South Carolina Law Review

Volume 11 | Issue 2 Article 6

Winter 1959

Physical Injury Arising Out of Fear for the Safety of a Third Person in Negligence Actions

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PHYSICAL INJURY ARISING OUT OF FEAR FOR THE SAFETY OF A THIRD PERSON IN NEGLIGENCE ACTIONS

The purpose of this article is to examine the rules of law in those cases which involve a personal injury to the plaintiff occasioned by fear for the safety of a third party who was placed in a position of peril by a negligent act or omission of the defendant. In order to cast light upon this particular subject, it will be necessary to delve into the law of emotional and mental disturbances as causes of action in the law of torts, but this will be done briefly and only in passing.

INTENTIONAL TORTS

The common law has been reluctant to recognize the interest in one's peace of mind as deserving of independent legal protection, even as against an intentional invasion such as an assault, unless it involved a threat to the peace of the community. More recently, injuries occasioned by invasions of intangible rights have been recognized as valid causes of action in torts such as libel, slander and invasion of the right of privacy.

The general rule today is that recovery will be allowed in those cases where injury was caused by the wilful act of the defendant even though the harm to the plaintiff resulted through fear.[1] This rule is based on the reasoning that the defendant should be held absolutely liable, having acted wilfully with the intent to cause harm to someone, although the intent was not necessarily directed toward the plaintiff. In the case of a wanton or intentional wrong causing fright and mental suffering resulting in physical injury, the element of fright does not sever the causal connection between the wrong and the resulting injury.[2] It is quite clear that where the wilful act of the defendant is directed toward the plaintiff, and the plaintiff thereby suffers injury or illness from fright, the right of recovery is recognized. In *Blakely v. Shortal's Estate*[3] the court held that the plaintiff had a case for the jury when she discovered the gory body of a suicide in her home. It was held that if the jury found that the decedent acted wilfully, with the intention of frightening the plaintiff, the decedent's estate would be liable.

A split of authority is apparent in those cases where the wilful act is directed toward another person, and not toward the plaintiff.

1. 4 SHEARMAN & REDFIELD, NEGLIGENCE § 856, p. 1948 (1941 rev. ed.).
2. State Rubbish Collector's Association v. Siliznoff, 38 Cal. 2d 330, 240 P. 2d 282 (1952).
3. 236 Iowa 787, 20 N. W. 2d 28, noted in 44 Mich. L. R. 486 (1945).

The better rule seems to be based on the doctrine of transferred intent and the defendant is held liable. This was so held in *Rogers v. Williard*[4] where a trespasser, by brandishing a pistol, threatened a third party in the presence of the plaintiff. Although there was no actual violence toward the plaintiff, the court held the defendant liable for the suffering of the plaintiff who experienced a miscarriage as a result of her fright. However, in *Goddard v. Watters*[5] a complaint was held to state no cause of action where it alleged in substance that the defendant, in the presence of the plaintiff, threatened to shoot the plaintiff's husband. The plaintiff suffered great fright and shock which resulted in a breakdown mentally and physically.

The latter case seems to be in direct conflict with the vast weight of authority[6] and the more modern view adopted by the American Law Institute in its *Restatement of the Law of Torts:*[7]

> If the actor intentionally and unreasonably subjects another to emotional distress which he should recognize as likely to result in illness or other bodily harm, he is subject to liability to the other for any illness or other bodily harm of which the distress is a legal cause,
>
> (1) although the actor has no intention of inflicting such harm, and
>
> (2) irrespective of whether the act is directed against the other or a third person.

NEGLIGENCE CASES

The law with respect to cases where the plaintiff suffered illness or injury as a result of fright caused by a *negligent* defendant is in a state of confusion. Some jurisdictions state absolutely that no recovery will be allowed where the plaintiff suffered no "impact" as a result of the defendant's negligent act.[8] This rule was laid down in New York in the case of *Mitchell v. Rochester Ry.*,[9] where the plaintiff was frightened by a team of horses driven by an agent of the defendant, narrowly missing the plaintiff. The court refused to allow recovery for the miscarriage and ensuing illness of the plaintiff

