Emotional Distress in a Bodily Injury Case—
Not Another Line on the Verdict Form

**Historical Overview**


A separate cause of action for the negligent infliction of emotional distress was first recognized by the Illinois Supreme Court in *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546, 555, 457 N.E.2d 1, 5 (1983). In *Rickey*, the Illinois Supreme Court held that even absent a physical impact or a physical injury, a plaintiff who is in “a zone of physical danger” of the defendant’s negligent conduct, i.e., “in such proximity to the accident in which the direct victim was physically injured that there was a high risk of physical impact,” could recover for negligent infliction of emotional distress.

Subsequent to *Rickey*, the Illinois Supreme Court has also recognized a right of action for the negligent infliction of emotional distress, in certain specific contexts, where plaintiffs were “direct victim[s]” of the defendant’s conduct. In *Corgan v. Muehling*, 143 Ill. 2d 296, 305-06, 547 N.E.2d 602, 606 (1991), the court held that an action for negligent infliction of emotional distress could proceed against a psychologist who used the therapist-patient relationship to sexually exploit the plaintiff during the course of treatment and under the guise of therapy. In *Thornton v. Garcini*, 237 Ill. 2d 100, 117, 928 N.E.2d 804, 814 (2009), the court upheld an award for negligent infliction of emotional distress in a case where a doctor’s negligence resulted in a mother having to watch the death of her baby while it was partially delivered outside of her body.

However, recovery of emotional distress damages under either a “direct victim” or “bystander-zone of danger” theory is still subject to many limitations and development on a case by case basis. See, e.g., *Brogan v. Mitchell Intern., Inc.*, 181 Ill. 2d 178, 183-86, 692 N.E.2d 276, 277-79 (1998), holding that the plaintiff was not entitled to recover for severe emotional distress caused by defendant’s negligent misrepresentations even though the plaintiff was the “direct victim” of those misrepresentations; *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 343-48, 654 N.E.2d 1365, 1370-72 (1995), holding that plaintiff could not recover for emotional distress on a strict products liability theory even though he was clearly in the zone of danger sitting next to his wife who died in his arms after she was struck by a part from a defective automobile at a drag race; *Rekosh v. Parks*, 316 Ill. App. 3d 58, 63-64, 735 N.E.2d 765, 771-72 (2d Dist. 2000), holding that the plaintiff had no cause of action for negligent infliction of emotional distress as a result of the
defendant’s alleged negligent mishandling of a corpse; Segall v. Berkson, 139 Ill. App. 3d 325, 330-31, 487 N.E.2d 752, 755-56 (4th Dist. 1985), holding that the plaintiff’s claim for emotional distress caused by the defendant’s negligent performance of legal work should have been stricken; Maere v. Churchill, 116 Ill. App. 3d 939, 944-45, 452 N.E.2d 694, 697-98 (3d Dist. 1983), holding that emotional distress damages are not recoverable in a negligence action against an attorney.

The Clark Decision

Clark v. Children’s Memorial Hospital, 2011 IL 108656, 955 N.E.2d 1065, decided May 6, 2011, involved an action for wrongful birth. The plaintiffs alleged that the medical defendants gave false assurances to plaintiffs that they did not have a genetic mutation that might cause birth defects if they conceived another child. After giving birth to a son who was seriously impaired as a result of such a genetic mutation, the plaintiffs sued to recover the extraordinary cost of rearing their child after he reached the age of majority and for negligent infliction of emotional distress. The Illinois Supreme Court had previously considered these same issues in Siemieniec v. Lutheran General Hospital, 117 Ill. 2d 230, 512 N.E.2d 691 (1987) and held that the parents of an impaired child were entitled to recover the extraordinary medical expenses necessary to manage and treat the child’s congenital or genetic disorder only up until his age of majority. The Siemieniec court had also denied plaintiffs’ claim for emotional distress because the parents did not come within a zone of danger as required by Rickey. Siemieniec, 117 Ill.2d at 262-63.

In Clark, the court reaffirmed its holding in Siemieniec concerning the parents’ inability to recover for the extraordinary expenses of raising an impaired child after he or she reaches the age of majority (Clark, 2011 IL 108656, ¶¶ 92-93). However, the court overruled its holding in Siemieniec that the parents were not entitled to recover for emotional distress. The Clark court held that Rickey was inapplicable because the parents were “direct victims” of the defendants’ negligence in failing to accurately report the results of the parents’ genetic testing. The Clark court explained the distinction between a bystander’s independent claim for emotional distress requiring that the zone of danger test be satisfied and a direct victim’s claim for emotional distress as an element of damages for another tort as follows (Id. at ¶¶ 106-07):

In such cases, where the claim of emotional distress is freestanding and not anchored to any other tort against the plaintiff, courts have applied special restrictions such as the zone-of-danger rule because of concerns regarding the possibility of fraudulent claims or frivolous litigation. See Rickey, 98 Ill. 2d at 555.

