for the benefit of her children. Mr. Justice Starke,¹ speaking for the court, *held* that there could be no recovery for negligence, but plaintiffs could recover for breach of an implied warranty of fitness for purpose even though the children were not in privity of contract with the seller. *Parish v. Great Atlantic & Pacific Tea Co.*, 177 N.Y.S.2d 7 (Munic. Ct. 1958).²

The general rule in actions for breach of warranty by the consumer against the vendor is that, without privity of contract between the parties, recovery will not be granted.³ The courts, however, have used various devices to allow recovery by a consumer against a retailer regardless of privity of contract.⁴ Thus, New York has allowed recovery where a husband was injured by consuming bread which his wife had purchased even though the husband was not in privity with the retailer by applying a theory of agency, holding the wife to be the husband's agent.⁵ In a similar situation, where the purchaser-wife was injured, the wife was held to be acting in her own right and not as an agent.⁶ Where two sisters jointly operated a household, sharing expenses, and one was injured consuming food bought by the other, New York again allowed recovery, employing the household fund theory in holding the purchaser to be the plaintiff's agent even though the money used was shown not to be exclusively the plaintiff's, but from a mutually created fund.⁷ A third party beneficiary

1. Mr. Justice Starke is the author of an article in the *NEW YORK LAW JOURNAL* of April 8, 9, and 10, 1957, on the implied warranty of quality and wholesomeness in the sale of food.

2. *Parish v. Great Atlantic & Pacific Tea Co.*, 177 N.Y.S.2d 7 (Munic. Ct. 1958).

3. *Chysky v. Drake Bros. Co.*, 235 N.Y. 468, 139 N.E. 576 (1922).

4. See COMMENT, 24 *FORDHAM L. REV.* 428-30 (1955).

5. *Ryan v. Progressive Grocery Stores*, 255 N.Y. 388, 175 N.E. 105, (1931).

6. *Giminez v. Great Atlantic & Pacific Tea Co.*, 264 N.Y. 390, 191 N.E. 27 (1934).

7. *Bowman v. Great Atlantic & Pacific Tea Co.*, 284 App. Div. 663, 133 N.Y.S.2d 904 (4th Dep't), *aff'd without opinion*, 308 N.Y. 780, 125 N.E.2d 165 (1954).

theory was apparently applied in allowing recovery by the estate of a deceased child where a cowboy suit purchased by the mother ignited causing the child's death, the court found that the purchase was made by the mother for the benefit of the child.⁸ Recently lower courts in New York, including the court in the instant case, have allowed recovery in cases against the retailer, under various theories, regardless of privity though the court of appeals has not yet done so.⁹ The Uniform Commercial Code, under the heading of third party beneficiaries, allows recovery by household members or guests of the buyer, against his seller even though they are not in privity with each other, if it could be reasonably expected that such persons would consume the food.¹⁰ Recovery against either the manufacturer or the retailer, according to the fact situation, has been allowed under similar theories in jurisdictions other than New York. Thus it has been held that implied warranties run with the goods similar to covenants running with the land,¹¹ and that a warranty is created as a matter of public policy for the benefit of the ultimate consumer.¹²

This is no longer the age of the small grocery store where placing an insurer's liability on the vendor would be a great burden. It is the age of the commercial giant upon whom the burden of guaranteeing foods in sealed containers would cost little more than its outlay in trading stamps, since businesses that are not capable of self-insuring could take out appropriate insurance policies at reasonable cost.¹³ By increases in prices to meet the cost of such insurance the burden could be spread over

8. *Blessington v. McCrory Stores Corp.*, 305 N.Y. 140, 111 N.E.2d 421 (1953). The court did not state what theory was used. If the child's money had been used the mother would have been acting as the child's agent and therefore the agency theory could have applied. If the mother's money was used the third party beneficiary theory would have been appropriate. It is more likely, under the circumstances, that it was the mother's money or at least the father's money, with the mother acting as agent for the father, in making a contract for the benefit of the child.

9. See, e.g., *Conklin v. Hotel Waldorf Astoria Corp.*, 5 Misc. 2d 496, 161 N.Y.S.2d 205 (City Ct. 1957). The court allowed recovery where plaintiff's friend paid for her lunch in defendant's restaurant, stating that a contract was made by both parties when the meal was ordered and the warranty arose then and it did not matter who subsequently paid. In *Welch v. Scheibelhuth*, 6 Misc. 2d 466, 169 N.Y.S.2d 309 (Sup. Ct. 1957) the court allowed recovery by the husband, mother-in-law and brother-in-law of a housewife who purchased a contaminated cake, stating that implied warranties of wholesomeness in food cases are imposed by law and run to all who partake of the goods.

10. UNIFORM COMMERCIAL CODE § 2-318 states: "A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home"

11. Allowing recovery against the retailer are: *Welter v. Bowman Dairy Co.*, 38 Ill. App. 305, 47 N.E.2d 739 (1943), and *Anderson v. Tyler*, 233 Iowa 1033, 274 N.W. 48 (1937). *Coca Cola Bottling Works v. Lyons*, 145 Miss. 76, 111 So. 305 (1927) (allowed recovery against the manufacturer). In *Ladaro v. M.B.S. Cigar Corp.*, 177 N.Y.S.2d 6 (Munic. Ct. 1958), a New York court recently allowed recovery by the vendee of a retailer, against a manufacturer holding that the implied warranty of quality and wholesomeness ran with the goods.

12. *Jacob E. Decker & Sons, Inc. v. Capps*, 164 S.W.2d 828 (Tex. Civ. App. 1942); *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382 (1920). See *Welch v. Scheibelhuth*, 6 Misc. 2d 466, 169 N.Y.S.2d 309 (Sup. Ct. 1957).

13. For a discussion on food products liability insurance see *DICKERSON PRODUCTS LIABILITY AND THE FOOD CONSUMER* (1951) 266-68.

many people instead of resting upon a few retailers. Further, standards of public health and public policy seem to demand that the warranty of wholesomeness apply to all who consume the food and not just to the immediate vendee. Although, the third party beneficiary theory could be used to allow recovery in most of these instances against the retailer, the theory would be strained if extended to allow recovery to the consumer in situations where the food would be eaten by one not contemplated by the vendee at the time of purchase, particularly when it can be shown that the purchase was made for the benefit of another specific individual. It would also appear that the agency theory would not apply in all cases, since a host could not properly be called his guest's agent. Since warranties existed before assumpsit, and recovery for breach of warranty could have been had in either trespass or case,¹⁴ there is now no reason why recovery for breach of warranty should be made to depend on privity of contract. Though the elimination of the requirement of privity in the instant case is not authority for the elimination in New York of the requirement of privity in actions for breach of warranty by the vendee against the manufacturer, if the requirement were generally eliminated on the grounds of public policy, the consumer who did not purchase the food could recover against the retailer and the vendee of the retailer could recover against the manufacturer.¹⁵ Such recovery by the consumer who is not the vendee against the retailer can be had without satisfying the requirement of privity in those states which have adopted the Uniform Commercial Code,¹⁶ and relief by the vendee of the retailer against a manufacturer has already been afforded under third party pleading as in section 193a of the New York Civil Practice Act.¹⁷

John G. Hall

14. *Stuart v. Wilkins*, 1 Doug. 18, 99 Eng. Rep. 15 (K.B. 1778).

