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Recent Cases

RECENT CASES

IMPACT RULE ABOLISHED IN DELAWARE AND NEW JERSEY—ACTION PERMITTED FOR INJURIES ARISING FROM MERE FRIGHT—A PLEA TO THE PENNSYLVANIA COURT

Robb v. Pennsylvania R. R.,
210 A.2d 709 (Del. 1965).
Falzone v. Busch,
45 N.J. 559, 214 A. 2d 12 (1965).

Updating their negligence law, the Supreme Courts of Delaware and New Jersey in *Robb v. Pennsylvania R.R.*[1] and *Falzone v. Busch*[2] unanimously allowed actions for bodily injuries arising from negligently inflicted fright without physical impact. This is a step which the Pennsylvania Supreme Court in *Bosley v. Andrews*[3] was unwilling to take. *Robb* was a case of first impression in Delaware while *Falzone* overruled *Ward v. West Jersey & S. R.R.*[4]

In *Robb*, the plaintiff alleged that her car was stuck in a rut which defendant railroad negligently permitted to form at a crossing. While attempting to free her vehicle, she noticed a train approaching. She leaped from the car just before the train hit the auto, hurling it into the air. Although she suffered fright and consequential injury, she was in no way touched by the locomotive or the airborne auto. The lower court dismissed the complaint.

The *Falzone* complaint averred that plaintiff Mabel Falzone was seated in a lawfully parked car while her husband, also a plaintiff, was standing in a field across the road. Defendant's car struck Mr. Falzone and then veered across the road directly towards the car in which Mrs. Falzone was seated, narrowly missing it. Mrs. Falzone saw defendant strike her husband, and then observed her position of peril. As a result of the *near miss*, Mrs. Falzone suffered severe fright and consequential bodily injury.[5] The *Robb*

1. 210 A.2d 709 (Del. 1965).
2. 45 N.J. 559, 214 A.2d 12 (1965).
3. 393 Pa. 161, 142 A.2d 263 (1958).
4. 65 N.J.L. 383, 47 Atl. 561 (Sup. Ct. 1900).
5. The New Jersey court did not consider whether one could maintain an action for injuries arising from the apprehension of harm to another. It is apparently settled in Delaware that one cannot. Williamson v. Wilmington Housing Authority, — Del. —, 208 A.2d 304 (1960). This is an area of broad controversy. It is widely held that in such a case the negligent party invades no legally protected right of the plaintiff-onlooker. See, *e.g.*, Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935) wherein a

and *Falzone* courts held that the complaints stated a cause of action. *Falzone* also allowed the husband to recover for loss of consortium.[6]

The impact rule began in England with the decision of the House of Lords in *Victorian Ry. Comm'r v. Coultas.*[7] The court concluded that damages from fright without impact were not the consequence of the defendant's act. It was reasoned that to permit recovery in such a case would be extending liability for negligence too far[8] and would subject the courts to many imaginary claims.[9] *Victorian Ry. Comm'r* had only a brief reign in England. It was overruled in 1901[10] but was followed as precedent in the United States.[11] The current trend in the United States today, however, seems to demand the abolition of any impact requirement.[12]

Illustrative of the traditional arguments in favor of the impact rule is *Ward v. West Jersey & S. R.R.*,[13] which *Falzone* overruled.

Firstly, it may be argued that physical injury is not a normal, natural or probable consequence of fright in the case of a person of ordinary physical condition.[14] The advance of medical knowledge long ago resulted in the refutation of this contention.[15] It is now widely recognized that emotional disturbance can and does cause physical injury. Moreover, certain of the *restrictive* cases candidly

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mother watching through a window saw defendant negligently kill her daughter with an automobile. As a result of witnessing the tragedy, it was alleged that the mother became emotionally distressed and died. The Wisconsin court held that plaintiff's allegations did not bring the dead mother's interest within the field of legally protected rights. See also Amaya v. Home Ice, Fuel, & Supply Co., 59 Cal. 2d 295, 379 P.2d 513 (1963). It would be interesting to speculate upon the extent to which Mrs. Falzone's injuries were attributable to seeing her husband injured and to what extent her injuries were attributable to fear for her own safety.

6. Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965). It is interesting to note that New Jersey recently allowed the *wife* to recover for loss of her *husband's* consortium. Ekalo v. Constructive Serv. Corp. of America, 46 N.J. 82, 215 A.2d 1 (1965) (gas explosion).

7. 13 App. Cas. 222 (1888).

8. *Id.* at 225.

9. *Id.* at 226.

10. Dilieu v. White & Sons, [1901] 2 K.B. 669.

11. West Chicago St. R.R. v. Liebeg, 79 Ill. App. 567 (1898); Spade v. Lynn & B. R.R., 168 Mass. 285, 47 N.E. 88 (1897); Ward v. West Jersey & S. R.R., 65 N.J.L. 383, 47 Atl. 561 (Sup. Ct. 1900) (overruled); Mitchell v Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896) (overruled); Miller v. Baltimore & O. S.W. R.R., 78 Ohio St. 309, 85 N.E. 499 (1908); Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958).

12. PROSSER, TORTS 351 n. 98 (3d ed. 1964).

13. 65 N.J.L. 383, 47 Atl. 561 (Sup. Ct. 1900).

14. Victorian Ry. Comm'r v. Coultas, 13 App. Cas. 222 (1888); Ward v. West Jersey & S. R.R., 65 N.J.L. 383, 47 Atl. 561 (Sup. Ct. 1900).

15. Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941); see Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922); Smith, *Relation of Emotion to Injury and Disease*, 30 VA. L. REV. 193 (1944).

recognize that mental shock may produce serious physical injury.[16]

Another objection is that injuries resulting from fright are too remote.[17] The courts have been very reluctant to compensate for mental disturbance. The remoteness argument fails, however, because it has long been recognized that a technical assault is compensable.[18] The emotional disturbance, *i.e.*, apprehension, is the very thing for which the plaintiff in an assault action is being compensated. Moreover, the slight impact cases also make it obvious that it is predominately the mental disturbance (and resulting bodily consequences) which is being compensated.[19] The Pennsylvania Supreme Court has found impact when, according to the plaintiff's testimony, he suffered an electric shock when a trolley wire fell on his car.[20] There were no external marks of physical injury, yet plaintiff was allowed to recover for the fright-induced psychoneurosis.[21] Nonetheless, the Pennsylvania Supreme Court has meticulously adhered to the impact rule. *Bosley v. Andrews*[22] epitomizes the situation. An elderly woman was chased and severely frightened by a runaway bull. She was precluded from maintaining an action to recover for an alleged fright-accelerated circulatory disorder. Presumably if the bulls' tail had so much as grazed her, this would have supplied sufficient impact to place the stamp of approval upon her claim.[23] Is it not most reasonable to suppose that a Georgia court was compensating for "remote" mental disturbance and resulting physical manifestations when it found impact due to a performing horse "evacuating his bowels" into plaintiff's lap?[24]

Certain restrictive courts have allowed recovery without impact for mental disturbance resulting in physical manifestations where the emotional disturbance is wilfully caused.[25] The injuries

16. See Spade v. Lynn & B. R.R., 168 Mass. 285, 47 N.E. 88 (1897); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896). These cases predominately relied upon a "public policy" argument.

17. See Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896).

18. I. de S. et ux. v. W. de S., Y.B. 22 Edw. III f. 99 p. 60 (1349).

19. Kentucky Traction & Terminal Co. v. Roman's Guardian, 232 Ky. 285, 23 S.W.2d 272 (1929) (slight burn); Homans v. Boston Elevated R.R., 180 Mass. 456, 62 N.E. 737 (1902) (slight blow); Porter v. Delaware, L. & W. R.R., 73 N.J.L. 577, 87 Atl. 130 (Sup. Ct. 1913) (dust in the eye); Zelinsky v. Chimics, 196 Pa. Super. 312, 175 A.2d 351 (1961) (any degree of physical impact, however slight).

