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## Recovery for Emotional Distress Damages in Attorney Malpractice Actions

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**RECOVERY FOR EMOTIONAL DISTRESS  
DAMAGES IN ATTORNEY  
MALPRACTICE ACTIONS**

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**I. INTRODUCTION**

Attorney malpractice, as other areas of malpractice, has well defined elements. Regardless of whether the malpractice claim is based on breach of contract, breach of fiduciary duty, or negligence, the plaintiff generally must prove that the attorney failed to exercise a reasonable degree of skill in counseling or representing the plaintiff and that such failure was the proximate cause of the plaintiff’s damages or loss.<sup>1</sup> A leading treatise on legal malpractice has stated the following: “[C]ommon to all theories of liability are the prerequisites that there be a duty, which was breached[,] and proximate causation of damage.”<sup>2</sup>

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1. See, e.g., *Cianbro Corp. v. Jeffcoat & Martin*, 804 F. Supp. 784, 789 (D.S.C. 1992) (mem.), *aff’d*, 10 F.3d 806 (4th Cir. 1993).

2. 1 RONALD E. MALLEN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 8.1, at 401 (3d ed.

In recent years, the question of what type of damages are compensable has arisen with greater frequency. In essence, courts have been faced with deciding whether emotional distress or mental suffering are compensable consequential damages in a malpractice action.

This article will not address recovery of damages for emotional distress that occur as the *direct* result of an attorney's malpractice, but instead it will address recovery of emotional distress damages that occur as the *consequential* result of the malpractice and are thus predicated upon other direct damages. Consequential and direct damages are defined as follows: "Direct damages are those damages which are the immediate, natural and anticipated consequences of the wrong. Consequential damages are those which flow as a result of the direct damages, and therefore depend upon special circumstances which are not necessarily anticipated."<sup>3</sup>

This article also will not address other non-economic consequential damages, such as injury to reputation. Instead, it will discuss the majority rule that denies recovery of damages for emotional distress unless the plaintiff has suffered a physical injury or the attorney has acted egregiously. This article will then review some recent cases that have focused on the nature of the plaintiff's direct damages, rather than the nature of the attorney's conduct, when considering whether damages for emotional distress or mental suffering may be recovered in a legal malpractice action. Finally, this article will conclude with what the authors hope is a common-sense rule to help practitioners determine whether or not to pursue damages for emotional distress in a legal malpractice case.

## II. THE MAJORITY RULE AGAINST RECOVERY OF DAMAGES FOR EMOTIONAL DISTRESS IN LEGAL MALPRACTICE CLAIMS

The general rule against recovery of damages for emotional distress caused by an attorney's legal malpractice may be expressed as follows:

Actions for intentional infliction of emotional distress brought against attorneys have rarely been successful. The conduct serving as the basis of the claim cannot be merely negligent, but must be extreme and outrageous, wanton and malicious or coercive.

An attorney is not expected to foresee that an error he commits might cause mental distress to his client.<sup>4</sup>

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1989) (footnotes omitted).

3. 1 MALLIN & SMITH, *supra* note 2, § 16.1, at 890 (footnotes omitted).

4. 1 S.C. JUR. *Attorney and Client* § 68, at 172 (1991) (citing *Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981); *Caddell v. Gates*, 284 S.C. 481, 327 S.E.2d 351 (Ct. App. 1984)).

A vast majority of states follow this rule.<sup>5</sup> Mallen and Smith have stated as follows:

Almost all jurisdictions which have passed upon the issue have held that damages for emotional injuries are not recoverable where they are a *consequence* of other damages caused by the attorney's negligence. This rule applies if the attorney's conduct does not involve fraud, intentional conduct, a willful fiduciary breach or physical contact.<sup>6</sup>

In South Carolina this rule is derived from two cases: *Ford v. Hutson*<sup>7</sup> and *Caddel v. Gates*.<sup>8</sup> In *Ford* a real estate agent brought an action against a home purchaser for intentional infliction of emotional distress. The court noted that "the concept of bringing an action seeking damages for mental and emotional injury outside the scope of some traditionally recognized tort (e.g., [.] assault[,] battery, false imprisonment) is a relatively novel one in this country."<sup>9</sup> The court concluded that to recover for emotional distress, the plaintiff must establish, among other things, that "the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct."<sup>10</sup> Therefore, an attorney's mere negligence in handling a case could not serve as the predicate for recovery of damages for emotional injury, because negligence is, by its very nature, not intentional or reckless.