4. 144 Ark. 587, 223 S. W. 15 (1920).
5. 14 Ga. App. 722, 82 S. E. 304, 7 N.C.C.A. 1 (1914).
6. May v. Western Union Telegraph Co., 157 N. C. 416, 72 S. E. 1059, 37 L. R. A. (N. S.) 912 (1911); Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759 (1868); cases cited in 12 Ann. Cas. at page 744.
7. 2 RESTATEMENT, TORTS § 312 (1934).
8. Mahoney v. Dankwart, 108 Iowa 321, 79 N. W. 134 (1899); Ellsworth v. Massacar, 215 Mich. 511, 184 N. W. 408 (1921); Southern Ry. v. Jackson, 146 Ga. 243, 91 S. E. 28 (1916). See, however, Kelly v. Lowney, 113 Mont. 385, 126 P. 2d 486 (1942).
9. 151 N. Y. 107, 45 N. E. 354 (1896).

as it was stated flatly that "no recovery could be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury." It is clear that the court intended the term "personal injury" to be synonomous with some physical impact to the person of the plaintiff. The rule of the *Mitchell* case is still the law in New York and at least eleven other states.[10]

The rule in South Carolina is that no impact is required as a condition precedent to the plaintiff's right of recovery. In the recent case of *Padgett v. Colonial Wholesale Distributing Co.*,[11] the plaintiff was in his home watching television when his house was struck by a truck driven by an agent of the defendant. The plaintiff subsequently suffered a neurodermatitis, fever, loss of appetite and rapid loss of weight. Judgment for the plaintiff was affirmed as the Court held that if the jury found that the bodily injury of the plaintiff was caused by the shock, fright and emotional upset as a result of the negligence and wilfullness of the defendant, he was entitled to recover. The Court cited with approval the case of *Sloane v. Southern California Ry.*,[12] where it was stated that it is immaterial whether the cause of the injury is direct, as by some blow, or indirect, through some action on the mind. The test is one of proximate cause, and if the act of the defendant set in motion the agencies which produced the injury, the right of recovery exists, said the Court.

Where the mental disturbance and its consequences are not caused by any fear for the plaintiff's own safety, but by some peril or harm to another person, as in the case of the shock of a mother witnessing the death of her child, there is still less agreement than there is in those cases involving only a threat to the plaintiff's own safety. The courts which require an "impact" to the person of the plaintiff, of course, deny recovery;[13] but even some of the courts which no longer insist on "impact" refuse to find a cause of action.[14]

10. *See* St. Louis, I. M. & S. R. R. v. Bragg, 69 Ark. 402, 64 S. W. 226 (1901); Braun v. Craven, 175 Ill. 401, 51 N. E. 657 (1898); Kramer v. Ricksmeier, 159 Iowa 48, 139 N. W. 1091 (1913); Morse v. Chesapeake & Ohio Ry., 117 Ky. 11, 77 S. W. 361 (1903); Herrick v. Evening Express Publishing Co., 120 Me. 138, 113 Atl. 6 (1921); Spade v. Lynn & Boston R. R., 168 Mass. 285, 47 N. E. 88 (1897); Nelson v. Crawford, 122 Mich. 466, 81 N. W. 335 (1899); Strange v. Missouri Pac. Ry., 61 Mo. App. 586 (1869); Ward v. W. J. & S. R. R., 65 N. J. L. 383, 47 Atl. 561 (1900); Miller v. Baltimore & O. S. W. R., 78 Ohio St. 309, 85 N. E. 499 (1908); Morris v. L. & W. V. R. R., 228 Pa. 198, 77 Atl. 445 (1910).

11. 232 S. C. 593, 103 S. E. 2d 265 (1958).

12. 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

13. See cases cited in note 8 *supra*.

14. Nuckles v. Tennessee Electric Power Co., 155 Tenn. 611, 299 S. W. 775 (1927); Cleveland, C. C. & St. L. R. R. v. Stewart, 24 Ind. App. 374, 56 N. E. 917 (1900); Sanderson v. Northern Pac. Ry., 88 Minn. 162, 92 N. W. 542, 60 L. R. A. 403, 97 Am. St. Rep. 509 (1902).

