CHAPTER 19

EMOTIONAL HARM

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This chapter focuses on stand-alone claims for emotional distress. Such a claim can be for intentional infliction of emotional distress (IIED), or negligent infliction of emotional distress (NIED). As we will see, both claims are subject to significant restrictions.

Courts have long recognized that tortfeasors should be responsible for causing pain, anxiety, emotional distress, and similar intangible harms. But courts approach emotional distress damages in two quite different ways, depending on whether the emotional harm is considered a stand-alone claim—our focus here—or simply as a category of damages "parasitic" to another tort. When emotional distress damages are sought in connection with a tort claim such as negligence (as "pain and suffering") or assault (where the damages are for the mental distress resulting from being aware of an imminent battery), none of the limiting rules discussed in this chapter will apply. That is, the restrictions we see in this chapter have arisen to limit stand-alone emotional distress claims, not to limit the recovery of damages for pain or distress caused by the commission of some other tort. *See* DOBBS, HAYDEN & BUBLICK, HORNBOOK ON TORTS § 29.1 (2d ed. 2016).

§ 1. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

CHANKO V. AMERICAN BROADCASTING COMPANIES, INC.

49 N.E.3d 1171 (N.Y. 2016)

STEIN, J. . . .

Mark Chanko (decedent) was brought into the emergency room of defendant The New York and Presbyterian Hospital (the Hospital). He had been hit by a vehicle, but was alert and responding to questions. Defendant Sebastian Schubl was the Hospital's chief surgical resident and was responsible for decedent's treatment. While decedent was being treated, employees of ABC News, a division of defendant American Broadcasting Companies, Inc. (ABC), were in the Hospital—with the Hospital's knowledge and permission—filming a documentary series (N.Y. Med) about medical trauma and the professionals who attend to the patients

suffering from such trauma. No one informed decedent or any of the individual plaintiffs—most of whom were at the Hospital—that a camera crew was present and filming, nor was their consent obtained for filming or for the crew's presence.

Less than an hour after decedent arrived at the Hospital, Schubl declared him dead. That declaration was filmed by ABC, and decedent's prior treatment was apparently filmed as well. Schubl then informed the family of decedent's death, with that moment also being recorded without their knowledge.

Sixteen months later, decedent's widow, plaintiff Anita Chanko, watched an episode of N.Y. Med on her television at home. She recognized the scene, heard decedent's voice asking about her, saw him on a stretcher, heard him moaning, and watched him die. In addition, she saw, and relived, Schubl telling the family of his death. She then told the other plaintiffs, who also watched the episode. This was the first time plaintiffs became aware of the recording of decedent's medical treatment and death.

Plaintiffs commenced this action against, among others, ABC, the Hospital and Schubl. Defendants separately moved to dismiss the complaint. [The trial court partially granted the motions, dismissing the causes of action against all defendants for intentional infliction of emotional distress. The Appellate Division affirmed the dismissal of the these claims, and plaintiffs appealed.]

This Court has enumerated four elements of a cause of action for intentional infliction of emotional distress: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Here, the complaint . . . alleges that the Hospital and Schubl allowed ABC to broadcast and disseminate the footage of the final moments of decedent's life, without the knowledge or consent of decedent or plaintiffs. The complaint alleges that plaintiffs watched the episode and were shocked and upset, that "[d]efendants acted intentionally, recklessly, willfully, maliciously and deliberately," and that it was foreseeable that plaintiffs would be caused to suffer emotional distress. Alternatively, the complaint alleges that "defendants acted with reckless disregard for the probability that they would cause plaintiffs to suffer emotional distress," and that defendants knew or should have known that emotional distress was a likely result of their actions. The complaint further alleges that plaintiffs experienced emotional distress due to defendants' conduct, and that "[d]efendants' conduct was extreme and outrageous, beyond all possible

bounds of decency, utterly intolerable in a civilized community, and without privilege."