In *Caddel* this principle was stated more explicitly. There, a client

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5. See, e.g., John H. Bauman, *Damages for Legal Malpractice: An Appraisal of the Crumbling Dike and the Threatening Flood*, 61 TEMP. L. REV. 1127, 1165 (1988) ("[E]motional distress damages are not awarded unless the lawyer commits some more aggravated misconduct than negligence: the cases require 'egregious conduct,' 'intentional wrongdoing,' 'extreme or outrageous conduct,' 'willful or wanton' misconduct, or occurrences of an inflammatory nature." (footnotes omitted)); Joseph J. Kelleher, Note, *An Attorney's Liability for the Negligent Infliction of Emotional Distress*, 58 FORDHAM L. REV. 1309, 1319 (1990) ("The vast majority of appellate decisions that have considered the issue have held that an attorney is not liable for emotional distress damages where the attorney's conduct has been merely negligent. . . . Under the majority rule, damages for emotional distress are awarded only when the plaintiff has suffered a physical injury or the attorney has acted egregiously." (footnotes omitted)); see also John E. Theuman, Annotation, *Measure and Elements of Damages Recoverable for Attorney's Negligence in Preparing or Conducting Litigation — Twentieth Century Cases*, 90 A.L.R.4TH 1033, 1060-63 (1991) (citing legal malpractice cases which have held that emotional distress damages were not recoverable).

6. 1 MALLEN & SMITH, *supra* note 2, § 16.11, at 904 (emphasis in original) (footnotes omitted).

7. 276 S.C. 157, 276 S.E.2d 776.

8. 284 S.C. 481, 327 S.E.2d 351.

9. *Ford*, 276 S.C. at 159, 276 S.E.2d at 777.

10. *Id.* at 162, 276 S.E.2d at 778 (quoting *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148, 154 (Me. 1979)).

brought an action against an attorney whose title certification failed to disclose a recorded easement on the client's property. Addressing the client's claim for mental anguish damages, the court concluded as follows:

Damages for mental anguish are recoverable by one who suffers and proves the tort of outrage; this tort has developed slowly over the past half-century. Suffice it to say that the conduct complained of must be intentional or reckless and so outrageous as to be inconsonant with and intolerable in a civilized society. We hold that a lawyer's overlooking of an easement or other title encumbrance in searching public title records, though negligent, will not be held by this court to be outrageous conduct. Though regrettable, the overlooking of an encumbrance by an attorney examining title is not antithetical to civilized society nor, we observe, is it inconsonant with the normal conduct of a lawyer who is a lady or gentleman in every respect, but human and subject to erring.<sup>11</sup>

In essence, under the majority rule — which we shall now call the “old” rule — recovery for emotional distress or mental anguish will not be successful if the jurisdiction does not recognize emotional distress or mental anguish without physical injury as an independent tort. A plaintiff must thus establish that the attorney's conduct was intentional or outrageous or that the conduct caused physical injury accompanied by emotional distress. This requirement is especially difficult in attorney malpractice cases because the basis for liability is that the attorney's conduct was negligent.

*Cummings v. Pinder*<sup>12</sup> also illustrates the old rule, which focuses on the

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11. *Caddel*, 284 S.C. at 483-84, 327 S.E.2d at 352 (citation omitted).

