

Table of Contents

CHAPTER 1. LEGAL PROTECTION FOR INTENTIONALLY CAUSED EMOTIONAL HARM

I. INTRODUCTION

§ 1:1 Background

II. PATH TO RECOGNITION OF INTENTIONAL INVASIONS OF EMOTIONAL INTERESTS

§ 1:2 Historical limitations

§ 1:3 Rationales for not recognizing an independent cause of
action—The valuation problem

§ 1:6 Rationales for not recognizing an independent cause of
action—Problem of genuineness

§ 1:7 Recognition of a new tort—ALI's initial rejection

§ 1:10 Recognition of a new tort—Elements of the tort—
Generally

§ 1:11 Recognition of a new tort—Elements of the tort—Intent or
recklessness

§ 1:12 Recognition of a new tort—Elements of the tort—Extreme
and outrageous conduct

§ 1:13 Recognition of a new tort—Elements of the tort—Severe
emotional distress

§ 1:14 Recognition of a new tort—Elements of the tort—
Causation

§ 1:15 Recognition of a new tort—Elements of the tort—Court
and jury

III. MODERN SAMPLING OF RELEVANT DECISIONS

§ 1:16 Liability of insurers for infliction of emotional distress

§ 1:17 Wrongful discharge and sexual harassment

§ 1:17.10 Negligent retention in workplace *[New]*

§ 1:18 Sexual and indecent proposals and non-workplace
harassment

§ 1:19 Debt collection

§ 1:20 Racial or ethnic slurs

- § 1:21 Taking advantage of plaintiff's known sensitivities or fears
- § 1:21.10 Defendant's occupying a position of power *[New]*
- § 1:21.20 Defendant's occupying position of authority *[New]*
- § 1:22 Actions between spouses
- § 1:23 Federal tort actions—Federal Employers' Liability Act (FELA)
- § 1:26 Constitutional limitations

IV. PRACTICAL CONCERNS OF THE LITIGATOR

- § 1:32 Miscellaneous reasons

V. STATE SUMMARIES

A. CALIFORNIA LAW

- § 1:33 Standards of recovery
- § 1:34 Wrongful discharge/employment cases
- § 1:35 Sexual assault and related claims

B. FLORIDA LAW

- § 1:36 Standards of recovery
- § 1:37 Employment situations
- § 1:38 Insults and indignities
- § 1:39 Miscellaneous

C. ILLINOIS LAW

- § 1:40 Standards of recovery
- § 1:41 Employment situations
- § 1:42 Examples of actionable conduct
- § 1:43 Sexual assault and related claims
- § 1:43.10 Fear of AIDS *[New]*
- § 1:43.20 Insults, indignities, and publication *[New]*

D. NEW YORK LAW

- § 1:44 Standards of recovery
- § 1:44.10 Bad faith refusal to settle *[New]*
- § 1:45 Employment situations
- § 1:46 Landlord/tenant-related disputes
- § 1:47 Insults; threats; name calling; vulgarities
- § 1:48 Sexual harassment
- § 1:49 Credit/mortgage-related claims
- § 1:50 Claims against physicians

TABLE OF CONTENTS

- § 1:51.10 Fear from toxic exposure *[New]*
- § 1:52 Defamation/publication
- § 1:52.10 Police conduct *[New]*

E. PENNSYLVANIA LAW

- § 1:53 Introduction
- § 1:54 Wrongful discharge/employment cases
- § 1:55 Insults and indignities
- § 1:56 Publication and stigmatization
- § 1:57 Sexual assault and related claims
- § 1:58 Examples of actionable conduct
- § 1:59 Current status of intentional infliction of emotional distress law

F. TEXAS LAW

- § 1:60 Standards of recovery
- § 1:61 Employment situations
- § 1:62 Insults and indignities
- § 1:63 Arrest/police conduct and related claims
- § 1:64 Sexual assault and related claims
- § 1:65 Examples of actionable conduct

CHAPTER 2. NEGLIGENT INVASIONS OF EMOTIONAL INTERESTS

I. STANDARDS FOR NEGLIGENTLY CAUSED EMOTIONAL DISTRESS

- § 2:1 Emergence of negligence—The nineteenth century milieu
- § 2:2 Emergence of negligence—The concepts of duty and due care
- § 2:3 The impact rule—English and American origins of the impact rule
- § 2:4 The impact rule—The rise of the impact rule in America
- § 2:5 The impact rule—Retreat from the impact rule
- § 2:6 Physical injury and the zone-of-danger rule—Whose safety is endangered
- § 2:7 Physical injury and the zone-of-danger rule—The zone of danger and injury to third persons
- § 2:8 Liability to bystanders outside the zone of physical danger—*Dillon v. Legg*
- § 2:9 Liability to bystanders outside the zone of physical danger—Rejection, retrenchment, or expansion of bystander liability
- § 2:10 Recovery for “purely” emotional distress and pushing the edges of liability—Physical injury requirement modified

- § 2:11 Special circumstances—Property damage
- § 2:12 Special circumstances—Mishandling of corpses and death telegrams
- § 2:13 Special circumstances—Medical malpractice
- § 2:14 Direct duties of professionals
- § 2:15 Is pure emotional distress compensable?

