

**INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
AND NEGLIGENCE**

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EMOTIONAL DISTRESS

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I. SCOPE AND INTRODUCTION

This article examines the development of the "emotional distress" torts with a focus on their potential application to the marriage dissolution process. The decision of the Texas Supreme Court to remove interspousal tort immunity presents a number of questions concerning the reach of tort liability between husband and wife. Some have taken the position that tort liability may be a means of equalizing the bargaining position between husband and wife during divorce proceedings, especially in jurisdictions such as Texas. This article evaluates the current status of the law and addresses some of the possibilities and problems of using "emotional distress" torts within a divorce context.

The discussion is theoretical in nature and thereby, does not provide a thorough discussion of the procedural or evidentiary details of bringing an "emotional distress" action within a divorce proceeding. Also beyond the scope of this article is a detailed discussion of medical evidence and specific mental disorders prevalent in emotional distress cases.

II. DEVELOPMENT IN TEXAS

A. Texas as Innovator. Texas pioneered the recognition of emotional distress as a compensable injury. In the landmark case of Hill v. Kimbal, 76 Tex. 210, 13 S.W. 59 (1890), the plaintiff sought emotional distress damages after suffering a miscarriage due to witnessing an altercation started by the defendant. The Court used traditional tort concepts to hold that recovery could not be denied if proof could be made that the injury proximately resulted from the actions of the defendant. However, the Court recognized the need for limitation and noted that recovery required some physical manifestation of the emotional distress.

B. Barriers to Recovery. In addition to the physical manifestation requirement recovery for emotional distress was allowed only if coupled to a willful tort. Despite criticism from scholars courts used artificial devices to deny emotional distress damages. The justification centered on a desire to insure validity of claims. Three fundamental

concerns were articulated by courts. The first dealt with medical science's difficulty in proving causation, the second concerned the fear of fraudulent or exaggerated claims, and the third involved the potential for a flood of litigation.

The dissent in Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983) articulated the prevailing judicial roadblocks to recovery for mental anguish: "The established threshold for recovering mental anguish damages requires proof of willful tort, gross negligence, willful and wanton disregard, or physical injury resulting from the mental anguish."

C. Removal of Barriers. A string of Texas cases removed artificial barriers to recovery or carved out exceptions to the general rule.

1. In Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967) the Court held that the physical manifestation requirement did not apply to battery or other willful torts.

"Personal indignity is the essence of an action for battery; and consequently the defendant is liable not only for contacts which do actual physical harm, but also for those which are offensive and insulting." Fisher at 630.

2. Prosser and Keaton on Torts 361-62 (5th ed. 1984) notes that an early exception to the physical manifestation requirement involved the negligent mishandling of corpses. The traditional rule denied recovery for mere negligence, without circumstances of aggravation. Recent cases suggest a more liberal approach. In City of Gladewater v. Pike, 727 S.W.2d 514 (Tex. 1987) the plaintiff was awarded emotional distress damages stemming from a city's negligent administration of burial records. Faulty records resulted in the parents' inability to locate the burial site of deceased son.

3. The exception for mishandling of a corpse was based on the realization that this situation inherently involved genuine mental anguish. Another line of cases which by their nature suggested the presence of a valid emotional injury were wrongful death cases. In Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983) the Court allowed the parents of a minor child to recover damages for mental anguish in a wrongful death action. The Court noted that "the destruction of the parent-child relationship results in mental anguish, and it would be unrealistic to separate injury to the familial relationship from emotional injury." Sanchez at 253. However, the Court highlighted the fact

that Mrs. Sanchez proved she was suffering from traumatic depressive neurosis, a clinical mental condition.

