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Cancerophobia--Recovery for a Neurosis

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As Ohio has only the most casual interest in this type suit, since the present decision is out of line with majority view,²³ and because this type decision does irremediable harm, it seems to this writer that the Ohio Supreme Court should re-examine the nature and theory of Workmen's Compensation; weigh the interests of the states concerned; and face the real problems presented — whether Ohio should become a happy hunting ground in cases where Ohio has only a casual interest; whether Ohio's minority view of allowing double-recovery should be extended to cases where no Ohio interests are concerned; whether Ohio should destroy the balance struck by another state in regulating its employment relationships when there are no Ohio contacts involved.

JAMES A. YOUNG

CANCEROPHOBIA — RECOVERY FOR A NEUROSIS

Plaintiff consulted defendant-radiologists for treatment of a bursitis condition in one of her shoulders. After the third X-ray treatment the plaintiff complained of a nauseous feeling. The defendants prescribed pills for her nausea and continued the shoulder treatments until a total of seven had been given. Subsequently, blisters formed on her shoulder and defendants prescribed a salve which she used. Eventually the blisters ruptured and scabs formed. A number of the scabs lasted five to six months, another over a year, resulting in permanent visible damage to the skin on her shoulder. Nearly two years later plaintiff's attorney sent her to a dermatologist for examination. He treated her radiodermatitis and advised her to return every six months to have the shoulder checked because the burned area could become cancerous. Suit for malpractice was then brought against the radiologists who had treated the bursitis originally. In addition to asking for damages for the physical injury, plaintiff sought to recover for mental anguish: *i.e.*, "a severe cancerophobia." She recovered a jury verdict of \$25,000 — \$10,000 for actual harm and \$15,000 for mental anguish. The verdict was affirmed by the appellate division and the Court of Appeals heard an appeal only on the propriety of the award for the cancerophobia. The damages were affirmed in a 4-3 decision.¹

The malpractice action was based on the theory that the number of Roentgens applied to her was excessive and defendants should have been aware of this because of her complaint of nausea and thereafter either should have varied or discontinued the therapy. Plaintiff's cause of ac-

23. Cases cited note 13, *supra*; *Wilson v. Faull*, *supra* note 12.

tion for mental anguish was supported solely by her own testimony as to what the dermatologist told her and that of a neuro-psychiatrist who stated that she had a severe cancerophobia.²

The situation is a novel one. The original tort-feasor was held liable for purely mental damage arising solely from the advice of the dermatologist who treated the injury inflicted by the defendants some two years before. The dermatologist was not made a party to the action, nor was it alleged that he was negligent in any way in treating the injury. New York is one of the many states which does not recognize a cause of action for mental anguish alone where it has been negligently inflicted.³

The court relied on two general rules from the case of *Milks v. Mc-Iver*.⁴ First, that the original tort-feasor is liable for the ultimate results even if the consulting doctor was negligent.⁵ Second, that public policy and common sense must dictate the outer limits of liability. The first rule can only be applied if the injured party was justified in procuring additional treatment and if reasonable care was exercised in selecting a second physician. In the instant case the court determined that the employment of the dermatologist was proper. Therefore, held the court, if the dermatologist had caused physical damage, the defendants would be liable for the physical and mental injury because once the consulting physician aggravated the condition, albeit slightly, the door would be open for so called "parasitic damages." If this is the law, reasoned the court, why should the plaintiff be denied because the only aggravation or injury was mental? In effect the court did not require a physical basis for the mental anguish as far as the acts of the dermatologist were concerned. The decision appears on the surface to be only a refinement of the protection of mental anguish; however, the holding has ramifications far beyond this.