Although these allegations facially address all of the required elements, they are not sufficient to support this cause of action because they do not rise to the level necessary to satisfy the outrageousness element—the element most susceptible to a determination as a matter of law—which is designed to filter out petty complaints and assure that the emotional distress is genuine. Noting that "the requirements . . . are rigorous, and difficult to satisfy," we have commented that, "of the intentional infliction of emotional distress claims considered by this Court, *every one* has failed because the alleged conduct was not sufficiently outrageous".

The conduct at issue here . . .—the broadcasting of a recording of a patient's last moments of life without consent—would likely be considered reprehensible by most people, and we do not condone it. Nevertheless, it was not so extreme and outrageous as to satisfy our exceedingly high legal standard. The footage aired by ABC was edited so that it did not include decedent's name, his image was blurred, and the episode included less than three minutes devoted to decedent and his circumstances. We cannot conclude that defendants' conduct in allowing the broadcasting of that brief, edited segment is more outrageous than other conduct that this Court and the Appellate Division Departments have determined did not rise to the level required to establish "extreme and outrageous conduct" sufficient to state a cause of action for intentional infliction of emotional distress. For example, we did not deem a newspaper's conduct sufficiently outrageous when it published a picture of a person in a psychiatric facility—thereby informing the world that the photographed person was a patient at such a facility—even though the residents were photographed by someone trespassing on facility grounds and the facility had expressly requested that the newspaper not publish pictures of residents. Similarly, the conduct of a television station has been deemed insufficiently outrageous when the station displayed recognizable images of rape victims after repeatedly assuring them that they would not be identifiable.

We conclude that defendants' conduct here, while offensive, was not so atrocious and utterly intolerable as to support a cause of action in the context of this tort. Hence, there is no need to address whether the newsworthiness privilege is applicable.

[The order dismissing plaintiffs' claims for intentional infliction of emotional distress is affirmed.]

GTE SOUTHWEST, INC. V. BRUCE, 998 S.W.2d 605 (Tex. 1999). Several employees of GTE working under Morris Shields alleged that over a period

of years, Shields engaged in a pattern of grossly abusive, threatening, and degrading conduct, regularly using the harshest vulgarity, verbally threatening and terrorizing them. He would physically charge at the employees, put his head down, ball his hands into fists, and walk quickly toward or lunge at the employees, stopping very close to their faces. A number of witnesses testified that Shields frequently yelled and screamed at the top of his voice, and pounded his fists when requesting the employees to do things. There was testimony that he often called one employee into his office and kept her standing there up to thirty minutes while he simply started at her. He required employees to vacuum their own offices daily despite the availability of regular janitorial services. A jury found for plaintiffs in their suit for intentional infliction of emotional distress. *Held*, affirmed.

"Generally, insensitive or even rude behavior does not constitute extreme and outrageous conduct. Similarly, mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities do not rise to the level of extreme and outrageous conduct. In determining whether certain conduct is extreme and outrageous, courts consider the context and the relationship between the parties.... Shields's ongoing acts of harassment, intimidation, and humiliation and his daily obscene and vulgar behavior, which GTE defends as his 'management style,' went beyond the bounds of tolerable workplace conduct.... Occasional malicious and abusive incidents should not be condoned, but must often be tolerated in our society. But once conduct such as that shown here becomes a regular pattern of behavior and continues despite the victim's objection and attempts to remedy the situation, it can no longer be tolerated. It is the severity and regularity of Shields's abusive and threatening conduct that brings his behavior into the realm of extreme and outrageous conduct."

NOTES

1. **History of the tort.** The American Law Institute recognized the tort of intentional infliction of mental distress in the Restatement of Torts in 1948. The Second Restatement § 46 first employed the "extreme and outrageous conduct" standard and courts widely adopted it. To determine whether conduct is extreme and outrageous courts often ask "whether the recitation of the facts to an average member of the community would arouse her resentment against the defendant so that she would exclaim 'Outrageous!' " *Howerton v. Harbin Clinic, LLC*, 776 S.E.2d 288 (Ga. Ct. App. 2015) (using a test from the Second Restatement and holding that surgeon's lewd actions met the outrageousness threshold).