4. The Court completely removed the physical manifestation barrier with respect to wrongful death cases in Moore v. Lillebo, 727 S.W.2d 683 (Tex. 1986). Again the Court reasoned that wrongful death cases present circumstances "where the genuineness of a mental anguish claim obviates the physical manifestation requirement." Moore at 685. The Court went further in wrongful death cases to define mental anguish as "the emotional pain, torment, and suffering that the named plaintiff would, in reasonable probability, experience from the death of the family member." Moore at 688. The Court instructs the trier of fact to consider (1) the familial relationship, (2) living arrangements, (3) extended absences, (4) family harmony, and (5) common interests when awarding damages for mental anguish.

5. Increasing judicial hostility to artificial barriers to the recovery of emotional distress eventually lead to the official recognition of the tort of intentional infliction of emotional distress. The Court in Tidelands Auto Club v. Walters, 699 S.W.2d 939 (Tex. App.--Beaumont 1985, writ ref'd n.r.e.) narrowly interpreted the Supreme Court's prior refusal to acknowledge the tort in Harned v. E. Z. Finance Co., 151 Tex. 641, 254 S.W.2d 81 (1953). In recognizing the tort the Court adopted the version set forth in the Restatement (Second) of Torts Section 46 (1965). The Restatement requires four elements: (1) the defendant acted intentionally or recklessly; (2) the conduct was "extreme and outrageous"; (3) the actions of the defendant caused the plaintiff emotional distress; and (4) the emotional distress suffered by the plaintiff was severe.

The plaintiff in Tidelands recovered damages after an automobile club initially denied a life insurance claim on the erroneous basis that the insured, plaintiff's wife, was intoxicated at the time of the fatal automobile accident.

6. Favorable judicial treatment of emotional distress damages reached its zenith in St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649 (Tex. 1987) which established that proof of physical injury is no longer required to recover for negligent infliction of mental anguish. In St. Elizabeth a hospital patient and her husband brought an action seeking damages for mental anguish after their stillborn daughter's body had been disposed of in an unmarked, common grave, without their knowledge or consent. While removal of the physical manifestation requirement was significant in itself, the Court's opinion ostensibly went farther, "by eliminating the physical manifestation requirement Texas joins an established trend in America

jurisprudence which recognizes the tort of negligent infliction of mental anguish without imposing arbitrary restrictions on recovery in such action." St. Elizabeth at 654. The Court then cites seven jurisdictions which "have adopted the tort of negligent infliction of mental anguish in a more or less pure form." St. Elizabeth at 654.

The Court argued that medical science had progressed enough to provide a useful understanding of mental anguish. The Court also noted that the physical manifestation requirement had encouraged extravagant testimony and had been expanded to the point of insignificance. Most importantly, the Court felt that freedom from severe emotional distress was an interest which the law should serve to protect regardless of the problems of proof. The trier of fact was given the task of culling legitimate claims. "Jurors are best suited to determine whether and to what extent the defendant's conduct caused compensable mental anguish by referring to their own experience". St. Elizabeth at 654. In his dissent Judge Spears admitted that the physical manifestation requirement amounted to arbitrary line drawing but argued that reasoned line drawing was necessary to distinguish compensable from noncompensable injuries.

D. "Lemons and Ice Machines." Two cases decided soon after St. Elizabeth indicate that both juries and judges were uncomfortable with the new status of emotional anguish.

1. In Centroplex Ford, Inc., v. Kirby, 736 S.W.2d 261 (Tex. App.--Austin 1987, no writ) automobile owners sued a dealer under the Deceptive Trade Practices and Consumer Protection Act for the car dealer's failure to repair their automobile as promised. The Court allowed damages for mental anguish citing St. Elizabeth. Curiously, the Court highlighted the fact that the dealer "knowingly" violated the act, suggesting this justified recovery for mental anguish.

2. In Kold-Serve Corp. v. Ward, 736 S.W.2d 750 (Tex. App.--Corpus Christi 1987) writ dismissed 748 S.W.2d 227, the buyers of an ice machine brought an action against the sellers, alleging breach of contract, breach of warranty and deceptive trade practices. The plaintiffs were allowed to recover for mental anguish based on testimony by the buyers that the defective machine brought their business to near bankruptcy and caused a strain upon their marriage. Again the Court sought a circumstance of aggravation and noted that the cause of action amounted to the willful tort of fraud.

