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TORTS-FEDERAL TORT CLAIMS ACT-RIGHT OF VETERAN TO SUE GOVERNMENT FOR NEGLIGENCE AGGRAVATING INJURIES RECEIVED WHILE IN SERVICE / EVIDENCE-IN PROSECUTION FOR SPEEDING, OWNERSHP OF SPEEDING CAR DOES NOT SUPPORT PRESUMPTION OR- INERENCE THAT OWNER WAS DRIVING AT TIME OF VIOLATION / TORTS-PROXIMATE CAUSATION-STATE HELD NOR LIABLE FOR DEATH OF PERSON FRIGHTENED TO DEATH BY CONVICT WHO ESCAPE THROUGH STATE'S NEGLIGENCE

NOTES

TORTS—FEDERAL TORT CLAIMS ACT—RIGHT OF VETERAN TO SUE GOVERNMENT FOR NEGLIGENCE AGGRAVATING INJURIES RECEIVED WHILE IN SERVICE.—The United States Supreme Court by a six to three decision, has affirmed a judgment of the Court of Appeals for the Second Circuit, allowing a veteran of the United States Army to sue under the Federal Tort Claims Act for injuries received while in active military service, which were aggravated, subsequent to discharge, by negligent treatment obtained in a Veterans Hospital. The Court rejected the District Court's ruling that such relief should be limited to payments obtainable under the Veterans Act.[1]

Plaintiff received a knee injury while on active duty with the United States Army. It never healed properly, constantly dislocating. Seven years after his discharge, the Veterans Administration performed an operation on his knee. During the operation, a tourniquet pressure gauge, allegedly defective, failed to indicate that excessive pressure was being applied, and the nerves of the leg were seriously and permanently injured.

The Federal Tort Claims Act states that the District Court "shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . ."[2] and that "The United States shall be liable, respecting . . . tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ."[3] The Act has no provision specifically covering servicemen. Under the Veterans Act, "where any veteran suffers or has suffered an injury or an aggravation of any existing injury, as the result of hospitalization or medical or surgical treatment . . . and such injury or aggravation results in additional disability . . . benefits . . . shall be awarded in the same manner as if such disability, aggravation or death were service connected. . . ."[4] Inasmuch as recovery under the Federal Tort Claims Act is likely to be far more substantial than the fixed benefits permitted under the Veterans Act, many injured parties would rather sue in tort than present a claim under the Veterans Act if negligence can be shown. The courts have uniformly held that the Federal Tort Claims Act has no applicability to damages arising from combatant activities during war.[5] Noting the "peculiar relationship which exists between a member of the armed services and superior military authority" they have held that to extend the act to cover injuries incident to active duty would "subject every injury sustained by a member of the armed forces in execution of military orders to the examination of a court of justice. . . . Courts would be required to pass upon the propriety of military decisions and actions and essential military discipline would be impaired. . . ."[6]

The courts have also maintained that servicemen cannot sue under the Federal Tort Claims Act for non-combatant injuries which were incurred while performing duty under orders. In *Freres* v. *United States*,[7] the Supreme Court considered three cases together. In the first, a soldier was killed by a fire in his barracks.[8] In the second, a soldier was operated upon for wounds incurred on active duty. In a sub-

[1] United States v. Brown, 348 U. S. 110, 75 S. Ct. 141, 99 L. Ed. 120 (1954).

[2] 65 STAT. 727 (1951), 28 U. S. C. § 1346 (b) (1952).

[3] 62 STAT. 983 (1948), 28 U. S. C. § 2674 (1952).

[4] 54 STAT. 1197 (1940), 38 U. S. C. § 501 (a) (1952).

[5] Troyer v. United States, 79 F. Supp. 558 (W. D. Mo. 1947); Peruchi v. United States, 80 F. Supp. 959 (M. D. Pa. 1948).

[6] Jefferson v. United States, 178 F. 2d 518 (4th Cir. 1949), *aff'd* 340 U. S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1953).

[7] Freres v. United States, 340 U. S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950).