15. There is another privity problem similar to the one in the instant case. It is where the vendee tries to recover for his injuries from the manufacturer rather than from his vendor. Some of the devices used to bypass this have been, the application of the doctrine of *res ipsa loquitur* to food cases. *Miller v. National Bread Co.*, 247 App. Div. 88, 286 N.Y.S. 908 (4th Dep't 1936); or holding that the manufacturer has made representations to the public at large and the consumer is entitled to rely on them. *Coca Cola Bottling Co. of Fort Worth v. Smith*, 97 S.W.2d 761 (Tex. Civ. App. 1936); or treating the retailer as a mere conduit from the manufacturer to the consumer. *Mazett v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633 (1913).

16. See note 10 *supra*. There is some doubt as to whether this provision would cover a situation such as the one in *Chysky v. Drake Bros. Co.*, 235 N.Y. 468, 139 N.E. 576 (1922), where an employee received her meals as part of her pay, and was injured when she bit into a nail in a piece of cake sold by defendant to her employer. This does not seem to fit into the member of the household or guest exception to the privity requirement under the Uniform Commercial Code. However, today plaintiff could probably recover by suing her employer for breach of warranty, who could join the retailer. N.Y. CIV. PRAC. ACT § 193a (1946).

17. N.Y. CIV. PRAC. ACT § 193a (1946) states: "[A]fter the service of his answer, a defendant may bring in a person not a party to the action, who is or may be liable to him for all or part of the plaintiff's claim against him"

TORTS—DAMAGES—RECOVERY ALLOWED FOR MENTAL ANGUISH
RESULTING FROM FEAR OF CANCER.*Ferrara v. Galluchio* (N.Y. 1958)

Plaintiff, who was suffering from bursitis in the right shoulder, received a series of seven X-ray treatments from defendants who were doctors specializing in X-ray therapy. Subsequent to the seventh treatment, the shoulder began to itch, turned pink, then red, and blisters formed. These blisters ruptured and the skin peeled, leaving the raw flesh of the shoulder exposed. The defendants prescribed a salve for the condition which the plaintiff procured and used. The condition was diagnosed as chronic radio-dermatitis which was caused by X-ray therapy. Approximately two years after the treatments, the plaintiff was referred to a dermatologist who, after taking her history and examining her, prescribed a substance used in the treatment of radiodermatitis and advised her to have her shoulder checked every six months inasmuch as the area of the burn might become cancerous. In this action for malpractice the plaintiff introduced, on the issue of damages for mental anguish, the statement of the dermatologist to her that there was a possibility of cancer and the testimony of a neuro-psychiatrist to the effect that she was suffering from a severe cancerophobia and that she might have permanent symptoms of anxiety. The jury returned a verdict in favor of the plaintiff for \$25,000 of which \$15,000 was to compensate for the mental anguish flowing from the cancerophobia.¹ The decision of the appellate division upholding the judgment of the trial court was affirmed by the court of appeals, with three judges dissenting, which *held* that damages for mental anguish arising from the dermatologist's statement are recoverable and that his statement was admissible in evidence for the purpose of showing that there was a basis for the plaintiff's anxiety. *Ferrara v. Galluchio*, 5 N.Y.2d 16, 152 N.E.2d 249 (1958).²

Before mental suffering will be allowed as an element of damages, the courts require that in the circumstances of the case there be some guarantee of the genuineness of the plaintiff's claim which would tend to counterbalance the risk of fraud attendant such claims.³ While the majority of courts view a physical illness resulting from the mental anguish as being a sufficient guarantee,⁴ many courts, including New York,⁵ re-

1. The phobic apprehension that the cancer would ultimately develop in the site of the radiation burn.

2. *Ferrara v. Galluchio*, 5 N.Y.2d 16, 152 N.E.2d 249 (1958).

3. PROSSER, TORTS § 37 (2d ed. 1955).

4. HARPER & JAMES, TORTS 1034 (1956); PROSSER, TORTS 179 nn.18 & 19 (2d ed. 1955). Smith, *Relation of Emotions to Injury and Disease*, VA. L. REV. 193, 207, nn.31 & 32 (1940) (classifies states as to those which have impact requirements and those which do not).

5. *Comstock v. Wilson*, 257 N.Y. 231, 177 N.E. 431 (1931); *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 354 (1896). *But see Klumbach v. Silver Mount Cemetery Ass'n*, 242 App. Div. 843, 275 N.Y. Supp. 180 (2d Dep't 1934).

quire that it be shown that at least an impact or a force from without acted upon the plaintiff.⁶ Once the test of genuineness has been met, the plaintiff is no longer, as a matter of policy, precluded from recovering;⁷ and thus, the tortfeasor has been held liable for such consequences of his act as intense psychoneurosis,⁸ anxiety neurosis,⁹ and post-traumatic neurosis.¹⁰ Mental anguish occasioned by the victim's apprehension and anxiety over what he believes to be the possible consequences of his injuries is also a proper element of damages;¹¹ and recovery has been allowed for a pregnant woman's fear that her child might be born deformed;¹² for the apprehension of insanity;¹³ a reasonable fear of blood poisoning;¹⁴ anxiety that injury might result in paralysis;¹⁵ in death;¹⁶ and also for the victim's fear that the impact might result in cancer.¹⁷ It is not necessary that the fear itself be reasonable in that it is founded upon a probability supported by scientific fact, but only that it is reasonable for a jury to believe that the fear or neurosis in fact exists.¹⁸ Recovery will not be allowed, however, without sufficient evidence of the existence of the apprehension,¹⁹ or where the claim is so fantastic as to be unbelievable,²⁰ or where the fear persists

6. See note 4 *supra*. The requirement of impact has become little more than a formality, it being satisfied by a slight jar, *Comstock v. Wilson*, *supra* note 5; a blast of air filled with splinters, *Sawyer v. Dougherty*, 286 App. Div. 1061, 144 N.Y.S.2d 746 (3d Dep't 1955); or the inhalation of smoke, *Morton v. Stack*, 122 Ohio St. 115, 170 N.E. 869 (1930).

7. See *Homans v. Boston Elevated Ry.*, 180 Mass. 456, 62 N.E. 737 (1902). Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497, 504 (1922).

8. *Hess v. Philadelphia Transp. Co.*, 358 Pa. 144, 56 A.2d 89 (1948).

