

## PRACTICE TIPS

### *Emotional Distress Damages – Recoverable in Legal Malpractice Actions*

Victims of legal malpractice often experience severe emotional distress when they fear they will suffer or have suffered an actual change in their status, such as becoming homeless, being deported, or losing custody of a child, which the attorney was retained to prevent. The question is whether the client should be able to recover his or her emotional distress damages. The confusion arises from the fact that the attorney-client relationship sounds in contract; and emotional distress damages are not usually recoverable in breach of contract cases.

Legal malpractice is a tort, because it is based upon an attorney's breach of his duty to client. MPJI 27:6 ("A lawyer is negligent if the lawyer does not use the degree of care and skill which a reasonably competent lawyer acting in similar circumstances would use").

It is a basic tenet of tort law that a tortfeasor is liable for the natural and proximate consequences of his misconduct:

Damages for emotional distress or emotional anguish are recoverable provided they are proximately caused by the wrongful action of the defendant and result in a physical injury or are capable of

objective determination.

Maryland Law Encyclopedia (2001), Damages at § 32, p. 74

The same rationale applies with equal force to emotional distress damages in tort cases:

The actor responsible for the wrongful, negligent act is liable for all proximately caused emotional distress experienced by the tort victim. The wrongful conduct need only proximately cause the emotional or mental anguish

*Smallwood v. Bradford* 352 Md. 8, 17 (1998); *Hamilton v. Ford Motor Credit Co.* 66 Md.App. 46, 63 (1986) ("Recovery may be had in a tort action for emotional distress arising out of negligent conduct. In such cases, the emotional distress is an element of damages, not an independent tort").

Accordingly, it is generally accepted that a client can recover emotional distress damages in a legal malpractice action:

As a proposition, the recovery of consequential damages for mental or indirect physical injuries should comport with the jurisdictional rules applicable to ordinary tort or

breach of contract actions. Thus, if there is a cognizable wrong, proximate causation and actual damages, recovery should be allowed.

*Legal Malpractice*, Mallen & Smith (2009), Damages at § 21.11, p. 45. This is because it is likely and highly foreseeable that a client will suffer emotional distress when an attorney's malpractice causes the client to fear and/or suffer a change in his or her living situation (e.g., loss of home, loss of child custody, deportation, incarceration, etc.) which the attorney was retained to prevent.

#### **Emotional Distress Recoverable in Legal Malpractice Case**

The issue of whether emotional distress is recoverable in a legal malpractice case was decisively resolved in *Fischer v. Longest* 99 Md.App. 368 (1994), cert. denied, 335 Md. 454 (1994). Mr. Fischer alleged that his initial attorney committed legal malpractice by failing to seek his release on bond from pre-trial detention in a criminal case and that he suffered emotional distress as a result of his lengthy pre-trial detention. Mr. Fischer subsequently retained a new criminal attorney, remained in

pre-trial detention, voluntarily pled guilty to lesser charges, and received full-credit for time served during his pre-trial detention.

The Court explained that recoverable emotional distress damages from a pre-trial detention caused by a criminal lawyer's malpractice would arise in situations in which "the plaintiff was ultimately acquitted, placed on probation without entry of judgment, had imposition of sentence suspended, or had the execution of the sentence suspended." *Id.* at 379. In a situation where credit for the pre-trial detention could not be applied and "that detention was indeed the result of attorney malpractice, the plaintiff would certainly have suffered harm." *Id.* at 380. The profound implication is that the *Fischer* court recognized there are situations where a client will suffer only emotional distress damages as a result of an attorney's malpractice.

In *Roebuck v. Stewart* 76 Md.App. 298, 315-316 (1998), the Court of Special Appeals implicitly rejected the argument that emotional distress damages are not recoverable in legal malpractice actions. Instead of holding that emotional distress damages are not recoverable in legal malpractice cases as a matter of law, the *Roebuck* court held that the plaintiff had failed to present sufficient evidence to support the claim. *Id.* at 315-16; *Hunt v. Mercy Medical Center* 121 Md.App. 515, 529-30 (1998) ("Most notably, in *Roebuck v. Stewart*, this Court found that plaintiff/appellant had not produced sufficient evidence to create a jury issue regarding her mental anguish arising from an attorney's malpractice"). By allowing the claim for emotional distress damages in a legal malpractice action,

but denying the recovery on the facts, the Court of Special Appeals in *Roebuck* followed settled principles of Maryland law.