II. STATE SUMMARIES

A. CALIFORNIA LAW

- § 2:16 Direct-victim and zone-of-danger liability
- § 2:16.10 Direct victims *[New]*
- § 2:17 Emotional distress as “parasitic” to physical injury
- § 2:18 Direct victims and breach of preexisting duty
- § 2:19 Bystander/percipient witness cases—The applicable standards and limits
- § 2:20 Misdiagnosis claims
- § 2:21.10 Medical malpractice statutory limits *[New]*

B. FLORIDA LAW

- § 2:22 Impact rule
- § 2:23 Bystander exceptions to impact rule—Elements of bystander claim
- § 2:24 Bystander exceptions to impact rule—Familial closeness requirement
- § 2:25 Bystander exceptions to impact rule—Requisite physical manifestations

C. ILLINOIS LAW

- § 2:26 Direct-victim and zone-of-danger rules
- § 2:27 Physical illness, injury, or manifestation
- § 2:28 Bystander rule predicated upon zone-of-danger-type facts
- § 2:29 Direct victim cases—Ordinary negligence cases
- § 2:30 Direct victim cases—Impact rule cases and law

D. NEW YORK LAW

- § 2:31 Impact rule
- § 2:32 Exceptions to impact rule
- § 2:33 Impact rule supplemented but not supplanted by zone-of-danger rule
- § 2:34 New York explicitly rejects bystander recovery
- § 2:35 Zone of danger as a form of bystander liability
- § 2:36 Medical malpractice prenatal cases
- § 2:37 “Immediate family member” strictly construed

TABLE OF CONTENTS

- § 2:38 Diagnosis/misdiagnosis recovery
- § 2:38.10 Fear of AIDS *[New]*

E. PENNSYLVANIA LAW

- § 2:39 Impact rule
- § 2:40 “Abolition” of impact requirement; adoption of zone of danger
- § 2:41 Bystander recovery is recognized
- § 2:42 Interpretation of bystander liability—Observance of traumatic event
- § 2:43 Interpretation of bystander liability—Necessity of discrete traumatic event
- § 2:44 “Close relative” requirement
- § 2:45 No recovery for misinformation or misdiagnosis causing emotional distress
- § 2:46 Fear of cancer cases

F. TEXAS LAW

- § 2:47 General rule
- § 2:48 Bystander liability—Elements of bystander claim
- § 2:49 Bystander liability—Standing to sue: “Closely related” test
- § 2:50 Bystander liability—Requirement of contemporaneous observation/perception of the injury
- § 2:52 Fetus/birth-related cases

CHAPTER 3. FEDERAL TORT STATUTORY ACTIONS

II. FEDERAL EMPLOYERS’ LIABILITY ACT

- § 3:3 Test for recovery of emotional distress damages
- § 3:4 Intentional infliction of emotional distress

III. JONES ACT AND MARITIME CLAIMS

- § 3:5 Negligent infliction of emotional distress
- § 3:6 Intentional infliction of emotional distress
- § 3:6.10 Maritime wrongful death and survival *[New]*
- § 3:6.20 Maritime claims for non-pecuniary losses *[New]*

IV. FEDERAL TORT CLAIMS ACT

- § 3:7 General background
- § 3:8 Exceptions to liability—Generally
- § 3:9 Exceptions to liability—The intentional tort exception

- § 3:10 Exceptions to liability—The discretionary function exception
- § 3:13 Intentional infliction of emotional distress—Recent judicial analysis: The emerging standard
- § 3:15 Intentional infliction of emotional distress—Discretionary function exception as a bar to emotional distress claims
- § 3:17 Negligence as basis for recovery for emotional distress
- § 3:18 Sexual harassment
- § 3:20 Causation
- § 3:21 State law on excessiveness of awards
- § 3:22 Warsaw Convention *[New]*
- § 3:23 Death of fetus *[New]*

CHAPTER 4. FEDERAL CIVIL RIGHTS ACTS

I. INTRODUCTION

- § 4:1 Generally

II. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND 1991 CIVIL RIGHTS ACT

- § 4:2 General provisions of Title VII
- § 4:3 Civil Rights Act of 1991
- § 4:3.10 Punitive damages cap *[New]*
- § 4:4 Damages under Title VII and CRA of 1991—Retroactivity
- § 4:5 Damages under Title VII and CRA of 1991—EEOC policy guide on nonpecuniary losses
- § 4:6 Damages under Title VII and CRA of 1991—Standards for awards
- § 4:7 After-acquired evidence doctrine and emotional distress
- § 4:8 Sexual harassment and Title VII—The basic theory under Title VII: The role of psychological injury
- § 4:8.10 State antidiscrimination laws *[New]*

III. AMERICANS WITH DISABILITIES ACT

- § 4:9 General provisions of ADA
- § 4:10 ADA remedies and CRA of 1991
- § 4:10.10 Compatibilty with social security payments under SSDI *[New]*

IV. AGE DISCRIMINATION

- § 4:11 General provisions of ADEA
- § 4:12 Remedies under ADEA

TABLE OF CONTENTS

V. RECONSTRUCTION CIVIL RIGHTS ACTS

A. SECTION 1981

- § 4:13 General provisions
- § 4:15 Emotional distress damages
- § 4:16.10 Punitive damages *[New]*

B. SECTION 1983

- § 4:17 General provisions
- § 4:18 Remedies
- § 4:18.10 Prison Litigation Reform Act *[New]*

**VI. HOUSING DISCRIMINATION: TITLE VIII
AND § 1982**

- § 4:20 Background of title VIII
- § 4:23 Remedies under title VIII
- § 4:26 Emergency Medical Treatment and Active Labor Act
[EMTALA] *[New]*
- § 4:27 Other federal laws—Title IX *[New]*

CHAPTER 5. INTENTIONAL TORTS

I. EMOTIONAL DISTRESS

- § 5:1 General rule of liability

II. CONVERSION

- § 5:3 Requiring heightened proof of emotional distress or other
approaches

III. ABUSE OF PROCESS

- § 5:5 Threshold of injury as a prerequisite to recovery for
emotional distress

IV. MALICIOUS PROSECUTION

- § 5:6 Nature of the tort and damages awardable
- § 5:7 Standard for award of emotional distress damages

