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Torts - Intentional Infliction of Mental Suffering: A New Tort in Illinois - Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E. 2d 157 (1961)

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argument stating that action or inaction by the legislature in 1959 is not indicative of legislative intent in 1907.[49]

The interpretation of the act as set forth in *Gannon* has been followed by the court in *Kiszkan v. The Texas Co.*[50] decided in the same term. The owner of the property in that case was a lessor and not in possession of the premises. The plaintiff, a workman employed by an independent contractor pursuant to a contract between the contractor and the lessee, was injured in a fall from a scaffold. Suit was brought against the lessor-owner. At the trial, the lessor was granted a summary judgment on the grounds that it was not in charge of the work, was not consulted about it and was not a party to the contract. Holding that the lessor was a mere title holder out of possession and therefore not an owner within the meaning of section 9 of the act, the Appellate Court affirmed.

Rejecting the Appellate Court's *ratio decidendi* and relying instead on the reasoning employed in the *Gannon* case, the Supreme Court in affirming held: "the criterion, according to the plain words of the statute, is not whether the owner is in or out of possession, but whether the owner has charge of the construction, erection, et cetera, of the designated structure. This is the standard imposed by the statute. . . ."[51]

[49] *Ibid.*

[50] 22 Ill.2d 326, 175 N.E.2d 401 (1961)

[51] *Id.* at 329, 175 N.E.2d at 403.

TORTS—INTENTIONAL INFLICTION OF MENTAL SUFFERING: A NEW TORT IN ILLINOIS

Plaintiff brought a civil suit against the convicted murderer of her husband. In her complaint, she alleged that the defendant's threat to kill her husband together with the fulfillment of that threat caused her to suffer great mental anguish and nervous exhaustion. It was not alleged that any physical injury resulted. The trial court held that no cause of action was stated. The plaintiff appealed directly to the Illinois Supreme Court.[1] The Court, after analyzing and evaluating the traditional rationalizations for the refusal to recognize intentional infliction of emotional distress as a separate tort, concluded that peace of mind is an interest of sufficient importance to receive the protection of the law from flagrant, unreasonable acts of this type. The Supreme Court, in reversing the trial court, stated that an unwarranted intrusion intended to cause severe emo-

[1] The constitutionality of the Dram Shop Act, ILL. REV. STAT. ch. 43 §§ 131–35 (1959) was involved, therefore an appeal directly to the Supreme Court was allowed. ILL. REV. STAT. ch. 110 § 75 (1959).

tional distress to a person of ordinary sensibilities and which, in fact does cause such mental disturbances is now actionable in Illinois. *Knierim v. Izzo*, 22 Ill. 2d 73, 174 N.E. 2d 157 (1961).

The decision of the Supreme Court of Illinois in this case has at least threefold significance:[2] (1) For the first time, Illinois has recognized intentional infliction of mental distress as a separate tort. (2) Illinois by innuendo is adopting the viewpoint of the Restatement of Torts[3] and will not require bodily harm to recover for this new tort. (3) The opinion in this case is a good indication of what part Illinois will play in "the trend today in the United States to give an increasing amount of protection to the interest in freedom from mental distress."[4] To illustrate the importance of these concepts, it is important to understand the historical background of this new cause of action.

Traditionally, courts have been reluctant to protect one's mental tranquility in the absence of a special legal relationship[5] or a recognized tort, such as trespass,[6] assault,[7] battery,[8] false imprisonment,[9] invasion of the right of privacy,[10] or malicious prosecution.[11] Many times these torts were merely technical and the real harm was the mental anguish incurred by the plaintiff. *Interstate Life & Acc. Co. v. Brewer*[12] is an example of a court deliberately finding a technical tort in order to grant relief. In that case, the defendant's servant had browbeaten and bullied the plaintiff in her sickroom, and in leaving threw several coins one of which

[2] This case also illustrates the concept that law is always in a state of flux. Thomas Jefferson once wrote: "But I know also that laws and institutions must go hand in hand with progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions changed with the change of circumstances, institutions must advance also and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain even under the regimen of their barbarous ancestors." Letter From Thomas Jefferson to Samuel Kerecheval, July 12, 1816, in CURTIS, LAW AS LARGE AS LIFE 52 (1959).