12. 574 A.2d 843 (Del. 1990) (per curiam); see also *Schonberger v. Serchuk*, 742 F. Supp. 108, 120 (S.D.N.Y. 1990) (dismissing, under New York law, the portion of the client's legal malpractice claim alleging negligent infliction of emotional distress because the client failed to prove that the attorney's alleged misconduct unreasonably threatened the client's physical safety); *Whitehead v. Cuffie*, 364 S.E.2d 87 (Ga. Ct. App. 1987) (holding that the clients' allegation that their attorney's misconduct was intentional and willful presented a material issue of fact precluding summary judgment on the client's claim for emotional distress damages); *O'Neil v. Vasseur*, 796 P.2d 134 (Idaho Ct. App. 1990) (affirming the trial court's refusal to allow the client's claim for emotional distress damages caused by the attorneys' malpractice in the absence of proof that the attorneys' conduct was so extreme and outrageous that they intended to inflict emotional distress on their client); *Kunau v. Pillers, Pillers & Pillers, P.C.*, 404 N.W.2d 573 (Iowa Ct. App. 1987) (holding that the attorney was not liable for intentional infliction of emotional distress because the attorney's failure to file timely notices of appeal was not intentional or reckless); *Segall v. Berkson*, 487 N.E.2d 752 (Ill. App. Ct. 1985) (holding that the trial court should have stricken the portion of the client's legal malpractice complaint alleging that he suffered emotional distress caused by the attorney's negligent handling of his marriage dissolution case); *Selsnick v. Horton*, 620 P.2d 1256 (Nev. 1980) (holding that the client's legal malpractice claim for the attorney's failure to prosecute the appeal of a default judgment was premised solely upon ordinary negligence, and absent proof of extreme and outrageous conduct by the attorney, the client could not recover for emotional distress); *Gautam v. De Luca*, 521 A.2d 1343 (N.J.

nature of the attorney's conduct. In *Cummings* the lawyer failed to advise his client fully of her right to pursue a claim against her own insurance carrier, unilaterally increased his agreed contingency fee from twenty-five percent to one third, and intentionally, and without notice to his client, stopped payment on his client's settlement check.<sup>13</sup> The court concluded that the lawyer's intentional and outrageous misconduct supported an award of damages for emotional distress in the client's legal malpractice action against the lawyer.<sup>14</sup>

A "new" rule, however, is now emerging. As the discussion below hopefully makes clear, recovery for emotional distress or mental anguish as a consequential damage of attorney malpractice is not recognized when the direct damage that flows from the attorney malpractice is strictly pecuniary or economic in nature. However, when the direct damage interferes with a personal interest of the client, such as liberty or family, the courts have been willing to allow recovery of consequential damages for emotional distress or mental anguish caused by the attorney's misconduct. The focus has thus shifted from the nature of the *attorney's conduct* to the nature of the *plaintiff's loss*.

### III. RECENT CASES DISALLOWING DAMAGES FOR EMOTIONAL DISTRESS BASED ON THE PECUNIARY NATURE OF THE PLAINTIFF'S DIRECT DAMAGES

As noted above, the majority of jurisdictions prohibit recovery for emotional distress caused by mere attorney negligence.<sup>15</sup> These courts base their holdings on whether the alleged attorney misconduct was intentional or reckless, thereby focusing the inquiry on the nature of the attorney's conduct. However, some courts have focused the inquiry on the nature of the plaintiff's direct damages and have concluded that consequential damages for emotional distress are not recoverable when the client's direct damages are strictly economic or pecuniary. This new rule thus focuses on the nature of the plaintiff's loss.

*Smith v. Superior Court*<sup>16</sup> illustrates the application of the new rule. In *Smith* the California Court of Appeals stated as follows:

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Super. Ct. App. Div. 1987) (holding that damages were not recoverable in the clients' legal malpractice action because of the absence of egregious or extraordinary circumstances and physical injury); *Heath v. Herron*, 732 S.W.2d 748 (Tex. Ct. App. 1987) (holding that the attorney's conduct in failing to file a verified answer, which deprived his client of a viable defense, was not egregious or extraordinary as required to support an award of damages for emotional distress).

13. 574 A.2d at 845.

14. *Id.*

15. See *supra* text accompanying notes 4-6.

16. 13 Cal. Rptr. 2d 133 (Ct. App. 1992).

[T]he primary interest protected in legal malpractice actions is economic and "serious emotional distress is not an inevitable consequence of the loss of money . . . ."