E. Retreat! The progeny of St. Elizabeth have not fully embraced the liberal approach to mental anguish as articulated in the opinion. Indeed the Courts seem to have

resurrected some of the old barriers. The Supreme Court itself significantly narrowed the scope of the St. Elizabeth holding in a later decision.

1. In a legal malpractice suit stemming from a partnership dissolution the plaintiff was denied recovery for emotional distress. Heath v. Herron, 732 S.W.2d 748 (Tex. App.--Houston 1987, writ denied). The Court held that emotional distress damages should not be awarded in legal malpractice cases at least in the absence of egregious or extraordinary conduct.

2. Ostensibly following St. Elizabeth the Court in Kneip v. United Bank-Victoria, 734 S.W.2d 130 (Tex. App.--Corpus Christi 1987, no writ), allowed debtors in a bank fraud case to recover damages for mental anguish only after they testified that prior conditions i.e., headaches, arthritis, and stomach ailments, worsened as a result of the fraud.

3. In Underwriters Life Ins. Co., v. Cobb, 746 S.W.2d 81 (Tex. App.--Corpus Christi 1988, no writ) insureds brought an action against the insurer arising from refusal to pay a medical claim. The Court asserted that in order to recover for mental anguish the plaintiff must show "the tortfeasor acted knowingly or with conscious indifference, causing a relatively high degree of mental pain and distress, such as a mental sensation of pain resulting from painful emotions such as grief, severe disappointment, indignation, wounded pride, shame, despair, or public humiliation." Cobb at 819. The plaintiffs recovered after testifying to "shock", lack of sleep, and destruction of peace of mind.

4. In City of Watauga v. Taylor, 752 S.W.2d 199 (Tex. App.--Fort Worth 1988, no writ) property owners sued the city for flooding damage to their property. Only the spouse who testified to physical symptoms, i.e. stomach aches, headaches, and loss of sleep, recovered for mental anguish. While citing St. Elizabeth the Court denied recovery to the spouse who simply described the situation as "disheartening" and "frustrating".

5. The proper scope of St. Elizabeth was the central issue faced by the Fifth Circuit in Harmon v. Grande Tire Co., Inc., 821 F.2d 252 (5th Cir. 1987). The plaintiff sought to recover mental anguish damages arising from injuries negligently inflicted upon her spouse in an automobile accident. The Court concluded that the current rule in Texas restricts mental anguish damages by persons not directly injured by the defendant's conduct to "bystander" and wrongful death cases. The Court suggested that the plaintiff's reliance on St. Elizabeth was misplaced since it was "directed only to the matter of proof." Harmon

at 259. In the dissent Judge Reavley provides a compelling argument for the broad interpretation of St. Elizabeth, "I read [St. Elizabeth] as unambiguously signalling the Texas court's desire to abandon all artificial restrictions on mental anguish recovery, including the bystander test used by the majority to defeat Mrs. Harmon's claim." Harmon at 260. Strangely, the same court in Moorhead v. Mitsubishi Aircraft Intern., Inc., 828 F.2d 278 (5th Cir. 1987), cites St. Elizabeth to demonstrate the intention by Texas courts to abandon all artificial restrictions on mental anguish.

6. Some of the remaining questions concerning the scope of the St. Elizabeth holding were removed by the Texas Supreme Court in Freeman v. City of Pasadena, 744 S.W.2d 923 (Tex. 1988). Freeman involved a suit by a stepparent and others against the city for damages arising out of an automobile accident in which two stepsons were injured. The Supreme Court held that bystander recovery for mental anguish did not extend to a stepparent who neither saw nor otherwise contemporaneously perceived the accident in which the stepsons were injured. The Court adopted the Dillon (See Section III (D) infra) analysis to evaluate foreseeability when bystanders seek recovery for negligent infliction of emotional distress. Following the analysis of Harmon the Court declared that St. Elizabeth addressed only the physical manifestation requirement. Without acknowledging it, the Court was retreating from its bold position taken in St. Elizabeth.

