The Legal Intelligencer
THE OLDEST LAW JOURNAL IN THE UNITED STATES

By Ben Present
Legal Intelligencer
1/3/2012

Split Court Lets Emotional Distress Suit Stand

NIED Claims May Be Triggered Without Physical Impact, Baer Says Three justices of the state Supreme Court have said a mother may have a cause of action for negligent infliction of emotional distress after a doctor interpreted her ultrasound during pregnancy as normal and her child was subsequently born with birth defects.

Three justices of the state Supreme Court have said a mother may have a cause of action for negligent infliction of emotional distress after a doctor interpreted her ultrasound during pregnancy as normal and her child was subsequently born with birth defects.

Another three justices in Toney v. Chester County Hospital declined to endorse the mother's theory of liability.

Without a seventh vote, the evenly divided Supreme Court let stand the opinion of a split en banc panel of the state Superior Court that one high court opinion in support of affirmance called "flawed."

The opinion of the trio of justices who supported the intermediate appeals court ruling would allow claims for NIED stemming from breaches of contract or fiduciary duty without the long-standing prerequisite of a "physical impact."

In his 29-page opinion supporting affirmance, Justice Max Baer said plaintiffs cannot recover for NIED in "garden variety" breach of contract or fiduciary duty cases. Rather, Baer said courts should limit such claims to those where a "special relationship" is involved and where the relevant breach of duty results in emotional harm "so extreme" that it could not reasonably be expected.

Three justices who supported reversal took the position that the high court should not, in the word chosen by Chief Justice Ronald D. Castille, "innovate" a new cause of action.

Justice Thomas G. Saylor said the General Assembly should address the application of NIED in a case where a health care provider fails to diagnose potential birth defects when administering ultrasound.

In the lead opinion, Baer said the law should dispense with the century-old "physical impact" rule for NIED claims. Baer noted that, while a severely emotionally disturbing event could arise absent a physical impetus, a physical event could very well lead to a minor emotional disturbance, as well. In prior rulings, the court had carved out exceptions to the physical impact rule, but they all required some type of physical impetus.

Nonetheless, Baer acknowledged that a claim lacking evidence of a physical impact would reflect a steeper legal challenge.

"A plaintiff asserting a special relationship NIED cause of action absent physical injury, however, must still demonstrate the genuineness of the alleged emotional distress, in part, by proving the element of causation," Baer wrote. "Unlike cases involving a physical impact, a plaintiff in a non-impact case faces a more difficult task of convincing a court of the legitimacy of the emotional distress and the causal nexus between the negligent action at issue and alleged distress."

Decisive Vote Lacking

The decision lets stand, by operation of law, a 6-2 en banc panel of the state Superior Court that said the mother should be able to pursue her NIED claim against the health care providers involved.

Justice Joan Orie Melvin, who sat on the Superior Court when it issued its opinion in 2008, dissented from the majority, saying that Jeanelle Antionette Toney did not state a valid cause of action for NIED. Orie Melvin did not participate in the case when it came before the Supreme Court; her vote would have been the deciding one.

In the case, Toney sued Chester County Hospital, the University of Pennsylvania, and Dr. Maheep Goyal, the Penn radiologist who interpreted Toney's ultrasound as normal exactly four months before Toney gave birth to a child with serious physical abnormalities.

The child was born with several deformities, Baer wrote, including a lack of all four extremities below his elbow and knee joints.

Toney filed a medical malpractice action in 2005. However, she did not allege the radiologist's interpretation of her ultrasound led to her baby's deformities. Rather, Toney sought damages for the emotional distress she is claiming to have suffered after

witnessing the birth of her physically deformed son without having time to brace herself for the experience. Toney's case now heads to trial.

The case tasked the high court with untangling the law on NIED in Pennsylvania and considering its treatment in other states. The case came up after defendants accused the Superior Court of creating a type of NIED claim based on a contractual or fiduciary duty that was, as they said, as novel as it would be dangerous.

The medical providers argued to the justices that the Superior Court's decision in Toney strays from the limitations the Supreme Court has established for NIED claims, thereby expanding NIED to impose liability facing any situation where a breach of duty is paired with emotional strife.

The hospitals argued that, for several reasons, the cases cited by the Superior Court amounted to dicta.

And, while Baer agreed, saying that the high court has never adopted a pre-existing relationship NIED cause of action, the justice eventually said some of those NIED claims should be able to move forward.

Baer was joined by Justice Seamus P. McCaffery and Justice Debra Todd, who also filed a separate opinion in support of affirmance.

'Limits' of Justice

In Saylor's opinion in support of reversal, the justice said the underlying claim in Toney , while unfortunate, fell outside of the "inherent limits" of the judicial system. "In light of the limitations of modern compensation law, there simply are some wrongs which are not, and should not be made, actionable in courts of law," said Saylor, who was joined by Justice J. Michael Eakin.

Borrowing language from his own dissenting opinion in Freed v. Geisinger Medical Center , Saylor said that regulation of medical malpractice litigation requires "difficult social policy judgments appropriate to the legislative branch."

He pointed out that Baer's opinion in support of affirmance did not spell out how damages would be determined with regard to the "new cause of action it sanctions."

Castille filed a separate opinion in support of reversal.

'Cutting Edge Issues'

Lawyers for Toney released a statement following the decision, saying the case was

one of "important public policy" and that it "addressed cutting edge legal issues" in the state's NIED law.