[8] Freres v. United States, 177 F. 2d 535 (2d Cir. 1949), *aff'd* 340 U. S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950).

sequent operation eight months later, a towel marked "Medical Department U. S. Army" was found in his stomach.[9] In the third case, a soldier died because his combat wounds were negligently treated in the army hospital.[10] The court denied recovery under the Federal Tort Claims Act to all three plaintiffs, holding that the Government was not liable under this act for injuries to servicemen "where the injuries arise out of or in the course of activity incident to service."[11]

However, in *Brooks* v. *United States*,[12] the court allowed recovery to a soldier on furlough who, while riding in his automobile, was killed by injuries suffered in a collision with an army truck. The court held that "one who is in the armed forces can recover under the Federal Tort Claims Act for injuries *not incident to service*". Similarly, recovery was permitted under the Federal Tort Claims Act to an Army private killed while a passenger on a bus operated by the War Department[13] and, in another case, to an officer killed in an Army plane which was transporting him to a post where he was to have been discharged.[14] Judge Parker, with whose dissent below the Supreme Court agreed in the *Brooks* case, noted how unfair it would be to deny recovery to soldiers just because they are soldiers, when their claim was not service connected. He urged that they should have the right to "the more substantial recovery to which any civilian would be entitled under like circumstances."[15]

The primary purpose of the Federal Tort Claims Act was to allow private plaintiffs to sue the Government in tort, and give them a legal remedy to supplant the chance redress of private bills, which burdened the legislature.[16] "Its effect is to waive immunity from recognized causes of action and not to visit the Government with novel and unprecedented liabilities."[17]

The *Brooks* case held that the Federal Tort Claims Act was also intended to be available to servicemen for injuries *not service connected,* and in the absence of a specific provision on this point, the statute was liberally construed. In support of this view it was noted that the Federal Tort Claims Act repealed the Military Claims Act,[18] which gave military personnel claims for death or injury not incident to their service and allowed them to sue under a private claim bill for those suits in excess of a certain amount. "The Federal Tort Claims Act should be construed in the light of the law which it supplanted. When Congress repealed the Military Claims Act it is evident that Congress intended that a claimant who was eligible to such redress by way of a private claim bill now might sue under the Federal Tort Claims Act. . . ."[19] "The repeal of this act by the Federal Tort Claims Act would appear to have purpose only if the claims covered by it are cognizable under the latter act . . . since under this interpretation servicemen would have an adequate substitute remedy".[20] Of the twelve exceptions in the bill none of them excludes the claims of servicemen

[9] See note 6, *supra.*

[10] United States v. Griggs, 178 F. 2d 1 (10th Cir. 1949), *rev'd* 340 U. S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950).

[11] See note 7, *supra,* at 146, 71 S. Ct. 153, 159, 95 L. Ed. 152, 156.

[12] Brooks v. United States, 337 U. S. 49, 69 S. Ct. 918, 93 L. Ed. 1200 (1949).

[13] Sampson v. United States, 79 F. Supp. 406 (S. D. N. Y. 1947).

[14] Alansky v. Northwest Airlines, 77 F. Supp. 556 (D. Mont. 1948).

[15] Brooks v. United States, 169 F. 2d 840 (4th Cir. 1938), *rev'd* 337 U. S. 49, 69 S. Ct. 912, 93 L. Ed. 1200 (1949).

[16] Note, 1 SYRACUSE L. REV. 87 (1949).

[17] See note 7, *supra,* at 142, 71 S. Ct. 153, 157, 95 L. Ed. 152, 156.

[18] 55 STAT. 880 (1943), 31 U. S. C. §§ 223 (b), 224 (d) (1952).

[19] See note 13, *supra* at 408, 409.