7. Analysis. The defendant in St. Elizabeth argued that the Garrards had not pleaded any intentional or willful act, gross negligence, breach of contract, physical injury or a cause of action under the wrongful death statute and therefore were not entitled to recovery under traditional analysis. Significantly, the Garrards were seeking recovery for only the negligent infliction of emotional distress. This fact coupled with the language and tenor of the opinion suggests that the Supreme Court had more than "physical manifestation" on their mind. A reasoned interpretation suggests that the Court was adopting the tort of negligent infliction of emotional distress in its pure form.

The hostility given the above interpretation by the lower courts and Fifth Circuit and the disparity of results indicated that the tort required further development to be effectively applied. A system which allows disgruntled car owners to recover for emotional distress while denying recovery to a grieving stepparent is in need of restructuring. The reluctance of courts in cases subsequent to St. Elizabeth to adopt the broad approach established in St. Elizabeth helps explain the Texas Supreme Court's retreat in Freeman. Indeed courts interpreting St. Elizabeth were grasping for some mechanism to deny recovery

almost to the point of equating negligent infliction of emotional distress to intentional infliction of emotional distress. With few exceptions, the current state of the law seems to be that recovery for emotional distress is allowed only if parasitic to an intentional tort, or within the context of gross negligence, or under a wrongful death cause of action, although St. Elizabeth is still good law.

III. OTHER JURISDICTIONS

A. Intentional Infliction. Most jurisdictions have recognized the tort of intentional infliction of emotional distress and have adopted the analysis used in the Second Restatement of Torts. There are a few jurisdictions which still do not recognize it including Florida. A review of the case law suggests that courts have used high standards to allow recovery and have often used the elements of intent and outrageous conduct in order to deny the issue going to the jury. Courts also have limited recovery by focusing on the "severe" requirement for compensable emotional distress.

B. Negligent Infliction. The area is highly unsettled among the jurisdictions. Most have adopted some artificial restrictions similar to those found in Texas to distinguish between compensable and noncompensable injuries. Many have carved out exceptions to the general rule that recovery of damages for emotional distress must be parasitic to another tort. A significant number of jurisdictions have abandoned the physical manifestation requirement but few have recognized the negligent infliction of emotional distress as an independent tort. The St. Elizabeth court cited seven jurisdictions which have acknowledged the tort in its pure form: Hawaii; Montana; Connecticut; Missouri; Alabama; Ohio; and California. The jurisdictions used very similar language as found in St. Elizabeth in rejecting artificial restrictions imposed on the recovery for the negligent infliction of emotional distress.

1. Hawaii was one of the jurisdictions which lead the way in broadening recovery for emotional distress. In Rodrigues v. State, 472 P.2d 509 (Haw. 1970) the court considered the current system of requisites, barriers, and exceptions and provided the following analysis:

"The principle to be extracted from the exceptions is that they involve circumstances which guarantee the genuineness and seriousness of the claim. The better view is to treat such exceptions as examples of trustworthy claims deserving of legal redress and not as restrictions on the plaintiff's right to recover. We believe that the preferable approach is to adopt general standards to test the genuineness and seriousness of mental distress in any particular case. Rodrigues at 519.

2. The California Supreme Court in Molien v. Kaiser Foundation Hospitals, 27 Cal.3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) favorably cited the Rodrigues court to conclude that compensation for emotional injury "should not turn on [an] artificial and often arbitrary classification scheme". The court held that the circumstances of the individual case as presented to the trier of fact would serve to establish genuineness of claims. The court relied heavily on a jury's ability to evaluate emotional distress based on their own experience.