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

21. *Ibid.*

22. 393 Pa. 161, 142 A.2d 263 (1958).

23. See Zelinsky v. Chimics, 196 Pa. Super. 312, 175 A.2d 351 (1961) (any degree of physical impact, however slight).

24. Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928).

25. Crane v. Loftin, 70 So.2d 574 (Fla. 1954); Kuzma v. Millinery Workers Union Local No. 24, 27 N.J. Super. 579, 99 A.2d 833 (1953) (prior to Falzone v. Busch); Boyce v. Greely Square Hotel Co., 228 N.Y. 106, 126 N.E. 647 (1920) (prior to Batalla v. State).

are no less real if they are negligently inflicted. It is arguable that Pennsylvania recognized this distinction in *Cucinotti v. Ortman*.[26] After citing authority that impact is required in cases of negligence, the *Cucinotti* court noted that "the rule may be different where the infliction is *intentional*."[27] The facts of *Cucinotti*, however, indicated an intentional infliction of mental distress which the court refused to recognize.[28] In *Cucinotti* the plaintiffs were threatened with great force and violence unless they left the premises by hoodlums brandishing blackjacks.[29] While this did not constitute a technical assault because there was no showing that defendants placed plaintiffs in *immediate fear* of bodily harm, it is difficult to perceive how the defendants' acts failed to constitute an intentional infliction of mental distress.[30] Their conduct *was intended* to frighten the plaintiffs into leaving the premises.

Another exception to the impact requirement has developed in those cases in which a person is injured attempting to avoid a hazard negligently created by another.[31] Thus, when one is injured during an attempt to escape a runaway railroad car, he may recover for the physical consequences of fright even though his original location subsequently turns out to have been one of complete safety.[32] In such a case the courts have not been at all troubled by any remoteness or absence of causal connection.

Another specious reason for denying recovery was given in *Ward*. The court reasoned that the absence of suits concerning negligent infliction of mental disturbance without contemporaneous physical impact demonstrated the concurrence of the bar as to the soundness of the impact rule.[33] *Falzone*, however, aptly noted:

> We do not believe the court meant to imply that it would deny recovery because of opinions held by lawyers on the

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26. 399 Pa. 26, 159 A.2d 216 (1960).

27. *Id.* at 29, 159 A.2d at 218. (Emphasis added.)

28. See State Rubbish Collector's Assoc. v. Siliznoff, 38 Cal.2d 330, 240 P.2d 282 (1952) (Siliznoff threatened with violence and permitted to recover for resulting physical and mental injury).

29. Cucinotti v. Ortman, 399 Pa. 26, 27, 159 A.2d 216, 217 (1960).

30. See State Rubbish Collector's Assoc. v. Siliznoff, 38 Cal.2d 330, 240 P.2d 282 (1952).

31. Stokes v. Saltonstal, 13 U.S. (13 Pet.) 114 (1839); Tuttle v. Atlantic City R.R., 66 N.J.L. 327, 49 Atl. 450 (Ct. Err. & App. 1901); Buchanan v. West Jersey & S. R.R., 52 N.J.L. 265, 19 Atl. 254 (Sup. Ct. 1890); Thornton v. Weaber, 380 Pa. 590, 112 A.2d 344 (1955).

32. In Tuttle v. Atlantic City R.R., 66 N.J.L. 327, 49 Atl. 450 (Ct. Err. & App. 1901), the court noted:

> [I]f a defendant, by negligence, puts the plaintiff under a reasonable apprehension of personal physical injury and plaintiff, in a reasonable effort to escape, sustains physical injury, a right of action arises to recover for the physical and the mental disorder naturally incident to its occurrence.

Id. at 332, 49 Atl. at 451.