9. *Potere v. Philadelphia*, 380 Pa. 581, 112 A.2d 100 (1955).

10. *Tracy v. Hotel Wellington Corp.*, 175 N.Y. Supp. 100 (App. Div. 1st Dep't 1919) *aff'd*, 176 N.Y. Supp. 923 (App. Div. 1st Dep't 1919).

11. *Sherwood v. Chicago & N. M. Ry.*, 82 Mich. 374, 46 N.W. 773 (1890); *Webb v. Yonkers*, 51 App. Div. 194, 64 N.Y. Supp. 491 (2d Dep't 1900); McCORMICK, DAMAGES § 88 (1935); 4 SUTHERLAND, DAMAGES 4651 (4th ed. 1916).

12. *Bowley v. Duca*, 80 N.H. 548, 120 Atl. 74 (1923); *State v. McLaughlin*, 47 N.J. Super. 271, 136 A.2d 22 (1957); *Fehely v. Senders*, 170 Or. 457, 135 P.2d 283 (1943); *Rosen v. Yellow Cab*, 162 Pa. Super. 58, 56 A.2d 398 (1948); *Contra Nevada v. Ironwood*, 232 Mich. 316, 205 N.W. 93 (1925) (mere apprehensions are outside realm of pecuniary compensation). But this decision of the Michigan court is difficult to reconcile with *Sherwood v. Chicago*, *supra* note 11, and *Main v. Grand Rapids, G.T. & M.R.R.*, 207 Mich. 473, 174 N.W. 157 (1919).

13. *Walker v. Boston & M.R.R.*, 71 N.H. 271, 51 Atl. 918 (1902).

14. *Butts v. National Exchange Bank*, 99 Mo. App. 168, 72 S.W. 1083 (1903); *Godeau v. Blood*, 52 Vt. 251, (1880) (hydrophobia).

15. *Smith v. Boston & M.R.R.*, 87 N.H. 246, 177 Atl. 729 (1925).

16. *Watson v. Augusta Brewing Co.*, 124 Ga. 121, 52 S.E. 152 (1905).

17. *Dempsey v. Hartley*, 94 F. Supp. 918 (E.D. Pa. 1951); *Flood v. Smith*, 126 Conn. 644, 13 A.2d 677 (1940); *Alley v. Charlotte Pipe & Foundry Co.*, 159 N.C. 327, 74 S.E. 885 (1912).

18. *Dempsey v. Hartley*, *supra* note 17; *Smith v. Boston & M.R.R.*, 87 N.H. 246, 177 Atl. 729 (1925); *Bowley v. Duca*, 80 N.H. 548, 120 Atl. 74 (1923); *Fehely v. Senders*, 170 Or. 457, 135 P.2d 283 (1943).

19. *Lake Erie & W.R. Co. v. Johnson*, 191 Ind. 479, 133 N.E. 732 (1922) (plaintiff's own description of his mental condition is insufficient where it is only basis for assessing damages); *Pandjiris v. Oliver Cadillac Co.*, 339 Mo. 711, 98 S.W.2d 969 (1936) (there was no evidence of apprehension).

20. *Smith v. Boston & M.R.R.*, 87 N.H. 246, 177 Atl. 729 (1925). Cf. *St. Louis Iron Mountain & Southern Ry. v. Buckner*, 89 Ark. 58, 115 S.W. 923 (1909).

even after its source or basis has been removed.²¹ Nor will recovery be allowed where the causal relationship is too tenuous, such as where mental injury is caused by plaintiff's brooding over what might be the affect of the injury on him and his family,²² and apprehension over the outcome of the trial.²³ In a recent New York decision recovery was allowed for mental anguish and shock to the nervous system suffered by the plaintiff after being advised of the probable consequences of the defendant's negligence.²⁴

In the instant case it is not disputed that the defendant has violated a duty owed to the plaintiff and has thereby caused the plaintiff to be injured; the problem is rather one of to what extent shall the defendant be responsible for the harm which has been caused. As stated in *Milks v. McIver*,²⁵ "liability . . . ceases at a point dictated by public policy. . . ." But any determination of public policy must consider the right of the injured party to be compensated for the ultimate result of the wrongdoer's act. The principle announced in the instant case would appear to represent the proper balance between the right to compensation and the danger of undetected fraudulent claims. Recognizing that a policy which denies relief in all cases out of a fear that a few claims might be fictitious places undue weight on the latter consideration, the court properly treats the problem as being one of adequate proof.²⁶ Where the circumstances of the case present some guarantee of the genuineness of the plaintiff's claim so as to render it entirely plausible,²⁷ a court will allow the plaintiff's evidence, if otherwise sufficient, to go to the jury. This court, however, while condemning an absolute prohibition against recovery for damages such as are claimed here, is not suggesting that a plaintiff should be allowed to recover for any damages which he might allege, but rather that each case be determined as the facts may or may not indicate the genuineness of the claim. The dissent's fear that this decision opens the door to increased recovery should the patient merely claim to be concerned enough to suffer worry over the doctor's statement, would seem to be unfounded since the plaintiff here recovered not for the mere worry over the possible consequences of her injury, but for a fear which developed into severe can-

21. *Watson v. Augusta Brewing Co.*, 124 Ga. 121, 52 S.E. 152 (1905) (fear of death from ground glass in stomach after glass had been removed).

22. *Phelps Dodge Corp. v. Industrial Comm.*, 46 Ariz. 162, 49 P.2d 391 (1935).

23. *Coffey v. Coffey Laundries, Inc.*, 108 Conn. 493, 143 Atl. 880 (1928). *Contra*, *Skelly v. Sunshine Mining Co.*, 62 Idaho 192, 109 P.2d 622 (1941).

24. *Berg v. New York Soc'y for the Relief of R. & C.*, 136 N.Y.S.2d 528 (Sup. Ct. 1954), *rev'd on other grounds*, 286 App. Div. 783, 146 N.Y.S.2d 548 (1st Dep't 1955); *Halloran v. New England Tel. & Telegraph Co.*, 95 Vt. 273, 115 Atl. 143 (1921). *Cf. Smith, Neuroses in Court*, 30 VA. L. REV. 87, 108 n.28 (1940) where author collects cases he has classified as supporting the proposition that recovery has been allowed for neuroses which plaintiff has sustained as a result of being led by the physician's mode of treatment to believe he has a serious or permanent injury, e.g., cardiac neurosis, fixations of serious injury, and neurasthenia.

25. 264 N.Y. 267, 269, 190 N.E. 487, 488 (1934).

