

THE VANISHING REMEDY

Mental Anguish Damages in Legal Malpractice Claims

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A decade ago, the Texas Supreme Court began its assault on what tort reformers pejoratively call psychic injuries. Today, key issues for those seeking mental anguish damages in legal malpractice claims remain murky. In 1993's *Boyles v. Kerr*, the high court rejected the tort of negligent infliction of emotional distress. As alleged, the defendant had videotaped his girlfriend having sex, then showed it to mutual friends. Writing for the court, Justice Tom Phillips noted that there is no general duty to refrain from inflicting emotional distress, but confirmed the right to recover mental anguish damages resulting from the breach of some other legal duty. The court characterized mental anguish damages as "unaffected" by its decision and rejected the argument that such damages are only recoverable when the emotional distress is physically manifested.

Also that year, in *Twyman v. Twyman*, the court upheld recovery for intentional infliction of emotional distress in the context of a divorce. The basis for the award was the defendant's alleged penchant for sadomasochism. The court was able to craft a remedy for the plaintiff by re-characterizing her pleadings — she had entered the 3rd Court of Appeals with a negligent infliction claim, but emerged from the Texas Supreme Court with an affirmed judgment for intentional infliction.

By the end of 1993, most plaintiffs attorneys believed that mental anguish damages — damages awarded in connection with the breach of some other legal duty — had survived.

But in 1995, a decidedly more conservative Texas Supreme Court decided *Parkway Co. v. Woodruff*, in which it held that a plaintiff must prove the "nature, extent and severity of plaintiff's anguish, thus establishing a substantial disruption in the plaintiff's daily routine." Absent such proof, the court held that mental anguish damages were not recoverable without "other evidence of a high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment or anger."

A year later, in *Saenz v. Fidelity & Guar. Ins. Underwriters Inc.*, the Supreme Court raised the bar yet again by holding that there must also be evidence of compensable mental anguish and "some evidence to justify the amount awarded." In these two decisions, the Texas Supreme Court granted itself the right to second-guess juries that made awards too large for a tort reform court to stomach.

1997 was a bad year for mentally anguished plaintiffs. In *Casteel v. Crown Life Ins. Co.*, the 3rd Court of Appeals struck a \$6 million mental anguish award after it determined there was no evidence to support the amount awarded. Of course, no trial judge would let an expert opine on the value of a claimant's mental anguish in dollars and cents. This unpublished opinion effectively set the bar to impossible new heights. The Texas Supreme Court ordered *Casteel* published in 1999.

City of Tyler v. Likes (1997) subsequently removed the bar and replaced it with a wall. The high court held that mental anguish damages are recoverable if there is intent or malice, when there is severe bodily injury or when there is a special relationship. It limited recoverable mental anguish damages to injuries of a shocking or disturbing nature. The court also added a new element, saying such injuries must be "highly foreseeable."

A year later, in *Temple-Inland Products Corp. v. Carter*, the court held that fear and anxiety experienced by asbestos exposure was not

LEGAL MALPRACTICE



& GRIEVANCE DEFENSE

foreseeable and denied recovery. Justice Nathan Hecht, writing for the court, noted, "There are few situations in which a claimant who is not physically injured by the defendant's breach of duty may recover mental anguish damages." He concluded that for many breaches of legal duties, "even tortuous ones, the law affords no right to recover for resulting mental anguish."

It took the court less than five years to move from affirming mental anguish damages without physical injury if awarded in connection with the breach of some other legal duty to restricting mental anguish damages to shocking or disturbing conduct that is accompanied by severe physical injury of a highly foreseeable nature.

Avoiding the Wall

Used generically, the term *legal malpractice* encompasses three legal theories: negligence; breach of fiduciary duty; and violation of the Deceptive Trade Practices Act.

An attorney is negligent if his services fall below the standard of care. He breaches his fiduciary duty by violating one of the disciplinary rules or by related bad conduct. He violates the DTPA by making a material misrepresentation, failing to disclose certain information or by engaging in an unconscionable course of conduct. Mental anguish can come into play in all three instances if the client-plaintiff claims that such damages arose from the attorney-client relationship. The trick is to avoid the judicially constructed wall that has been built between plaintiffs and recovery.

In 1989 — before tort reform — the Texas Supreme Court had affirmed recovery for mental anguish damages in a claim for legal malpractice in *Cosgrove v. Grimes*. It also had denied writ in two appellate cases, 1987's *Heath v. Herron* and *Rhodes v. Batilla* in 1993, preserving awards of mental anguish damages from an attorney. In these cases, the lower courts had applied the limitation that the plaintiff had to show "egregious and extraordinary circumstances."

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In 1997, the Texas Supreme Court faced head-on the issue of mental anguish damages in *Delp v. Douglas*, a legal malpractice claim. The trial court issued a directed verdict on the plaintiff's mental anguish claims after hearing testimony that alleged mistakes made by her legal counsel in a contract matter had caused her to experience physical ailments and depression that required anti-depressant medication.

The court considered, but declined to adopt, a blanket rule prohibiting mental anguish damages resulting from legal malpractice, citing its holding in *Cosgrove v. Grimes*. The court held that the evidence of the plaintiff's mental anguish was sufficient to raise a fact issue as to whether it was the result of "egregious and extraordinary circumstances" and ruled

that the trial court had improperly granted the directed verdict as to her mental anguish damages.

The court's holding in *Delp* did not resolve key issues for those seeking mental anguish damages in a claim for legal malpractice. First, the court did not specifically apply the standards set out in *Parkway* or *Saenz*. It is unclear whether the "egregious and extraordinary circumstances" standard replaces or augments *Parkway* and *Saenz*.

Second, the court made no reference to *City of Tyler v. Likes*. In *Delp*, there were physical manifestations of her mental anguish, but the court did not clarify if this evidence met the severe physical injury requirement of *Likes* or whether the attorney-client relationship meets the "special relationship" exception in *Likes* instead.

Finally, the holding in *Delp* is dicta because the court upheld the directed verdict as to all claims on other grounds.

A claim for legal malpractice brought under §17.49(c) of the DTPA may include damages for mental anguish, even if the plaintiff sustained no other damages. This was the holding in *Latham v. Castillo*, a 1998 case where the Texas Supreme Court applied the criteria set out in *Parkway* and *Saenz*, but not the criteria in *Likes*.

Although mental anguish damages are available in a claim for legal malpractice, it is likely that the standards set out in *Parkway* and *Saenz* apply. In addition, there must be a showing of egregious and extraordinary circumstances. Some physical manifestations are probably required, although it is unclear if they must be "severe." It also is unclear whether a plaintiff is required to show a high degree of foreseeability in a malpractice claim seeking mental anguish damages, although *Likes* suggests this result. One thing, however, does seem certain: If the jury awards too much money for mental anguish damages, the appellate courts will use some or all of the criteria in *Parkway*, *Saenz* and *Likes* to make large verdicts vanish.

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