V. FALSE IMPRISONMENT

- § 5:8 Nature of the tort and damages awardable
- § 5:9 Standard for award of emotional distress damages

VI. ASSAULT AND BATTERY

- § 5:10 Tort and damages
- § 5:11 Judicial illustrations and standards
- § 5:12 Sexual assaults and batteries
- § 5:12.10 Warsaw Convention *[New]*
- § 5:12.20 Elder abuse *[New]*

VII. SEXUAL ABUSE OF CHILDREN

- § 5:13 Generally
- § 5:15 Direct liability to the victim

CHAPTER 6. PERSONAL INJURY TORTS

I. EMOTIONAL DISTRESS DAMAGES IN PRODUCTS LIABILITY ACTIONS

- § 6:1 Introduction
- § 6:2 Physical injury requirement—Rationales for the requirement
- § 6:3 Physical injury requirement—Evidence necessary to satisfy the requirement
- § 6:4 Zone of danger
- § 6:5 Bystander rule
- § 6:7 The role of strict liability and other products liability theories

II. EMOTIONAL DISTRESS RELATING TO AVIATION

- § 6:8 Emotional distress under the Warsaw Convention: International air accidents—History of the Convention
- § 6:9 Emotional distress under the Warsaw Convention: International air accidents—Rejection of recovery for purely emotional distress
- § 6:11 Emotional distress under the Warsaw Convention: International air accidents—Effect of bodily injury on recovery for emotional distress—Recovery of all distress
- § 6:12 Emotional distress under the Warsaw Convention: International air accidents—Effect of bodily injury on recovery for emotional distress—Distress as an element of damages
- § 6:14 Pre- and post-impact pain and suffering and emotional distress—The nature of the problem
- § 6:15 Pre- and post-impact pain and suffering and emotional distress—Pre-impact fear

TABLE OF CONTENTS

III. WRONGFUL DEATH AND SURVIVAL ACTS

A. INTRODUCTION

§ 6:18 Generally

B. WRONGFUL DEATH ACTS

§ 6:19 Loss of companionship, society, and consortium—Early rule disallowing

§ 6:20 Loss of companionship, society, and consortium—Modern rule of allowance

§ 6:21 Loss of companionship, society, and consortium—Nature of the claim

§ 6:22 Mental anguish or distress of survivors—General rule disallowing recovery for mental anguish

§ 6:23 Mental anguish or distress of survivors—View allowing recovery for mental anguish

§ 6:24 Mental anguish or distress of survivors—Bystander liability

§ 6:24.10 Death of fetus *[New]*

§ 6:24.20 Other wrongful death damage *[New]*

C. SURVIVAL ACTIONS

§ 6:25 Pain and suffering

§ 6:27 Showing of conscious pain and suffering

IV. CONSORTIUM

A. SPOUSAL CONSORTIUM

§ 6:28 Introduction

§ 6:29 What is “consortium”?

§ 6:30 Necessity of physical injury to the impaired spouse

B. OTHER CONSORTIUM

§ 6:31 Loss of parental consortium

§ 6:32 Loss of child consortium

§ 6:32.10 Other consortium claimants *[New]*

V. EMOTIONAL DISTRESS AS FEAR FOR FUTURE CONSEQUENCES

§ 6:33 Introduction

§ 6:34 Physical injury or impact requirement

§ 6:35 Moving to a test of reasonableness of the fear or other criteria

VI. AIDS-RELATED EMOTIONAL DISTRESS

- § 6:36 Background
- § 6:38 Negligent infliction of emotional distress—Physical injury test
- § 6:39 Negligent infliction of emotional distress—Actual exposure requirement: The emerging rule
- § 6:40 Negligent infliction of emotional distress—Reasonableness standard

CHAPTER 7. DIGNITARY TORTS

I. DEFAMATION

- § 7:1 The nature of the defamation and emotional interests
- § 7:2 Constitutional overlay
- § 7:6 Emotional distress by another name
- § 7:7 Relationship of reputational harm and emotional distress

II. INVASION OF PRIVACY

- § 7:10 Damages in privacy actions, generally
- § 7:11 Intrusion privacy and emotional distress
- § 7:12 Appropriation privacy and emotional distress
- § 7:13 False light privacy
- § 7:14 Public disclosure of private facts
- § 7:15 Breach of a confidential relationship

CHAPTER 8. COMMERCIAL AND CONTRACTUAL TORTS

I. RECOVERY OF DAMAGES FOR EMOTIONAL DISTRESS ARISING FROM A BREACH OF CONTRACT

- § 8:1 The general rule of nonliability
- § 8:2 Exceptions to the general rule—Personal contracts: Matters of solicitude
- § 8:3 Exceptions to the general rule—Insurance contracts
- § 8:5 Exceptions to the general rule—Contracts with inherent emotional value
- § 8:6 Exceptions to the general rule—Tortious breach of contract

II. EMOTIONAL DISTRESS IN ACTIONS FOR FRAUD

- § 8:8 The general rule of nonliability in fraud actions

TABLE OF CONTENTS

- § 8:9 Alternative theories applied for allowing recovery of emotional distress
- § 8:11 Alternative theories applied for allowing recovery of emotional distress—Requirement of severe emotional distress
- § 8:12 Alternative theories applied for allowing recovery of emotional distress—Foreseeability of emotional distress
- § 8:15.10 Deceptive trade practices acts *[New]*

