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Torts - Mental Distress - Recovery Against Original Wrongdoer for Fear of Cancer Caused by Subsequent Medical Advice

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TORTS—MENTAL DISTRESS—RECOVERY AGAINST ORIGINAL WRONGDOER FOR FEAR OF CANCER CAUSED BY SUBSEQUENT MEDICAL ADVICE—Plaintiff, suffering from bursitis in the right shoulder, received X-ray treatments from defendant physicians. Subsequent thereto, plaintiff's shoulder began to itch, scab, and blister for several years, a condition diagnosed as chronic radio-dermatitis caused by the X-ray therapy. Approximately two years after the treatments, plaintiff was examined by a dermatologist who advised her to have her shoulder checked every six months because the area might become cancerous. Plaintiff then developed a severe "cancerphobia," an apprehension that she would ultimately develop cancer from the radiation burn. Plaintiff brought a malpractice suit against defendant physicians, seeking recovery for the physical injury and the mental distress caused by her later-developed fear of cancer. The trial court gave judgment for plaintiff and the appellate division affirmed. On appeal, *held*, affirmed, three judges dissenting in part. Plaintiff can recover for the mental suffering which resulted from information she received from a third party to whom she had gone for treatment of the original physical injury. *Ferrara v. Galluchio*, 5 N.Y. (2d) 16, 152 N.E. (2d) 249 (1958).

When a defendant's negligence inflicts an immediate physical injury, litigants have been allowed compensation for the accompanying mental distress. If the physical harm is not immediate but follows subsequently as a result of plaintiff's fright or shock, there is a division of authority. Some courts have granted a recovery for such consequences only if there has been some physical "impact" on the plaintiff's person, while a growing number of courts allow recovery without considering "impact." When defendant's negligence causes only mental disturbance, without accompanying physical injury, there is general agreement denying recovery, with certain exceptions as in the case of negligent mishandling of a corpse. The courts recognize intentional infliction of mental distress as a separate

tort.¹ The plaintiff in the principal case sought recovery for her anxiety and worry over the possibility of contracting cancer.² The elements of impact, physical injury, and accompanying pain and suffering were present. The decision, however, represents the first case in New York to allow recovery from the defendant for mental suffering arising from information the plaintiff received from a doctor to whom she later went for treatment of the original physical injury caused by the defendant.³ On facts quite similar to those in the principal case, a Vermont court has allowed recovery,⁴ and in circumstances somewhat different a Texas court has approved recovery of damages for mental distress.⁵ In allowing recovery the court in the principal case faced two problems: proximate cause and proof. The first problem, proximate cause, seems a relatively simple one.⁶ While in the principal case the mental anguish did not arise for two years,

¹ See generally on mental distress PROSSER, *TORTS*, 2d ed., 38-47, 178-182 (1955); 1 HARPER AND JAMES, *TORTS* 665-691 (1956); McCORMICK, *DAMAGES* 299-334 (1935); 1 STREET, *FOUNDATIONS OF LEGAL LIABILITY* 460-471 (1906); 25 C.J.S. 548-560 (1941); 15 AM. JUR., *DAMAGES* §§175-189 (1938); Prosser, "Intentional Infliction of Mental Suffering: A New Tort," 37 MICH. L. REV. 874 (1939); Goodrich, "Emotional Disturbance as Legal Damage," 20 MICH. L. REV. 497 (1922); Plant, "Damages for Pain and Suffering," 19 OHIO ST. L. J. 200 (1958); Zelermyer, "Damages for Pain and Suffering," 6 SYRACUSE L. REV. 27 (1954); McNiece, "Psychic Injury and Tort Liability In New York," 24 ST. JOHN'S L. REV. 1 (1949); Harper and McNeely, "A Re-examination of the Basis for Liability for Emotional Distress," 1938 WIS. L. REV. 426; Magruder, "Mental and Emotional Disturbance in the Law of Torts," 49 HARV. L. REV. 1033 (1936); Throckmorton, "Damages for Fright," 34 HARV. L. REV. 260 (1921); Burdick, "Tort Liability for Mental Disturbance and Nervous Shock," 5 COL. L. REV. 179 (1905).

² Recovery has generally been allowed for anxiety over complications from present physical injury. See *Smith v. Boston and Maine R.R.*, 87 N.H. 246, 177 A. 729 (1935) (fear of paralysis); *Serio v. American Brewing Co.*, 141 La. 290, 74 S. 998 (1917) (fear of hydrophobia following dog bite); *Walker v. Boston and Maine R.R.*, 71 N.H. 271, 51 A. 918 (1902) (fear of insanity); *Watson v. Augusta Brewing Co.*, 124 Ga. 121, 52 S.E. 152 (1905) (fear of death); *Fink v. Dixon*, 46 Wash. (2d) 794, 285 P. (2d) 557 (1955) (plaintiff, pregnant woman, physically injured by defendant, worried about effects on herself and her baby).

³ See principal case at 252. However, the original tortfeasor has been held liable for further physical injuries suffered by plaintiff because of the negligence of the attending physician. See *Primes v. Ross*, 123 N.Y.S. (2d) 702 (1953); *Sauter v. New York Central and Hudson River R. Co.*, 66 N.Y. 50 (1876).