26. PROSSER, TORTS § 37 (2 ed. 1955).

27. "The liability to cancer must necessarily have a most depressing effect upon the injured person. Like the sword of Damocles, he knows not when it will fall." *Alley v. Charlotte Pipe & Foundry Co.*, 159 N.C. 327, 331, 74 S.E. 885, 886 (1912).

cerophobia, the existence of which was attested to by a neuro-psychiatrist. The dissenting Justices indicate that they would grant recovery if the development of cancer had been a probability instead of a mere possibility. But it would seem that the question of probability or possibility, at most, should bear only on the credibility of the plaintiff's testimony.²⁸ By the decision in the instant case, control over fictitious claims has not been relinquished but may be exercised by the court through its control over the adequacy of the evidence, and by its power to review the amount of the jury's award.

Herbert H. Brown

TORTS—GUEST STATUTE—OWNER OF AUTOMOBILE IS GUEST ON
MUTUAL PLEASURE TRIP.

Phelps v. Benson (Minn. 1958)

This was a tort action,¹ brought in Minnesota, against the operator of plaintiff's automobile for personal injuries and property damages sustained by plaintiff when his automobile, in which he was riding and defendant driving, was involved in an accident occurring in South Dakota. The parties, who were friends, decided to take a long motor trip as their vacation, agreeing to use plaintiff's car because it was in better condition than defendant's. There was also an agreement that the expenses of travel, such as gas, food and lodgings, were to be shared evenly, with plaintiff, however, paying for all major car repairs. In a special verdict, the jury found that the defendant was negligent, but that plaintiff had not given compensation for the ride; judgment was therefore entered for defendant on the ground that plaintiff was a guest within the meaning of the South Dakota guest statute,² and had failed to prove that his injuries were caused by the wanton and wilful misconduct of the defendant as required by that statute. On appeal, the Supreme Court of Minnesota affirmed, *holding* that plaintiff, although owner of the car was defendant's guest. The court reasoned that the providing of the car by the plaintiff was not compensation, but, in a mutual pleasure trip such as this, it was a mere act of hospitality. *Phelps v. Benson*, 90 N.W.2d 533 (Minn. 1958).³

28. See note 19 *supra*.

1. The action was consolidated for trial with a wrongful death action by the trustee for the heirs and next of kin of plaintiff's wife who was killed in the same accident.

2. S. D. CODE § 44.0362 (1939). "No person transported by the owner or operator of a motor vehicle as his guest without compensation for such transportation shall have a cause of action for damages against such owner or operator for injury, death, or loss, in case of accident, unless such accident shall have been caused by the willful and wanton misconduct of the owner or operator . . ."

3. *Phelps v. Benson*, 90 N.W.2d 533 (Minn. 1958).

Guest statutes provide that an operator of a motor vehicle owes his rider a lower standard of care when the rider has not given any compensation for the transportation.⁴ Those acts of hospitality which are part of the normal courtesies of the road are generally not considered compensation.⁵ In applying the term *guest* to an owner who has consented to be driven by another, the courts distinguish between actions by the owner against his driver and actions by the owner against third parties.⁶ In the latter instance, the majority of courts hold that there is a presumption of an agency relationship between the owner and his driver, causing the negligence of the driver to be imputed to the owner in actions by the owner against third parties.⁷ If this agency presumption is rebutted, the owner is often referred to as a guest of the driver.⁸ In actions by the owner against the driver of his car, the owner, absent a guest statute, may recover damages sustained as a result of the negligence of the driver.⁹ This is so even though an agency relationship exists, since the master of a principal may recover for torts committed against him by his agent.¹⁰ When the accident occurs where a guest statute is in force, the courts have almost uniformly held that the owner is not a guest of the driver within the meaning of the statute, but that he is a passenger.¹¹ The courts have reasoned that the very act of furnishing the vehicle is itself compensation rendered to the driver in return for the ride.¹²

Although the circumstances of the trip in the instant case would seem to indicate a relationship based more on hospitality than on compensation, the providing of the means of transportation by the owners is a tangible contribution to the driver and should be deemed compensation within the meaning of the statute, particularly when the owner is to pay for all major car repairs.¹³ Some courts further reason that where an owner sues the driver of his car, there is a danger of collusion between the owner and driver against the insurer, an evil which the guest statute was designed to prevent.¹⁴ To include another class of persons within the scope of the

4. See, e.g., *Mayer v. Puryear*, 115 F.2d 675 (4th Cir. 1940); *Boyd v. Mueller*, 320 Ill. App. 303, 50 N.E.2d 847 (1943); *O'Hagan v. Bryon*, 153 Pa. Super. 372, 33 A.2d 779 (1943).

5. *Ibid.*

6. *Lorch v. Elgin*, 369 Pa. 314, 85 A.2d 841 (1952); *Beam v. Pittsburg Ry.*, 366 Pa. 360, 77 A.2d 634 (1951).

7. See *McCramie v. Moorehead*, 131 Cal. App. 2d 877, 281 P.2d 542 (1955); *Fisch v. Waters*, 136 N.J.L. 651, 57 A.2d 471 (1948); *Bell v. Jacobs*, 261 Pa. 204, 104 Atl. 587 (1918).

8. *McNett v. Volfi*, 205 Cal. 89, 269 Pac. 932 (1928); *Christensen v. Hennepin Transp. Co.*, 215 Minn. 394, 10 N.W.2d 406 (1943).

9. *Webb v. Elmore Water, Light R.R. Co.*, 144 Misc. 506, 258 N.Y.S. 892 (Sup. Ct. 1932); *Doshier v. Hunt*, 243 N.C. 247, 90 S.E.2d 374 (1955).

10. *Urquhart v. McEvoy*, 204 Misc. 426, 126 N.Y.S.2d 539 (Sup. Ct. 1953).

11. *Ahlgren v. Ahlgren*, 152 Cal. App. 2d 723, 313 P.2d 88 (1957); *Glen Hill v. Connecticut*, 121 Conn. 102, 183 Atl. 379 (1936); *Naphtalin v. Lafazan*, 7 Misc. 1057, 165 N.Y.S.2d 395 (Sup. Ct. 1957); *Lorch v. Elgin*, 369 Pa. 314, 85 A.2d 841 (1952).

12. *Ibid.*

13. See *Phelps v. Benson*, 90 N.W.2d 533, 535 (Minn. 1958).

14. *Id.* at 537.

guest statute because of the danger of collusion seems unfortunate since the efficacy of the guest statutes in preventing collusion has never been persuasively demonstrated.¹⁵ If there is going to be collusion, it is difficult to believe that the parties will not assume the relationship the law requires.¹⁶ Even if it could be said that there has been collusion between the owner and driver against the insurer under the guest statutes, this can probably be attributed to the fact that there has been less recovery; there is no evidence that the relative proportion of collusion to recovery has declined.¹⁷ Because in most jurisdictions there is a tendency to strictly construe the scope of the guest statutes, it is doubtful that the decision in the instant case will be followed to any significant degree.¹⁸

Peter G. Nyhart

TORTS—PENAL ANTI-DISCRIMINATION LAWS IN THE DISTRICT OF COLUMBIA—AVAILABILITY OF A CIVIL REMEDY.