[3] RESTATEMENT, TORTS § 46 (1948 Supp.).

[4] Eick v. Perk Dog Food Co., 347 Ill. App. 293, 302, 106 N.E. 2d 742, 746 (1952).

[5] Courts have applied special rules as to the liability of common carriers and others who undertake to serve the public.

[6] Engle v. Simmons, 148 Ala. 92, 41 So. 1023 (1906); Continental Cas. Co. v. Garrett, 173 Miss. 676, 161 So. 753 (1934).

[7] Kline v. Kline, 158 Ind. 602, 64 N.E. 9 (1902).

[8] Interstate Life & Acc. Co. v. Brewer, 56 Ga. App. 599, 193 S.E. 458 (1932).

[9] Great Atl. & Pac. Tea Co. v. Smith, 281 Ky. 756. 299 S.W. 967 (1927).

[10] Hepworth v. Covey Bros. Amusement Co., 97 Utah 205, 91 P. 2d 501 (1939); Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927).

[11] Merriman v. Merriman, 290 Ill. App. 139, 8 N.E. 2d 64 (1937).

[12] 56 Ga. App. 599, 193 S.E. 458 (1937).

struck her. The court held that this constituted a technical battery and used this battery as a peg on which to hang damages for the injury to the plaintiff's feelings.

In comparatively recent years however, the courts have been faced with factual situations wherein no recognized tort could be found even though there was a flagrant, unreasonable act on the part of the defendant which resulted in real and substantial damage to the plaintiff. Thus they were faced with the dilemma—as was the Illinois Supreme Court in this case—of either recognizing a new tort or denying recovery in a case where such a denial would have violated common sense and justice. In all but a few cases,[13] the courts have chosen the former of the two alternatives if there was bodily harm. There is, however a split of opinion among the courts as to whether or not recovery should be granted where there is emotional disturbance, unconnected with either contemporaneous physical injury (bodily harm from without) or consequential physical injury (bodily injury flowing from the mental anguish). In 1934, the American Law Institute took the position that there was generally no liability for emotional distress although it was intentionally caused.[14] However in 1948 (allegedly in order that a more accurate restatement of American law might be given)[15] the RESTATEMENT OF TORTS was amended to recognize, as a separate tort, the intentional infliction of mental distress. In addition, the Restatement of Torts approved recovery for emotional distress alone, as well as the bodily harm resulting from it.[16] At the time of the amendment only four states[17] had allowed recovery for emotional distress per se. Since the adoption of the amendment, there has been a definite trend on the part of the courts to recognize a duty to refrain from intentionally causing severe emotional distress, regardless of whether or not bodily harm results. If we include

[13] Bartow v. Smith, 149 Ohio St. 301, 78 N.E. 2d 735 (1948); Judevine v. Berzies Montanye Fuel & Warehouse Co., 222 Wis. 512, 259 N.W. 295 (1936).

[14] RESTATEMENT, TORTS § 46 (1934).

[15] It is interesting to note that the RESTATEMENT OF TORTS listed eight cases to support this amendment. In one, recovery was given for trespass. Kirby v. Jules Chain Stores Corp., 210 N.C. 808, 188 S.E. 625 (1936). In another, recovery was based on a battery. Interstate Life & Acc. Ins. Co. v. Brewer, 56 Ga. App. 599, 193 S.E. 458 (1937). In two other cases, the plaintiff recovered for invasion of privacy. Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931); Mau v. Rio Grande Oil Co., 28 F. Supp. 845 (1939). A fifth case cited, involved the negligent infliction of mental distress. Klumbach v. Silver Mount Cemetery Ass'n, 268 N.Y. 525, 198 N.E. 386 (1935). Only three of eight cases cited supported the RESTATEMENT OF TORTS position.

[16] RESTATEMENT, TORTS § 46 (1948 Supp.)

[17] Quin v. Roberts, 16 So.2d 558 (La. 1944); LaSalle Extension Univ. v. Fogerty, 126 Neb. 457, 253 N.W. 424 (1934); Barnett v. Collection Service Co., 214 Iowa 1303, 242 N.W. 25 (1932); Wilson v. Wilkins, 181 Ark. 137, 25 S.W. 2d 428 (1930).