The reason usually assigned for denying recovery, is that the defendant was under no duty of conduct toward the plaintiff, since no harm to him was to be anticipated.[15] This view which denies recovery[16] is adopted by the *Restatement,* as is shown in the following excerpt:[17]

> One who unintentionally but negligently subjects another to an emotional distress does not take the risk of any exceptional physical sensitiveness to emotion which the other may have, unless the circumstances known to the actor should apprise him thereof. Thus, one who negligently drives an auto through a city street and who, therefore, injures or imperils a third person is not required to take into account the possible presence at the scene of the accident of someone who is so constituted that the shock of witnessing the accident may cause her a distress which in view of her peculiar physical makeup may bring about an illness.

However, note this qualification:[18]

> *Caveat:* The institute expresses no opinion as to whether an actor whose conduct is negligent as involving an unreasonable risk of causing bodily harm to a child or spouse is liable for an illness or other bodily harm caused to the parent or spouse who witnesses the peril or harm of the child or spouse and thereby suffers anxiety or shock which is the legal cause of the parent's or spouse's illness or other bodily harm.

The rule denying the right of recovery has been recently reaffirmed by a Utah decision.[19] There it was held that there could be no recovery for fright and shock suffered by a father, where a fire occurred at night in his home as a result of the negligent installation of certain appliances by the defendants and he had awakened to discover the fire, knowing his children were upstairs. Although his children were not injured, he allegedly experienced extreme mental and physical shock. Under Utah law it was conceded that recovery could not be allowed for fright or shock alone in the absence of some bodily or

15. Waube v. Warrington, 216 Wis. 603, 258 N. W. 497, 98 A. L. R. 394 (1935).

16. Recovery for the physical consequences of fright at another's peril has generally been denied. Cleveland, C. C. & St. L. R. R. v. Stewart, note 14 *supra*; Mahoney v. Dankwart, 108 Iowa 321, 79 N. W. 134 (1897); McGee v. Vanover, 148 Ky. 737, 147 S. W. 742, Ann. Cas. 1913E 500 (1912); Chesapeake & Ohio R. R. v. Robinett, 151 Ky. 778, 152 S. W. 976, 45 L. R. A. (N. S.) 433 (1913); Smith v. Johnson & Co., unreported English case referred to in Dulieu v. White, 2 K. B. 669 at 675 (1901).

17. 2 RESTATEMENT, TORTS § 313 comment b (1934).

18. *Ibid.*

19. Preece v. Baur, 143 F. Supp. 804 (E. D. Idaho 1956).

physical injury where the acts complained of constituted merely acts of ordinary negligence and were not wilful or wanton.

The precise question was raised in 1925 in England in the landmark case of *Hambrook v. Stokes Brothers.*[20] A woman became frightened for the safety of her children whom she believed would be injured by a motor vehicle which the defendant left unattended and which ran down an incline. It was held in an action for her wrongful death that her husband was entitled to recover, notwithstanding that the shock was brought about by fear for her children's safety, and not by fear for her own. The decision in this case has been accepted, rejected, modified, explained, distinguished and forced to undergo various indignities, when, if examined closely, it will be shown that the ruling in the case was sound. Notice that the opinion by Arkin, L. J., in the *Hambrook* case restricted recovery on the principle laid down in that case to those cases where the following factors appear:

(1) The facts must be essentially the same as those in the *Hambrook* case.
(2) The proximate cause of the plaintiff's injury must be the negligent act of the defendant.
(3) The plaintiff must actually see the threat to the safety of the third party or realize the danger from her "unaided senses."
(4) The fear must be for herself or her children.

In *Bowman v. Williams,*[21] which is the leading American case in point with the *Hambrook* case, the defendant negligently ran his truck into the basement of the plaintiff's house, and although the plaintiff did not sustain any physical impact, he sustained a shock to his nervous system because of his fright and alarm for the safety of his children who were in the basement of the house. In holding that a recovery might be had for the nervous shock, the court said:

> With respect to the present inquiry, the primary effect of this wrongful act upon the personality of the plaintiff was the fright it caused him, since his person was untouched, although the possession under his demise was invaded. In fright, a man's whole being reacts. The shock to his nervous system is reflected in instinctive excitement and intensive action of the muscles and organs of the body, and so it is clear that the mental state has a corresponding physical accompaniment, although there has

20. 1 K. B. 141 (1925).
21. 164 Md. 397, 165 Atl. 182 (1933).