Tynes v. Gogos (Munic. Ct. App. D.C. 1958)

The plaintiff, a white woman, and her husband, a negro, while attempting to dance in the restaurant and dance hall owned by the defendant, were told by defendant that mixed dancing was not permitted. When plaintiff protested this order, the defendant made insulting and abusive remarks. The plaintiff sought damages based on anti-discrimination laws¹ of the District of Columbia contending that the words and actions of the defendant caused her to suffer humiliation, embarrassment, anguish and anxiety. The Municipal Court of Appeals for the District of Columbia affirmed the dismissal of the complaint by the trial court, and *held* that the anti-discrimination laws of the District of Columbia were municipal ordinances, penal in nature, and could not serve as a basis for a civil remedy. *Tynes v. Gogos*, 144 A.2d 412 (D.C. Munic. Ct. App. 1958).²

As a general rule a municipal corporation cannot promulgate a civil remedy for an individual by municipal ordinance, unless a cause of action already exists either at common law or by statute in the jurisdiction where

15. HARPER AND JAMES, THE LAW OF TORTS 961 (1956).

16. *Ibid.*

17. See Comment 2 S.D.L. Rev. 70.

18. *McCann v. Hoffman*, 9 Cal. 2d 279, 70 P.2d 909 (1937); *Dobbs v. Sugioka*, 117 Colo. 218, 85 P.2d 784 (1947); *Kitchens v. Duffield*, 83 Ohio App. 41, 76 N.E.2d 101, *aff'd*, 149 Ohio St. 500, 79 N.E.2d 906 (1948); *Milkovich v. Biene*, 371 Pa. 15, 89 A.2d 320 (1952) (the Pennsylvania court applied the Ohio guest statute).

1. D.C. CODE § 49-2901 at 2911 (Supp. VI, 1951). These acts, make it a misdemeanor if a restaurant owner refuses "to sell or wait upon any respectable well behaved person, without regard to race, color, or previous condition of servitude." They further provide for fines upon conviction but are silent as to civil remedies.

2. *Tynes v. Gogos*, 144 A.2d 412 (D.C. Munic. Ct. App. 1958).

the municipality is incorporated.³ The reason for the rule is that the power to enact a new civil remedy is retained by the national or state governments when they create the municipal corporation. In *Bain v. Ft. Smith Light and Traction Co.*,⁴ the court held that a city had no power to create a new cause of action by ordinance because the state had not delegated that authority, but if the power to pass such ordinances had been delegated, then a civil remedy could have been created.⁵ Because of their sovereign power the federal or state governments, by legislation, can create a new cause of action expressly,⁶ or the right can arise by implication from a statute penal in nature.⁷ However, if a law imposes only criminal sanctions but is enacted for the protection of a certain class of persons the courts will grant a civil remedy in the absence of contrary implications.⁸ This principle was applied in *Fitzgerald v. Pan American World Airways*,⁹ where the plaintiff, a negro passenger on the plane of the defendant, was not allowed to re-board the aircraft after a stopover. The court allowed a civil action based on unjust discrimination where the statutes provided only a criminal penalty, reasoning that the laws involved were enacted for the benefit of passengers as a class.

The relevant anti-discrimination laws were enacted by the Legislative Assembly of the District of Columbia.¹⁰ These laws should not come under the general rule enunciated for municipal corporations because Congress made no reservation of power as to the Legislative Assembly of the District of Columbia, as is usually done by a state when it creates a municipal corporation; on the contrary, Congress extended the law-making authority of the Legislative Assembly to all rightful subjects of legislation.¹¹ It is anomalous to reason, as the instant court has, that when enacting laws statutory in nature the Assembly has the power of a state to create a new type of relief whereas when it enacts a law in the nature of a municipal

3. 6 McQUILLIN, MUNICIPAL CORPORATIONS § 22.01 (3d ed. 1949).

4. 116 Ark. 125, 172 S.W. 843 (1915). *Accord*, *Heeney v. Sprague*, 11 R.I. 456 (1877).

5. *Hayes v. Michigan Cent. Ry.*, 111 U.S. 228 (1884). A municipal ordinance, silent as to civil relief, was allowed as a basis for a cause of action because the city had the power under its charter to protect persons from injury by railroads.

6. *Ewing v. Resher*, 176 F.2d 461 (10th Cir. 1949); *In re International Re-insurance Corp.*, 29 Del. Ch. 34, 48 A.2d 529 (1946).

7. *Remar v. Clayton Securities Corp.*, 81 F. Supp. 1014 (Mass. 1949); *Mezullo v. Maletz*, 331 Mass. 233, 118 N.E.2d 356 (1954).

8. RESTATEMENT, TORTS § 286 (1934).

9. 229 F.2d 499 (2d Cir. 1956). *Accord*, *General Teleradio v. Manuti*, 284 App. Div. 400, 131 N.Y.S.2d 365, (1st Dep't 1954).

10. This body was created by 16 STAT. 419 (1871), and replaced by a three man commission appointed by the President. 18 STAT. 116 (1874). This latter act has also been repealed.

11. *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100 (1953). The Supreme Court compared the law making powers of the Legislative Assembly to those of the territories of the United States and said that the Assembly's legislative authority "covers all matters, 'which within the limits of a state, are regulated by the laws of the state only.'" *District of Columbia v. John R. Thompson Co.*, *supra* at 106.

ordinance it does not.¹² It would have been proper to find that regardless of how these laws are classified they should create a new cause of action if the Legislative Assembly so intended. The anti-discrimination laws in the instant case were enacted with only penal provisions but one of their purposes was clearly to protect patrons of restaurants as a class.¹³ Since it would appear that the Legislative Assembly had the authority to enact legislation creating a civil remedy, and the anti-discrimination laws here involved were enacted to protect a class, the plaintiff should be permitted, as a member of that class to use them as a basis for a civil remedy.

Joseph P. Kelly

TORTS—RECOVERY FOR MENTAL DISTURBANCE—NECESSITY OF IMPACT.

Bosley v. Andrews (Pa. 1958)

The defendant's cattle strayed on to the plaintiff's farm as they had done many times before, and as the plaintiff was attempting to drive them off, the defendant's bull charged at her. The bull was distracted from its pursuit of the plaintiff by a barking dog; but the plaintiff, as she was attempting to escape from the bull, collapsed and suffered a heart attack. The plaintiff sued in tort¹ for permanent injury to her heart allegedly caused by the shock she suffered in her encounter with the bull. The plaintiff's doctor testified that in his opinion the heart attack was the result of an existing coronary deficiency triggered by the plaintiff's running from the bull and her fear of being gored. A non-suit was entered against the plaintiff and was sustained by the supreme court, two Justices dissenting, which *held* that there can be no recovery for injuries caused by shock and fright without an accompanying physical injury or impact. *Bosley v. Andrews*, 393 Pa. 161, 142 A.2d 263 (1958).²

Historically, courts have been reluctant to allow recovery for mental suffering caused by another's negligence because of the difficulty of proving the alleged injury.³ The tort action of intentional interference with peace of mind has met with the same obstacle.⁴ However, where a de-

12. *Tynes v. Gogos*, 144 A.2d 412, 417 (D.C. Munic. Ct. App. 1958).