. . . "[T]he foreseeability of serious emotional harm to the client and the degree of certainty that the client suffered such injury by loss of an economic claim are tenuous. Litigation is an inherently uncertain vehicle for advancing one's economic interests. . . . The closeness of the connection between the defendants' conduct and the injury suffered is problematic. Litigation is almost always distressing for litigants. . . . The policy of preventing future harm is served by the sanction of compensation for the economic loss occasioned by the malpractice."<sup>17</sup>

The court thus held that a legal malpractice claim based on mere negligence will not support a recovery of damages for mental distress when the attorney's tortious conduct has resulted in only economic injury to the client.<sup>18</sup>

The California Court of Appeals reached the same conclusion in *Pleasant v. Celli*.<sup>19</sup> In *Pleasant* the client sued her attorney for malpractice after the attorney allowed the statute of limitations to expire on the client's medical malpractice claim. The court found that the attorney's negligent conduct had resulted in only economic loss to the client and held that the client could not recover damages for emotional distress. The court stated as follows:

Generally, the only foreseeable impact on the plaintiff from an attorney's wrongdoing is an economic loss. It is foreseeable that the plaintiff would be annoyed and inconvenienced by the attorney's failure, for example, to file suit within the applicable statute of limitations. However, the disappointment one might feel upon learning that counsel has missed a filing deadline falls far short of the shock, grief, anxiety or nervousness which characterize the cases imposing liability for negligent infliction of emotional distress.

. . . .  
Litigation is frequently stressful and disagreeable, even when one is a plaintiff. It is not reasonably foreseeable that prolonged litigation would cause any especial trauma above and beyond the stresses inherent in litigation generally.<sup>20</sup>

Other cases have followed this approach to analyzing claims for emotional distress caused by attorney malpractice. For example, in *Richards v.*

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17. *Id.* at 136 (quoting *Merenda v. Superior Court*, 4 Cal. Rptr. 2d 87, 91-92 (Ct. App. 1992)).

18. *Id.* at 137.

19. 22 Cal. Rptr. 2d 663 (Ct. App. 1993).

20. *Id.* at 670 (citation omitted) (footnote omitted).

*Cousins*<sup>21</sup> the clients sued their attorney after he failed to take proper measures to protect their interest in certain property. The court, refusing to allow damages for emotional distress because the clients had suffered only economic damages as a result of the attorney's malpractice, stated as follows:

[The clients'] losses were strictly pecuniary. [The clients'] actual damages are their respective portions of the amounts deducted from the proceeds of the sale of the house . . . . We can find no cases in our jurisprudence, and [the clients] have cited none in their brief, where damages for mental anguish or emotional distress were awarded when a plaintiff suffered a purely monetary loss.<sup>22</sup>

Similarly, in *Cornell v. Wunschel*<sup>23</sup> the court focused on the pecuniary nature of the plaintiff's loss even though the claim against the attorney was based on fraudulent misrepresentation rather than negligence:

One of the keys to an award of damages for fraudulent misrepresentation is that the party committing the fraud could have contemplated the claimed damage as a consequence of the fraud at the time the misrepresentation was made. Damages for mental distress are not ordinarily contemplated in a business transaction; thus, few courts have recognized their availability as an element of fraud damages.<sup>24</sup>

The court determined that damages for mental distress could not be had because "deceit is an economic, not a dignitary tort."<sup>25</sup>

The same result was reached in *Hilt v. Bernstein*.<sup>26</sup> In that case, the court distinguished *McEvoy v. Helikson*,<sup>27</sup> which had allowed recovery of emotional distress damages based on an attorney's negligence.<sup>28</sup> The *Hilt* court held that unlike *McEvoy*, in which the damages suffered by the plaintiff were the loss of his legal right to child custody,<sup>29</sup> the harm in *Hilt* was

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21. 550 So. 2d 1273 (La. Ct. App.), *cert. denied*, 552 So. 2d 397 (La. 1989).

22. *Richards*, 550 So. 2d at 1278.

23. 408 N.W.2d 369 (Iowa 1987).

