Negligent Infliction of Emotional Distress

Under what circumstances can relief
“The whole of what we know is a system of compensations. Each suffering is rewarded; each sacrifice is made up; every debt is paid.”

Essayist and poet Ralph Waldo Emerson could have been describing the emergence and evolution of the modern-day tort of negligent infliction of emotional distress. Whether an individual can ever truly be monetarily compensated for emotional distress, such as heartbreak, grief, terror, and the like, is a metaphysical subject for poets, philosophers, and ultimately, the individual, not the courts. Nonetheless, the courts have fashioned this unique cause of action in an attempt to address this difficult and sensitive issue.

Negligent infliction of emotional distress is the predictable, probable, and anticipated serious emotional consequence to negligent conduct, without physical contact, which results in physical injury to the plaintiff. The emotional distress can ensue from a series of immediate “traumatic events,” the fear, “horror,” or “shock” from witnessing a sudden event, or from the threat of immediate personal physical harm. Recovery of damages for emotional distress has always been available in connection with negligence cases in which the plaintiff sustained physical injury or when some other independent basis for tort liability existed. However, when the defendant’s negligence caused emotional distress alone, courts denied recovery for “stand-alone” emotional harm, to guard against fraudulent claims and increased litigation on the basis that the defendant owed no duty to the plaintiff. Furthermore, the courts found it difficult to evaluate proximate cause and assign a monetary value to mental disturbance.

The “notable exception” to this general rule was the “special” duty imposed on common carriers, innkeepers, and telegraph companies who were required to exercise civility toward customers, and the negligent mishandling of corpses. Another exception to the rule against recovery for “independent” emotional distress occurred when the plaintiff sustained severe immediate physical consequences or physical injury as a result or manifestation of the emotional harm. However, even this exception was sometimes subject to limitation, specifically the requirement of a literal contemporaneous physical “impact” on the person, ostensibly to ensure that the mental disturbance was genuine.
Thus, prior to 1970, Michigan courts did not recognize a claim for “independent” emotional distress unless the party sustained some physical injury or “physical impact.” The corollary to this “no impact, no recovery” rule, was the “zone of danger” concept, which required that the party be close enough to the tortious activity to justifiably fear a physical impact, or fear for his or her own safety. The “time-worn no impact—no recovery rule,” was rejected and overruled in Daley v LaCroix.

In Daley, the defendant’s vehicle “sheared off” a utility pole causing high voltage lines to strike the electrical lines leading into the plaintiffs’ house; a “great electrical explosion” followed, resulting in property damage to the plaintiffs’ home. Plaintiffs (minors) sought recovery for property damages as well as damages for “traumatic neurosis, emotional disturbance . . . nervous upset,” and “nervousness.”

The Daley court held:

[W]here a definite and objective physical injury is produced as a result of emotional distress proximately caused by defendant’s negligent conduct, the plaintiff may recover in damages for such physical consequences to himself notwithstanding the absence of any physical impact upon plaintiff at the time of the mental shock.

Furthermore, initially the “bystander” must have actually witnessed the accident or continuously personally observed the negligent act or event to maintain an action. In Gustafson v Faris, this “witness” requirement characterized as “nothing but a poor arbitrary rule at best,” was relaxed and supplemented by an admittedly equally “arbitrary” rule that was “a little less restrictive,” the alternate “fairly contemporaneous” requirement.

In Gustafson, the parents of a five-year-old son did not witness their son’s fatal bicycle-automobile accident but the mother arrived at the accident scene shortly thereafter. Gustafson suggested that a bystander need not actually witness the accident to maintain a viable cause of action for negligent infliction of emotional distress.

Thus, after Daley, “physical impact” was “no longer the sine qua non for recovery,” for independent emotional distress. Shortly thereafter, in Toms v M Connell, the court also abolished the “hopeless artificiality and harshness of the ‘zone-of-danger’ rule” as a prerequisite for recovery. The Toms court held that “a parent [the mother] may maintain a cause of action for mental anguish resulting in a definite and objective physical injury generated by witnessing the negligent infliction of injuries upon its child.” Accordingly, a party could maintain an action for emotional distress arising out of fear for his or her own personal safety as a result of the defendant’s negligent act, as well as in the capacity of a “bystander” who witnesses or observes the negligent infliction of tortious injury upon an immediate family member.

Thus, the “fairly contemporaneous” rule provides for recovery if the bystander does not witness the accident, but experiences the emotional distress “fairly contemporaneously with the accident or injury to the third person.” Courts have defined “fairly contemporaneous” as “on the scene moments later,” viewing the third party’s injuries “within moments” of the incident, and seeing a newborn’s “disabilities . . . immediately after her birth,” but it does not include being “informed of the matter at a later date.”

Additionally, Gustafson’s requirement of “a sudden, brief, and inherently shocking accidental event,” and its reinforcement of Daley’s requirement that the plaintiff’s mental disturbance result in a “definite and objective physical injury,” or “actual physical harm,” must be examined on a case-by-case basis in order to determine whether it is foreseeable that mental distress to the individual parents is likely to result.

Gustafson thus established the present-day limitations and parameters for “bystander” negligent infliction of emotional distress. Currently, a party can establish a viable claim for negligent infliction of emotional distress when the party proves four elements: (1) that the injury threatened or inflicted on the third person is a serious one, of a nature to cause severe mental disturbance to the plaintiff; (2) that the shock must result in actual physical harm; (3) that the plaintiff is a member of the third person’s immediate family, i.e., a parent, child, husband or wife, and (4) that the plaintiff must actually be present at the time of the accident or injury, or
suffers shock “fairly contemporaneous” with the accident or injury.38

Today, negligent infliction of emotional distress is a separate and distinct independent cause of action, with special characteristics and restrictions.39 Yet, there is still evidence that some Michigan courts are reluctant to adopt it or recognize it as a vehicle of recovery.40 Certainly however, Michigan courts do allow recovery for negligent infliction of emotional distress under the appropriate circumstances and provide some relief to an emotionally injured individual.◆

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Footnotes
3. Id. at 81.
4. Id.
8. Id.
10. Dobbs, supra at 825; Daley v. LaCroix, 384 MICH 4 at 8–10.
11. Id. at pp 9–10. “Incident” has meant a slight blow, a trifling burn or electric shock, a trivial jolt or jar, a forcible seating on the floor, dust in the eye, or the inhalation of smoke. The requirement has been satisfied by a fall brought about by a faint after a collision, or the plaintiff’s own wrenching of her shoulder in reaction to the fright...” Id. at p 12, n 9 quoting from Prosser, Torts (3d ed), pp 350–351.