> been no impact suffered. The fear is as bad as falling. Nor does the cause of the fear afford any standard of measurement of its consequences. When fear exists, the nervous and physical reactions, although probably differing in degree, are fundamentally identical, whether the fear is purely subjective as it is for the victim's own safety, or is objective. The effect of fright being unpredictable, there is neither logic nor reason to hold, with some of the cases, that a distinction is to be taken, so that, if a party suffers an injury, as loss of health of mind, or of life, through fear of safety for self, a recovery may be had for the negligent act of another; but may not recover under similar circumstances, if the fear be of safety for another.[22]

There are two leading American cases contra to the *Hambrook* and *Bowman* cases. In *Waube v. Warrington*[23] it was held that one who sustained the shock of witnessing the negligent killing of her child could not recover for physical injuries caused by such fright or shock, where she herself was not placed in peril or fear of physical impact. The court held there could be no recovery for physical injuries sustained by a person out of the range of ordinary physical peril, as a result of the shock of witnessing another's danger. The opinion by Wickhem, J., in sustaining defendant's demurrer, relied heavily on Cardozo's opinion in the *Palsgraf*[24] case, by finding no duty owed by the defendant to persons in the class of the plaintiff. *Hambrook v. Stokes Brothers* was rejected, because the court's opinion in the *Hambrook* case emphasized proximate cause rather than duty. The dissent in the *Hambrook* case was adopted in which the court stated that once the doctrine starts, no rational boundaries can be set. Also, the court disapproved of the arbitrary opinion in the *Hambrook* case which limited the relationship to parent and child. It was stated that the liability imposed by such a doctrine was wholly out of proportion to the culpability of the negligent tort feasor, and would put an unreasonable burden upon the users of the highway, open

22. *Accord:* Frazee v. Western Dairy Products Co., 182 Wash. 578, 47 P. 2d 1037 (1935); Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (1912); Gulf, C. & S. F. R. R. v. Coopwood, 96 S. W. 102 (Tex. Civ. App. 1906); Cohn v. Ansonia Realty Co., 162 App. Div. 791, 148 N. Y. S. 39 (1914); s. c., 162 App. Div. 794, 148 N. Y. S. 41 (1914).

23. 216 Wis. 603, 258 N. W. 497 (1935).

24. Palsgraf v. Long Island R. R., 248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253 (1928). Here, the plaintiff was denied recovery when injured by scales which fell from a railroad platform as the result of an explosion occasioned by the dropping of a package of fireworks by a passenger who was being helped aboard the train by an agent of the defendant.

the way to fraudulent claims, and enter a field that had no sensible or just stopping point.

In *Cote v. Litawa*,[25] which is also contra to the *Hambrook* and *Bowman* cases, the defendant, having injured a child by the negligent operation of his automobile, carried her upstairs to her pregnant mother. The mother had heard a commotion outside and had heard someone call out the child's name just prior to the defendant bringing the child to her. To recover damages for shock and fright, with ensuing physical consequences, the mother instituted the action, and her husband sought to recover for the loss of consortium of his wife resulting therefrom. The court held there could be no recovery because the consequences of the defendant's act were such an unusual and extraordinary result of the careless operation of an automobile that to impose liability therefor would place an unreasonable burden upon users of the highways.

The facts of *Waube v. Warrington* are indistinguishable in principle from the recent English case of *King v. Phillips*.[26] In that case, a taxi driver backed his cab, without looking, onto a child's tricycle, slightly injuring the child. The child's mother, who was in a house about sixty yards down a side street, heard her child scream, and, looking out of the window, saw the taxi slowly backing over the tricycle. She could not see the child, and she immediately ran downstairs and into the street where she met the child running towards her. She suffered nervous shock as a result of her experience. The trial judge held that she could not recover as she was outside the area of physical danger, and there was therefore no breach of duty towards her. The Court of Appeal upheld the decision, but with different reasons given by each Lord Justice. The essential question should have been whether it could reasonably be foreseen that a mother would suffer nervous shock as a result of immediate fear for her child's safety. Singleton and Hodson, L. J., held that no duty existed on the ground that the plaintiff was outside the area of physical danger. If it is to be admitted that a woman can reasonably be expected to suffer nervous shock as a result of apprehension for the safety of her child (and Singleton, L. J., seems to admit this), it is difficult to see how her distance from the accident can qualify this foresight, providing she is in a position to appreciate the nature and quality of the immediate threat to her child. Denning, L. J., held that a duty did exist under the circumstances, but that the