III. INTERFERENCE WITH ECONOMIC RELATIONS

- § 8:17 The judicial authority supporting damages for emotional distress

IV. CONTRACTS FOR BURIALS AND TELEGRAMS

- § 8:22 Treatment of corpses—Interference with dead bodies and mutilations

CHAPTER 9. EMPLOYMENT TORTS

I. GENERAL THEORIES OF RECOVERY

- § 9:3 Tort theories

II. RECOVERY FOR EMOTIONAL DISTRESS

- § 9:4 Contract theories
- § 9:5 Tort theories and emotional distress

III. WORKERS' COMPENSATION AND THE TORT SYSTEM

- § 9:6 Introduction
- § 9:7 Workers' compensation as a bar to tort suits for mental distress—Bar against negligently inflicted emotional distress
- § 9:8 Workers' compensation as a bar to tort suits for mental distress—The intentional tort exception
- § 9:9 Workers' compensation as a bar to tort suits for mental distress—Extending the exception to emotional distress

IV. WORKERS' COMPENSATION COVERAGE FOR EMOTIONAL HARMS

- § 9:10 The legal terminology

- § 9:11 Physical trauma causing a mental injury (physical-mental cases)
- § 9:14 Mental stimulus causing a nervous injury (mental-mental cases)—The view rejecting compensability
- § 9:15 Mental stimulus causing a nervous injury (mental-mental cases)—Gradual mental stimuli and job-related stress

CHAPTER 10. INTRA-FAMILY TORTS

I. ACTIONS FOR EMOTIONAL INJURIES BETWEEN DIVORCING SPOUSES

- § 10:1 Background
- § 10:4 Crystallized factual patterns that bear on the actionability of the emotional distress claim—Emotional distress and physical abuse
- § 10:5 Crystallized factual patterns that bear on the actionability of the emotional distress claim—Sexually transmittable diseases
- § 10:6 Crystallized factual patterns that bear on the actionability of the emotional distress claim—Extramarital affairs and misrepresentation

II. INTERFERENCE WITH CHILD CUSTODY AS BASIS FOR CLAIMS FOR EMOTIONAL DISTRESS

- § 10:9 Intentional infliction of emotional distress

CHAPTER 11. PROPERTY TORTS

I. INTRODUCTION

- § 11:1 Generally

II. TRESPASS AND NUISANCE

- § 11:2 Discomfort and annoyance—General rules of compensability
- § 11:3 Discomfort and annoyance—Standards for awards of damages—No physical injury requirement
- § 11:4 Discomfort and annoyance—Standards for awards of damages—Intentional tort standard
- § 11:5 Discomfort and annoyance—Standards for awards of damages—Quality of life distinguished from mental distress
- § 11:7 Fear of future consequences—Fear as discomfort and annoyance

TABLE OF CONTENTS

- § 11:8 Fear of future consequences—Fears of future disease as emotional distress

III. PREMISES LIABILITY

- § 11:9 Distress arising from criminal acts on commercial properties
§ 11:11.10 Negligent infliction emotional distress *[New]*

IV. EMOTIONAL INJURY AND PROPERTY DAMAGE

- § 11:12 General rule of nonliability for emotional distress
§ 11:13 Cases involving injury or death of a pet
§ 11:14 Heirlooms and property of sentimental value

CHAPTER 12. PROFESSIONAL LIABILITY

I. MEDICAL MALPRACTICE AND EMOTIONAL DISTRESS

- § 12:1 Introduction: Basic principles
§ 12:2 General malpractice litigation
§ 12:2.10 Informed consent *[New]*
§ 12:2.20 Medical malpractice statutory limits *[New]*
§ 12:3 Medical malpractice statutory limits—Impact or physical injury rule
§ 12:4 Medical malpractice statutory limits—Zone-of-danger rule
§ 12:5 Medical malpractice statutory limits—Bystander rule
§ 12:6 “Direct victim” or “duty to the plaintiff” analysis: Misdiagnosis and false positives
§ 12:7 Pregnancy and prenatal injury cases
§ 12:8 Pregnancy and prenatal injury cases—Stillbirth cases; physical injuries to parent or bystanders
§ 12:9 Pregnancy and prenatal injury cases—Direct duties and alternatives; abortions and fetal injuries
§ 12:10 Pregnancy and prenatal injury cases—Physical injury and zone of danger
§ 12:11 Pregnancy and prenatal injury cases—Bystander analysis
§ 12:12 Pregnancy and prenatal injury cases—Doctrinal problems regarding direct duties and direct victims
§ 12:13 Wrongful conception, birth and life
§ 12:14 Wrongful conception, birth and life—Wrongful life
§ 12:15 Wrongful conception, birth and life—Wrongful birth

- § 12:16 Wrongful conception, birth and life—Wrongful pregnancy
- § 12:16.10 Wrongful adoption *[New]*
- § 12:16.20 Lost chance theory *[New]*

II. LEGAL MALPRACTICE AND RECOVERY FOR EMOTIONAL DISTRESS

- § 12:17 General rule denying recovery in absence of intentional wrongdoing
- § 12:18 Reliance on attorney's conduct as intentional
- § 12:19 Reliance on the nature of the harm suffered
- § 12:21 Liability in loss of child custody cases

III. PSYCHIATRISTS AND COUNSELORS

- § 12:22 Introduction
- § 12:23 Patient-counselor sexual relations: The transference phenomenon
- § 12:27 False memory syndrome
- § 12:27.10 Suicide *[New]*

IV. ACTIONS AGAINST CLERGY

- § 12:28 Introduction
- § 12:29 Actions arising out of marriage and other counseling—Marriage counseling as distinguished from spiritual counseling
- § 12:30 Actions arising out of marriage and other counseling—Breach of fiduciary duties
- § 12:31 Actions arising out of marriage and other counseling—Intentional infliction of emotional distress
- § 12:32 Actions arising out of sexual abuse of children—Introduction
- § 12:33 Actions arising out of sexual abuse of children—Illustrative non-clergy decisions
- § 12:34 Actions arising out of sexual abuse of children—The clergy situation
- § 12:35 First amendment issues *[New]*