[20] See note 16, *supra* at 94.

with the exception of overseas and combatant activities.[21] It would therefore be reasonable to assume that Congress did not intend such an exception to be implied and intended to assure servicemen a position of equality with civilians in allowing them to use under this Act.[22] "It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed."[23]

Although veterans have been allowed to sue under the Federal Tort Claims Act for injuries not service connected,[24] the instant case is the first in which a veteran has been allowed to sue under this act for aggravation of an injury originally incurred while on active duty. However, the court pointed out that the action was brought for the negligent treatment of a civilian veteran and for the original injury incurred during combat. Although the hospitalization was the result of an injury incurred while in service, and "the causal relation of the injury to the service was sufficient to bring the claim under the Veterans Act (the injury for which suit was brought was not incurred while respondent was on active duty or subject to military discipline. . . .) The injury occurred after his discharge, while he enjoyed a civilian status . . . [and] . . . the negligent act giving rise to the injury in the present case was not incident to the military service".[25]

A vigorous dissent by Justice Black, in which Justices Reed and Minton concurred, maintained that in this case "the injury is inseparably related to military service. . . . Except for his army service this veteran could not have been injured in the veterans hospital. . . . He was eligible and admitted for treatment there solely because of war service which gave him veteran status. Moreover, he was actually being treated for an army service injury. . . . To permit a veteran to recover damages from the Government in circumstances under which a soldier on active duty cannot recover seems like an unjustifiable discrimination which the Act does not require".[26] The Federal Tort Claims Act should not be "interpreted to permit recovery for injuries incident to military service".[27]

While not affecting the principles of the *Brooks*[28] and *Freres*[29] cases as to servicemen's injuries which are service connected, the Supreme Court in this case appears to have given the veteran full civilian status with respect to the Federal Tort Claims Act. Once discharged, the veteran is now in a position of equality with civilians, and is not limited as to his remedies for subsequent negligent acts affecting his service-incurred injuries.

EVIDENCE—IN PROSECUTION FOR SPEEDING, OWNERSHIP OF SPEEDING CAR DOES NOT SUPPORT PRESUMPTION OR INFERENCE THAT OWNER WAS DRIVING AT TIME OF VIOLATION. —In a prosecution for speeding, the fact that the car is registered in defendant's name will not in itself support a presumption or establish an inference that defendant was operating the vehicle at the time of the offense. The fact of ownership does not impose the burden of proof on the defendant, nor does it establish a prima facie case for the

21 62 STAT. 983 (1948), 28 U. S. C. § 2680 (1952).
22 See note 15, *supra*.
23 See note 12, *supra*, at 51, 69 S. Ct. 918, 919, 93 L. Ed. 1200, 1203.
24 Santana v. United States, 175 F. 2d 320 (1st Cir. 1949).
25 See note 1, *supra*, at 112, 113, 75 S. Ct. 141, 148, 99 L. Ed. 120, 122.
26 *Id.*
27 See note 7, *supra*, at 144, 71 S. Ct. 153, 158, 95 L. Ed. 152, 156.
28 See note 12, *supra*.
29 See note 7, *supra*.

people. The Court of Appeals in the case of *People* v. *Hildebrandt*,[1] has articulated this rule, three judges dissenting.

The car of the defendant, Hildebrandt, was observed by the police as it was traveling in excess of the prescribed speed limit. At the time of the commission of the offense, the observing officer did not pursue and apprehend the driver, nor did he ascertain the driver's identity because of the unusual method of detection employed. A "phototraffic" camera took two pictures of the moving vehicle, and by mathematical computation the speed was determined. Defendant did not contest the accuracy of the result obtained with the "phototraffic" camera. Defendant did question the correctness of the ruling of the trial court, which was sustained on appeal by the County Judge, that the fact that defendant was driving could be presumed or inferred from the fact of ownership, despite the absence of further proof that defendant was driving at the time the violation was observed.

The Court of Appeals upheld the defendant in his contention and reversed the conviction. As Judge Desmond observed in the majority opinion, a prosecution for a speeding violation, which is, strictly speaking, an offense rather than a crime, is nevertheless a criminal proceeding, and the customary rules as to the presumption of innocence and the requirement that guilt be proven beyond a reasonable doubt are applicable.[2]

In reaching its conclusion, the court found it necessary to confine to its facts the strongly analogous case of *People* v. *Rubin*.[3] There, the Court of Appeals affirmed a conviction for illegal parking obtained after a police officer had ticketed an empty parked car. The trial court inferred from the fact of ownership that defendant owner had parked his car in violation of a New York City Traffic Regulation. No other evidence was offered. In sustaining the conviction the court remarked that "to rule that this inference may not be drawn from the established facts would be to deny to the trier of the facts the right to use a common process of reasoning."[4]

Recognizing the factual similarities in the *Rubin* case, and acknowledging the importance of that decision in regulating parking violations, the majority in the instant case pointed out two distinctions supporting its refusal to follow the earlier case. First of all, "parking violations are of a special sort. The car is left unattended, there is usually no one present to be arrested."[5] However, it is obvious that the driver of a speeding car can always be arrested. Secondly, the court observed, there is an *in rem* element in a parking violation, in the sense that the owner is charged for illegally storing his vehicle on a public street. Therefore, since parking is a special situation, decisions involving parking violations should not be extended beyond this situation.