33. Ward v. West Jersey & S. R.R., 65 N.J.L. 383, 384, 47 Atl. 561, 562 (Sup. Ct. 1900).

> legal question presented. And if the court intended to bar the cause of action because of a lack of precedent in this State, a sufficient answer is that the common law would have atrophied hundreds of years ago if it had continued to deny relief in cases of first impression.[34]

The most tenable argument against allowing recovery is that of public policy.[35] Three major interrelated contentions have arisen under the public policy heading.[36] *Mitchell v. Rochester Ry.*[37] held that proof or disproof of fear-induced physical suffering would be so difficult that recovery would be based upon mere conjecture. In overruling *Mitchell*, the New York court said "the question of proof in individual situations should not be the arbitrary basis upon which to *bar* all actions. . . ."[38] Plaintiff should be permitted an attempt to convince the jury of defendant's liability.[39] The difficulty of tracing a causal connection from the negligent act of the defendant to the injury is not peculiar to cases without impact.[40] Thus mere difficulty of proof should not bar the plaintiff from the opportunity of attempting to convince the trier of fact as to the truth of his claim.[41]

Another public policy argument is that to allow recovery for the physical consequences of emotional disturbance without impact would open the door to fraudulent actions.[42] The allowance of recovery in the slight impact cases[43] negates the effectiveness of the impact rule as a method of preventing fraudulent claims.[44]

> The arbitrary denial of recovery in all cases not falling within the realm of one or another of the exceptions [to the impact rule] discourages the bringing of meritorious actions and at the same time allows the prosecution of

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34. Falzone v. Busch, 45 N.J. at 562, 214 A.2d at 15.

35. Spade v. Lynn & B. R.R., 172 Mass. 488, 62 N.E. 737 (1898); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896); Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958); Huston v. Freemansburg Borough, 212 Pa. 548, 61 Atl. 1022 (1905).

36. Falzone v. Busch, 45 N.J. at 561-63, 214 A.2d at 15-17.

37. 151 N.Y. 107, 45 N.E. 354 (1896).

38. Battala v. State, 10 N.Y.2d at 242, 176 N.E.2d at 732 (1961). (Emphasis added.)

39. *Ibid.* See also Bosley v. Andrews, 393 Pa. 161, 152 A.2d 263, (1958) (Musmanno, J., dissenting).

40. See Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960) (prenatal injuries); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960) (prenatal injuries).

41. Robb v. Pennsylvania R.R., 210 A.2d at 713-15; Falzone v. Busch, 45 N.J. at 562, 214 A.2d at 15.

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

43. Kentucky Traction & Terminal Co. v. Roman's Guardian, 232 Ky. 285, 23 S.W.2d 272 (1929) (slight burn); Homans v. Boston Elevated R.R., 180 Mass. 456, 62 N.E. 737 (1902) (slight blow); Porter v. Delaware, L. & W. R.R., 73 N.J.L. 577, 87 Atl. 130 (Sup. Ct. 1913) (dust in the eye); Zelinsky v. Chimics, 196 Pa. Super. 312, 175 A.2d 351 (1961) (any degree of physical impact, however slight).

44. Falzone v. Busch, 45 N.J. 559, 563, 214 A.2d 15, 16 (1965).

> fabricated claims, for surely those capable of perjuring evidence will not hesitate to manufacture one additional feature of the occurrence - a slight impact - to insure recovery.[45]

When Connecticut abolished the impact rule, the court noted that there was very little additional risk of fraud in allowing recovery in the no impact cases than presently existed in the slight impact cases.[46] The *Falzone* court said:

> As to the possibility of actions based upon fictitious injuries, a court should not deny recovery for a type of wrong which may result in serious harm because some people may institute fraudulent actions. Our trial courts retain sufficient control, through the rules of evidence and the requirements as to the sufficiency of evidence, to safeguard against the danger that juries will find facts without legally adequate proof.[47]

The final public policy argument is the ubiquitous "floodgates" argument.[48] This argument fails since there has been absolutely no showing that the majority[49] of courts which now allow recovery without impact have been swamped with such litigation. No court which has abolished the impact rule has reinstated it because of a flood of litigation, or for any other reason. The purpose of a court is to dispense justice, and if the action is meritorious, it must willingly cope with the increased burden.