C. Slippery Slope? - Pets and Pecan Trees. Some courts have allowed recovery for emotional suffering for grief at the loss of a favored pet, Campbell v. Animal Quarantine Station, 636 P.2d 1066 (Haw. 1981), and for the negligent destruction of a much loved pecan tree, Adams v. State, 357 So.2d 1239 (La. App. 1978).

1. In Campbell the Hawaii quarantine station negligently transported a nine-year old female boxer in a van without adequate ventilation. When the dog died of heat prostration the family owning the dog sued for emotional distress. Testimony suggested that the family members were preoccupied with the dog's death for two to three weeks. (Upon hearing the tragic news "all cried except the father"). In upholding the \$1,000 damage award the Hawaii Supreme Court cited Rodrigues and reiterated that "judgment of the genuineness and seriousness of a claim of mental distress resides with the trier of fact." Campbell at 1070.

2. In Adams the state negligently cut down "a landmark pecan tree distinctively shaped by the ravages of time and lightning and called by plaintiffs, their relatives, and friends, the statue-of-liberty tree." In affirming an award for mental anguish the court noted that plaintiff's wife, a naturalized citizen, had attached particular significance to the tree.

D. Retreat. A number of jurisdictions which had adopted the tort of negligent infliction of emotional distress have subtly stepped back from their position. For example California developed factors used by many courts to analyze "foreseeability" of emotional distress to bystanders who are not directly injured by the defendant's conduct. Dillon v. Legg, 68 Cal.2d 729, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). Ostensibly only guidelines to evaluate foreseeability as described by the Molien opinion, courts have used the Dillon factors as rigid elements to deny recovery, e.g. Freeman. (The Dillon factors are the following: (1) whether plaintiff was at or near the scene of the incident; (2) whether the plaintiff contemporaneously "experienced" the accident; and (3) whether the plaintiff and the victim were closely related.)

1. In the year following the Campbell decision the Hawaii Supreme Court decided Chedester v. Stecker, 643 P.2d 532 (Haw. 1982). The court denied recovery for emotional distress arising out of claimed negligent conduct in the course of attempting to collect an assessment for a waterline in a subdivision. The court ignores Rodrigues but cites a case decided thirty years earlier to limit recovery of emotional distress to intentional wrongs, absent some physical injury to person or property.

2. In Elden v. Sheldon, 46 Cal.3d 267, 758 P.2d 582, 250 Cal. Rptr. 254, (1988) the court denied recovery to a plaintiff who witnessed the accident and death of "his unmarried cohabitant". The court applied a strict reading of Dillon, contrary to the approach articulated in Molien, and emphasized the state's interest in promoting formal marriage. The court also harkened to a traditional argument against recovery for emotional distress, "the allowance of a cause of action in the circumstances of this case would impose a difficult burden on the courts." Elden at 593.

IV. EMOTIONAL DISTRESS BETWEEN SPOUSES. Case law exists only as to the application of intentional infliction of emotional distress in the marriage context. The cases indicate that the threshold is high for recovery, heated argument and harsh language will not do. Courts tend to allow recovery if the cause of action is based on the abduction of a child or the sexual transmission of a disease. Since the Texas Supreme Court only recently rejected spousal immunity the development in this area is open to conjecture.

A. Other Jurisdictions

1. In Vance v. Vance 286 Md. 490, 408 A.2d 728 (1979) the plaintiff's second wife brought suit against her husband of 20 years for fraud, negligent misrepresentation and intentional infliction of emotional distress. The husband had recently left his second wife to marry another woman. When his second wife sought to obtain a divorce decree the husband filed a timely motion to strike the decree and annul the marriage on the ground that the marriage was void because he was not divorced from his first wife at the time he purportedly married the plaintiff!