There is no statute in New York which prescribes that with respect to traffic violations, the fact of ownership is presumptive of use by the owner, and therefore the court did not have the question of a statutory presumption before it in this case. However, statutory presumptions applicable to similar matters have been enacted in New York and other jurisdictions.[6]

[1] People v. Hildebrandt, 308 N. Y. 397, 126 N. E. 2d 377 (1955).

[2] *Ibid.*

[3] People v. Rubin, 284 N. Y. 392, 31 N. E. 2d 501 (1940).

[4] *Ibid.*

[5] See note 1 *supra* at 398, 126 N. E. 2d 377, 379.

[6] N. Y. PEN. L. § 441 (the effect of which is to make presumptive of illegality failure of any debtor to produce accounting records at the request of such creditor who advanced credit on the strength of such records), construed in People *ex rel.* Woronoff v. Mallon, 222 N. Y. 456, 119 N. E. 102 (1918); COMP. ORD. CITY OF DETROIT, c. 196, § 65(b), (illegally parked car presumed to have been parked by owner), construed in People v. Kayne, 286 Mich. 571, 282 N. W. 258 (1938).

The power of the legislature to inject presumptions into the law of evidence is limited by a rule of rationality. There must be a rational connection between the fact presumed and the fact proved. In the common experience of mankind there must be a reasonable likelihood that where one fact is true, the other will also be found. It is not necessary that the one fact always follow the other, but there must be some logical connection between them. For example, the Supreme Court of the United States held invalid, in the case of *Tot* v. *United States*,[7] a federal statute creating the presumption that an ex-convict in possession of firearms had received them through interstate commerce. In the words of the Supreme Court in that case, "Under our decisions a statutory presumption can not be maintained if there be no rational connection between the fact proved and the ultimate fact presumed."[8]

The New York legislature has enacted a number of statutory presumptions. One who buys stolen property, without making a reasonable inquiry to determine whether or not the property is stolen, is presumed to know that the property is stolen.[9] In the crime of disorderly conduct, one who consorts with criminals is presumed to have an unlawful purpose in mind.[10] The possession of a machine gun is presumed to be unlawful.[11] In Michigan, the registered owner of an illegally parked motor vehicle is presumed to have so parked it.[12]

These statutes creating presumptions of evidence have stood the test of adjudication because there is a logical relation between the fact proved and the ultimate fact sought to be inferred from it. Such a logical relation might seem to exist between the facts in the instant case. In the majority opinion, however, Judge Desmond remarked that "the New York Legislature has not disclosed its awareness of a need for such a statutory presumption,"[13] and with measured judicial caution refused to hazard any advance opinion as to the effect of such legislation. Pointing out that there are almost one million more drivers in this state than there are cars for them to drive, the Court held that in the absence of a statutory presumption it is not permissible for the trier of facts to infer from mere ownership of a vehicle that the owner was at the wheel when the violation occurred.[14]

In a vigorous dissenting opinion in which Conway, Ch. J. and Dye, J. concurred, Judge Fuld stated that in the light of the decision in the *Rubin* case[15] stare decisis commanded affirmance. The dissent takes the position that a basis for distinguishing the *Rubin* case from the instant case cannot be found in the fact that the former case involved parking and the instant case involved speeding. Discussing non-statutory presumptions employed in law to infer ultimate facts,[16] Judge Fuld stated that it is reasonable in the light of human experience to infer the fact of personal use by the owner from the fact of ownership of the vehicle inasmuch as the test of a valid presumption is a rational connection between the fact proved and the ultimate fact

[7] Tot v. United States, 319 U. S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943).