Illinois, four additional states[18] have followed this trend bringing the total to eight. There are also at least eight courts[19] that have said by way of dicta that they would allow recovery without bodily harm. However, there are still at least fourteen courts[20] that have ruled out recovery for intentional infliction of emotional disturbance if it is unconnected with either consequential or contemporaneous physical injury.[21] In *Harned v. E-Z Fin. Co.*,[22] the court held that no cause of action will lie for the intentional infliction of emotional distress unaccompanied by physical injury. The defendant's agents in attempting to collect usurious interest harassed the plaintiff. The complaint alleged that they threatened to cause the plaintiff to lose his job; that they constantly called his home at hours when they knew he was sleeping; and that they used vile and intimidating language when they talked to his wife. The court held that no recovery could be granted for mental anguish alone since its very existence can be established only by the testimony of the injured party. The court concluded that the recognition of this type of tort action should come from the Legislature.

The underlying reason for requiring contemporaneous or consequential

[18] Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E. 2d 157 (1961); Cohen v. Lion Prod. Co., 177 F. Supp. 486 (D.C. Miss. 1959); Savage v. Boies, 77 Ariz. 355, 272 P. 2d 349 (1954); State Rubbish Collection Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P. 2d 282 (1952).

[19] Kuhr Bros. Inc. v. Spahos, 89 Ga. App. 855, 85 S.E. 2d 491 (1954); Crane v. Loftin, 70 So. 2d 574 (1954 Fla.); Frazer v. Morrison, 39 Hawaii 370 (1952); Brown v. Crawford, 296 Ky. 249, 177 S.W. 2d 1; Mashunkashey v. Mashunkashey, 189 Okla. 60, 113 P. 2d 190 (1941); Saenger Theaters Corp. v. Herndon, 180 Miss. 791, 178 So. 86 (1938); Aetna Life Ins. Co. v. Burton, 104 Ind. App. 576, 12 N.E. 2d 360 (1938); Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920).

[20] Geftner v. Rosenthal, 384 Pa. 123, 119 A. 2d 250 (1956); Duty v. General Fin. Co., 154 Tex. 16, 273 S.W. 2d 64 (1954); Bartow v. Smith, 149 Ohio St. 301, 78 N.E. 2d 735 (1948); Carrigan v. Henderson, 192 Okla. 254, 135 P. 2d 330 (1943); Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941); Hinish v. Meir & Frunk Co., 166 Ore. 482, 113 P. 2d 438 (1941); Kirby v. Jules Chain Stores Corp., 210 N.C. 808, 188 S.E. 625 (1936); Clark v. Associated Retail Credit Merchants, 70 App. D.C. 183, 105 F.2d 62 (D.C. Cir. 1939); Walker v. Tucker, 220 Ky. 363, 295 S.W. 138 (1927); Nicholis v. Central Vermont Ry., 94 Vt. 14, 109 Atl. 905 (1919); Brooker v. Silverthorne, 111 S.C. 553, 99 S.E. 350 (1919); Whitsel v. Watts, 98 Kan. 508, 159 Pac. 401 (1916); Green v. T. A. Shoemaker & Co., 111 Md. 69, 73 Atl. 688 (1909); Galzow v. Buening, 106 Wis. 1, 81 N.W. 1003 (1900); Ward v. West Jersey & S.R.R., 65 N.J.L. 383, 47 Atl. 561 (1900).

[21] The courts have not been consistent in their interpretation of what constitutes physical injury. Symptoms, such as nervousness, loss of weight, and sleeplessness may be classified as being merely mental by one court and physical by another. These inconsistencies have led one writer to conclude that the distinction is in reality made largely on the basis of two factors: 1) The liberality with which the particular court regards recovery in these situations; 2) The ingenuity and genius of the plaintiff's attorney in forming his pleading and presenting his testimony. For further discussion, see 64 A.L.R. 2d, *Emotional Disturbance* 100 (1959).