13. See: *Indritz, Post Civil War Ordinances Prohibiting Racial Discrimination in the District of Columbia*, 42 GEO. L.J. 179 (1954).

1. The plaintiff also sued for crop damage caused by the trespassing cattle of the defendant and received a judgment for \$179.99.

2. *Bosley v. Andrews*, 393 Pa. 161, 142 A.2d 263 (1958).

3. See *Victorian Rys. Comm'n v. Coultas*, 13 A.C. 222 (P.C. 1888).

4. Some jurisdictions will allow recovery for interference with peace of mind resulting from the defendant's wilful and malicious conduct when the plaintiff's mental anguish produces a physical injury. *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952); *Johnson v. Sampson*, 167 Minn. 203, 208 N.W.

fendant's negligent conduct has brought about a direct physical injury, all courts will permit inclusion of the injured party's accompanying mental suffering in a determination of the measure of damages.⁵ Furthermore, courts have seen fit to permit recovery for a subsequent measurable injury which has been caused by a psychic stimulus such as fright if, at the time the plaintiff experienced fright, the defendant's negligence had caused the plaintiff to suffer a direct physical injury.⁶ However, some jurisdictions, including Pennsylvania, are reluctant to go further and allow compensation for injuries resulting from shock or mental suffering alone without an accompanying direct injury or impact.⁷ Denial of recovery is generally based either on the reasoning that the defendant has not breached a duty to the plaintiff⁸ or that the plaintiff's injury is too remote to have been proximately caused by the defendant.⁹ Courts that require evidence of an impact have found a slight touching to be sufficient to satisfy the requirement even though the real harm resulted from the injured party's mental state and was not caused by the touching.¹⁰ And some courts find that if one person's negligent activity creates a dangerous situation and another, reacting spontaneously in a foreseeable manner, is thereby physically injured, the necessity of impact is waived; that is, even though there is no direct impact the court will consider the physical injury as the necessary impact, and the injured party will be compensated for his physical damages, and in addition, the accompanying nervous shock and fright.¹¹ Thus, one who, while waiting for an elevator, was so frightened by the noise and vibration of an elevator door falling into the shaft, that she fell and suffered bodily harm was compensated upon proof of the property

814 (1926); *Matheson v. American Tel. & Tel. Co.*, 137 S.C. 227, 135 S.E. 306 (1926). *But see* *Bartow v. Smith*, 149 Ohio St. 301, 78 N.E.2d 735 (1948).

Liability for such malicious conduct has been more readily imposed on certain economic groups (landlords and bill collectors) or when a common law duty has been breached, *e.g.*, common carriers. *Clark v. Associated Retail Credit Men*, 105 F.2d 62 (D.C. Cir. 1939); *Emden v. Vitz*, 88 Cal. App. 2d 313, 198 P.2d 696 (1948); *Humphrey v. Michigan United R.R.*, 166 Mich. 645, 132 N.W. 447 (1911).

5. See, *e.g.*, *Lowenthal v. Mortimer*, 125 Cal. App. 2d 636, 270 P.2d 942 (1954); *Boston v. Chesapeake & O. R. R.*, 223 Ind. 425, 61 N.E.2d 326 (1945).

6. *Freedman v. Eastern Mass. Street Ry.*, 299 Mass. 246, 12 N.E.2d 739 (1938); *Samarra v. Allegheny Valley Street Ry.*, 238 Pa. 469, 86 Atl. 287 (1913); *Hess v. American Pipe Mfg. Co.*, 221 Pa. 67, 70 Atl. 294 (1908).

7. *Koplin v. Louis K. Liggett Co.*, 322 Pa. 333, 185 Atl. 744 (1936); *Morris v. Lackawanna & Wyoming Valley R.R.*, 228 Pa. 198, 77 Atl. 445 (1910); *Chittick v. Philadelphia Rapid Transit Co.*, 224 Pa. 13, 73 Atl. 4 (1909); *Huston v. Borough of Freemansburg*, 212 Pa. 548, 61 Atl. 1022 (1905).

8. *Ewing v. Pittsburgh C. & St. L. Ry.*, 147 Pa. 40, 23 Atl. 340 (1892).

9. *Fox v. Borkey*, 126 Pa. 164, 17 Atl. 604 (1889).

10. *Potere v. Philadelphia*, 380 Pa. 581, 112 A.2d 100 (1954); *Hess v. Philadelphia Transportation Co.*, 358 Pa. 144, 56 A.2d 89 (1948).

11. See *Baltimore & Ohio R.R. v. Harriss*, 121 Md. 254, 88 Atl. 282 (1913); *Howarth v. Adams Express Co.*, 269 Pa. 280, 112 Atl. 536 (1921). In the latter case, a woman was ascending the stairs of her home when a truck collided with the outside of the house. Due to the shock and fright, she lost her balance and fell down the stairs, sustaining a back injury. The court allowed recovery although there was no physical impact between the tortfeasor's instrumentality and the plaintiff.

In the instant case the plaintiff's physical injury was from the fright alone, not from a physical mishap such as falling down stairs.

owner's negligence even though her fright was unaccompanied by an impact.¹² The trend is toward repudiation of the requirement of impact.¹³ In the jurisdictions which no longer insist on impact, nonetheless, a person seeking recovery must have been within the range of foreseeable physical danger, and the injuries sustained must have been of the type that a normally constituted person would have sustained had there been direct bodily contact.¹⁴ Even in those jurisdictions which no longer insist upon impact, it is almost universally held that the injury must have been caused by the apprehension of one's own danger and not concern over the safety or well-being of another.¹⁵ In contrast with the split of authority over the necessity of impact, courts have generally denied recovery in negligence actions for mental disturbance alone, unaccompanied by either a direct or consequent physical injury.¹⁶

In some of the jurisdictions that require a direct injury or impact as a condition to recovery it is argued that a relaxation of the rule would open a floodgate of fictitious claims.¹⁷ However, there is little evidence of an increase in such claims in the states which permit compensation in a situation similar to the instant case.¹⁸ Claims of injury from mental disturbances are subject to the strict standards of proof that apply to direct physical injury.¹⁹ The policy argument as to difficulty of proof that was applicable when the impact rule was formulated²⁰ would appear to have lost most of its force because of modern medical investigations into the nature and effects of physical and mental disturbances. An absolute application of the impact rule in the Pennsylvania cases has had harsh conse-

12. *Mundy v. Levy Bros. Realty Co.*, 184 App. Div. 467, 170 N.Y. Supp. 994 (2d Dep't 1918).

