

[J-2-2000]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

MARGARET TAYLOR, Parent and Natural Guardian of the Estate of KA-RIN	:	No. 33 E.D. Appeal Docket 1999
ALISE TAYLOR, a minor, and KATHY MAPP, Administratrix of the Estate of Louis T. Mapp, Deceased	:	
Plaintiff-Appellees	:	Appeal from order of Superior Court dated February 19, 1999, denying reargument of decision dated December 18, 1998, at No. 3787 PHL 96, vacating judgment and remanding for a new trial
v.	:	
ALBERT EINSTEIN MEDICAL CENTER, PETER TRINKAUS, M.D., JOHN WERTHEIMER, M.D.,	:	
Defendant-Appellants	:	723 A.2d 1027 (Pa.Super. 1998)
and	:	
OWEN WILLIAMSON, M.D.	:	ARGUED: January 31, 2000

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

MR. CHIEF JUSTICE FLAHERTY

DECIDED: May 17, 2000

This is an appeal from an order of Superior Court which vacated a judgment of the court of common pleas and remanded for a new trial in a medical malpractice case involving claims of negligence, intentional infliction of emotional distress, lack of informed consent, and misrepresentation. The case was brought by the parents of a deceased child.

Malpractice is the alleged cause of the child's death. We granted allowance of appeal on the issue of whether a parent's contemporaneous sensory perception of an intentional tort inflicted upon a child is necessary before recovery can be obtained by virtue of the Restatement (Second) of Torts § 46(2) for intentional infliction of emotional distress. The factual background of the case is as follows.

In the early morning hours of June 1, 1989, Ka-Rin Taylor, a sixteen-year-old girl who was suffering from fever and shortness of breath, was brought to the emergency room of the Albert Einstein Medical Center (Einstein) in Philadelphia. Approximately six hours later she was admitted to the pediatric intensive care unit with a tentative diagnosis of pneumonia. Her condition deteriorated, and, at approximately 10 a.m. she was intubated and placed on a ventilator. A chest x-ray taken at 11 a.m. revealed that the endotracheal tube inserted earlier had been misplaced into her right main stem bronchus. Another x-ray, taken at 1:30 p.m. showed that the tube had been properly repositioned. The tube had been in an improper position for somewhere between one and three hours.

Later that day, Dr. Peter Trinkaus, the physician in charge of Ka-Rin's care at Einstein, determined that in order to provide proper treatment it would be necessary to gain information obtainable only through an invasive diagnostic procedure known as a Swan-Ganz catheterization of the heart. Dr. Trinkaus consulted a cardiologist, Dr. John Wertheimer, who agreed that such a procedure was warranted. Drs. Trinkaus and Wertheimer spoke with the patient's mother, Margaret Taylor, who then consented orally to performance of the catheterization. Testimony at trial differed as to whether she consented only to having Dr. Wertheimer perform the procedure, or whether her consent included Dr. Trinkaus, who admittedly had less experience with the procedure than Dr.

Wertheimer. The procedure was in fact performed by Dr. Trinkaus, but Ka-Rin died at approximately 6:25 p.m. while the procedure was in progress.

Kathy Mapp, as administratrix of the estate of the patient's father Louis T. Mapp, and Margaret Taylor commenced the present action against Einstein, Dr. Trinkaus, and Dr. Wertheimer.¹ The complaint alleged negligence in the mispositioning of the endotracheal tube and in the performance of the Swan-Ganz catheterization, misrepresentation and lack of informed consent with respect to Dr. Trinkaus performing the catheterization, and infliction of emotional distress.

Prior to the case going to the jury, the trial court granted defense motions for directed verdicts on the claims related to informed consent, misrepresentation, and punitive damages.

In response to special interrogatories, the jury found that Dr. Trinkaus had been negligent, but that his negligence had not been a substantial factor in causing the death of the patient. The jury also found that the conduct of Dr. Trinkaus had been outrageous and that it had been a substantial factor in causing emotional distress to Margaret Taylor. The jury awarded Margaret Taylor \$500,000 in compensatory damages for emotional distress. Judgment on the verdict was entered by the trial court. An appeal was taken to Superior Court. That court held that the trial court erred in refusing to submit to the jury the issues of lack of consent, misrepresentation, and punitive damages. It vacated the judgment and remanded for a new trial on all issues.

¹ Dr. Owen Williamson was also named as a defendant, but the complaint against him was dismissed prior to trial.

At issue is whether Superior Court properly upheld the trial court's denial of a motion for judgment n.o.v. filed by Dr. Trinkaus with respect to the claim for intentional infliction of emotional distress. Superior Court held that Margaret Taylor could recover damages for intentional infliction of emotional distress for conduct directed at her daughter even though she did not observe the conduct at the time it occurred. During the allegedly wrongful performance of the catheterization, Margaret Taylor was in another room of the same hospital building. In that sense, she was not "present" when the procedure was performed. The issue of "presence" arises from a requirement expressed in the Restatement (Second) of Torts § 46(2) that, where distress caused by wrongful conduct directed at a third person is claimed, the plaintiff must have been "present at the time" of the conduct in order to recover damages for intentional infliction of emotional distress. Section 46 provides:

§ 46. Outrageous Conduct Causing Severe Emotional Distress

- (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
- (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
 - (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
 - (b) to any other person who is present at the time, if such distress results in bodily harm.