25. 96 N. H. 174, 71 A. 2d 792, 18 A. L. R. 2d 216 (1950).
26. 1 Q. B. 429 (1953).

damage was too remote a consequence of the negligence, as a taxi driver could not reasonably be expected to have foreseen that the slow backing of his cab would terrify a mother seventy yards away. He distinguished the *Hambrook* case on the ground that there the lorry driver ought to have foreseen that a runaway lorry might seriously shock the mother of her children in the danger area. It is suggested that this "reasonable foresight" test applied by Denning, L. J., is the result of careful reasoning and is the best test to be applied in these cases.

The cases which refuse the right of the plaintiff to recover place the accent then on duty owed by the defendant to the plaintiff, while those courts recognizing the right place the emphasis on the proximate cause of the injury to the plaintiff. Should there really be a distinction between the reasoning of the courts on this question? It is submitted that there should be no such distinction. The area of foreseeable risk must in every case be a question of fact depending on the particular circumstances. This is a question which is not peculiar to the shock cases but arises whenever reasonable foresight is at issue. The area of physical risk doctrine is not necessary for the purpose of enabling the courts to reject extravagant claims. The ordinary reasonable foresight doctrine will give sufficient protection in such cases. If the area of risk in the shock cases is limited to the area in which physical injury to the person who receives the shock ought to have been in the contemplation of the defendant, then it is clear that the mother in the *Hambrook* case was never within that area. On the other hand, if the necessary foresight is concerned only with foresight that a person may receive a shock when witnessing an accident or by becoming immediately aware of it by his own senses as in the *Hambrook* case, then anyone within eyesight or earshot is within the required "emotional" area.

The confusion between foresight of emotional injury and foresight of physical injury is due to four reasons which are not always recognized: (1) Confusion among the courts in the different tests applicable to physical injuries and emotional injuries with reference to foresight. (2) Confusion of the cases where emotional injuries follow physical injuries with those cases where physical injuries follow emotional injuries. (3) The courts' using "the area of physical risk" concept as a scientific or mechanical answer to the scope of the defendant's responsibility. (4) The courts' contentions that allowing recovery would greatly enlarge the extent of the duty of care. This is not valid reasoning. If it is reasonable and just that a person

should be held liable under certain circumstances, why should he escape liability merely because there is a possibility that others in similar circumstances will also seek to recover? Fear of spurious claims is an unsatisfactory foundation on which to build a legal doctrine. If it is argued that such an extension may lead to illegitimate claims, the answer is that similar fears expressed when shock was first recognized as a cause of action have proved to be groundless. In fact, the only rational and satisfactory test is one based on reasonable foresight that the wrongful act may, in the circumstances of the *particular case,* give to another person so violent a shock that physical injury may result from it. The nature of the accident, the position of the person who received the shock, the relationship between the person who received the shock and the person who has been injured, are all facts which may be relevant in determining liability, but no one of them can be regarded as conclusive.

The law endeavors to afford a redress for wrongs committed on the plaintiff by the defendant. Where the courts deny that the plaintiff even has a cause of action because of a play on such words as "duty", "area of risk", and "foreseeability", and fail to recognize the fact that the plaintiff has been injured as a direct and proximate result of the defendant's negligent act, it seems that the defendant is receiving the benefit of the rule, when in fact, the interests of both parties should be balanced.