The hospitals had argued there was no scientific way to measure the emotional distress in the case, Baer said. They raised concerns about an affirmance opening a floodgate of litigation. They questioned what would stop a mother from suing for NIED on a botched determination of boy or girl.Toney argued the court had previously adopted two relevant subsections of the Restatement (Second) of Torts and that they allowed for the court to accept an NIED cause of action tied to a fiduciary or contractual relationship. She argued those subsections — "zone of danger" and "bystander liability" theories — have limitations to protect against "limitless liability and the flood of litigation" and that a pre-existing relationship cause of action affords similar protections.

The defense pointed to the threat of endless litigation in support of keeping the NIED physical impact trigger in place.

The Supreme Court in 1970 adopted the zone of danger theory in Niederman v. Brodsky , marking its first divergence from the physical impact rule. The rule provided NIED compensation to those who fall in the territory of physical danger even if they never suffer physical impact.

Nine years later, in Sinn v. Burd , the court widened the spectrum for NIED claims, adopting the bystander liability theory. Under it, plaintiffs can recover for emotional distress if they witness a serious accident to a family member, even if they don't fall within the zone of danger.

While not a precedential decision, the Supreme Court's review of Toney marks the biggest NIED case to hit the high court since it adopted those two theories more than three decades ago.

Special Relationship
Lacking definitive state law precedent on special relationship claims, Baer reviewed legal commentary and case law from several other states before concluding there should be a duty of emotional care in certain relationships.

That duty is breached, Baer said, when the resulting emotional trauma passes the threshold of a reasonably expected daily hardship.

"The potential emotional harm must not be the type that a reasonable person is expected to bear," he said. Citing a Wake Forest Law Review article — " Is Negligent Infliction of Emotional Distress a Freestanding Tort?" — Baer described compensable

emotional harm as "'likely to be experienced as a visceral and devastating assault on the self' such that it 'resemble[s] physical agony in its brutality.'"Rather than make an exhaustive list of such relationships, Baer said the state's trial judges should decide whether a sufficient duty exists on a case-by-case basis.In the current matter, Toney's assertion that she could not properly brace herself for giving birth to a child with severe birth defects, Baer concluded, was enough for her to clear preliminary objections.

Physical Impact

Turning to the physical impact issue, Baer noted the "ridiculous lengths" to which courts have stretched the impact rule to justify a reward.

One such example, which Baer called the "pinnacle of absurdity of the physical impact rule," came in a 1928 case out of Georgia. In the case, a woman collected $500 (worth about $6,000 today) after a circus horse "evacuated his bowels" onto her lap during a performance.

If that could justify a reward, Baer said, then courts should not block claims simply because they lack a physical component.

"It is incongruous that the utilization of the impact rule could result in a clearly genuine and severe emotional distress being denied recovery due to the lack of a physical impact, when a minor emotionally distressing event, such as the circus horse incident, would result in recovery based purely on the existence of a minor physical impact," he said.

Stephen Raynes and Daniel Bencivenga of Raynes McCarty represented Toney.

"In affirming the Superior Court's en banc opinion by virtue of the Supreme Court being equally divided, the law in Pennsylvania now expressly recognizes a claim for emotional distress in cases ... where there is foreseeable emotional distress to a victim which flows from a particular contractual or fiduciary relationship," Raynes said in the statement.

Charles A. Fitzpatrick of Rawle & Henderson represented Goyal, the radiologist, and the University of Pennsylvania.

"We are disappointed in Justice Baer's opinion and feel very disappointed that the entire court did not issue a decision," Fitzpatrick said. "We're left with an affirmance of the Superior Court by operation of law rather than an opinion by the Supreme Court."

Daniel J. Rovner, of Berwyn, Pa., firm Post & Post, represented Chester County Hospital. Rovner, who worked with Benjamin Post of the same firm on the case, said the holding added to concerns his firm has for the medical profession in the state but was encouraged that it set no precedent.

"Specifically in this case, we appealed the Superior Court's decision because it appeared to sanction a new basis for claims of negligent infliction of emotional distress against health care providers," Rovner said. "We are pleased that an equally divided Supreme Court has, in part, agreed with our concerns for any expansion of the law on negligent infliction of emotional distress.

"While it applies to this particular case, and this particular case will go down to the trial court and proceed, it does not have any precedential value in future cases."

Rovner said that, had Orie Melvin been able to participate in the high court's review of Toney and followed in her previous dissent, the case would have been decided in favor of his client.

Sure to Be Cited

Philadelphia plaintiffs attorney Thomas R. Kline of Kline & Specter said the holding, though not a majority opinion, would be widely cited by the bench and bar. Kline said he would be surprised if the Supreme Court quickly revisited the principle addressed in Toney .

"Although [Toney is] a plurality and not a majority opinion, previously the law had been developed at the Superior Court level and this pronouncement by the Supreme Court, in a well-reasoned opinion of affirmance of the Superior Court, goes a long way toward establishing the fundamental core principle that physical impact is no longer a requirement," Kline said.

In medical malpractice cases, plaintiffs often face the argument on preliminary objections that their emotional distress claims must be accompanied by a physical injury, according to plaintiffs attorney Matthew Casey of Ross Feller Casey.

Casey said that, though Sinn v. Burd had already abrogated the physical impact standard, Toney should result in preliminary objections on that basis being even more uniformly overruled.

"Unless a case makes it back [to the Supreme Court] where you have all seven justices voting, that Superior Court precedent will be important for plaintiffs alleging negligent infliction of emotional distress," he said.

Neither Kline nor Casey were involved in Toney .

The Pennsylvania Medical Society filed an amicus brief on behalf of the medical providers.