### Legal Malpractice Claims Distinguishable from Property Damages Cases

Maryland courts have held that emotional distress damages are generally not recoverable when property has been damaged as a result of negligent conduct. *Dobbins v. WSSC* 338 Md. 341 (1995) (holding that plaintiff could not recover for the emotional distress suffered as a result of her basement being flooded by a water main break); *H & R Block, Inc. v. Testerman* 375 Md. 36, 48-49 (1975) (holding that "Maryland decisions have generally denied compensation

for mental anguish resulting from damage to property").

The reason why emotional distress damages are generally prohibited in property damage cases is that it is not foreseeable that a plaintiff will suffer emotional distress damages when his or her property is damaged. *Dobbins v. WSSC* 338 Md. 341, 349 (1995) (holding that an emotional injury resulting from water flooding a plaintiff's basement is "an unusual or extraordinary result", which is not "contemplated as a natural and probable consequence of the defendant's negligence").

For example, an owner of a classic automobile which has been painstakingly restored to its original condition cannot recover emotional distress damages when his parked vehicle is side-swiped, especially

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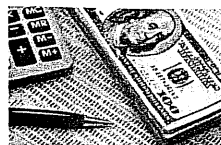
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when the owner's vehicle can always be repaired to its original condition.

The line of cases which hold that emotional distress damages are not recoverable for property damage is easily distinguishable, because legal malpractice plaintiffs usually are not claiming any physical damage to their personal or real property. Instead, legal malpractice plaintiffs are claiming that they suffered emotional distress from a fear of change, or an actual change, in their living status (e.g., when they lose their home as a result of bankruptcy law malpractice, when they are deported as a result of immigrant law malpractice, or when they lose custody of a child as a result of family law malpractice), which the attorney was retained to prevent. Such dispiriting changes in living situations are essentially the same type of harm that supported emotional distress damages in the *Fischer* case, namely the stark difference between being free on bail while waiting trial versus being incarcerated prior to trial.

Such a change in living status was recognized in the context of a medical malpractice case. The plaintiff in *Hunt v. Mercy Medical Center* 121 Md.App. 515 (1998) suffered emotional distress and resulting physical symptoms when he was erroneously advised by his physician that he had prostate cancer. This erroneous medical advice caused a change in the patient's living status, namely from being healthy to erroneously fearing he had prostate cancer. Under such circumstances, he was entitled to recover emotional distress damages. *Id.* at 529-530.

## Recovery of Emotional Distress Damages When Physical Impact

It is a common misconception among Maryland attorneys that emotional distress damages are not recoverable in legal malpractice due to the absence of a physical impact. In fact, emotional distress damages are recoverable when there has been no physical impact, such as from fright alone:

In Maryland, the decisions have settled the principle that a plaintiff can sustain an action for damages for nervous shock or injury caused, without physical impact, by fright directly from defendant's negligent act or omission.

*Mathews v. Amberwood Associates Ltd. Partnership, Inc.* 351 Md. 544, 572 (1998) (quoting *Bowman v. Williams* 165 Md. 397, 404 (1933)).

Emotional distress damages are compensable, as long as they are capable of an objective determination. *Hunt* at 531 (holding that a plaintiff's own testimony concerning his mental distress may be sufficient to render the injury capable of objective determination); *Beynon v. Montgomery Cablevision Ltd. Partnership* 351 Md. 460, 463 (1998) (holding that "mental and emotional injuries such as fright are not compensable unless there are objective manifestations of such injury"). There is no requirement that "an emotional injury must reach a certain threshold level of severity before it becomes compensable". *Hunt* at 531.

In fact, expert testimony regarding causation is not necessary even when a plaintiff suffers common maladies as a result of his or her

emotional upset. *Hunt* at 542. The common maladies suffered by the patient in *Hunt* from the erroneous diagnosis of prostate cancer included sleeplessness, constipation, and tiredness.

## Insurance Coverage

Maryland attorneys cannot expect that a client's emotional distress damages will be covered by their malpractice policy. Malpractice policies typically exclude any bodily injury and/or emotional distress damage claim from coverage, unless the emotional distress arises from false arrest, wrongful entry, abuse of process, malicious prosecution, defamation, or advertising.

Maryland attorneys are liable for the foreseeable damages proximately caused by their negligence, including their client's emotional and mental distress damages. Knowledge that a client may recover emotional distress damages should encourage attorneys, who practice in fields in which their clients are seeking to prevent a change in their living status, to be more attentive in their representation in order not to harm their clients' emotional well being, especially when emotional distress damages are not typically covered by legal malpractice insurance policies.

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