The plaintiff sought compensatory damages for emotional distress as a consequence of the defendant's negligent misrepresentation concerning his marital status and damages under the independent tort of intentional infliction of emotional distress. The Vance court upheld the jury award for damages as a result of the negligent misrepresentation but reversed the jury's finding of intentional infliction of emotional distress.

Central to the court's decision was the plaintiff's reliance on the defendant's initial misrepresentation and continued concealment. The court held that these actions did not amount to "extreme and outrageous" conduct because plaintiff's lack of knowledge precluded mental suffering.

2. In Deibel v. Deibel, 512 F. Supp. 135 (E.D. Mo. 1981) the court held that former husband's breach of support provisions of divorce agreement could not be characterized as outrageous conduct sufficient to constitute intentional infliction of emotional distress. The defendant's precarious financial position convinced the court that the breach was not motivated by vindictive or malicious considerations.

3. Common marital discourse, intuitively, should not be the basis of intentional infliction of emotional distress. The court so held in Wiener v. Wiener, 84 App. Div. 2d 814, 444 N.Y.S.2d 130. (2d Dept. 1981). The wife brought suit "based on such alleged acts as her husband's addressing her in 'loud, abusive language', informing her and the family of his loss of any love for her, staying away from the marital home, refusing to pay family expenses, and removing her from control of the family budget." Wiener at 814. The court pointed out that strong public policy considerations militated against introduction of the tort to disputes arising out of marital differences.

4. The Iowa Supreme Court considered a claim by a former wife for intentional infliction of emotional distress stemming from defendant's "seduction" of the plaintiff's former husband in Van Meter v. Van Meter, 328 N.W.2d 497 (Iowa 1983). In upholding the district court's refusal to dismiss the Supreme Court refused to conclude "as a matter of law that no facts are conceivable under which a claim for intentional infliction of emotional distress could be maintained merely because it, like alienation claims, arises out of a failed marital relationship." Van Meter at 498.

5. In Hassing v. Wortman, 333 N.W. 2d 765 (Neb. 1983) a former husband harassed his former wife and new partner almost to the level dramatized in a recently popular motion picture, e.g. crawling in the bushes outside her home and attempting to force her and her date off the side of the road. The court noted that while the defendant "acted in a childish, irresponsible, and inconsiderate fashion" his conduct probably did not amount to the level of "extreme and outrageous". More importantly, the court held that the plaintiff's emotional distress was not so severe that no reasonable person should be expected to endure it, and therefore the distress was not actionable.

6. Abduction of a child can elevate spousal disharmony to the point where emotional distress becomes

actionable. In Kajtazi v. Kajtazi 488 F. Supp. 15 (1978) the husband abducted his infant son to Yugoslavia soon after marital separation from plaintiff. The court awarded damages for intentional infliction of emotional distress since it was "difficult to conceive of intentional conduct more calculated to cause severe emotional distress than the outrageous conduct of the defendant in surreptitiously abducting the infant, from his mother who had legal custody, and falsely imprisoning him in Yugoslavia". Id. at 20.

7. California, New York, and New Jersey have refused to extend or recognize the emotional distress tort in the context of marital dissolution. See Haldane v. Bogy, 208 Cal. App. 2d 302, 25 Cal. Rptr. 392 (1962); Weicker v. Weicker 22 N.Y.2d 8, 290 N.Y.S.2d 732, 237 N.E.2d 876 (1968); Hafner v. Hafner, 135 N.J. Super 328, 343 A.2d 166 (Law Div. 1975). Kentucky has refused to recognize an interspousal cause of action for intentional infliction of emotional distress based on one spouse's conduct with a third party deferring such matters to "a court having final and eternal jurisdiction". Browning v. Browning 584 S.W.2d 406, 408 (Ky. Ct. App. 1929).