24. *Id.* at 382.

25. *Id.* (quoting DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 9.2, at 602 (1973)); *accord* *Jourdain v. Dineen*, 527 A.2d 1304, 1307 (Me. 1987) ("[P]ecuniary loss is an essential element of a fraud action and . . . damages for emotional or mental pain and suffering are not recoverable.").

26. 707 P.2d 88 (Or. Ct. App. 1985), *review denied*, 715 P.2d 92 (Or. 1986).

27. 562 P.2d 540 (Or. 1977), *superseded by rule on other grounds as stated in* *Moore v. Willis*, 767 P.2d 62 (Or. 1988).

28. *See infra* part IV.

29. 562 P.2d at 544.

strictly economic — the plaintiff's right to share equitably in a marital asset.<sup>30</sup> The *Hilt* court stated, "Plaintiff's invaded interest is solely an economic one; that she was required to engage in legal action regarding that interest does not change its character."<sup>31</sup>

It should be pointed out that the decisions focusing on the purely pecuniary nature of the plaintiff's loss are somewhat inconsistent. As noted above, in *Smith v. Superior Court*<sup>32</sup> the court refused to allow damages for emotional distress arising from economic harm. In *Tara Motors v. Superior Court*,<sup>33</sup> however, the appellate court developed a different rule. There, the court held that a requirement of "substantial economic loss" would prevent abusive, unfounded allegations of emotional distress.<sup>34</sup>

*Gore v. Rains & Block*<sup>35</sup> also stands apart from both the old and the new rule. In that case, the attorney negligently handled the plaintiff's medical malpractice claim. The attorney conceded his failure to file the medical malpractice claim within the statute of limitations period, but he claimed that legal malpractice had not occurred because the value of the underlying suit was zero, and therefore, the plaintiff had not been damaged.<sup>36</sup> The jury found otherwise and awarded the plaintiff \$60,000 for his medical malpractice claim and \$60,000 for mental anguish on the legal malpractice claim.<sup>37</sup>

The appellate court affirmed the award of damages for mental anguish, even though the plaintiff failed to prove any physical injury produced as a result of the emotional distress caused by the legal malpractice.<sup>38</sup> The court held, without great discussion, that the plaintiff was entitled to recover damages to the extent of the injury, which in this case included the underlying physical injury caused by the medical malpractice and the mental anguish caused by the legal malpractice.<sup>39</sup>

In cases concerning damages for emotional distress arising out of attorney negligence, the modern trend is a shift in focus from the defendant's conduct to the plaintiff's loss. From that perspective, *Tara Motors* makes sense. The

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30. *Hilt*, 707 P.2d at 96.

31. *Id.*

32. 13 Cal. Rptr. 2d 133 (Ct. App. 1992).

33. 276 Cal. Rptr. 603 (Ct. App. 1990), *petition for review granted*, 807 P.2d 418 (Cal.), *review dismissed and cause remanded*, 812 P.2d 563 (Cal. 1991).

34. *Tara Motors*, 276 Cal. Rptr. at 609; *see also* Salley v. Childs, 541 A.2d 1297 (Me. 1988) (holding severe emotional distress was a "foreseeable" result of an attorney's malpractice when result of malpractice was the suspension of the plaintiff's horse training license and loss of income).

35. 473 N.W.2d 813 (Mich. Ct. App. 1991).

36. *Id.* at 816-17.

37. *Id.* at 821.

38. *Id.* at 818.

39. *Id.* at 819.

*Tara Motors* court declined to predicate the recovery of damages for emotional distress on the defendant's conduct, focusing instead on the nature of the plaintiff's loss. By requiring that the damages be "substantial," the court took the speculative nature of the emotional distress out of the equation. *Gore*, however, simply cannot be reconciled with either the old rule or the new rule.

