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Nuances of emotional damages

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Two weeks ago, my 3-year-old daughter, Lily, and I were spending a little father-daughter time at a nearby park. For the most part, this is a harmless activity. I watched as my little monkeylike daughter climbed up and down one piece of playground apparatus after another. She was fearless. As she approached the minizip line equipment, Lily insisted on doing it by herself. At first, I said, "No," explaining that she was too little to embark on this adventure alone. On four consecutive occasions, I walked alongside the zip line, moving about as fast as a snail. On the fifth trip, I relented and let her try it solo. One light push and she was off — off the handle and onto the ground. When I saw her land, I knew something was wrong. Her screams confirmed my suspicion. She broke her arm. Is there anything worse than seeing your daughter in a cast ... especially when it is on your watch?

Little Lily suffered a physical injury that day, but the trauma of the incident affected me as well. To be honest, I was a wreck. My tossing and turning were a testament to my empathy. In fact, my compassion ran so deeply that I felt like I needed to be compensated for the emotional damage that she had suffered. For me, the entire incident and seeing the pint-sized little girl in a cast were heartbreaking. If you are a parent, you know what I am talking about.

Early morning, after my third restless night, Lily came into our bedroom, pointing to her cast and begging me to "take it off." After contemplating using a saw to rid her of the cast and realizing that was not an option, I thought back to Oct. 25, 1997, the day two former clients were involved in a horrific collision on I-90. One died and the other suffered life-changing emotional injuries after holding her best friend in her arms and watching her die. This was a real-life nightmare. Whether you believe a person should be compensated for emotional damages based on a theory of negligent infliction of emotional distress or you are an opponent of emotional damages in general, there is no doubt in my mind (nor was there a doubt in the minds of the jurors deliberating in my clients' case) that emotional damages are real.

Almost 30 years ago, the Illinois Supreme Court contemplated whether a bystander-plaintiff could recover damages for emotional distress resulting from witnessing an injury caused by the defendants' negligence. *Rickey v. CTA*, 98 Ill. 2d 546 (1983). There, the Illinois Supreme Court permitted 8-year-old Robert to sue for negligent infliction of emotional distress after he witnessed his 5-year old brother being choked into a comatose state as his clothing became entangled in an escalator.

A few years ago, the Illinois Supreme Court revisited the issue in *Thornton v. Garcini*, 2009 Ill. LEXIS 1927 (2009), holding that the absence of medical testimony does not preclude recovery for negligent infliction of emotional distress. Instead, whether or not medical testimony is introduced goes to the weight, not the admissibility of the evidence. In *Thornton*, the plaintiff-mother testified about her horrific birthing experience and specifically the emotional harm that she experienced as a result of the hour and 10 minutes that she waited for a doctor to deliver her baby, while the baby died inside of her. The court found that "based on personal experience alone, the jury could reasonably find that the circumstances ... caused the plaintiff's emotional damages." *Id.* at *11.

A party making a claim of negligent infliction of emotional distress must establish the elements of the tort, just like any other personal-injury plaintiff. Why, then, are claims for emotional distress so controversial? Could it be the confusion that these cases cause? Don't be discouraged! Even the 7th U.S. Circuit Court of Appeals acknowledged that this area of the law "is somewhat complicated." See, *Lewis v. CITGO Petroleum Corp.*, 561 F.3d 698, 702 (2009). Many must be reminded that there is a distinction between emotional distress as a cause of action and emotional distress as an element of damages.

Additional confusion stems from who can actually sue for negligent infliction of emotional distress. Illinois specifically permits those who can be defined by law as bystanders or direct victims to make these claims. The bystander is conscribed by the zone of physical danger and their reasonable fear for their own safety. Direct victims, on the other hand, may recover with a showing of emotional distress as well as contemporaneous physical impact or injury. *Corgan v. Muehling*, 143 Ill. 2d 296, 303 (1991) (permitting the patient-plaintiff to sue the psychologist-defendant for negligently engaging in sexual relations with her during her course of treatment, causing her to suffer emotional injury). Yet, in some instances, a plaintiff can be both a bystander and a direct victim. See, *Hayes v. Illinois Power Co.*, 225 Ill. App. 3d 819 (4th Dist. 1992).

One doesn't need a crystal ball to predict where this area of the law is bound to find potential litigation — the Internet. An Illinois case decided earlier this year almost provided guidance. In *Bonhomme v. St. James*, 407 Ill. App. 3d 1080, (2d Dist. 2011), the plaintiff developed an online romance with the defendant, who fabricated an online presence and took the plaintiff for more than \$10,000 in gifts. The plaintiff filed a claim for negligent infliction of emotional distress, but was procedurally precluded from arguing her claim on appeal. (The plaintiff's claim for fraudulent misrepresentation survived.)

In a recent California case, *Catsouras v. Department of California Highway Patrol*, 181 Cal. App. 4th 856 (Cal. App. 4th Dist. 2010), the family of a woman decapitated in a fatal automobile accident brought an action for negligence, requesting damages for emotional

distress, against the California Highway Patrol and two of its officers, who disseminated images of the decedent taken at the time of her death to co-workers and family members as a "Halloween joke." Those photos then spread across the Internet, appearing in websites in the United States and abroad. Adhering to a general negligence standard, the court found that it was foreseeable that the dissemination of the photos would cause trauma to the family, that the defendants' acted morally deficient and that they owed the family a duty of care not to share photos of the decedent on the Internet. Had the case occurred in Illinois, the family could have argued that they were direct victims of the defendants' acts under a negligent infliction of emotional distress cause of action. (In California, negligent infliction of emotional distress is not an independent tort. 181 Cal. App. 4th 856, 876.)

Back on the playground, my daughter may have suffered physical damages, but for three sleepless nights, I swear I suffered emotionally. Obviously, I am not looking to recover — truth be told, I would probably be a named defendant. In the end, her fall made me realize that I cannot always protect my children from harm. I am somewhat prepared for the scratches and bruises, but despite the fact that I know my children will have to deal with emotional harm at sometime in the future, the thought of it pains me. This incident will better yet make me a more effective advocate for my clients suffering from unseen, emotional trauma.

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