B. Texas

1. Spousal immunity in Texas met its demise in Price v. Price, 732 S.W.2d 316 (Tex. 1987). The end had been signalled by the carving out of the intentional tort exception in Bounds v. Caudle, 560 S.W.2d 925 (Tex. 1977) and by the tone of the court's opinion in Stafford v. Stafford, 726 S.W.2d 14 (Tex. 1987). The court in Price dismissed the argument that marital harmony is preserved via immunity, observing that redress of wrongs does not inherently entail marital strife. The potential for fraud and collusion did not dissuade the court from opening the door for married opposing parties in a tort action. The court, in language very reminiscent of St. Elizabeth, Molien, and Rodrigues, etc. pointed to the ability of the trier of fact to cull legitimate claims.

2. The immediacy of the Price decision leaves the practitioner no subsequent case to make a determination of the scope of the decision. By its terms, tort liability between husband and wife is analyzed under the same principles and standards as any other case. The St. Elizabeth experience suggests that the court may make some refinements to its position.

3. In Price the court did say that torts of the type found in Stafford would be included in the torts to be recognized between man and wife. In Stafford the husband sued the wife for divorce with the wife counterclaiming to recover personal injury damages for the husband's transmission of a venereal disease to her. The jury awarded

a substantial amount for mental anguish after finding the husband was grossly negligent.

4. Ostensibly, a spouse may now recover damages for negligent and intentional infliction of emotional distress from the other spouse. These causes of action will arise with greater frequency as part of divorce proceedings, e.g., Stafford. The court's expansive move with Price may meet head on with its retreat as evidenced in Freeman. Intuitively, emotional distress is a pervasive element in divorce proceedings. The court must now grapple with the problem of determining what emotional distress is compensable in the divorce context. A reasoned prediction would suggest that courts will not allow emotional distress between spouses to become strictly a jury issue.

V. PROPOSALS

A. Limit Recovery. As between spouses in the marital dissolution context, damages for negligent infliction of emotional distress should be limited to cases of gross negligence. Despite their rhetoric, Texas courts seem to be unwilling to leave the emotional distress issue solely to the jury. Instead of grasping for various mechanisms to bar recovery the courts should settle on the familiar gross negligence standard. Some may argue that the requirement is placing a heavier burden on married couples to receive compensation. However, the unsettled development of negligent infliction of emotional distress suggests all plaintiffs may be held to that standard as a practical matter in the near future.

A straightforward application of the intentional infliction of emotional distress should not present any problem given the elements of the tort and case history in other jurisdictions.

B. Sanctions. A liberal use of court sanctions against parties making ungrounded, fallacious, or vindictive claims would dissuade parties to a divorce from "throwing in" emotional distress claims as a "filler".

C. Standard Instructions. Jury instructions with regard to emotional distress damages should be reformulated to promote clarity and uniformity. The Texas bar is currently working on such a task through the Pattern Jury Charge Committees. The Tidelands court approved of the following instructions submitted to the jury:

Emotional Distress

By the term emotional distress is meant any highly unpleasant mental reactions, such as grief, shame, humiliation, embarrassment, anger, disappointment, worry.

Severe Emotional Distress

By severe is meant that the distress inflicted is so extreme that no reasonable man could be expected to endure it without undergoing unreasonable suffering.

The problem with these instructions is that they introduce a "reasonable" standard to the realm of damages: a move contrary to the general theory of tort liability. Indeed, the defendant's knowledge of the plaintiff's vulnerable psyche is often cited as evidence of "extreme and outrageous" conduct. Tort theory demands that the victim be taken "as is".

VI. CONCLUSION

The Price decision will spawn a number of issues regarding tort liability among spouses, e.g. can liability be waived via prenuptial agreement. In light of the treatment of "emotional distress" in recent Texas cases the courts will seek to exercise some restraint with regard to "emotional distress" within the divorce context. The freewheeling use of "emotional distress" claims as leverage may result in a disfavored alternative--the refusal of the court to recognize the independent tort between spouses.

Judicial clarity and practitioner restraint will allow deserving spouses the ability to seek redress for compensable emotional injuries which also resulted in marriage dissolution.

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