⁴ *Halloran v. New England Telephone and Telegraph Co.*, 95 Vt. 273, 115 A. 143 (1921), in which defendant's negligently-inflicted injury prevented plaintiff from having a necessary operation. When plaintiff learned this from her physician and suffered great mental anxiety, she was allowed to recover.

⁵ See *Kimbell v. Noel*, (Tex. Civ. App. 1950) 228 S.W. (2d) 980, in which defendant's negligence caused a breast injury to plaintiff, with a resulting possibility of cancer. The court recognized the right to recover for mental anguish. However, in this case there was a subsequent physical harm to plaintiff, an exploratory operation to remove what was believed to be a malignancy.

⁶ See *Milks v. McIver*, 264 N.Y. 267, 190 N.E. 487 (1934), which states the New York rule on proximate cause to be that the original wrongdoer is liable even for an increase in damages caused by subsequent medical treatment. This rule was deemed controlling in the principal case.

it is nevertheless reasonable for one suffering from a severe X-ray burn to see a physician. The advice of the dermatologist to watch for possible cancer and plaintiff's subsequent anxiety also seem foreseeable if not inevitable. Any defense the defendant might raise that the dermatologist here was an insulating intervening cause fails, once it is recognized that plaintiff acted foreseeably in going to the dermatologist. The second problem, proof, is much more serious and is complicated by the possible flood of litigation, both spurious and valid, which might accompany this decision. The court recognized the problem,⁷ but endorsed "public policy and common sense" as the ultimate limitation on recovery.⁸ The opinion indicates a confidence in the court's ability to distinguish valid and spurious claims, and an attitude that the possibility of false claims should not negate recovery in valid cases.⁹ Though there has been disagreement over the reliability of evidence admitted to prove mental distress,¹⁰ the contemporary medical position is that mental distress is rarely unaccompanied by physical reaction, and physical injury seldom not attended with mental distress.¹¹ Although it follows therefore that mental distress can be substantiated by evidence of physical injury or reaction, which is much easier to prove than mental suffering, it is not universally agreed that all problems of proof are now solved for purposes of litigation.¹² Nevertheless courts today accept in increasing number previously spurned medical opinion, such as the concurrent physical injury-mental distress thesis, and doctors are demonstrating a greater willingness to testify in litigations. These factors, coupled with the limitation provided by "public policy and

⁷ See principal case at 252: "Mental disturbance is easily simulated, and courts which are plagued with fraudulent personal injury claims may well be unwilling to open the door to an even more dubious field" [quoting from PROSSER, TORTS, 2d ed., 212-213 (1955)].

⁸ See principal case at 253. Although the court split 4-3, objective analysis of the mind is the turning point in many areas of the law: e.g., malicious prosecution, libel, slander, assault, alienation of affections, fraud cases in proving scienter.

⁹ The court's quick dismissal of the problem of spurious claims (and the complementary problem of a flood of litigation) is not without justification. Similar worries in granting recoveries in novel fact situations have proved unfounded. Thus, following a hesitant grant of recovery for shock for the first time, L. J. Atkin in *Hambrook v. Stokes Bros.*, 1 K.B. 141 (1925), said at 158: "I find only about half-a-dozen cases of direct shock reported in about thirty years." See also *Gulf Ry. Co. v. Hayter*, 93 Tex. 239, 54 S.W. 944 (1900).

¹⁰ Representing contrary opinions, see *Lake Erie and Western R. Co. v. Johnson*, 191 Ind. 479, 133 N.E. 732 (1922), and PROSSER, TORTS, 2d ed., 38 (1955).

¹¹ ELDREDGE, MODERN TORT PROBLEMS 76 (1941). See also PROSSER, TORTS, 2d ed., 177 (1955).

¹² See McNiece, "Psychic Injury and Tort Liability in New York," 24 ST. JOHN'S L. REV. 1 at 74-75 (1949): "With the possible exception of a few standardized psychometric tests of intelligence and broad personality categories and the electroencephalograph useful in epilepsy cases, there are no reliable objective guides." Moreover, it is not difficult for both parties to the complaint to get medical testimony reaching diametrically opposed conclusions.

common sense,"¹³ provide a stronger foundation for court decisions. The court then appears to be on firm ground in rejecting the arguments concerning difficulty of proof. The result agrees with current trends to recognize mental distress alone as an actionable injury,¹⁴ and the diminution of the requirement of physical impact for recovery in several states.¹⁵ The liberal approach of the court, in rejecting objections proved largely untenable in the past and in recognizing advanced medical knowledge particularly in the field of psychiatry, is refreshing and reasonable. The right to peace of mind is fast becoming a well-protected interest in our courts today.

Paul Gerding

¹³ See note 8 *supra*.

¹⁴ See PROSSER, *TORTS*, 2d ed., 38 (1955). See also Farage, "Mental Distress as an Independent Basis for Recovery," 40 *DICK. L. REV.* 1 (1935).

¹⁵ See ELDREDGE, *MODERN TORT PROBLEMS* 72-73 (1941). See also Harper and McNeely, "A Re-examination of the Basis for Liability for Emotional Distress," 1938 *Wis. L. Rev.* 426.