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Damages Recoverable for "Cancerophobia" Caused by Negligence

Plaintiff sustained burns on her shoulder as a result of X-ray treatments administered by defendant radiologists. Two years later, when the burns failed to heal, plaintiff consulted a dermatologist who prescribed medication and advised plaintiff to have her shoulder checked every six months as a precaution against cancer. Plaintiff brought this malpractice action against the radiologists, alleging negligent administration of X-ray therapy.[28] In addition to compensation for her physical injury, plaintiff claimed damages for mental anguish resulting from cancerophobia—the phobic apprehension that cancer would ultimately develop in the area of the burn.

Judgment on a verdict for plaintiff in the amount of $25,000 was unanimously affirmed by the Appellate Division without opinion. The Court of Appeals granted leave to appeal solely to pass on the property of the award of $15,000 for mental anguish flowing from cancerophobia.

A divided court affirmed the judgment, stating that the original wrongdoer is liable for the ultimate result of his act so long as the aggravating acts of others can be found to flow as a natural and probable consequence of the original injury.[29] The Court ruled that the jury's verdict did not extend liability beyond the limits dictated by public policy and common sense.[30] With regard to the advice of the dermatologist, the Court said, "Under our law the risk of such advice and it's effects on the plaintiff must be borne by the wrongdoers who started the chain of circumstances without which the cancerophobia would not have developed".

The dissenting judges felt that as a matter of public policy, plaintiff's recovery should not include damages for mental anguish suffered in contemplation of a disease which might never develop and based solely upon the dermatologist's statement as to possible future developments.

Once the extent of plaintiff's compensable injuries has been determined, it is a relatively easy matter in this case, to determine defendant's liability for them. The advice of the dermatologist may be labeled a normal intervening cause[31]—one which, though not contemplated by defendant at the time of his negligence, is nevertheless to be regarded as a normal incident of the risk he created. Such intervention, even if negligent, would not supersede defendant's

28. Ferrara v. Galluchio, 5 N.Y.2d 16, 176 N.Y.S.2d 996 (1958).
29. Milks v. McIver, 264 N.Y. 267, 190 N.E. 487 (1934).
30. *Ibid.*
31. PROSSER, TORTS 270 (2d ed. 1955).

liability.[32] The more difficult problem, however, arises in determining the consequences of the dermatologist's advice which are to be compensable.

It is well settled in New York that a negligent wrongdoer takes his victim as he finds him and is liable even for consequences that would not have followed but for plaintiff's abnormal susceptibility.[33] Up to this time, however, the Court had never been called upon to decide whether this rule should be applied so as to include mental injury unaccompanied by aggravation of plaintiff's physical condition. If we assume in the instant case that plaintiff's preexisting neurotic tendencies had rendered her peculiarly susceptible to anxiety-producing stimuli,[34] should the result be different from that reached in cases where plaintiff's predisposition is purely physical?

It has been suggested that in psychic injury cases, recovery should be denied unless plaintiff's reaction is that of an average individual.[35] Thus, in determining whether the injury is compensable, plaintiff's reaction would be tested by the same reasonable-man standard that determines whether defendant's conduct is actionable, and even if psychic injury could be proven, recovery would be denied if plaintiff's reaction were found to be unreasonable.[36] The reason given for this result, at least in cases where there is no impact, is that unless defendant knows of the idiosyncracy, it would be impractical to require him to gear his activity to a world of hypersensitive plaintiffs.[37] We may assume from this, that if plaintiff's only injury had been mental anguish flowing from cancerophobia, then, even in jurisdictions which do not require impact, recovery would have been denied if it were established that plaintiff's reaction was not only beyond reasonable anticipation, but also idiosyncratic. But in the present case it was established that defendants had violated a duty owed to the plaintiff. Even the dissent agreed that plaintiff sustained physical injuries serious enough to support a $10,000 verdict. Apparently the majority thought that this $10,000 "guarantee of genuineness"[38] was sufficient to relieve plaintiff of the burden of showing that her mental anxiety was a reasonable reaction to the advice of the dermatologist. At least the majority was satisfied by plaintiff's evidence that her reaction was

32. Sauter v. New York Cent. & H. R.R., 66 N.Y. 50 (1876).
33. McCahill v. New York Transportation Co., 201 N.Y. 221, 94 N.E. 616 (1911).
34. See Smith and Solomon, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 1, 77.
35. McNiece, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S L. REV. 193, 282.
36. The reasonableness of plaintiff's reaction may be an issue in nuisance cases where recovery is denied if the injury would not have been sustained by a normally constituted person. Rogers v. Elliot, 146 Mass. 349, 15 N.E. 768 (1888); Lord v. DeWitt 116 Fed. 713 (C.C.N.Y. 1902); *but cf.* Dixon v. Trap Rock Corp., 293 N.Y. 509, 58 N.E.2d 517 (1944), where the reasonableness of plaintiff's reaction was not considered.
37. HARPER AND JAMES, THE LAW OF TORTS §18.4 (1956).
38. PROSSER, TORTS 177 (2d ed. 1955).

plausible— that under the circumstance, the advice she received *could* cause such a reaction.

Thus the majority rejected one of the contentions against allowing recovery for neurotic mental suffering—the fear of false and inflated claims. It did not, however, consider the more theoretical objection, the notion that the plaintiff should be held to the same standard as that applied to the defendant. Plaintiff's reaction, assuming that it flowed partially from a sub-standard state of mind, might not be considered to be contributory negligence because her injury was not caused by any volitional act of her own. Her cancerophobia did not result from any substandard conduct on her part, but was inseparable from her sub-normal state of mind. The distinction thus drawn between a case of substandard *action* and one of substandard *reaction,* might be justified on the ground that although the law may attempt to influence volitional physical activity, it cannot presume to operate in the area of purely emotional responses.

Contributory Negligence of Decedent in Wrongful Death Action

In an action for the negligent shooting of plaintiff's husband by a New York City policeman, verdict was for the defendants. Plaintiff appealed alleging errors in the instructions to the jury. The automobile of the decendent had collided with another automobile and the decedent was attempting to flee the scene of the accident. The defendant patrolman, while not a witness to the accident, was in the vicinity, and upon hearing cries of "hit and run" from several spectators, gave chase. His patrol car collided with the car of decedent after the latter's car had blown a tire. The decedent had jumped from his car and was attempting to flee on foot when defendant patrolman, after calling the decedent to stop, fired a shot which ricocheted off decedent's car, struck and killed him.

Appellant's contention was that the trial court erroneously charged the jury on the question of decedent's contributory negligence. The effect of this charge was to allow the jury to find that if the deceased was negligent in the initial accident, from which he was fleeing, he could be contributorily negligent as to the shooting by defendant patrolman. The Court in *Fields v. City of New York*[39] held this to be prejudicial error and ground for a new trial stating that even conceding decedent's negligence in the prior collision, this incident was wholly separate and unrelated to the shooting, especially in view of the fact that the officer had not even witnessed the accident.

The appellant also alleged error in the instruction to the jury on the question of justifiable homicide. The charge was correct in stating that leaving the scene

39. 4 N.Y.2d 334, 175 N.Y.S.2d 32 (1958).