2. **The Restatement Third of Torts.** The elements under the Third Restatement are slightly different from those in *Chanko*. According to the Restatement, "[a]n actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for

that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 cmt. m (2012). In what way does the standard in *Chanko* seem easier to satisfy than the standard in the Restatement? *See Hill v. Cundiff*, 797 F.3d 948 (11th Cir. 2015).

3. **Judging extreme and outrageous conduct.** Courts are often called upon to determine whether conduct is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in civilized society." *Tiller v. McLure*, 121 S.W.3d 709 (Tex. 2003). Or whether the conduct is only "unfortunate" or engenders "the mere disapproval" of the community. *Mik v. Federal Home Loan Mortgage Corp.*, 743 F.3d 149 (6th Cir. 2014); *see also Ortberg v. Goldman Sachs Group*, 64 A.3d 158 (D.C. 2013) (anti-Goldman Sachs protestors protesting outside employee's home and chanting "we know where you sleep at night," was not extreme and outrageous). According to the Restatement, the terms extreme and outrageous serve distinct roles. "Some conduct that may be outrageous—for example, marital infidelity—is sufficiently common that it could not be characterized as extreme." Moreover, "some extreme conduct—climbing Mt. Everest, for example—is not outrageous." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 cmt. d (2012). Could the conduct in *Chanko* and *GTE* be considered extreme and outrageous? Typically a court takes the question from the jury only when there is insufficient evidence to permit a jury to reach that conclusion, "[h]owever, the court plays a more substantial screening role on the questions of extreme and outrageous conduct." *Id.* cmt. g. Should the jury in *Chanko* have had an opportunity to evaluate whether the conduct was extreme or outrageous?

4. **Markers of outrage.** Perhaps the most common fact patterns involve conduct that is (a) repeated or carried out over a period of time, (b) an abuse of power by a person with some authority over the plaintiff, or (c) directed at a person known to be especially vulnerable. Which, if any, pattern does *Chanko* fit? Which pattern does *GTE* fit?

5. **Repeated conduct.** A single request for sexual contact might be offensive but is usually not sufficiently outrageous. *See Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998). On the other hand, repeated and harassing requests for sexual attention can be outrageous. Conduct that takes place over a long time can be actionable as well. *See Bratton v. McDonough*, 91 A.3d 1050 (Me. 2014) (landlord allowed tenants with young children to live for four years in a house containing toxic levels of lead, and delayed the tenants' relocation for four months after the State had declared the house a lead hazard; jury question); *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140 (2d Cir. 2014).

6. **Abuse of power.** Abuse of power by the defendant takes many forms. It might involve employers and employees, or public officials and those in a subordinate position. *See, e.g., Brandon v. County of Richardson*, 624 N.W.2d 604 (Neb. 2001) (sheriff crudely questioning rape victim soon after

rape); *Hysjulien v. Hill Top Home of Comfort, Inc.*, 827 N.W.2d 533 (N.D. 2013) (employee who, at a work conference, had fallen asleep after an evening of drinking with the boss and co-workers and awoke shortly after everyone else had left the room to find the boss naked on top of her trying to remove her clothes); *Hayward v. Cleveland Clinic Found.*, 759 F.3d 601 (6th Cir. 2014) (police officers arrested a man for a minor traffic infraction, and during arrest in front of parents, at 4 a.m. in their home, used excessive force, profanity and racial epithets, then dragged him from the home where they beat him severely and tased him numerous times).

7. **Knowledge of plaintiff's vulnerability.** This pattern may be seen as a subset of the abuse-of-power pattern. *See, e.g., Liberty Mut. Ins. Co. v. Steadman*, 968 So. 2d 592 (Fla. Dist. Ct. App. 2007) (insurance company's conduct was outrageous where it denied and delayed paying for treatment, knowing claimant had limited life expectancy); *Doe v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 167 P.3d 1193 (Wash. Ct. App. 2007) (affirming jury verdict for plaintiff where church bishop acted with knowledge of teenaged church member's peculiar susceptibility to emotional distress).