13. Of those jurisdictions which have taken a definite stand, thirteen require a contemporaneous injury or impact. Twenty-two states no longer require an impact. See Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. R. 193, n. 31, 32 (1944).

14. *Orlo v. Connecticut Co.*, 128 Conn. 231, 21 A.2d 402 (1941); *Frazee v. Western Dairy Products*, 182 Wash. 578, 47 P.2d 1037 (1935).

15. *Kelly v. Fretz*, 19 Cal. App. 2d 356, 65 P.2d 914 (1937); *Cote v. Litawa*, 96 N.H. 174, 71 A.2d 792 (1950); *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935). But see *Bowman v. Williams*, 164 Md. 397, 165 Atl. 182 (1933); *Hambrook v. Stokes Bros.*, [1925] 1 K.B. 141.

16. See, e.g., *Espinosa v. Beverly Hospital*, 114 Cal. App. 2d 232, 249 P.2d 843 (1952); *Kuhr Bros. v. Spahos*, 89 Ga. App. 885, 81 S.E.2d 491 (1954); *Memphis St. Ry. v. Bernstein*, 137 Tenn. 637, 194 S.W. 902 (1917). Cf. *Geffer v. Rosenthal*, 384 Pa. 123, 119 A.2d 250 (1956).

17. "It requires but a brief judicial experience to be convinced of the large proportion of exaggeration, and even of actual fraud, in the ordinary action for physical injuries from negligence; and if we open the door to this new invention the result would be great danger, if not disaster, to the cause of practical justice." *Huston v. Borough of Freemansburg*, 212 Pa. 548, 550-51, 61 Atl. 1022-23 (1905).

18. See *Goodrich, Emotional Disturbance as Legal Damage*, 20 MICH. L. R. 497 (1922).

19. See Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. R. 193 (1944).

20. The landmark cases are: *Spade v. Lynn & Boston R.R.*, 168 Mass. 285, 47 N.E. 88 (1897); *Mitchell v. Rochester R.R.*, 151 N.Y. 107, 45 N.E. 354 (1897); *Victorian Rys. Comm'n v. Coultas*, 13 A.C. 222 (P.C. 1888).

quences,²¹ as indicated by Mr. Justice Musmanno in his dissent in the instant case.²² It is admitted that the plaintiff's encounter with the bull was the proximate cause of her injury.²³ If, instead of being diverted, the bull had grazed the plaintiff slightly, the impact rule would have been satisfied and, according to the majority of the court, the plaintiff could have recovered. Yet the plaintiff's damages and her burden of proof would not have changed. Perhaps an exception to the impact rule could be formulated in a situation involving absolute liability, such as where the injury is caused by trespassing domestic animals, as in the instant case.²⁴ Such an exception would not appear to be in conflict with the language of the Pennsylvania decisions.²⁵ However, the requirement of impact, having only the strength of *stare decisis* in its favor, should be rejected since the reason for the rule has disappeared.

John J. Guilfoyle, Jr.

TORTS—USE OF EXPLOSIVES—PLAINTIFF MUST SHOW NEGLIGENCE IN SEISMOGRAPHIC OPERATIONS.

Klostermann v. Houston Geophysical Co. (Tex. Civ. App. 1958)

Plaintiffs, landowners, brought an action for damages allegedly sustained to their homes because of vibrations caused by defendant's discharge of high explosives in the performance of seismographic operations in connection with its mineral explorations. The trial court sustained exceptions to plaintiffs' pleadings because they asserted a cause of action grounded solely upon liability without fault. The Texas Court of Civil Appeals affirmed and *held* that recovery for damage resulting from seismographic operations must be grounded upon negligence, and not on the rule of liability without fault, even though such operations require the use of high explosives. *Klostermann v. Houston Geophysical Co.*, 315 S.W.2d 664 (Tex. Civ. App. 1958).¹

21. See *Morris v. Lackawanna & Wyoming Valley R.R.*, 228 Pa. 198, 77 Atl. 445 (1910); *Ewing v. Pittsburgh C. & St. L. Ry.*, 147 Pa. 40, 23 Atl. 340 (1892); *Fox v. Borkey*, 126 Pa. 164, 17 Atl. 604 (1889).

22. *Bosley v. Andrews*, 393 Pa. 161, 142 A.2d 263, 271 (1958) (dissenting opinion).

23. *Bosley v. Andrews*, 393 Pa. 161, 142 A.2d 263, 269 (1958) (dissenting opinion).

24. Such an exception is implied in the dissent in the superior court opinion. *Bosley v. Andrews*, 184 Pa. Super. 396, 410, 135 A.2d 101, 108 (1957).

25. "It is true that if the owner of any animal, having it in his possession, which is vicious, allows such animal to run at large, then the owner is liable for any damage which may ensue. . . ." *Hilton v. Overly*, 69 Pa. Super. 348, 349 (1918). See also *Rossell v. Cottom*, 31 Pa. 525 (1858); *Ramsey v. Martin*, 45 Pa. Super. 645 (1911); *Troth v. Wills*, 8 Pa. Super. 1 (1897).

1. *Klostermann v. Houston Geophysical Co.*, 315 S.W.2d 664 (Tex. Civ. App. 1958).

The theory of strict liability, or liability without fault, as first enunciated in *Rylands v. Fletcher*,² makes one who keeps something ultra-hazardous on his land strictly responsible for damage caused by its escape therefrom. The doctrine was not generally accepted by American courts.³ However, the states that rejected the case frequently reached similar results on similar facts on the theory of nuisance.⁴ In those states which accepted the *Rylands* case, while damages from flying debris were recoverable on a theory of strict liability, damages from vibrations and concussion were not.⁵ Today the majority of courts have done away with this distinction⁶ and, under one label or another, allow recovery for damages from such hazardous activity as blasting within such close proximity to another's property as to cause substantial damage thereto.⁷ Texas courts now flatly reject the doctrine of strict liability and predicate liability upon negligence⁸ in the absence of facts so obvious as to constitute a nuisance as a matter of law.⁹ In the old case of *Cisco & N. E. Ry. v. Texas Pipe Line Co.*, where damage was caused by flying debris as the result of defendant's blasting operations, there was recovery in the absence of wilful misconduct or negligence even though the work was being done by an independent contractor because, as the court said, "the work was inherently dangerous."¹⁰ Dam-

2. L.R. 3 H.L. 330 (1868).

3. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399 (1942). The dictum of Lord Cairns in *Rylands v. Fletcher*, *supra* note 2, was that the rule of strict liability would not apply to a natural use of land. This caused confusion as some courts held this to be mere dicta while others felt that the rule of strict liability would be too harsh without such a limitation.