> [T]he fear of an expansion of litigation should not deter courts from granting relief in meritorious cases; the proper remedy is an expansion of the judicial machinery, not a decrease in the availability of justice.[50]

Robb and *Falzone* definitely are representative of the trend of modern case law. Today, courts are less prone to deny a remedy for a substantial wrong for fear of their inability to cope with the problem. It leaves one to wonder how long Pennsylvania will cling to the outdated impact rule in the name of stare decisis.[51] Rear-

45. McNiece, *Psychic Injury and Liability in New York*, 24 ST. JOHNS L. REV. 1, 31 (1949).

46. Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941). See also Bowman v. Williams, 164 Md. 397, 165 Atl. 182 (1933).

47. Falzone v. Busch, 45 N.J. at , 214 A.2d 16 (1965); see also Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960).

48. *E.g.*, Ward v. West Jersey & S. R.R., 65 N.J.L. 383, 47 Atl. 561 (Sup. Ct. 1900); Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958) (would open a Pandora's box).

49. *E.g.*, Lindley v. Knowlton, 179 Cal. 298, 176 Pac. 440 (1918); Orlo v. Connecticut Co., 128 Conn. 23, 21 A.2d 402 (1941); Robb v. Pennsylvania R.R., 210 A.2d 709 (1965); Bowman v. Williams, 164 Md. 397, 165 Atl. 182 (1933); Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 Atl. 540 (1930); Battalla v. State, 10 N.Y.2d 327, 176 N.E.2d 729 (1961).

50. Falzone v. Busch, 45 N.J. at 563, 214 A.2d at 16 (1965).

51. Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958) wherein the majority said: "What plaintiff is really asking us to do is to review and change the rule which has been so long and clearly established by our

guard actions such as *Bosley v. Andrews* may occur, but the trend of the case law clearly supports the contention that the impact rule is "destined for ultimate extinction."[52]

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cases, because the courts of many other states and the Restatement allow recovery . . . ." *Id.* at 167-68, 142 A.2d at 266.

52. PROSSER, TORTS 351 (3d ed. 1964).

CRIMINAL CONTEMPT PROCEDURE IN FEDERAL COURTS—RULES 42(a) AND (b)

Harris v. United States, 382 U.S. 162 (1965)

Al Harris appeared under subpoena as a witness before a federal grand jury. He refused to answer certain questions on the ground of self-incrimination. The district court directed him to answer the questions and instructed him that he would receive immunity from prosecution in matters to which he testified. Again before the grand jury he refused to answer. He was taken back to the district court, sworn, and ordered to answer each question as it was read to him. He still refused to comply. The district court then summarily found Harris to be in contempt of court and sentenced him to a year in jail under Rule 42(a) of the Federal Rules of Criminal Procedure.[1] The court of appeals affirmed[2] but the Supreme Court of the United States reversed and remanded.[3]

Although the district court's pronouncement was within the literal scope of rule 42(a) and followed a summary procedure expressly approved by the Supreme Court under identical facts in *Brown v. United States*,[4] the Supreme Court reversed the conviction and overruled *Brown*. Rather than utilizing the summary procedure of 42(a), the district judge should have held a hearing as provided in 42(b).[5] While Rule 42(a) gives the judge power to summarily punish any contempt "if the judge certifies that he saw

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1. FED. R. CRIM. P. 42. Criminal Contempt:
   (a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
2. United States v. Harris, 334 F.2d 460 (2d Cir. 1964).
3. 382 U.S. 162 (1965).
4. 359 U.S. 49 (1959). See also, Levine v. United States, 362 U.S. 610 (1960).
5. FED. R. CRIM. P. 42. Criminal Contempt:
   (b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

or heard the conduct constituting the contempt and that it was committed in the actual presence of the court,"[6] the power does not extend to cases of this kind. The Court gives two reasons for excluding this conduct from "the narrow category envisioned by Rule 42(a)."[7]