(Emphasis added). Although we have never expressly recognized a cause of action for intentional infliction of emotional distress, and thus have never formally adopted this section

of the Restatement, we have cited the section as setting forth the minimum elements necessary to sustain such a cause of action. Kazatsky v. King David Memorial Park, 515 Pa. 183, 527 A.2d 988 (1987). Accord Hoy v. Angelone, 554 Pa. 134, 151 n.10, 720 A.2d 745, 753 n.10 (1998); Johnson v. Caparelli, 625 A.2d 668, 671-73 (Pa.Super. 1993), allocatur denied, 647 A.2d 511 (Pa. 1994).

Superior Court, relying on Section 46(2), *supra*, upheld the claim for intentional infliction of emotional distress on the theory that there had been extreme, outrageous, and intentional conduct by Dr. Trinkaus when he disregarded the limits of consent provided by Margaret Taylor. The evidence demonstrated that the death of Ka-Rin, which occurred when Dr. Trinkaus performed the catheterization, caused severe emotional distress to Margaret Taylor. Superior Court held, therefore, that the trial court did not err in denying the defense motion for judgment n.o.v. as to the verdict awarding damages for intentional infliction of emotional distress. We do not agree.

Superior Court completely disregarded the language in Section 46(2) requiring that the family member, who claims emotional distress, have been "present at the time" when the extreme and outrageous conduct occurred. Margaret Taylor remained in a hospital waiting room and a hallway while physicians worked on her daughter in an intensive care unit. She did not learn of the alleged outrageous conduct, to wit, that Dr. Trinkaus performed the catheterization despite his alleged representation that Dr. Wertheimer would do so, until afterwards. Inasmuch as she was not present when the procedure was performed and did not observe Dr. Trinkaus' conduct, she cannot maintain an action under Section 46(2).

The rationale for the requirement of presence was well explained in Johnson v. Caparelli, 625 A.2d at 673:

Presence is a crucial element of the tort because an individual who witnesses outrageous or shocking conduct directed at a third-party has no time in which to prepare himself / herself for the immediate emotional impact of such conduct. Moreover, the actor can reasonably be expected to know of the emotional effect which his or her conduct is likely to produce where the person is present. By way of comparison, the emotional effects are generally lessened where the individual learns of the outrageous conduct long after its occurrence and by means other than through his or her own personal observations. Presence is therefore an essential element which must be established to successfully set forth a cause of action for intentional infliction of emotional distress.

A comment to Section 46 further explains the requirement of presence. It notes that concerns regarding the foreseeability of emotional distress, the practical necessity of limiting liability, and the need to assure bona fide claims support the requirement:

Where the extreme and outrageous conduct is directed at a third person, as where, for example, a husband is murdered in the presence of his wife, the actor may know that it is substantially certain, or at least highly probable, that it will cause severe emotional distress to the plaintiff. In such cases the rule of this Section applies. The cases thus far decided, however, have limited such liability to plaintiffs who were present at the time, as distinguished from those who discover later what has occurred. The limitation may be justified by the practical necessity of drawing the line somewhere, since the number of persons who may suffer emotional distress at the news of an assassination of the President is virtually unlimited, and the distress of a woman who is informed of her husband's murder ten years afterward may lack the guarantee of genuineness which her presence on the spot would afford.

Restatement (Second) of Torts § 46, comment L.

The “presence” requirement of Section 46(2) corresponds to an element required in the context of claims for negligent infliction of emotional distress, where the “critical element for establishing such liability is the contemporaneous observation of the injury to the close relative.” Mazzagatti v. Everingham, 512 Pa. 266, 279-80, 516 A.2d 672, 679 (1986). Where one is not present at the scene of tortious conduct, but instead learns of it later from a third party, he is buffered against the full impact that presence and observation would have entailed. Id. at 279, 516 A.2d at 679. “By contrast, the relative who contemporaneously observes the tortious conduct has no time span in which to brace his or her emotional system.” Id.

Inasmuch as Margaret Taylor had no contemporaneous observation of the tort allegedly committed to her child, recovery on the theory of liability set forth in Section 46(2) is barred. Reversal of Superior Court’s decision insofar as it upheld the trial court’s denial of a defense motion for judgment n.o.v. as to the verdict based on intentional infliction of emotional distress is, therefore, required.

Order reversed in part.

Mr. Justice Castille files a Concurring Opinion in which Mr. Justice Nigro joins.

Mr. Justice Zappala and Mr. Justice Saylor concur in the result.