[22] 151 Tex. 641, 254 S.W.2d 81 (1953).

physical injury is to prevent a flood of fraudulent litigation,[23] and yet states which have not injected this requirement thus far have been spared this proverbial deluge. It cannot be contended that defendants will be defenseless against the allegations of pretentious mental injuries. Justice House, speaking for a unanimous court in the *Knierim* case,[24] pointed out two safeguards that can be used to effectively deal with the problem. The first of these two safeguards is the "professional eye."[25] Medical science is able to detect symptoms which stronger emotions arouse and thus should be able to offer reasonably credible evidence to distinguish those plaintiffs deserving relief from the pretenders and malingerers. The second safeguard is the jurors themselves who "from their own experience will be able to determine whether outrageous conduct results in severe emotional disturbance."[26] Where the gravity of the outrage evidences the fact that there has been severe emotional distress neither feigned nor trivial, is it not absurd to demand bodily harm as additional proof? In the absence of contrary circumstances, could a jury doubt the emotional distress of a man threatened with lynching,[27] or of a mother who has been falsely told by officers of the law that her husband and seven month old daughter were seriously injured,[28] or of a wife who has received a threat that her husband will be murdered?[29]

Although in most instances of severe mental disturbance, physical consequences can be found, there are cases in which there is not bodily harm but, nevertheless, there is real mental damage. To deny legal redress to those who fit into the latter category would be both arbitrary and unreasonable.

Thus far this discussion has dealt only with the intentional infliction of mental suffering. Though the decision of the *Knierim* case dealt only with intentional aspects of mental suffering, it is a good indication of how Illinois will participate in the general trend of American courts to protect individuals from both intentional and negligent infliction of mental anguish. In order to demonstrate this, it is necessary to draw an analogy between the requirement of bodily injury, used in cases involving intent and the impact rule as used in cases of negligence. The two are extremely similar. Each owes its existence to the court's fear of fraud.

[23] For a further discussion see Prosser, *Insult and Outrage,* 44 COLUM. L. REV. 40 (1956).

[24] Knierim v. Izzo, 22 Ill.2d 73, 174 N.E.2d 157 (1961).

[25] *Id.* at 85, 174 N.E.2d at 164.

[26] *Ibid.*

[27] Wilson v. Wilkins, 181 Ark. 137, 25 S.W. 2d 428 (1930).

[28] Savage v. Boies, 77 Ariz. 355, 222 P.2d 349 (1954).

[29] Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E. 2d 157 (1961).

Each has been rejected by the majority of states that have considered the problem. Each is a harsh rule. Where a court requires either of these standards and the plaintiff is unable to meet them, judgment is rendered in favor of the defendant in *all* cases because there might be fraud in *some* cases.

Under the impact rule, a plaintiff is not entitled to recover for the negligent infliction of mental distress unless there is physical contact. The rigorous application of the rule is "unjust as well as opposed to experience and logic."[30] Recovery was denied in *Boseley v. Andrews*[31] where plaintiff suffered a heart attack while fleeing from the defendant's bull which was trespassing on the plaintiff's land. The court held that the rule was well established in Pennsylvania that there could be no recovery for injuries from fright unaccompanied by physical impact and to adopt a more liberal view "would open a Pandora's box."[32]

Many courts have held that even trivial contact is sufficient and the rule seems to have lost most of its effectiveness as a guard against fraud. The impact rule was satisfied and recovery was granted in *Jones v. Brooklyn Heights R.R.*[33] The plaintiff in that case was hit on the head by a small incandescent light bulb which fell from a lamp attached to the roof of defendant's car.

This rule, requiring impact in cases of negligence is followed by Illinois[34] and by thirteen other states.[35] However, it has been rejected in several states and abandoned by many others that had previously adopted it; so that today the majority rule[36] is that where there is a definite

[30] Battala v. State, 10 N.Y.2d 337, 239, 176 N.E.2d 729, 730 (1961).

[31] 393 Pa. 161, 142 A.2d 263 (1958).

[32] *Id.* at 168, 142 A.2d at 266.

[33] 23 App. Div. 141, 48 N.Y. 914 (1897).

[34] West Chicago St. R.R. v. Liebig, 79 Ill. App. 567 (1899).

