

Chapter IV Duty – Nonphysical Harm

The prima facie case in negligence:

Duty

Emotional Distress

Economic Loss

Breach

Causation

Damages

Chapter IV The Duty Requirement: Non-physical Harm.

A. Emotional Harm: If a person's negligence (that is to say, failure to use reasonable care) results in emotional harm – but not an initial physical injury – is there liability?

Emotional Distress

Fact
Pattern

#1

physical injury, emotional harm
consequences follow

#2

threat of physical injury, emotional
harm results

#3

conduct directed at you creates an
unreasonable risk of emotional
harm

#4

emotional harm caused by a physical
injury to another person

Recurring
fact
patterns

Fact Pattern #1: Negligence causes physical injury, emotional harm results from the injury

By way of background:

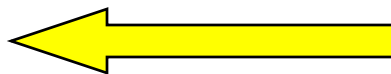
Where negligence causes physical injury, and emotional distress accompanies the injury:

Duty

Breach

Causation

Damage / Injury



The issue is treated as one for the law of remedies!

Fact Pattern #1: physical injury, emotional harm
consequences follow

The rule : Where negligence has resulted in physical injury --

The plaintiff is entitled to an award of money to restore the
plaintiff to her pre-tort position

Special damages: medical expenses, lost earnings

General: compensation for non pecuniary losses, pain
and suffering (emotional distress)

Chapter IV Emotional Harm

Should pain and suffering damages be recoverable even when they *are* attendant on a physical injury?

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Should pain and suffering damages be recoverable even when they are attendant on a physical injury?

Pro recovery:

Real injury / loss.
Necessary to make whole.
Deterrence.

No more speculative than economic loss

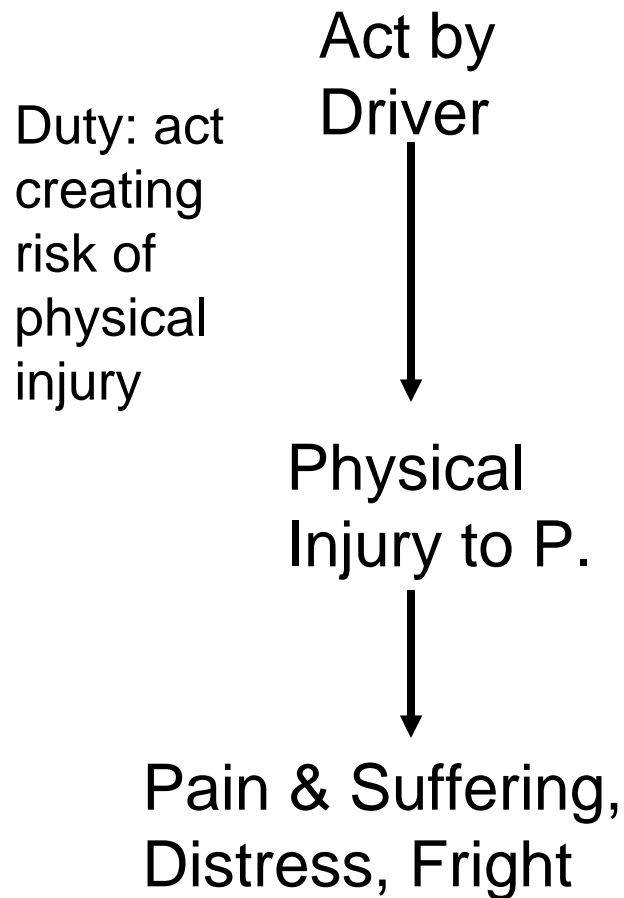
Con Recovery:

Not really compensatory
S*** happens
Windfall
Punitive

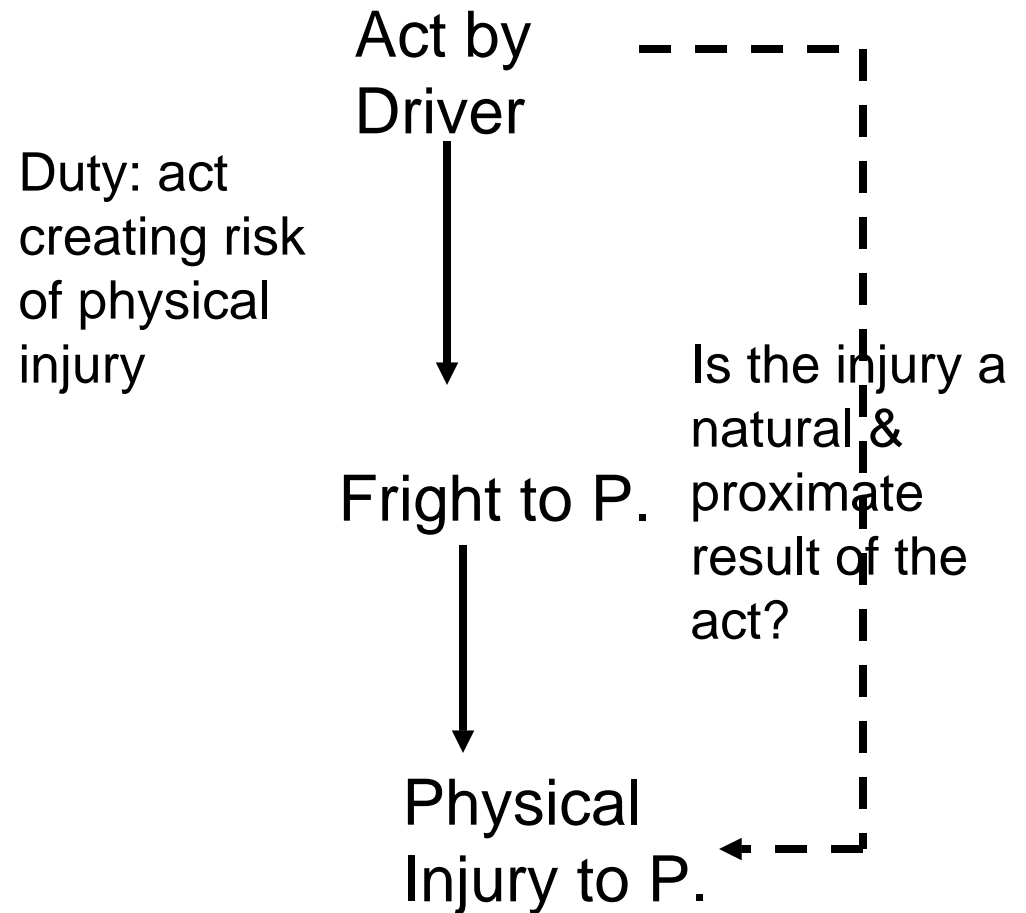
Speculative
Difficult to measure
Fraud

Fact Pattern #2: Threat of physical injury, emotional harm occurs

Usual tort case:



Falzone v. Busch



Chapter IV: Emotional Harm

Falzone v. Busch

Three reasons for denying recovery:

- 1) Not a natural and proximate result of his negligent act.
- 2) Never allowed this kind of recovery before.
- 3) Flood of litigation would occur where injuries could be feigned and damages would rest upon conjecture.

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Emotional Harm

Falzone v. Busch

Three reasons for denying recovery:

1) Not a natural and proximate result of his negligent act.

In other contexts, fright has been recognized as the proximate cause of physical injury.

Whether fright can really, seriously impact your health is properly determined by medical evidence.

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Falzone v. Busch

Three reasons for denying recovery:

2) Never allowed this kind of recovery before.

Common law evolves.

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Falzone v. Busch

3) Flood of litigation would occur where injuries could be feigned and damages would rest upon conjecture.

There are other safeguards against fraud

No evidence of a “flood” in other jurisdictions, and anyway, proper response is to add more courts

Fact pattern #2:

threat of physical injury, emotional distress results
(plaintiffs who are in the zone of physical danger)

Falzone v. Busch

- 1) Negligence
- 2) Causes fright from a reasonable fear of immediate personal injury
- 3) Fright results in substantial bodily injury or sickness
- 4) May recover if the bodily injury or sickness would be regarded as proper elements of damage had they occurred as a consequence of direct physical injury.

Fact pattern #2:

Falzone (p. 261): Where negligence causes fright from a reasonable fear of immediate personal injury, and fright results in substantial bodily injury or sickness, damages for emotional distress are recoverable.

The logic: Limiting recovery to cases in which there is impact or contact is arbitrary. Whether fright has caused serious injury is a question of proof.

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Lawson, n. 7, p. 266 (Cal.App. 1999): Bystanders who observe an airplane crash cannot recover damages for emotional distress, even if they momentarily feared for their own safety.

The logic: The *Rowland* factors point toward limiting an airline's liability for emotional distress to those who momentarily fear that they may be killed.

Chapter IV: Emotional Harm

Metro-North Commuter RR. v. Buckley

Plaintiff exposed to asbestos, no showing of physical injury (yet).

Increased risk of cancer, by 1% to 5%

Can he recover damages for emotional distress stemming from his fear of cancer?

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Metro-North Commuter RR. v. Buckley

Held: Exposure to a cancer causing substance, even involving physical contact, will not support recovery for emotional distress.

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Metro-North Commuter RR. v. Buckley

Does it make sense to allow recovery in *Falzone*, and not in *Metro-North*?

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Does it make sense to allow recovery in *Falzone*, and not in *Metro-North*?

Contact does not help separate valid from invalid claims, because contact with carcinogens is common.

Problem of uncertain and unpredictable liability

Categorical rules are necessary

Fact pattern #3: direct victim of conduct that creates an unreasonable risk of emotional distress

Gammon v. Osteopathic Hospital of Maine

Where defendant should have reasonably foreseen that serious emotional distress would result from his negligence, defendant is subject to liability. Serious emotional distress is distress that “a reasonable person, normally constituted, would be unable to adequately cope with.”

The logic: 1) Psychic well being is as much entitled to legal protection as is physical well being.

2) Limiting recovery to cases of impact, objective manifestation, etc. would be arbitrary.

Fact pattern #3: direct victim of conduct that creates an unreasonable risk of emotional distress

Are Gammon & MetroNorth reconcilable?

Doesn't exposing someone to asbestos foreseeably result in serious emotional distress?

Fact Pattern #4: distress at injury to another

Portee v. Jaffee

What are the objections to imposing liability?

- Liability might not be commensurate with the defendant's culpability
- Limited nature of the interest being protected
 - deep, intimate familial ties
 - death of loved one
 - traumatic sense of loss that witness at the scene suffers

Fact Pattern #4: distress at injury to another

Portee v. Jaffee

A plaintiff may recover for negligently inflicted emotional distress if he or she proves:

1. Negligence that caused death or serious physical injury to a victim.
2. A marital or intimate family relationship with the victim.
3. Observation of the death or injury at the scene of the accident.
4. Resulting severe emotional distress.

Fact Pattern #4: distress at injury to another

Is *Portee* consistent with *Gammon*: Was it foreseeable to the defendant that the plaintiff would suffer serious emotional distress?