8. **Exercising legal rights.** Cases and the Restatement emphasize that a person cannot be held liable for this tort merely for exercising a legal right, even where he is substantially certain that it will cause emotional distress—such as filing for a divorce, or firing an at-will employee, or seeking to collect a debt. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 cmt. e (2012). But a person is "not immunized from liability if the conduct goes so far beyond what is necessary to exercise the right that it is extreme and outrageous." *Id.* Thus a creditor would not be acting outrageously simply by demanding payment of an overdue debt, but might be liable for making harsh threats to a plaintiff known to be mentally fragile. *See MacDermid v. Discover Fin. Servs.*, 488 F.3d 731 (6th Cir. 2007).

9. **Causation.** A plaintiff must prove a sufficient causal link between the defendant's conduct and the plaintiff's distress. This is usually thought to mean factual causation, meaning that the plaintiff must show that but for the defendant's outrageous conduct, the severe distress would not have occurred. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 cmt. k (2012). *See Turcios v. Debruler Co.*, 32 N.E.3d 1117 (Ill. 2015) (where plaintiff seeks to recover based on decedent's suicide as a result of the intentional infliction of emotional distress, plaintiff must plead facts demonstrating that the suicide was a likely result of defendant's conduct).

10. **Severity of emotional distress.** Although severe distress can be proved without showing physical symptoms, courts insist that the distress must be severe or even debilitating. *See, e.g., Rogers v. Louisville Land Co.*, 367 S.W.3d 196 (Tenn. 2012) (listing nonexclusive factors that are relevant to a determination that a plaintiff has suffered severe distress, including physiological manifestations; psychological manifestations such as depression, nightmares and anxiety; evidence of medical treatment and diagnosis;

evidence of the duration and intensity of the distress; proof that the distress caused significant impairment of day-to-day functioning; and the extreme and outrageous nature of the defendant's conduct itself). Is severe distress a useful requirement, or should a plaintiff be allowed to recover damages for lesser distress provably caused by a defendant's "extreme and outrageous" behavior?

11. **Overlap with other tort claims.** The tort of intentional infliction of emotional distress "originated as a catchall to permit recovery in the narrow instance when an actor's conduct exceeded all permissible bounds of a civilized society but an existing tort claim was unavailable." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 cmt. a (2012). Does the fact that the defendants in *Chanko* breached their fiduciary duty to the patient, and that that claim was permitted to proceed, make an intentional infliction of emotional distress claim on the part of the family members more or less essential? Would it matter if the two torts differed in terms of elements or measures of damage? Did some of the supervisor's actions in *GTE* constitute other intentional torts? Should a plaintiff be allowed to bring a claim for intentional infliction of emotional distress if a claim for battery or assault is stated as well?

12. **Constitutional limitations.** The First Amendment to the United States Constitution guarantees free speech and the free exercise of religion. These clauses may limit a variety of tort claims, including claims for intentional infliction of emotional distress, that are based on communicative or religiously motivated conduct. *See Snyder v. Phelps*, 562 U.S. 443 (2011) (barring claim of intentional infliction of emotional distress against defendant church members who picketed near military service member's funeral; anti-homosexual theme of the demonstration was a matter of public concern and therefore protected by the First Amendment although picketing caused father great distress); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1998) (barring intentional infliction claim by a public figure on First Amendment free speech grounds). Could the *Chanko* court have said the conduct in that case was sufficient to establish extreme or outrageous conduct, but the media defendants had a privilege to publish it anyway because the story was newsworthy?

ROTH V. ISLAMIC REPUBLIC OF IRAN, 78 F. Supp. 3d 379 (D.D.C. 2015). American family members of 15-year-old Malka Roth, who died in a Hamas terrorist bombing at a Sbarro restaurant in Jerusalem, Israel, filed suit against the Islamic Republic of Iran and the Iranian Ministry of Information and Security, which played a role in supporting the terrorists. Family members sought damages pursuant to the Foreign Sovereign Immunities Act (FSIA). The family moved for a default judgment as to liability and damages. The district court held that the court had jurisdiction under the state-sponsored terrorism exception to the FSIA and awarded economic loss damages over $1 million, solatium damages (a form of damages intended to compensate persons for mental anguish