[8] *Id.* at 467, 63 S. Ct. at 1241, 1255, 87 L. Ed. at 1519, 1524.

[9] People v. Nelson, 260 N. Y. 559, 184 N. E. 91 (1932), construing N. Y. PEN. L. § 1308(3).

[10] People v. Pieri, 269 N. Y. 315, 199 N. E. 495 (1936), construing N. Y. PEN. L. § 722(12).

[11] People v. Terra, 303 N. Y. 315, 102 N. E. 576 (1951), construing N. Y. PEN. L. § 1897(1a).

[12] People v. Kayne, 286 Mich. 571, 282 N. W. 248 (1938), construing COMP. ORD. CITY OF DETROIT, c. 196, § 65(b).

[13] See note 1 *supra* at 400, 126 N. E. 2d 377, 379.

[14] *Ibid.*

[15] See note 3, *supra*.

[16] People v. Galbo, 218 N. Y. 283, 112 N. E. 1041 (1916).

sought to be presumed.[17] Surely it is no less reasonable to suppose that the owner was driving a speeding car than to suppose that the owner illegally parked it as was done in the *Rubin* case. Where the body of the offense is proved, the effect of allowing the presumption into evidence merely places on the accused the burden of going forward with the evidence by requiring him to explain what is uniquely within his knowledge to explain.

It may be noted that from the viewpoint of public policy the balance between the rights of the individual and the interests of society is always a delicate one to maintain. Inclining the scale of justice in favor of either must of necessity produce results unfavorable to the other. For example, one may take the position that the decision in the instant case, in protecting the individual by maintaining the burden of proof on the state, is consistent with the traditional common law concepts of criminal justice by which the accused is regarded as innocent, and under no duty to prove his innocence. The presumption of identity from ownership made, for instance, in a prosecution for vehicular homicide might have unfortunate results.

On the other hand it might be argued that the interests of the public should mitigate towards a contrary decision. The control of traffic is a serious problem. Speeding on the highways is an important element in this problem. The use of the "phototraffic" camera could go far towards a solution. But the utility of the device is severely limited when the evidence of ownership of the speeding car so obtained must be supported by other and different evidence to support a conviction for speeding. In any event, the way may be open to the legislature to take action and alter the situation, but it is clear that in the absence of legislative intervention the decision in *People* v. *Hildebrandt* does not permit the application of a presumption or inference that the defendant was speeding from the mere fact that the defendant was the owner of the vehicle involved.

TORTS—PROXIMATE CAUSATION—STATE HELD NOT LIABLE FOR DEATH OF PERSON FRIGHTENED TO DEATH BY CONVICT WHO ESCAPED THROUGH STATE'S NEGLIGENCE.—The New York Court of Appeals has held that the State is not liable for the death of one who died of a brain hemorrhage brought on by fright, where this fright was caused by threats to and coercion of deceased on the part of a convict who was escaping from a State prison farm.[1]

Both the Court of Claims[2] and the Appellate Division[3] had held that the State was negligent in two respects: 1. In failing, under the circumstances, to guard the convict properly; and 2. in failing to apprehend him within a reasonable time after escape. On the basis of these findings the State was held liable for the subsequent death. The Court of Appeals reversed these judgments on the ground that the State as a jailer, does not owe a duty to private citizens in respect to guarding and apprehending its prisoners. Without duty, there can be no breach of duty, and without breach of duty there can be no liability.[4]

On the 21st of April, 1951, William A. Kennedy, a convict, was in the custody of the State of New York at the Auburn State Prison Farm, having been convicted of attempted robbery of a taxi driver with a toy pistol. He was classified as a "minimum security" prisoner, and was assigned to farm work. While the unarmed

[17] Tot v. United States, note 7 *supra*.

[1] Williams v. State of New York, 308 N. Y. 548, 127 N. E. 2d 545 (1955).
[2] 204 Misc. 843, 143 N. Y. S. 2d 867 (1953).
[3] 284 App. Div. 1027, 134 N. Y. S. 2d 857 (4th Dep't 1954).
[4] See note 1, *supra*.

guard went to another part of the farm, without keeping a permanent watch upon the prisoners entrusted to him, Kennedy, a member of this group, escaped. When the escape was discovered, the farm siren was not blown, as it should have been, and as it had been after previous escapes. Since the siren was silent, the road-block system available for such contingencies was not used, with the result that Kennedy's escape was facilitated and his apprehension delayed.