#### IV. RECENT CASES ALLOWING DAMAGES FOR EMOTIONAL DISTRESS BASED ON THE PERSONAL NATURE OF THE PLAINTIFF'S DIRECT DAMAGES

##### A. *Liberty Loss*

When an attorney's negligence causes a client's loss of liberty, courts have been willing to step away from the general rule barring damages for emotional distress. Generally, these cases hold that when an attorney represents a criminal defendant, incarceration is the foreseeable result of negligence. Accordingly, damages for the mental anguish arising from that foreseeable result, a non-pecuniary damage, should not be barred.

Typical of such cases is *Holliday v. Jones*,<sup>40</sup> in which the plaintiff was convicted of involuntary manslaughter. The appellate court reversed and remanded on the ground that defense counsel was incompetent. The plaintiff was acquitted at the retrial. The plaintiff then sued his original attorney for professional negligence and was awarded \$400,000 for emotional distress. The appellate court affirmed the award of damages for emotional distress, distinguishing those cases which prohibit recovery for emotional distress based on harm to a property interest as follows:

If the purpose in prohibiting the award of emotional distress damages absent physical injury or intentional or affirmative misconduct is to screen out fraudulent or speculative claims, the necessity for such screening is simply nonexistent here when loss of liberty and its consequent impact on [the client] is not only a reasonable and foreseeable consequence of [the attorney's] professional incompetence in defending [the client] in his murder trial, but virtually a guaranteed result.<sup>41</sup>

Thus, recovery of damages for emotional distress should turn on whether the plaintiff's injury is pecuniary or non-pecuniary, and should not rest on the reprehensibility of the attorney's conduct.

The court in *Wagenmann v. Adams*<sup>42</sup> reached the same result. In that

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40. 264 Cal. Rptr. 448 (Ct. App. 1989).

41. *Id.* at 457.

42. 829 F.2d 196 (1st Cir. 1987).

case, the client, after his arrest, was forcibly committed to a mental hospital. The court found that the plaintiff was placed in the mental hospital as a direct and proximate result of the attorney's ineffectiveness and held that the attorney was liable for the plaintiff's emotional distress.<sup>43</sup> The court carefully distinguished *Wagenmann*'s loss of liberty from those cases involving merely pecuniary loss as follows:

As a direct and proximate result of [the attorney's] ineffectiveness, the plaintiff was forcibly deprived of his liberty and dispatched to a mental hospital. The fright and suffering incident to such a wrenching dislocation can hardly be overstated. . . . We decline [the attorney's] invitation to relieve him of the foreseeable consequences of his malpractice by the overly simplistic expedient of relabelling the resultant award as damages for "emotional distress."<sup>44</sup>

Of course, some courts have disagreed with this analysis and have focused exclusively on whether the attorney's conduct was intentional or reckless.<sup>45</sup> Thus, in order for counsel to successfully make the argument that damages for emotional distress may be had when an attorney's negligence results in incarceration, counsel must first persuade the court to shift the focus from the attorney's conduct to the nature of the plaintiff's loss.

Finally, it should be noted that courts have not been willing to recognize a claim for emotional distress in cases in which the incarcerated person commits suicide.<sup>46</sup> For example, in *Snyder v. Baumecker*<sup>47</sup> the court held that an attorney could not be held liable for a client's suicide on a theory of legal malpractice. Although the court conceded the suicide was caused by the attorney's delay in prosecuting the criminal defense, suicide was simply not a foreseeable risk of malpractice.<sup>48</sup>

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43. *Id.* at 221-22.

44. *Id.* at 221; *accord* *Lawson v. Nugent*, 702 F. Supp. 91 (D.N.J. 1988) (mem.) (holding inmate was entitled to offer proof of damages for emotional distress attributable to extra period of confinement when inmate claimed his counsel's negligent advice resulted in a longer sentence than he would have otherwise received).

45. *Cf.* *Hamilton v. Powell, Goldstein, Frazer & Murphy*, 306 S.E.2d 340 (Ga. Ct. App. 1983) (holding plaintiff, who claimed emotional distress damages for injury to reputation, humiliation, and mental and physical strain incident to his arrest, may not recover without a showing of physical injury because the attorney's conduct was neither intentional nor voluntary), *aff'd*, 311 S.E.2d 818 (Ga. 1984); *Bowman v. Doherty*, 686 P.2d 112, 118 (Kan. 1984) (stating the rule that recovery for emotional distress without physical injury is allowed only if the negligent act is wanton or willful).

