

Could Lawyers Face Claims for Negligent Infliction of Emotional Distress?

A lawyer's professional conduct can be actionable based upon various theories asserted by a client other than for malpractice, such as for breach of fiduciary duty. But what about a claim for negligent infliction of emotional distress (NIED) where the emotional distress is caused by "negligently divulge(d) incorrect, emotionally disturbing information" even if it ultimately does not harm the client's case? This author raises this question in light of a recent Pennsylvania Supreme Court case dealing with medical malpractice, which may prove to be a harbinger of the eventual "loosening" of this area of the law so that it might be applied to lawyer professional liability. *Toney v. Chester County Hosp.*, 36 A.3d 83 (Pa. 2011) (decided Dec. 22, 2011) was a plurality decision only, but its result was to affirm a published Superior Court decision, *Toney v. Chester County Hosp.*, 961 A.2d 192 (Pa. Super. 2008), a 6-2 en banc holding.

Under Pennsylvania jurisprudence, NIED was recognized in accident cases where the victim was impacted physically, referred to as the "impact rule," and later where "the victim personally witnessed a tortfeasor physically impact a close relative," referred to as "bystander liability." But the tort of NIED has now been recognized in some other jurisdictions in another category — "where an actor has a particular contractual or fiduciary relationship with a victim and it is foreseeable that the actor's carelessness could cause severe emotional harm to the victim, and that harm occurs. ..." Under certain circumstances, "a particular contractual or fiduciary relationship" could describe the relationship between a lawyer and a client, and "severe carelessness" could be a misstatement made by the lawyer to the client, which causes emotional distress to the client.

In *Toney*, the majority in the Superior Court found that the physical injury impact requirement was satisfied "so

long as the emotional distress caused physical symptoms. ..." In granting the petition for allowance of appeal, however, the Supreme Court framed the issue before it as follows: "Whether the Superior Court erred in finding a cause of action for [NIED] exists where emotional distress results from the negligent breach of a contractual or fiduciary duty, absent a physical impact or injury?"

The three justices in support of affirming, Max Baer (who wrote the opinion), Debra M. Todd and Seamus P. McCaffery, found that such a claim could be based upon "a contractual or fiduciary relationship." The three justices in support of reversal, Chief Justice Ronald D. Castille, Thomas G. Saylor and J. Michael Eakin, were of the view that adoption of this tort is more appropriately a matter for consideration by the Legislature. What is telling is that the justices in support of affirming would recognize a claim for NIED even without the existence of physical impact. In their view, "the physical impact requirement is a flawed tool to distinguish between true emotional distress deserving recovery and the trivial or fraudulent emotional distress claims that should not result in liability."

If an attempt were made to "stretch" the application of NIED to lawyers acting in their professional capacity, this would not be the first attempt to apply principles of medical professional liability law to legal professional liability.

In *Toney*, the defendants either directly or vicariously performed a pelvic ultrasound on plaintiff during her pregnancy, which was interpreted and reported to the plaintiff as "normal." Unfortunately, when the child was born, which occurred while the plaintiff was conscious, the child "had several profound physical abnormalities" that the plaintiff alleges she was not prepared to see as a result of the negligent misinterpretation of the ultrasound, causing her emotional distress due to shock. The child had no medical malpractice claim to assert because he sustained no harm as a result of the misread ultrasound, i.e., he would have received no different medical treatment if the ultrasound had been correctly interpreted.

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Avoiding Liability



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bility. Notwithstanding, the requisite burden for demonstrating such a claim in the context of an attorney/client relationship is so great that, to this author, it appears that meeting that burden would be almost insurmountable.

Despite the apparent "loosening" of the physical impact requirement, and remembering that this view was not shared by a majority of the participating justices and is therefore not binding precedent, NIED does not appear to be a serious threat to lawyers. The opinion in support of affirming states that "we would hold that NIED is not available in garden-variety 'breach of contractual or fiduciary duty' cases, but only in those cases where there exists a special relationship where it is foreseeable that a breach of the relevant duty would result in emotional harm so extreme that a reasonable person should not be expected to endure the resulting distress." That does not seem to describe the nature of any misstatement that a lawyer would give to his or her client. On the other hand, although the affirming opinion did not state that NIED can apply to lawyers, neither did it state the contrary. Instead, the opinion in support of affirming found it "prudent to leave the legal question of whether a sufficient duty exists to court trial judges to decide on a case-by-case basis. ..." Moreover, none of the cases it cited from other jurisdictions involved defendant lawyers. Notwithstanding, examples of professionals to whom NIED liability could possibly extend include psychologists, morticians "and other situations where the defendants are aware that their assumed duty impliedly includes a duty to care for the emotional well-being of the plaintiff." Anything is possible.