CHAPTER 13. PAIN AND SUFFERING

I. GENERAL CONCEPTS AND DEFINITIONS

- § 13:2 Definitions of “pain” and “suffering”
- § 13:3 Kinds of pain and suffering—Mental suffering accompanying physical injury
- § 13:4 Kinds of pain and suffering—Loss of sleep, humiliation and embarrassment

TABLE OF CONTENTS

- § 13:5 Kinds of pain and suffering—Disfigurement and scars
- § 13:6 Necessity of consciousness or awareness
- § 13:7 Relationship of pain and suffering to awards for medical expenses
- § 13:7.10 Pre-impact pain and suffering [*New*]

II. PROVING PAIN AND SUFFERING

- § 13:8 No definitive standard—The jury’s discretion
- § 13:9 No definitive standard—Factors considered by the jury
- § 13:10 Yardsticks for pain and suffering: Per diem arguments—The nature of such arguments
- § 13:11 Yardsticks for pain and suffering: Per diem arguments—General approval for per diem arguments
- § 13:12 Yardsticks for pain and suffering: Per diem arguments—Per diem with cautionary instruction or at trial court’s discretion
- § 13:13 Yardsticks for pain and suffering: Per diem arguments—Per diem arguments held improper
- § 13:14 Evidentiary standards and admissibility
- § 13:15 Evidentiary standards and admissibility—Plaintiff’s burden
- § 13:16 Evidentiary standards and admissibility—Plaintiff’s testimony
- § 13:17 Evidentiary standards and admissibility—Testimony of non-expert witnesses
- § 13:18 Evidentiary standards and admissibility—Role of expert testimony
- § 13:20 Evidentiary standards and admissibility—Documentary evidence
- § 13:21 Evidentiary standards and admissibility—Photographs and other demonstrative evidence
- § 13:22 Evidentiary standards and admissibility—Videos and film

III. FUTURE PAIN AND SUFFERING

- § 13:23 General principles
- § 13:24 Reasonable certainty or probability of occurrence
- § 13:26 General rule not requiring expert testimony

CHAPTER 14. HEDONIC DAMAGES

- § 14:1 Early development
- § 14:2 Content of hedonic losses
- § 14:3 Treatment of hedonic loss—An integrated approach
- § 14:5 Treatment of hedonic loss—A segregated approach
- § 14:7.10 Comparative fault or negligence: Factors affecting [*New*]

EMOTIONAL INJURIES LAW AND PRACTICE

- § 14:9 Hedonic damages in wrongful death actions—Postdeath damages generally disallowed
- § 14:10 Hedonic damages in wrongful death actions—Minority allowance of hedonic damages
- § 14:11 Hedonic damages in wrongful death actions—Hedonic damages under survival acts
- § 14:14 Expert testimony and admissibility—Admissibility of expert testimony

Table of Contents

CHAPTER 15. PUNITIVE DAMAGES

I. BASES FOR PUNITIVE DAMAGES

- § 15:1 Punitive damages standard
- § 15:2 Constitutional limitations
- § 15:2.10 Statutory limitations *[New]*

II. RELATION TO INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

- § 15:3 Close nexus between the tort and punitive liability
- § 15:4 Illustrative situations of outrage and punitive damages
- § 15:5 Illustrations of punitive damage awards *[New]*
- § 15:6 Other illustration of awards *[New]*
- § 15:7 Other illustrations of awards or rejection *[New]*
- § 15:8 Other illustrations of punitive damages awards or rejection *[New]*

CHAPTER 16. INSURANCE ISSUES

I. BODILY INJURY AND DISTRESS

- § 16:4 Bodily injury and emotional distress—Minority view regarding “bodily injury” as encompassing emotional distress

II. INTENTIONAL ACTS, EMOTIONAL INJURY, AND INSURABILITY OF DISTRESS

- § 16:6 Interpretation and application of “accident or occurrence” and intentional acts exclusions—Intended acts, but not injuries, not excluded
- § 16:7 Interpretation and application of “accident or occurrence” and intentional acts exclusions—Intended acts and foreseeable injuries excluded
- § 16:10 Interpretation and application of “accident or occurrence” and intentional acts exclusions—Specific application of intentional acts exclusions to sexual contact—Sexual assault outside the workplace

CHAPTER 17. STATUTORY LIMITS ON NONECONOMIC DAMAGES

I. NATURE OF THE ISSUES

§ 17:1 Meaning of noneconomic losses

II. CONSTITUTIONALITY OF “CAPS” ON DAMAGES

- § 17:3 Equal protection—Decisions upholding caps
- § 17:4 Equal protection—Decisions invalidating caps
- § 17:5 Due process—Decisions upholding caps
- § 17:6 Due process—Decisions invalidating caps
- § 17:7 Right to jury trial—Decisions upholding caps
- § 17:8 Right to jury trial—Decision invalidating caps
- § 17:9 Access to the courts/open courts/certain remedy provisions—Decisions upholding caps
- § 17:10 Access to the courts/open courts/certain remedy provisions—Decisions invalidating caps

III. ISSUES OF INTERPRETATION AND SCOPE OF COVERAGE OF STATUTORY CAPS

- § 17:11 Generally
- § 17:12 Multiple plaintiff or defendants or claims: How many caps apply?
- § 17:13 What are noneconomic damages and who is covered?
- § 17:14 Wrongful death actions
- § 17:17 Related tort reforms that affect recovery for noneconomic damages—Periodic payment statutes
- § 17:18 Related tort reforms that affect recovery for noneconomic damages—Joint and several liability
- § 17:19 Choice of law

CHAPTER 18. DEFENSES

I. STATUTES OF LIMITATION

- § 18:1 General issues
- § 18:2 What statute governs?
- § 18:4.10 Laches *[New]*
- § 18:4.20 Consent *[New]*
- § 18:5 When the statute commences to run—Intentional infliction of emotional distress

