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Civil LITIGATION

New test for recovery of emotional harm

We litigators spend most of our time applying precedent and on rare, special occasions, shaping it.

We are on the threshold of one of those rare experiences. In June 2009, the state Public Health Law was amended, as it pertains to claims against nursing homes for alleged violations of a resident's rights, which could mark a sea-change in the test for the recovery of emotional harm in New York.

The bill stated that it was intended to "clarify the grounds for liability claims against nursing homes."

By MARGARET E. SOMERSET
Daily Record Columnist

Specifically, Public Health Law Section 2801-d was amended to specify that injuries for which a nursing home may be held liable under the statute include physical, emotional and financial harm to the patient.

The amendments clarified that liability for such injuries is not solely limited to violations of Section 2803-c of the Public Health Law, which enumerates certain rights to nursing home residents (often called the Resident Bill of Rights).

Proponents stated that the "bill would make it clear that ... that the right to sue applies to any injury to the patient by the nursing home."

Importantly, the statutory amendment does not require that a claim for emotional harm be linked to any physical injury, or be the result of intentional or outrageous conduct. What will it really mean in the context of historical precedent in New York governing claims for emotional distress?

Historically in New York, there have been very limited bases for recovering damages for emotional distress. In the case of a negligent act causing emotional distress, the emotional injury had to be associated either with a physical injury caused by the defendant, or the plaintiff had to prove the defendant's negligent conduct either unreasonably endangered or caused the plaintiff to fear for her physical safety. That burden often has not been fulfilled.

To recover for intentional infliction of emotional distress, the plaintiff must prove that the defendant's conduct was so outrageous in character, so extreme in degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community. That has been an almost insurmountable hurdle for most plaintiffs.

For example, the fear of contracting rabies from a dog bite was not sufficient fear of physical suffering to warrant recovery for negligent infliction of emotional distress, and false information as to the dog's vaccinations was not sufficiently outrageous to sustain a cause of action for intentional infliction of emotional distress. *Fairman v. Santos,* 174 Misc. 2d 85 (Sup. Ct. Queens Co. 1997).

The negligent repair of a car that left the plaintiff stranded on highway was an insufficient allegation of fear for one's own safety to warrant recovery for negligent infliction of emotional distress. *Ford v. Village Imports Ltd.,* 92 AD2d 717 (Fourth Dept. 1983).

An allegation that the plaintiff was raped by a television show's employee failed to allege sufficient extreme and outrageous conduct to warrant recovery for either negligent or intentional infliction of emotional distress. *Sheila v. Povich,* 11 AD2d 120 (First Dept. 2004).

The easier cases under the new amendment will be those involving emotional harm allegedly related to, and connected with, some physical injury. But what about those cases in which the only injury is emotional harm? What about insults to the resident's dignity?

Commonly, nursing home residents will complain that staff members were rude, slow, loud or neglectful, that the linens are soiled or that the food is unpalatable. Simultaneously, the vast majority of those residents also are being treated for depression, which I suspect will be the new synonym for emotional harm. Are those allegations, in the absence of any physical injury, sufficient to sustain claims for emotional harm under the statute?

In any other context, the answer would be "no." For example, false accusations to authorities — *Chinese Consol v. Benev. Ass'n v. Tsang,* 254 AD2d 222 (First Dept. 1998); *Vardi v. Mutual Life Ins. Co. of New York,* 136 AD2d 453 (First Dept. 1988) — telephone threats to harm someone's career — *Novak v. Rubin,* 129 AD2d 780 (Second Dept. 1987) — and the use of religious, ethnic or racial slurs to denigrate a person — *Graham v. Gilderland Central School District,* 256 AD2d 863 (Third Dept. 1998) — have not been sufficiently egregious conduct to state a cause of action for intentional or negligent infliction of emotional distress.

If we are to give credence to the proponent's statement that the

Continued ...

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"bill would make it clear that ... the right to sue applies to any injury to the patient by the nursing home," the historical high hurdles to establish a claim for emotional harm do not seem to be contemplated. How then shall a court assess a claim whose essence is an insult to one's dignity?

A 1997 case answered that exact question in the context of hospital treatment. The decision serves as an interesting model to analyze the very same questions that face the new nursing home cases.

In *Afentakis v. Memorial Hospital*, 174 Misc.2d 962 (Sup. Ct. New York Co. 1997), the plaintiff alleged that a hospital had breached a terminal cancer patient's right to dignity citing inattentive care, delays in treatment and a doctor's thoughtless and offensive statements. No physical injuries were distinguishable from the ordinary discomfort attending a hospital stay. The plaintiff argued that injury to the decedent's dignity should be sufficient to sustain the cause of action. The court disagreed.

The issues that troubled the court in *Afentakis* undoubtedly will haunt the courts now trying to apply the new statutory basis for the recovery of emotional harm in nursing home claims. As *Afentakis* underscores, dignity is an extraordinarily difficult concept to define and measure. It is almost impossible for a court to dictate a standard of care relating to such an abstraction: "Unfortunately, ordinary human experience teaches that a certain unavoidable loss of dignity attends most illnesses, terminal and otherwise, both in and out of the hospital setting. An unsuitable expansion of liability would certainly result should courts attempt to distinguish between the ordinary assaults upon a patient's dignity which stem from the loss of power and control which is all too often the corollary to illness, and the loss of autonomy produced by even a short hospitalization, from those occasioned by the failure of a hospital and its staff to maintain a certain level of caring, respect and consideration for the feelings of its charges. It would be unsuitable for courts to attempt to dictate a standard of care relating to such an abstraction and to the precise quantum of respect and consideration which should be accorded hospital[s] and their staffs, or to arbitrate the complex emotional response a patient's terminal illness is likely to invoke in their caretakers."

How does one measure the relative loss of dignity a resident may have felt as a result of alleged delays in responding to her call bells, allegedly unpalatable foods, torn or soiled linens or the alleged rudeness that a resident perceives in a staff member's tone of voice? How does a court distinguish between a lack of dignity that necessarily and naturally occurs as a result of becoming institutionalized, with all of its attendant losses of privacy, autonomy, power and control, from that which allegedly flows from negligent treatment?

The proof of injury in the new emotional harm cases against nursing homes also will be tainted by the feelings of the residents' representatives, which will force courts to attempt to discern how much of what a family describes is, in fact, what the resident felt, and how much is based on a transference of a family's concern fora resident's well being. Such proof is nearly impossible to weigh properly.

It depends so much on speculation when it comes to what someone else must have been feeling or thinking, it is easily tainted by the understandable distress of the party's representative as they watch a loved one's health decline. Is it not, then, inherently unreliable?

The courts will have to decide whether the new statutory basis to recover emotional harm should follow the tests ascribed to the traditional tort theories of either negligent or intentional infliction of emotional distress. Alternatively, the statutory amendment may be inviting the courts to create a brand new standard to be used for the recovery of emotional harm in nursing home cases.

If the new standard is developed due to a perceived need to protect an otherwise vulnerable population, what is to prevent the standard's spreading to parallel claims for other vulnerable populations? Have the flood gates been opened?

For litigators in this field, all of those questions have yet to be shaped. I suspect that, 10 years from now, we may be talking about a whole new body of law on the subject.

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