46. *See generally* Gregory G. Sarno, Annotation, *Liability of Attorney for Suicide of Client Based on Attorney's Professional Act or Omission*, 41 A.L.R.4TH 351 (1985) (listing cases deciding the attorney's liability for a client's suicide).

47. 708 F. Supp. 1451 (D.N.J. 1989).

48. *Id.* at 1463-64; *accord* *McLaughlin v. Sullivan*, 461 A.2d 123, 124 (N.H. 1983) (noting

### B. Family Loss

An older North Carolina case, *Carroll v. Rountree*,<sup>49</sup> notes the distinction between economic loss and personal loss in a family law case. In *Carroll* a former client brought a breach of contract action against his attorney for failing to perform certain tasks relative to the client's divorce.<sup>50</sup> The court held that in a typical breach of contract action, damages for mental and emotional distress are not normally recoverable because they are not viewed as the foreseeable consequences of the breach.<sup>51</sup> However, there are exceptions to this general rule in such cases as a breach of contract to marry, because the subject matter of the contract is more of a "personal" rather than a "commercial" nature. The court noted:

While we readily concede that there could be contracts between attorney and client so personal in nature that the attorney could be assumed to have entered the contract with the knowledge that a failure to fulfill the obligation thereunder in the manner contemplated by the parties would naturally and probably result in the client's suffering mental anguish, we do not think the contract which is the subject of this action falls in that category.<sup>52</sup>

Therefore in cases with particularly personal subject matters, such as family relations, it may be possible to obtain damages for emotional distress because the harm is reasonably foreseeable.

One of the first cases to explicitly allow recovery of damages for emotional distress as a result of an attorney's negligence was *McEvoy v. Helikson*.<sup>53</sup> In *McEvoy* the parties stipulated and the court imposed a duty on the attorney for the wife, a citizen of Switzerland, not to return the wife's passport to her without first obtaining the return of the child to the husband.<sup>54</sup> The attorney breached that duty and the wife took the child to Switzerland. The husband then sued the wife's attorney alleging malpractice and seeking

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that suicide was a deliberate intervening act that broke the chain of causation between attorney's negligence and damages); *McPeake v. Cannon*, 553 A.2d 439, 440-41 (Pa. Super. Ct. 1989) (finding that suicide constitutes independent intervening act so extraordinary that it could not have been foreseen by the attorney who negligently handled incarcerated client's case).

49. 237 S.E.2d 566 (N.C. Ct. App. 1977), *aff'd on reh'g*, 243 S.E.2d 821 (N.C. Ct. App. 1978), *review denied*, 248 S.E.2d 725 (N.C. 1978).

50. *Carroll*, 237 S.E.2d at 568-69.

51. *Id.* at 572.

52. *Id.*

53. 562 P.2d 540 (Or. 1977), *superseded by rule on other grounds as stated in Moore v. Willis*, 767 P.2d 62 (Or. 1988).

54. *Id.* at 541.

damages for his emotional distress.<sup>55</sup>

The court had little trouble finding that the wife's attorney breached the duty owed to the husband. In regards to the damages for the alleged mental anguish, the court stated, "It follows, in our opinion, that conduct by defendant which resulted in an infringement of that legal right, if established by evidence on trial, would entitle plaintiff to recover damages for 'anguish and mental [suffering] due to the loss of his minor child,' as alleged in the complaint."<sup>56</sup>

Other jurisdictions have followed this analysis. In *Person v. Behnke*<sup>57</sup> the plaintiff alleged that the attorney he retained to represent him in a divorce "failed to take *any* action on plaintiff's behalf" and thus "lost custody of his children and effective visitation with them"<sup>58</sup> The court held that "a valid claim exists for noneconomic damages resulting from a plaintiff's loss of custody and visitation of his children which allegedly resulted from an attorney's negligence."<sup>59</sup>