TABLE OF CONTENTS

II. ABSENCE OF CAUSATION

- § 18:9 General requirements
- § 18:9.10 Avoidable consequences; duty to mitigate *[New]*
- § 18:10 Proof of causation
- § 18:10.10 Substantial factor *[New]*
- § 18:10.20 Increased risk and cause *[New]*
- § 18:10.30 Sudden onset rule *[New]*
- § 18:11 Foreseeability and the egg shell psyche
- § 18:12 Apportionment and pre-existing conditions
- § 18:12.10 Admissibility under Daubert *[New]*
- § 18:12.20 Apportionment, indivisible injuries and pre-existing conditions *[New]*
- § 18:12.30 Concurrent causes and pre-existing conditions as sole cause of injury *[New]*
- § 18:12.40 Concurrent causes *[New]*
- § 18:12.50 Increased risk of harm as causal factor *[New]*

III. PROOF OF SEVERITY OF EMOTIONAL DISTRESS

- § 18:14 Sufficiency of proof
- § 18:14.10 Sufficiency of causation proof *[New]*
- § 18:14.20 Sudden onset rule *[New]*
- § 18:14.30 Role of experts *[New]*
- § 18:14.40 Aggravation of pre-existing condition *[New]*

IV. PREEMPTION OF TORT ACTIONS UNDER FEDERAL LABOR LAWS

- § 18:15 Generally
- § 18:19 National Labor Relations Act
- § 18:24 Labor-management relations act—Application of preemption rules to emotional distress claims
- § 18:26 Employees retirement income security act—Preemption standard
- § 18:27 Employees retirement income security act—Application of preemption standard to emotional distress claims
- § 18:28 Miscellaneous federal statutes
- § 18:29 Immunities *[New]*

CHAPTER 19. ESSENTIAL MEDICAL AND PSYCHIATRIC PRINCIPLES AND AUTHORITIES

- § 19:2.10 Working definitions: Ecological validity *[New]*
- § 19:3 Selecting experts in the mental health arena

EMOTIONAL INJURIES LAW AND PRACTICE

- § 19:7 Medical and behavioral assessment tools—Mental status examination
- § 19:8 Medical and behavioral assessment tools—Tests of cognition, memory and attention
- § 19:11 Objective and not-so objective medical diagnostic studies
- § 19:12 Objective and not-so objective medical diagnostic studies—The sensitivity-specificity dichotomy
- § 19:13 Objective and not-so objective medical diagnostic studies—*Daubert* standards of admissibility
- § 19:14 Objective and not-so objective medical diagnostic studies—Commonly used psychological or neurodiagnostic tests
- § 19:15 DSM-IV—Purpose and limitations
- § 19:15.30 DSM-5—A radical—And potentially chaos causing—Transformation? *[New]*
- § 19:15.70 What the DSM-IV-TR and DSM-5 writers intended: cautionary statements *[New]*
- § 19:16.50 The critical importance of base rates *[New]*
- § 19:16.51 The molecular objectification of neuropsychiatric disorders *[New]*
- § 19:16.52 The future necessary “clean-up batter” role of psychiatrists and Neuropsychiatrists in emotional and traumatic brain injury Litigation *[New]*
- § 19:19 The use and misuse of newer diagnostic tools *[New]*
- § 19:20 The current coming conundrum about “authoritative texts” *[New]*
- § 19:21 More on trying to understand the uses and limitations of traditional statistics *[New]*
- § 19:21.1 “Rules of Engagement” for expert witnesses for either side *[New]*
- § 19:21.2 An equal collaboration and the parable of the three blind sons and the elephant *[New]*
- § 19:21.21 Problems for collaboration: liens and billing *[New]*
- § 19:21.22 Helping the helpless expert when ethically/unfairly/improperly “bushwhacked” by opposing counsel *[New]*
- § 19:21.23 The problem of “polarizing” the case *[New]*
- § 19:22 Diffusion tensor imaging: the new battleground and litigation frontier—Including bad science and court decisions *[New]*

TABLE OF CONTENTS

CHAPTER 20. MENTAL AND PSYCHOLOGICAL DISORDERS RELEVANT TO LITIGATION

I. POSTTRAUMATIC STRESS AND THE ANXIETY DISORDERS

- § 20:1 History and definition
- § 20:4 Course, causation, and differential diagnosis
- § 20:5 Disability and permanency
- § 20:6 Treatment and treatability
- § 20:7 The future
- § 20:7.10 Recovered memories *[New]*
- § 20:7.20 Introduction and definitions *[New]*
- § 20:7.30 The emergent significance of obsessive compulsive disorder as a complication of stress and traumatic events *[New]*
- § 20:7.40 The ongoing search for objective neuroanatomical “markers” for posttraumatic stress disorder in the hippocampus *[New]*
- § 20:7.40.1 Emerging neurobiological research *[New]*
- § 20:7.50 Clinical treatment needs of individual victims both of traumatic brain injury and stress disorders *[New]*
- § 20:7.51 The challenge of distinguishing between acute stress disorder and post-traumatic stress disorder *[New]*
- § 20:7.52 The need to recognize the long-term *interaction* between post-traumatic stress disorder and mild traumatic brain injury *[New]*
- § 20:7.53 History and possible future regarding posttraumatic stress disorder as a DSM disorder *[New]*

II. BRAIN TRAUMA AND OTHER CENTRAL NERVOUS SYSTEM DISORDERS

- § 20:8 Introduction and definitions
- § 20:8.25 Mandatory reading for plaintiff and defense attorneys: the February 2014 issue of National Geographic *[New]*
- § 20:8.50 New clinical uses of brain imaging and looming duties for both plaintiff attorneys and insurers *[New]*
- § 20:8.75 The search for objective traumatic brain injury “markers”: Tau *[New]*
- § 20:9 Proving or disproving traumatic brain injury claims
- § 20:14 Proving or disproving traumatic brain injury claims—Interactions between traumatic brain injury and psychiatric disorders