The court applied its legal formulae with clarity and precision only to the point of not requiring a physical "peg" for mental anguish. It then disregarded its second, or "common sense" rule. As a consequence the

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1. *Ferrara v. Gallucho*, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958).
 2. The only evidence of the dermatologist's statement was plaintiff's testimony. The court held that such hearsay evidence was admissible to establish a basis for her anxiety, but would not be if it were to prove that plaintiff would develop cancer.
 3. *Blessington v. Autry*, 105 N.Y.S.2d 953 (Sup. Ct. 1951); *Edmond v. American-Hawaiian S.S. Co.*, 65 N.Y.S.2d 433 (1946), *aff'd*, 274 App. Div. 1035, 85 N.Y.S.2d 915 (1949); *Kaufman v. Israel Zion Hospital*, 183 Misc. 714, 51 N.Y.S.2d (Sup. Ct. 1944).
 4. 264 N.Y. 267, 190 N.E. 487 (1934).
 5. RESTATEMENT, TORTS § 457 (1934); *Poplar v. Bouigois*, 298 N.Y. 62, 80 N.E.2d 334 (1948); *Corbett v. Clarke*, 187 Va. 222, 46 S.E.2d 327 (1948).

plaintiff was successful just because she had the anxiety or neurosis. There was no determination of whether it was more than a mere possibility that cancer could develop.⁶ It can be admitted that her phobia was real, but the wisdom of the decision is still open to question since the law does not award damages simply because injury does in fact exist. It could be that the nature of the neurosis was an overriding factor. Cancer, the "dreaded plague" of the 20th century, is perhaps our most commonly feared malady. Such considerations are matters for conjecture, not conclusion.

The basis of the dissent is simply that the recovery was based on "the subjective mind of the litigating plaintiff and speculation by the physician."⁷ There was no determination of any probability of cancer. On the contrary it was only shown to be a possibility. In addition, the law of torts protects the "reasonable man," not the ultra-sensitive, yet in this case the plaintiff could be in the latter category. In fact it might have been most "unreasonable" for the plaintiff to develop this neurosis, yet she was protected.⁸ If these qualifications were added to the legal formulae applied by the court, a more realistic approach would result. Bare emotional reactions could be minimized, yet the ultimate questions would still be decided by a jury, the mirror of our standards.

Each day preventive medicine is moving forward. We cannot ignore the fact that the preventive approach to disease is the basic factor responsible for situations such as this case typifies. Nevertheless many older concepts of the law have a real application in new situations. The traditional argument against allowing recovery for mental anguish is the great opportunity for questionable claims.⁹ Absent tests other than the existence of a condition this argument has validity. It is suggested that

6. *St. Louis, Iron Mt. & So. Ry. v. Buckner*, 89 Ark. 58, 115 S.W. 923 (1909). Plaintiff contracted a cold in defendant's waiting room. She sought damages for mental anguish on the ground that she thought she was getting consumption. The court held that her chance of getting consumption from a cold was too remote to allow evidence on it.

7. *Ferrara v. Galluchio*, 5 N.Y.2d 16, 23, 152 N.E.2d 249, 254, 176 N.Y.S.2d 996, 1001 (1958); *Lake Erie & W. R.R. v. Johnson*, 191 Ind. 479, 133 N.E. 732 (1922). Where the only basis for assessing damages would be the plaintiff's description of his mental condition at a time when the defendant was doing nothing to infringe his legal rights no recovery was allowed.

8. There is also the problem of limiting or controlling the period for which recovery will be allowed. What may be a reasonable apprehension at one time may not be at a later date or after a certain event. *Prescott v. Robinson*, 74 N.H. 460, 69 Atl. 522 (1908); *Watson v. Augusta Brewing Co.*, 124 Ga. 121, 52 S.E. 152 (1905).

9. *Employer's Liability Assurance Corp. v. Koehler*, 137 F. Supp. 191 (N.D. Ind. 1956).

several tests are possible. Recovery in such cases could be limited to instances where the fear did actually materialize in a physical malfunction, or a less harsh solution would be to apply a test of "reasonable certainty" to determine if such neurosis was justified in the reasonable person. Regardless of the legal formula applied, recovery should not be allowed on the bare fact that a condition does exist.

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