First, the majority thought the real offense was committed outside the presence of the judge and before the grand jury, when Harris refused to answer as ordered. His second refusal, before the judge, was *not* a second contempt.[8] This reasoning, however, was not decisive for the Court assumed arguendo that his second refusal was a separate contempt committed in the presence of the judge. The Court's second point, and the basis of its decision, was that Rule 42 (a) does not apply to all contempts committed in the judge's presence. Rule 42(a) is applicable when the disruption to the business of the court is more tangible. "To preserve order in the courtroom for the proper conduct of business, the court must act instantly to suppress disturbance or violent obstruction or disrespect to the court, when occurring in open court."[9] Here there was nothing in Harris' conduct requiring "immediate penal vindication of the dignity of the court."[10] Therefore, Rule 42(b) should have been followed by giving notice and holding a hearing on the contempt charges.

A hearing is necessary so that a just sentence may be imposed. While this record did not disclose any extenuating circumstances, the Court suggested that fear of reprisal upon the witness might be the cause of his silence. The sentencing judge should have the opportunity to learn of such mitigating circumstances so that the punishment is appropriate.[11]

Since Rule 42(a) was intended to be a restatement of existing case law at the time of its adoption,[12] the Court has relied on its prior cases in construing the Rule. The Court has long recognized that a summary proceeding of immediate conviction, *i.e.*, without a hearing, is proper only when the contempt takes place in the presence of the court. That procedure is proper because the judge knows all the facts and a prompt exercise of the power is necessary

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6. FED. R. CRIM. P. 42 (a)

7. 382 U.S. at 165.

8. *Ibid.* The same point, that a second refusal should not constitute a second contempt was made by the four dissenters in Brown v. United States, 359 U.S. at 54. Harris was first in contempt of court when upon return to the grand jury room he refused to answer as he had been ordered by the court. Undoubtedly he could then have been subject to 42(b) proceedings. See Carlson v. United States, 209 F.2d 209. (1st Cir. 1953).

9. Cooke v. United States, 267 U.S. 517, 534 (1925).

10. 382 U.S. at 165, citing Cooke v. United States, *supra* note 9, at 536.

11. *Id.* at 166.

12. FED. R. CRIM. P. 42(a), Notes of Advisory Committee on Rules, citing *Ex parte* Terry, 128 U.S. 289 (1888) and Cooke v. United States, 267 U.S. 517 (1925).

to assert the authority, order and dignity of the court.[13] Correspondingly, when the offense is committed outside the presence of the court, a hearing must be held to determine the facts. Summary disposition is not required to maintain decorum in the courtroom.[14] Rule 42(a) states the case law rule too broadly. Not all contempts committed in the court's presence will disclose all the relevant facts nor will they necessarily so disrupt the court as to require instant punishment. The *Harris* facts fit this description. His refusal in court did not disrupt the court. A hearing was necessary to disclose any relevant mitigating circumstances. The reasons for permitting a summary conviction were absent. Therefore a hearing procedure was necessary.

This restrictive interpretation placed on Rule 42(a) by *Harris* is more consistent with the Court's treatment of the contempt power than was *Brown*. From the earliest times, the Court has said that the contempt power should be limited to "the least possible power to the end proposed."[15] This standard has been implemented in several cases, as it was in *Harris*, by requiring a hearing even though the contempt occurred in court. Thus, when a defendant was found to be schizophrenic shortly after his summary contempt conviction, the Court ordered a full hearing on the question of his legal responsibility for misbehavior at trial.[16] Likewise, the Court has ordered disqualification of the presiding judge when the contempt involved personal criticism and vilification of the judge. The possibility of biased judgment is very real under those circumstances and the Court required a hearing before another judge to restore impartiality to the decision.[17] Like *Harris*, these cases require a judge to proceed to punish for contempt only with knowledge of all the facts and upon impartial deliberation.