In the present state of scientific knowledge and with the danger of imposture, is it expedient to allow the plaintiff to trace the causal connection through a psychic link in the chain of causation? When the defendant leaves a truck negligently unattended at the top of a steep hill, he subjects others to the risks of being: (1) run over directly; (2) run over while rescuing someone; (3) injured while getting out of the way; (4) frightened and fainting from excitement; (5) frightened and suffering a physical injury through shock induced by fear for the safety of another. All of these possible events are dangerous to the safety of others. In the case of a bystander being injured through shock at the sight of injury to a third person, the difficulty of proving causation would of course be great, and the trial judge should direct a verdict for the defendant unless the proof offered by the plaintiff is very substantial and very persuasive. If, in rescue cases, where a defendant in negligently putting one person in peril, is held to be at the same time negligent toward potential rescuers who might be drawn into the zone of danger to extricate the

imperiled person,[27] it would seem *a fortiori* that the mother of a child so endangered would be allowed recovery for physical injuries resulting from witnessing the incident. The light of ordinary experience would seem to show that it is more foreseeable that a mother might be so injured than a rescuer in the same circumstances.

CONCLUSIONS

It is obvious that if recovery is to be permitted there must be some limitations. It would be an entirely unreasonable burden on all human activity if the defendant were compelled to pay for the lacerated feelings of every person shocked at an accident, or every distant relative of the person injured; and the danger of fictitious claims, and the necessity for some guarantee of genuineness, should be given much consideration.

Some such limitations are suggested. It is clear that the injury threatened or inflicted upon the third person must be a serious one, of a nature to cause severe shock to the plaintiff[28] and that the shock must result in actual physical harm.[29] These requirements, if strictly adhered to, would do much to eliminate false claims.

As an additional safeguard, it has been said that the plaintiff must be present at the time of the accident, or at least that the shock must be fairly contemporaneous with it,[30] rather than following at a later date.[31] Such limitations are necessary in order not to leave the liability of a negligent defendant open to undue extension by the verdicts of sympathetic juries. Within some such limits, it is suggested that a rule imposing liability may ultimately be adopted.

It appears that liability in negligence actions will become established as it now is in wilful torts if the negligently caused shock and resulting physical injury is reasonably foreseeable. The only distinction between wilful and negligent shock is that in the former the

27. Wagner v. International Ry., 232 N. Y. 176, 133 N. E. 437 (1921).
28. Sperier v. Ott, 116 La. 1087, 41 So. 323, 7 L. R. A. (N. S.) 518 (1906).
29. Keyes v. Minneapolis & St. L. R. R., 36 Minn. 290, 30 N. W. 888 (1886); Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303 (1880).
30. Hambrook v. Stokes Bros., 1 K. B. 141, 152, 94 L. J. K. B. 435 (1925).
31. *See* Huston v. Freemansburg Borrough, 212 Pa. 548, 61 Atl. 1022, 3 L. R. A. (N. S.) 49 (1905); Kalleg v. Fassio, 125 Cal. App. 96, 13 P. 2d 763 (1932); Chester v. Council of Waverly, 38 N. S. W. S. R. 603; noted, 55 L. Q. R. 495, 17 Can. B. R. 541 (1938). The plaintiff's evidence indicated that the defendant had negligently left unprotected in a street a deep, water-filled trench into which the plaintiff's son fell and was drowned. Several hours later the plaintiff was a member of the party which discovered the child's body. She suffered a severe nervous shock resulting in illness. Held, for defendant, upholding directed verdict. Assuming that, under the rule of Hambrook v. Stokes Brothers, a negligent person may be liable for illness resulting from nervous shock caused to one who witnesses a harrowing spectacle, *the doctrine does not extend to persons not present at the time of the accident.*

foresight of shock is absolute, being intentional, while in the latter it is relative, depending on the facts of the particular case.

If the person threatened is a husband, wife or child of the person receiving the shock, the foreseeability is, of course, greater than in other circumstances, but it is a gloomy view of human nature which suggests that the sight of the death or injury of someone else cannot create such a shock. It must always be a question of reasonable foresight and this cannot depend on arbitrary categories such as family relationships.

Recovery in those cases where the plaintiff is merely told of the accident and thus suffers shock should be denied on the basis of ordinary human experience.

It is submitted that the courts in the future will grant the right of recovery in those cases similar in principle to the *Hambrook* case. If the cases seem to be in a state of confusion at the present time, this is primarily because the field is relatively new and the number of cases arising on this theory have been few. As is so aptly stated by Mr. Justice Holmes:[32] "If a consistent pattern cannot yet be clearly discerned in the cases, this but indicates that the law on this subject is in a process of growth."

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32. HOLMES, THE COMMON LAW 36 (1881).