EMOTIONAL INJURIES LAW AND PRACTICE

- § 20:15 Causation: Differential diagnosis of traumatic brain injury and the post-concussion syndromes
- § 20:16 Causation: Differential diagnosis of traumatic brain injury and the post-concussion syndromes—Comorbid conditions and traumatic brain injury
- § 20:16.10 Causation: Differential diagnosis of traumatic brain injury and the post-concussion syndromes—Comorbid conditions and traumatic brain injury—Personality disorders *[New]*
- § 20:16.20 Causation: Differential diagnosis of traumatic brain injury and the post-concussion syndromes—Comorbid conditions and traumatic brain injury—Posttraumatic stress disorder *[New]*
- § 20:16.30 Causation: differential diagnosis of traumatic brain injury and the postconcussion syndromes—Metabolic abnormalities and correlation with functional impairment *[New]*
- § 20:17 Disability and permanency
- § 20:17.50 Disability and permanency *[New]*
- § 20:18 Treatment and treatability
- § 20:19 The future
- § 20:19.10 The future: traumatic brain injury in the elderly *[New]*
- § 20:19.20 The search for objective traumatic brain injury “markers”: neuroendocrinology *[New]*
- § 20:19.21 The increasingly important forensic neuropsychiatric significance of violence and behavioral changes as clinical sequelae and causation “markers” for the presence of traumatic brain injury *[New]*
- § 20:19.70 Mild traumatic brain injury and other central nervous system disorders: the increasing attempts for “slam dunk” causation using new brain imaging *[New]*
- § 20:19.80 Electrical Traumatic Brain Injuries *[New]*
- § 20:19.90 Update about Biomarker Explosion in Traumatic Brain Injury *[New]*

III. SOMATIZATION, CONVERSION “HYSTERIA,” AND MALINGERING

- § 20:20 Overview
- § 20:21 History of the somatoform disorders
- § 20:22 The somatoform disorders
- § 20:23 The somatoform disorders—Conversion disorder
- § 20:25 The somatoform disorders—Somatization disorder
- § 20:25.50 The challenges of comorbidity: cognitive impairment in psychiatric disorders *[New]*
- § 20:27 Pain disorder

TABLE OF CONTENTS

- § 20:27.10 Review of the past and present research and likely future of the scientific and legal approaches to understanding pain disorders *[New]*
- § 20:28.50 Palliative care and pain management at the end of life *[New]*
- § 20:29 Pain disorder—Malingering: Symptomology and diagnosis
- § 20:30.10 The future: The neuroanatomy of self-deception *[New]*
- § 20:31 The future—Comorbidity
- § 20:31.10 The future—The future—Comorbidity; Disability, treatability, and permanency *[New]*
- § 20:32 The future—Fibromyalgia
- § 20:33 The future—Chronic fatigue syndrome
- § 20:36 The future—Irritable bowel syndrome (IBS)
- § 20:37 The future—Urethral syndrome
- § 20:39 The future—Chronic back pain
- § 20:42 The future—Sexual or other severe abuse in childhood
- § 20:42.10 Sexual or other severe abuse in childhood: Dissociative identity disorder *[New]*
- § 20:43.10 The future—“Psychogenic” Nonepileptic Seizures
- § 20:43.20 The future: Neuropsychiatric defenses to claims of “fraud on the court” *[New]*
- § 20:43.50 The future: the central role of neuronal factors in understanding the causes and treatment of chronic pain *[New]*
- § 20:43.51 The future: an organic basis to malingering behavior caused by trauma? *[New]*
- § 20:43.52 The increasingly clear relationship between noncompliance with treatment and invalidism/“sick role” behavior and destruction of brain resilience opportunities *[New]*

IV. PERSONALITY DISORDERS (AXIS II)

- § 20:44 Overview
- § 20:44.40 Personality disorders *[New]*
- § 20:50 Schizotypal personality disorder
- § 20:54 Borderline personality disorder
- § 20:54.10 The resolution of a previous seeming oxymoron: brain abnormalities as a result of personality disturbance? *[New]*
- § 20:54.20 Will the last barrier fall?: the finding that there are white matter abnormalities in personality disorders *[New]*
- § 20:54.30 Borderline personality and the brain: the discovery of dramatic interrelationships *[New]*
- § 20:64 Obsessive-compulsive personality disorder
- § 20:66 Etiology and causation of disorders
- § 20:67 The future—Comorbidity

- § 20:67.10 The future—Comorbidity and treatability *[New]*
- § 20:67.20 The future—Comorbidity and the specific need to look for borderline personality disorder *[New]*

V. MOOD DISORDERS

- § 20:68 Overview
- § 20:71 Bipolar disorder
- § 20:75 Etiology and causation of the disorders
- § 20:76 The future—Comorbidity
- § 20:76.10 The future: neurochemical and neuroanatomical causal connection markers *[New]*
- § 20:76.20 The future: treating mood and other “psychogenic” disorders by altering brain structure and function *[New]*
- § 20:76.30 The future: Links between the presence of new depression treatments and duties that need to be imposed on both patient litigants and defendant insurance companies *[New]*

VI. SUBSTANCE ABUSE

- § 20:77 Overview and relevance of substance abuse in litigation
- § 20:77.10 The future—New treatment modalities *[New]*
- § 20:77.20 The future—ECT and treatability from major depression *[New]*
- § 20:80 Three principal categories of substances—Non-analgesic “street drugs”