However, these special restrictions have no logical bearing on a wrongful-birth claim, where a tort has already been committed against the parents. Wrongful-birth plaintiffs do not assert a freestanding emotional distress claim, but merely assert emotional distress as an element of damages for a personal tort. “For these reasons, the physical manifestation and zone-of-danger rules offer no occasion to reject mental distress damages in wrongful birth cases any more than they would do so in the case of libel or invasion of privacy.” 2 Dan B. Dobbs, Law of Remedies § 8.2, at 414 (2d ed. 1993).

More troublesome language, as concerns emotional distress in bodily injury cases, was contained in this excerpt from the court’s initial opinion in Clark (¶111):

The nature of the error is evident when one considers that damages for emotional distress are available to prevailing plaintiffs in cases involving other personal torts such as defamation (see, e.g., Slovinski v. Elliott, 237 Ill. 2d 51 (2010); medical negligence (see, e.g., Cummings v. Jha, 394 Ill. App. 3d 439 (2009)); conversion (see, e.g., Cruthis v. Firstar Bank, N.A., 354 Ill. App. 3d 1122 (2004)); and misappropriation of identity (see, e.g., Petty v. Chrysler Corp., 343 Ill. App. 3d 815 (2003)). See also 2 Dan B. Dobbs, Law of Remedies § 8.2, at 413-14 (2d ed. 1993) (“When it comes to mental or
emotional distress, the usual rule allows free recovery of emotional distress damages to any victim of a personal tort.”).

This reference to Cummings v. Jha and medical negligence claims in the same discussion with intentional tort/non-bodily injury claims, such as defamation and conversion, was particularly concerning as it could have been misinterpreted to mean that every direct victim in every bodily injury case—from medical malpractice to product liability to automobile negligence—is entitled to seek a separate recovery for emotional distress. While Cummings did involve separate awards for pain and suffering and emotional distress in a medical malpractice case, it does not appear there was any issue raised concerning this aspect of the verdict in either the trial or the appellate courts. Furthermore, such a result is inconsistent with the many cases that have recognized that emotional or mental distress arising from one’s own bodily injuries is generally recoverable as part of a pain and suffering or a loss of normal life award. See Wood v. Mobil Chemical Co., 50 Ill. App. 3d 465, 476-77, 365 N.E.2d 1087, 1095-96 (5th Dist. 1977) (plaintiff’s anxiety, depression and other mental suffering arising from his own physical inabilities properly included in a pain and suffering award); Holston v. Sisters of Third Order of St. Francis, 247 Ill. App. 3d 985, 1000-02, aff’d, 165 Ill. 2d 150, 173-75 (mental anguish due to physical injury properly included in pain and suffering award); Spiegelman v. Victory Memorial Hosp., 392 Ill. App. 3d 826, 848, 911 N.E.2d 1022, 1042 (1st Dist. 2009) (separate award for “suffering” properly set aside as duplicative of loss of normal life award); Richardson v. Chapman, 175 Ill. 2d 98, 115, 676 N.E.2d 621, 629 (1997) (recovery for the plaintiff’s nightmares resulting from the accident included in pain and suffering award).

Thus, on rehearing, the hospital urged the Illinois Supreme Court either to eliminate its reference to the Cummings case and medical malpractice or to add the following clarifying sentence: “In most cases involving bodily injury, the injured plaintiff’s emotional and mental distress over his own bodily injuries will be included in a pain and suffering or loss of normal life award.” Thankfully, in denying rehearing, the court took the hospital’s first suggestion and deleted the reference to Cummings and medical negligence actions in its final published opinion. Clark, 2011 IL 108656, ¶111.

With this rehearing history, Clark should not be authority for a separate recovery for emotional distress—in addition to an award for pain and/or suffering and loss of enjoyment of life—in an ordinary bodily injury case. Unfortunately, before this reference to medical malpractice claims and the Cummings case was deleted from the final opinion in Clark, the initial Clark opinion was cited in an appellate court decision upholding an award for emotional distress and pain and suffering in a medical malpractice case. Babikian v. Mruz, 2011 IL App (1st) 102579, ¶19, 956 N.E.2d 959, 964 (2011).

Note that there are cases in which a bodily injury plaintiff may properly recover a separate award for emotional distress. For example, where an injured plaintiff also sustains emotional distress because he or she was in the zone of danger and observed another person’s injuries in the same accident, that may well be a basis for a separate emotional distress award in addition to plaintiff’s recovery for pain and suffering and loss of normal life arising out of his or her own injuries. See, e.g., Hayes v. Illinois Power Co., 225 Ill. App. 3d 819, 825-26, 587 N.E.2d 559, 562-63 (4th Dist. 1992) (the plaintiff injured in an electrocution accident entitled to recover pain and suffering award for his own injuries and a separate emotional distress award for being in the zone of danger and observing the accident and fatal injuries to his grandfather that caused him to fear that he could be further injured due to the electric current in the grandfather’s body).

Practice tip: be sure to object on double recovery grounds to any jury instruction that seeks to add a line item recovery for emotional distress, in addition to pain and suffering and/or loss of normal life, in a bodily injury case.

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