About an hour after escaping, the trial court found, Kennedy, "by use of force, threats, and duress" compelled Williams, a local farmer, to aid his escape by transporting him away from the prison farm area in Williams' truck. During the ride, several witnesses observed Williams driving at an excessive rate of speed, visibly upset and agitated, with Kennedy seated next to him. A little over an hour after Kennedy had forced Williams to give him a ride, Williams was found sitting on the running board of his truck, vomiting and very ill. The court found that the force and duress exercised upon Williams caused the brain hemorrhage from which he died the next day. Kennedy was apprehended shortly after leaving Williams, carrying a sharp, six-inch blade which could have been taken from any of several machines or junk piles on the prison farm. Williams' body showed no bruises or other signs of physical trauma. Although the issue as perceived by the courts below was whether plaintiff could recover damages for an injury unaccompanied by physical impact, the Court of Appeals viewed the case as turning upon the issue of proximate causation. The Court of Appeals held that although negligence was indeed present, the State was in this case exempted from liability on the ground that this negligence was not the proximate cause of the injury.

Proximate cause, an essential element of liability for negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the result would not have occurred.[5] To make defendant liable, his act or omission must be the proximate or legal cause of plaintiff's injury.[6] Proximate cause cannot be reduced to any exact rule. It must be determined upon mixed consideration of logic, common sense, policy and precedent.[7]

The courts have applied various tests in establishing what constitutes a proximate cause. One of these is the *nearest cause* rule, also called *Lord Bacon's rule*: "In jure non remota causa sed proxima spectatur." (In law the nearest cause is looked to, not the remote one.) In other words, the proximate cause is the immediate and direct cause as opposed to an indirect and remote one. Another is the *but for* or *sine qua non* rule, under which defendant's act is not a cause of the event if the event would have happened without it.[8] A third is the *probable consequence* rule: is the injury the natural and probable consequence of defendant's conduct?[9] The New York courts have been prone to apply the *foreseeability* test, and it is the one employed here.

The *foreseeability* test, briefly stated, enunciates the principle that where harm was foreseeable at the time of the defendant's conduct, it is the legal cause thereof.[10] Foreseeability is the fundamental basis of the law of negligence, for if the defendant could not foresee reasonably any injury as the result of his act, or if his conduct was reasonable in the light of what he could anticipate, there is no negligence and no liability.[11] Another avenue of approach has been to inquire whether the defend-

[5] Rider v. Syracuse Rapid Transit Co., 171 N. Y. 139, 63 N. E. 836 (1902).

[6] Perry v. Rochester Lime Co., 219 N. Y. 60, 113 N. E. 529 (1916).

[7] Pease v. Sinclair Ref. Co., 104 F. 2d 183 (2d Cir. 1939); Comstock v. Wilson, 257 N. Y. 231, 177 N. E. 431 (1931).

[8] Camp v. Wilson, 258 Mich. 38, 241 N. W. 844 (1932).

[9] Gilbert v. State, 56 N. Y. S. 2d 232 (Ct. Cl. 1945).

[10] Steits v. Gifford, 280 N. Y. 15, 19 N. E. 2d 661 (1939).

[11] Stephens v. Mutual Lumber Co., 103 Wash. 1, 173 Pac. 1031 (1918).

ant is under a duty to protect plaintiff against unforeseeable consequences of his (defendant's) negligent acts. Chief Judge Cardozo declared in the *Palsgraf*[12] case that the "risk to be perceived" defines the duty "to be obeyed" in such situations.[13]