Since the exercise of the contempt power is immune from constitutional protections,[18] the Court is guided only by its sense of fairness and practicality in imposing restraints upon the use of that power.[19] The procedural safeguard on which the Court has

13. Sacher v. United States, 343 U.S. 1, 9 (1952); *Ex parte* Terry, *supra* note 12, at 308-10.

14. Cooke v. United States, 267 U.S. 517 at 536 (1925). *Cf. In re* Savin, 131 U.S. 267 (1889) (misconduct near the courtroom held to be in the presence of the court).

15. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1824).

16. Panico v. United States, 375 U.S. 29 (1963).

17. This rule was first applied to contempts committed outside the presence of the court, Cooke v. United States, 267 U.S. 517 (1925). It was then extended by Offutt v. United States, 348 U.S. 11 (1954), to contempts in the presence of the court. It may be a close question whether the contempt charged was so personal as to require the judge's disqualification. See Sacher v. United States, 343 U.S. 1 at 12 (1952).

18. Levine v. United States, 362 U.S. 610, 616 (1960); Green v. United States, 356 U.S. 165, 183-87 (1958); Offutt v. United States, 348 U.S. 11, 14 (1954).

19. The Court may properly rule on these matters because it has

chosen to rely is the hearing requirement.[20] As a safeguard against abuse of the contempt power, the hearing depends for its effectiveness upon the integrity of the presiding judge. The hearing would be a barren formality for a defendant against whom the judge's mind was already set.[21] Thus, the *Harris* decision will not satisfy those who protest that a contemnor, like any other criminal offender, should be entitled to a jury trial.[22] The Court, however, has always held this judicial prerogative power to be inherent in and essential to the court's function.[23] Possibilities for abuse are inherent in the process. What the Court has done in previous cases and again in *Harris*, is to rely on the integrity of the judiciary, assuming its ability to arrive at a just decision given opportunity for fair consideration.

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supervisory authority in the administration of criminal justice in the federal courts. See McNabb v. United States, 318 U.S. 332, 341 (1943).

20. The *Harris* opinion approvingly cited the use of Rule 42(b) to punish similar contempts. See United States v. Pappadio, 346 F.2d 5 (2d Cir. 1965); United States v. Shillitani, 345 F.2d 290 (2d Cir. 1965); United States v. Traumunti, 343 F.2d 548 (2d Cir. 1965); United States v. Castaldi, 338 F.2d 833 (2d Cir. 1965).

Supreme Court review is not limited to procedural questions. If the conduct complained of does not appear to have been contemptuous of the court, the conviction will be reversed. See *In re* McConnell, 370 U.S. 230 (1962); Cammer v. United States 350 U.S. 399 (1956). Likewise, if conduct outside the court's presence was not sufficiently obstructive, contempt conviction cannot be sustained. See *In re* Michael, 326 U.S. 28 (1945); Nye v. United States, 313 U.S. 33 (1941). *But see* 18 U.S.C. §§ 402, 3691 (1964), which provide the right to a jury trial on contempt charges when any contempt committed outside the presence of the court is also a criminal offense.

21. Abuses of discretion may be corrected by appellate courts. See Nilva v. United States, 352 U.S. 385 (1957). Summary convictions are also subject to review. Rule 42(a) requires specification of the contempt charges in order that the conviction may be properly reviewed. Tauber v. Gordon, 350 F.2d 843 (3d Cir. 1965). *Cf.* United States v. Schiffer, 351 F.2d 91 (6th Cir. 1965) (trial record incorporated into specific charges to give proper context to the misconduct).

22. See Levine v. United States, 362 U.S. 610, 622 (1960) (Black, J., dissenting); Green v. United States, 356 U.S. 165, 194 (1958) (Black, J., dissenting); see also Frankfurter and Landis, *Power to Regulate Contempts*, 37 HARV. L. REV. 1010, 1056 (1924); Goldfarb, *The Constitution and Contempt of Court*, 61 MICH. L. REV. 283 (1962).

23. Levine v. United States, *supra* note 22, at 615; *Ex parte* Terry, 128 U.S. 289, 309 (1888); United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812).