However, fearful that there might be an explosion of attorney malpractice cases brought by disgruntled parents who dislike the results of their divorce proceedings, the court refocused on defendant attorney's conduct. The court limited the scope of its holding to only those more egregious cases of legal malpractice.<sup>60</sup> Specifically, the court adopted the ineffective assistance of counsel standard enunciated by the Supreme Court in *Strickland v. Washington*<sup>61</sup> "as the criteria for judging whether an attorney's alleged malpractice in representation of that attorney's client in a divorce proceeding can serve as the basis for the client's subsequent claim that he lost custody or visitation of his child as a direct result of the attorney's malpractice."<sup>62</sup>

While the courts seem to be moving in the direction of a rule that would allow damages for emotional distress which is predicated upon a direct non-pecuniary injury, some courts have hesitated in applying this rule. In *Timms v. Rosenblum*<sup>63</sup> a litigant claimed that her former lawyer's malpractice deprived her custody of her children for two years. Furthermore, she alleged that she incurred an additional expense of \$100,000 to get them back.<sup>64</sup>

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55. *Id.* at 542.

56. *Id.* at 544.

57. 611 N.E.2d 1350 (Ill. App. Ct.), *cert. denied*, 622 N.E.2d 1226 (Ill. 1993).

58. *Person*, 611 N.E.2d at 1352 (emphasis in original).

59. *Id.* at 1353.

60. *Id.* at 1355.

61. 466 U.S. 668 (1984). Under this standard, the plaintiff must show "(1) his counsel's performance was seriously deficient in that it fell below an objective standard of reasonableness, and (2) this deficient performance prejudiced his case." *Person*, 611 N.E.2d at 1356.

62. *Person*, 611 N.E.2d at 1355-56.

63. 713 F. Supp. 948 (E.D. Va. 1989) (mem.), *aff'd*, 900 F.2d 256 (4th Cir. 1990).

64. *Timms*, 713 F. Supp. at 950.

Citing Virginia's traditional emotional distress rules, the court held that for the plaintiff to recover: (1) the defendant must have acted intentionally or recklessly; or (2) the plaintiff's mental anguish must have resulted from physical injury.<sup>65</sup> The court found that neither criteria was met in the case.<sup>66</sup>

More importantly, the court declined to distinguish malpractice cases involving family law or custody issues from any other professional malpractice cases:

Any lawyer who has practiced for any substantial time in virtually any area of law will immediately confirm that parties in all of these areas make substantial emotional investments in their causes and suffer mental anguish in the event of an adverse result. This is manifestly so in areas of civil litigation involving claims of employment discrimination, wrongful discharge, civil rights violations, handicapped rights violations, labor disputes, worker's compensation, and indeed even patent, copyright, and corporate disputes. Mental anguish is not restricted to parties to child custody disputes; it is experienced by parties to any lawsuit to the extent they are emotionally involved in the subject of the lawsuit.<sup>67</sup>

Therefore, in the case of loss of familial relationships, plaintiff's counsel will have to stress the unique nature of their injury and its totally noncommercial aspects.

## V. CONCLUSION

Allowing damages for emotional distress where the client's personal interests are harmed is a welcome and appropriate departure from the majority rule. This new rule comports with the fundamental principles of tort law, which rests on competing and complimentary considerations: "(1) the need for compensation, (2) precedent, (3) the defendant's culpability, (4) convenience of administration, (5) the parties' capacity to bear the loss, and (6) deterrence."<sup>68</sup>

Harm to a personal interest, as opposed to a pecuniary interest, demands compensation, because harm to a personal interest virtually guarantees that emotional distress will result. Further, the growing trend to establish such liability on the part of an attorney will establish both precedent and the ability to predict liability, thus creating an ease of judicial administration. When

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65. *Id.* at 954-55.

66. *Id.* at 955.

67. *Id.*

68. Kelleher, *supra* note 5, at 1323; see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 20-26 (5th ed. 1984).

attorneys know that in certain kinds of cases damages for emotional distress may be awarded, then attorneys may be more diligent in those cases. This extra diligence can only redound to the benefit of all attorneys.