[35] Greenburg v. Stanley, 51 N.J. Super. 90 ,143 A.2d 588 (1958); Potere v. Philadelphia, 380 Pa. 581, 112 A. 2d 100 (1955); Boston v. Chesapeake & O. Ry., 223 Ind. 425, 61 N.E. 2d 326 (1945); Wheeler v. Balcsti, 304 Mass. 257, 23 N.E. 2d 132 (1939); Boweles v. Max, 159 Va. 419, 166 S.E. 550 (1932); Alexander v. Pacholek, 222 Mich. 157, 192 N.W. 652 (1923); Stiles v. Pantages Theatre Co., 152 Wash. 626, 279 Pac. 112 (1929); Kentucky Traction & Terminal Co. v. Roman, 232 Ky. 285, 23 S.W. 2d 272 (1929); Herrick v. Evening Express Publishing Co., 120 Me. 138, 113 Atl. 16 (1921); Miller v. Baltimore & O.S.W.R.R., 78 Ohio St. 309, 85 N.E. 499 (1908); St. Louis I.M.&S.R.R. v. Bragg, 69 Ark. 402, 64 S.W. 226 (1901); Nelson v. Crawford, 122 Mass. 466, 81 N.W. 335 (1899); Trigg v. St. Louis K.C. & N.R.R., 74 Mo. 147 (1881).

[36] Battalla v. State, 10 N.Y. 2d 337, 176 N.E. 2d 729 (1961); Padgett v. Colonial Wholesale Distrib. Co., 232 S.C. 593, 103 S.E. 2d 265 (1958); Colla v. Mandella, 1 Wis. 2d 594, 85 N.W. 2d 345 (1957); Lewis v. Woodland, 101 Ohio App. 442, 140 N.E. 2d 322 (1955); Kuhr Bros. Inc. v. Spahos, 89 Ga. App. 885, 81 S.E. 2d 491 (1954); Bell v. St. Louis S.F.R.R., 195 F.2d 241 (10th Cir. 1952); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951);

physical injury produced by extreme emotional distress negligently caused, the defendant is liable notwithstanding the absence of any physical impact.

New York, which had previously been one of the staunchest supporters of the impact rule, recently repudiated the doctrine in *Battalla v. State*.[37] The plaintiff, a nine year old child, was sent down a ski lift without a safety bar through the negligence of the defendant's servant. The language used in that case bore a striking similarity to that used in the *Knierim* case. The court, as in the *Knierim* case, decided to rely on medical science and the jury to "weed out"[38] pretenders and malingerers rather than to apply a harsh rule which bars recovery. In the light of all these factors, it would seem that the time is right for Illinois and the other states to abandon the impact rule.

There could be no better way of concluding this note than to quote a part of this New York decision which overruled a fifty-five year old precedent. "We act in the finest common law tradition when we adopt and alter decisional law to produce common sense justice. Legislative action there could of course be, but we abdicate our own function in a field peculiarly non-statutory when we refuse to reconsider an old unsatisfactory court made rule."[39]

Cote v. Litawa, 96 N.H. 174, 71 A. 2d 792 (1950); Rasmussen v. Benson, 133 Neb. 449, 275 N.W. 674 (1937); Frazee v. Western Dairy Prod., 182 Wash. 578, 47 P.2d 1037 (1935); Cashin v. Northern P.R.R., 96 Mont. 92, 28 P. 2d 862 (1934); Bowles v. May, 159 Va. 419, 166 S.E. 550 (1932); Lambert v. Brewster, 97 W. Va. 124, 125 S.E. 244 (1924); Lindley v. Knowlton, 179 Cal. 298, 176 Pac. 440 (1918); Strhagen v. Kozel, 40 S.D. 396, 167 N.W. 398 (1918); Memphis St. R.R. v. Bernstein, 137 Tenn. 637, 194 S.W. 902 (1917); Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916); Whitsel v. Watts, 98 Kan. 508, 159 Pac. 401 (1916); Salmi v. Columbia & N.R.R., 75 Ore. 200, 146 Pac. 819 (1915); Simone v. Rhode Island Co., 28 R.I. 186, 66 Atl. 202 (1907); Kimberly v. Howland, 143 N.C. 398, 55 S.E. 778 (1906); Purcell v. St. Paul City R.R., 48 Minn. 134, 50 N.W. 1034 (1892); Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890).

[37] 10 N.Y.2d 337, 176 N.E.2d 729 (1961).

[38] *Id.* at 242, 176 N.E.2d at 732.

[39] *Id.* at 239, 176 N.E.2d at 730, quoting Woods v. Larcet, 303 N.Y. 349, 355, 103 N.E.2d 691, 694 (1952).