4. PROSSER, THE LAW OF TORTS 333 (1955).

5. Lehigh Portland Cement Co. v. Donaldson, 231 Ala. 242, 164 So. 97 (1935); Bacon v. Kansas City Terminal Ry., 109 Kan. 234, 198 Pac. 942 (1921); Williams v. Codell Construction Co., 253 Ky. 166, 69 S.W.2d 20 (1934); Dolhan v. Peterson, 297 Mass. 479, 9 N.E.2d 406 (1937); Jenkins v. Tomasello & Son, 286 Mass. 180, 189 N.E. 817 (1934); Whitla v. Ippolito, 120 N.J.L. 354, 131 Atl. 873 (1926); Booth v. Rome W. & O. Terminal Ry., 140 N.Y. 267, 35 N.E. 592 (1893); Indian Territory Illuminating Oil Co. v. Rainwater, 140 S.W.2d 491 (Tex. Civ. App. 1940).

6. See *Fairfax Inn v. Sunnyhill Mining Co.*, 97 F. Supp. 991 (N.D. W.Va. 1951); *Brilton v. Harrison Const. Co.*, 87 F. Supp. 405 (S.D. W.Va. 1948); *Richard v. Kaufman*, 47 F. Supp. 333 (E.D. Pa. 1942); *McGrath v. Baisch Bros. Const. Co.*, 7 Cal. App. 2d 573, 46 P.2d 981 (1935); *McKenna v. Pacific Elec. Ry.*, 104 Cal. App. 538, 286 Pac. 445 (1930); *Whitman Hotel Corp. v. Elliot & Watrons Eng. Co.*, 137 Conn. 562, 79 A.2d 591 (1951); *Baker v. S.A. Healey Co.*, 302 Ill. App. 634, 24 N.E.2d 615 (1939); *Louden v. Cincinnati*, 90 Ohio St. 144, 106 N.E. 970 (1914); *Tibbetts v. Benedict*, 128 Okla. 106, 261 Pac. 551 (1927); *Federoff v. Harrison Const. Co.*, 362 Pa. 181, 66 A.2d 817 (1949); *Hickey v. McCabe*, 30 R.I. 396, 75 Atl. 404 (1910); *B. Schade Brewing Co. v. Chicago M. & P.S. Ry.*, 79 Wash. 651, 140 Pac. 897 (1914).

7. *Baker v. S.A. Healey Co.*, 302 Ill. 634, 24 N.E.2d 615 (1939); *Brown v. Lunder Const. Co.*, 240 Wisc. 122, 2 N.W.2d 859 (1942); RESTATEMENT, TORTS §§ 519-24 (1938). See, e.g., *Sullivan v. Commonwealth*, 142 N.E.2d 347 (Mass. 1957); *Dixon v. New York Trap Rock Corp.*, 293 N.Y. 509, 58 N.E.2d 517 (1944), Note, 40 Ill. L. Rev. 278 (1945); *Baer v. Glen Alden Coal Co.*, 131 Pa. Super. 309, 200 Atl. 190 (1934), *aff'd*, 3 A.2d 349 (1938); *Whitla v. Ippolito*, 102 N.J.L. 354, 131 Atl. 873 (1936) (dictum).

8. *Turner v. Big Lake Oil Co.*, 128 Tex. 155, 96 S.W.2d 221, 224 (1936); *Stanolind Oil & Gas Co. v. Lambert*, 222 S.W.2d 125 (Tex. Civ. App. 1949).

9. *Turner v. Big Lake Oil Co.*, *supra* note 8.

10. 240 S.W. 990, 992 (Tex. Civ. App. 1922).

age from vibration and concussion caused by blasting did not have to be of a permanent character but it had to be substantial, as it did not constitute a nuisance as a matter of law.¹¹ In *Seismic Explorations v. Dobray*,¹² the court said that where damage to plaintiff's land was caused by defendant's use of explosives, it was for the jury to determine whether the damage was substantial enough for it to be said that the blasting was inherently dangerous within the rule of the *Cisco* case. In making such a determination, the fact that the business of the defendant contributes to the welfare and prosperity of the community is not controlling.¹³

In the instant case the court held that Texas would not include cases of isolated explosions within a doctrine on strict liability whether it is called absolute liability, nuisance or is given some other label.¹⁴ But the court does discuss the possibility of recovery on a nuisance theory.¹⁵ They would qualify recovery on such a theory, however, by requiring that the nuisance be of a permanent character.¹⁶ In asserting this requirement of permanency, the court relies on decisions¹⁷ where relief was granted on nuisance theory but where the facts were such as showed a recurring or permanent interference with plaintiff's enjoyment of his property. However, while these cases cited happened to involve instances of recurring and permanent interference, the courts there laid down no requirement of permanency, and there is ample authority in Texas supporting the position that as long as the damage is substantial, there is no requirement of permanency.¹⁸ In requiring proof of permanency the court has left the plaintiffs with extremely limited chances of recovery since seismographic operations are by nature temporary. Other cases indicate that *res ipsa loquitur* receives a narrow application in Texas cases of this nature¹⁹ and proof of negligence becomes very difficult. Texas has taken a much criticized position²⁰ which other oil-producing states have not felt compelled to follow.²¹

Edward T. Bresnan

11. *Dallas v. Newberg*, 116 S.W.2d 476 (Tex. Civ. App. 1938).

12. 169 S.W.2d 739 (Tex. Civ. App. 1943).

13. *King v. Columbian Carbon Co.*, 152 F.2d 636, 639 (5th Cir. 1946).

14. *Klostermann v. Houston Geophysical Co.*, 315 S.W.2d 664, 665 (Tex. Civ. App. 1958).

15. *Id.* at 667.

16. *Ibid.*

17. *Ibid.*

18. See authorities cited notes 11-13 *supra*.

19. *Stanolind Oil & Gas Co. v. Lambert*, 222 S.W.2d 125 (Tex. Civ. App. 1949).

20. See, e.g., PROSSER, *TORTS* 79 (1941): Smith, *Reasonable Use of One's Own Property as a Justification for Damages to Neighbor*, 17 *COL. L. REV.* 383 (1917); Smith, *Liability for Substantial Physical Damage to Land by Blasting*, 33 *HARV. L. REV.* 322 (1910).

21. *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 Pac. 952 (1928); *Berry v. Shell Petroleum Co.*, 140 Kan. 947, 33 P.2d 953 (1934); *Helmes v. Eastern Kansas Oil Co.*, 102 Kan. 164, 169 Pac. 208 (1917). *Contra*, *Constantin Refining Co. v. Martin*, 155 Ark. 193, 244 S.W. 37 (1922); *Gulf Pipe Line Co. v. Sims*, 168 Okla. 209, 32 P.2d 902 (1934).