VII. PROPOSED NEW NEUROPSYCHIATRIC DISORDERS

- § 20:82 Overview *[New]*
- § 20:83 Causation *[New]*
- § 20:84 The future—Comorbidity *[New]*
- § 20:84.25 The hitherto ignored issue of subjective belief in influencing neuropsychological tests and neuroimaging studies *[New]*
- § 20:84.50 The future-comorbidity: traumatic brain injury, attention deficit/hyperactivity disorder, substance abuse, psychosis, posttraumatic stress disorder, and cognitive impairment *[New]*
- § 20:85 The challenges of comorbidity *[New]*
- § 20:86 Multiple chemical sensitivity syndrome *[New]*
- § 20:87 Sick building syndrome *[New]*

TABLE OF CONTENTS

CHAPTER 21. INTEGRATION OF LEGAL AND PSYCHIATRIC CONCEPTS

§ 21:2	Causation
§ 21:2.50	Risk factors and the future of causation <i>[New]</i>
§ 21:2.70	An example of statistical “shooting in the dark”: video games, aggression, and violent crimes <i>[New]</i>
§ 21:2.90	A seemingly easier battlefield? A link between hearing loss and dementia? <i>[New]</i>
§ 21:5	Social security disability and psychiatric claims <i>[New]</i>
§ 21:6	The coming great synthesis of neuropsychiatry and the law <i>[New]</i>
§ 21:6.50	The coming great synthesis of neuropsychiatry and the law: impending huge paradigm shifts <i>[New]</i>
§ 21:7	Depression in the elderly: illustration of research documenting the interactions between mood disorder, cognition, and stress <i>[New]</i>
§ 21:8	Present and future ethical dilemmas for plaintiff counsel, defense counsel and behavioral experts <i>[New]</i>
§ 21:9	The impending dominance of the “substantial factor” test in emotional and traumatic brain injury litigation <i>[New]</i>
§ 21:9.50	A practical model for translating the “substantial factor” test into clinical text: the three interlocking rings of emotional and brain injury causation <i>[New]</i>
§ 21:10	Integration of medical/neuropsychiatric concepts: the coming critical battlefield: resilience or no resilience? <i>[New]</i>
§ 21:11	Cross examination of plaintiff experts in emotional and brain injury litigation <i>[New]</i>
§ 21:11.10	Cautions and Caveats <i>[New]</i>
§ 21:11.20	Specific possible cross examination questions for plaintiff experts in emotional and brain injury litigation <i>[New]</i>
§ 21:12	Specific possible cross-examination questions for defense experts in emotional and brain injury litigation <i>[New]</i>
§ 21:13	The increasing future duties of patient responsibilities to participate in treatment—or else <i>[New]</i>
§ 21:13.50	The issue of providing—Or not providing—Hope <i>[New]</i>
§ 21:14	Deception and self-deception <i>[New]</i>
§ 21:15	Resilience: Recent research with summary <i>[New]</i>
§ 21:16	New treatments that have the promise of increasing brain resilience <i>[New]</i>
§ 21:17	Functional resilience and returning to work <i>[New]</i>
§ 21:18	The history of the localization dogma <i>[New]</i>
§ 21:19	Coming pitfalls of <i>Daubert</i> standards of admissibility <i>[New]</i>

- § 21:20 Bayes' Theorem and the underlying threat to foundations of *Daubert* Analysis and its implied threats *[New]*
- § 21:21 The critical importance of testifying experts continuing to gather information and be open to altering their opinions as a result of same up to and including the day of trial *[New]*
- § 21:21.1 Importance of testifying experts continuing to gather information and offering their opinion: more on the discovery date conundrum and how to solve it *[New]*
- § 21:22 The Critical Importance of Hope in Litigation and in Clinical Recovery *[New]*
- § 21:22.1 Resilience and the critical important of facing and overcoming self-doubt *[New]*

CHAPTER 22. PRACTICE POINTERS FOR PLAINTIFF'S COUNSEL

I. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

- § 22:13.10 Attorneys' fees *[New]*

II. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

- § 22:15 Satisfying the physical injury requirement
- § 22:18 Pre-existing conditions

III. TRIAL STRATEGY

- § 22:22 Treating psychologist or psychiatrist
- § 22:24 Taxation of emotional distress awards *[New]*
- § 22:25 Medical and psychiatric examinations *[New]*
- § 22:26 Income tax consequences *[New]*
- § 22:27 Plaintiff's proposed jury instruction *[New]*
- § 22:28 Psychotherapist—Patient privilege *[New]*

CHAPTER 23. DEFENDING A PSYCHOLOGICAL INJURY CLAIM

II. INVESTIGATION AND DISCOVERY

- § 23:3 Generally
- § 23:4 Written discovery—Interrogatories and requests for production

TABLE OF CONTENTS

- § 23:8 Deposition discovery—Preparation for plaintiff's deposition—Review diagnostic criteria
- § 23:18 Rule 35 mental examination—Governing legal principles
- § 23:19 Rule 35 mental examination—Objectives of mental examination—Determining existence of diagnosable mental disorder
- § 23:20 Rule 35 mental examination—Objectives of mental examination—Determining causation
- § 23:21 Rule 35 mental examination—Evaluation of the plaintiff—Generally
- § 23:25 Rule 35 mental examination—Examination observers

III. TRIAL STRATEGY

- § 23:28.10 When awards challenged as excessive *[New]*
- § 23:28.20 Privileged communication *[New]*
- § 23:39 Prepare thoroughly—Impeach the plaintiff
- § 23:43 Admissibility of psychiatric testimony under Daubert *[New]*
- § 23:44 Daubert standards of admissibility *[New]*

APPENDICES

APPENDIX A

Table of Laws and Rules

Table of Cases

Index