The trial court, in the instant case, found that it was reasonably foreseeable that a prisoner once out of the confines of the prison farm would use force, if necessary to perfect his escape. The Court of Appeals concluded that even if the authorities should have anticipated that Kennedy would escape, they should not have anticipated that he would use threats and coercion against Williams. A reasonable and experienced prison official would not anticipate that Kennedy, in view of his known nature and conduct would, if not kept under constant surveillance, leave the prison farm, threaten someone with bodily harm, and thereby induce in that person a fatal emotional stress. Generally, a party is not accountable at law for failure to anticipate the commission of a crime by a third person.[14] Moreover, the presence of reasonable foreseeability is a matter of foresight based upon knowledge and experience,[15] and mere evidence of an honest mistake in judgment is not alone sufficient to establish the expectation of a particular risk.[16]

This case is distinguishable from cases where inmates are confined in State mental institutions and inflict injury after escape. In the latter case it has been held that because such inmates have propensities toward violent crimes it is foreseeable that if they escape due to some negligent act of the State, they might harm or injure someone.[17]

In this case, Kennedy was not a psychiatric patient. He was being punished for a crime by being deprived of his liberty. The Court of Appeals held the State owed no duty to members of the public to protect them from the risk of exposure to such men. If the State was negligent in permitting Kennedy to escape to society prematurely, it breached only the public duty to punish Kennedy, and not a private duty to protect Williams. Even though the State was negligent, it was "negligence in the air" and that there is no liability on the part of the State for the injury to the deceased.[18]

Part of the rationale of the court was that, in addition to well settled legal principles and precedents, public policy would require that the State be freed from liability. A contrary holding might well dissuade correction workers and officials from continuing to experiment with "minimum security" work, which many believe to be a fruitful rehabilitation process.[19]

In the absence of any proximate causation between the State's act and Williams' death, the Court of Appeals felt it was not necessary to discuss the problem of liability for the particular injury involved, a brain hemorrhage resulting in death, which had been occasioned by fright unaccompanied by physical impact. This result unfortunately deprives us of a discussion by the Court of Appeals on the much dis-

[12] Palsgraf v. Long Island Railroad, 248 N. Y. 339, 162 N. E. 99 (1928).

[13] Campbell, *Duty, Fault and Legal Cause,* 1938 WIS. L. REV. 402.

[14] Saugerties Bank v. Delaware & Hudson Co., 236 N. Y. 425, 125 N. E. 904 (1923); Regone v. State, 243 N. Y. 607, 154 N. E. 625 (1926).

[15] Weills v. State, 267 App. Div. 233, 45 N. Y. S. 2d 542 (3d Dep't 1943).

[16] Jones v. State of New York, 267 App. Div. 254, 45 N. Y. S. 2d 404 (3d Dep't 1944).

[17] Flaherty v. State, 296 N. Y. 342, 73 N. E. 2d 543 (1947); Scolairno v. State, 297 N. Y. 460, 74 N. E. 2d 174 (1947); Excelsior Ins. Co. of New York v. State, 296 N. Y. 40, 69 N. E. 2d 553 (1946); St. George v. State, 308 N. Y. 681, 124 N. E. 2d 320 (1955).

[18] Martin v. Hertzog, 228 N. Y. 164, 126 N. E. 814 (1920).

[19] Excelsior Ins. Co. of New York v. State, 296 N. Y. 40, 69 N. E. 2d 553 (1946).

cussed and disputed rule that there can be no recovery for personal injuries resulting from fright without physical contact.[20]

Although the Court of Appeals has never repudiated the rule of the *Mitchell* case, or confined the case to its own facts, it greatly weakened its authority by its holding in *Comstock* v. *Wilson*.[21] In that case recovery was allowed where the injuries resulted from fright, accompanied by a contact. It was clear, however, that the contact was not the cause of the injuries; the chief culprit was the fright.

The Court of Claims, in finding for the plaintiff herein, felt that recovery was proper even though there was no contact, relying on *Comstock* v. *Wilson*.[22] It should be pointed out that the *Mitchell* rule does not apply in cases of wilful torts[23] and certainly the tort of Kennedy was wilful. If defendant was liable it was liable for whatever tort Kennedy committed.

However, since the defendant was not found to be liable, we must await clarification of this problem in the future.

[20] Mitchell v. Rochester, 151 N. Y. 107, 45 N. E. 354 (1896).
[21] See note 7, *supra*.
[22] *Ibid.*
[23] Garrison v. Sun Publishing Co., 207 N. Y. 1, 100 N. E. 430 (1912).