
Volume 12
Issue 2 *Trauma: Causation Problems (A
Symposium)*

Article

1963

Legal Relation of Trauma to Cancer

Isidore Halpern

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>



Part of the [Medical Jurisprudence Commons](#)

[How does access to this work benefit you? Let us know!](#)

Recommended Citation

Isidore Halpern, *Legal Relation of Trauma to Cancer*, 12 *Clev.-Marshall L. Rev.* 208 (1963)

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in *Cleveland State Law Review* by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

Legal Relation of Trauma to Cancer

Isidore Halpern*

WHEN A LAWYER ATTEMPTS to discuss the subject of cancer, he finds himself in the position of the nursery rhyme figures, Winken, Blinken and Nod, who attempted to sail a stormy, turbulent sea in a frail washtub. How does the lawyer feel with respect to the medical questions presented by the problem of relation of an isolated trauma to cancer? My legal colleagues disagree violently amongst themselves.

I approach the entire subject with humility. After all, am I not in the position of one who has a knowledge of elementary algebra and is asked to express an opinion on the subject of calculus? I am mindful of the statements of Dr. Lelia Charlton Knox who said:

it is obvious that the science of tumors is still in the course of development. . . So much new knowledge has been acquired from the studies of tumors in human beings and in animals in the last twenty years, that many observations which were regarded as established facts by the preceding generation, have now been, of necessity, discarded or completely remolded. . . Writers on the subject of the relationship between a single trauma and the appearance of a neoplasm, still cite the works of the old masters with a highly commendable desire for accuracy and completeness; but that these citations have any great value in comparison with what we now know, is more than doubtful.¹

The writer, in this manner, disposes of the opinion of the great Virchow, stating that he might have changed his opinion with respect to trauma and cancer if he had before him the past twenty years of biological research on the nature and causation of tumors. She does, however, state that a single trauma has never been proved to be the cause of animal tumor.

As far as the writer's personal opinion is concerned, he has lectured and taught to thousands of lawyers that one trauma will

* Of Brooklyn, New York; member of the New York Bar; Fellow of the American College of Trial Lawyers and of the International Academy of Trial Lawyers, Chairman of the Advanced Medical Course at the Practising Law Institute of New York; Advisory Board of Editors of *Negligence & Compensation Service*; etc.

¹ Knox, *Trauma and Neoplasms*, in *Trauma and Disease*, 468, 469 (Brahdy & Kahn ed. 1941). But for a very recent study see, March, *Traumatic Cancer in Workmen's Compensation*, 11 *Clev-Mar. L. R.* 501 (1962).

never cause a cancer. This opinion is based on the experimental work done by Maude Slye, Ribbert, and Lubarsch.² However, one must be mindful of the opinion of Dr. Ropke, who states that 11.3 of cancers of the skin are caused by a single injury.³ The experimenter, Borrmann, places it at scarcely 1%.⁴ Despite the so-called Ewing Postulates,⁵ Lubarsch views the time interval as unimportant for the reason that nothing is known concerning the time required by the cells to grow into a tumor which can be recognized.⁶

As a practical lawyer, my negative viewpoint is based on the statistics compiled from the many thousands of serious injuries sustained in the various World Wars. It is likewise based on the opinion of Dr. Lewy, Chief Medical Examiner of the Bureau of Workmen's Compensation, Department of Labor of the State of New York. After examining 26,389 cases, he was of the opinion that trauma, per se, is never the primary cause for the development of any type of cancer.⁷ To similar effect, the statement of Dr. Pick in connection with the injuries sustained by German soldiers, and likewise the studies of the French Association for the study of cancer in 1918.⁸ It may be noted, however, that Dr. Berard disagreed and held the position that trauma was quite frequently the cause of neoplasm.⁹

Space does not permit a recitation of the authorities on the subject of trauma and the aggravation of cancer. To repeat, as a practical lawyer, I have grave doubts, with the exception of osteogenetic sarcomas in the region of the epiphysis in children, as to the possibility of a single trauma causing cancer.

Let me now, however, review a subject concerning which there can be no doubt. What views have our courts taken with respect to trauma and cancer? They have followed the so-called Ewing's Postulates enunciated in 1935. Dr. Ewing's five

² *Id.* at 481-488.

³ *Id.* at 481.

⁴ *Ibid.*

⁵ Ewing, *Neoplastic Diseases* 108 (4th ed. 1940).

⁶ Knox, *op. cit. supra* n. 1 at 483.

⁷ New York State Department of Labor Med. Bull., Nos. 1 and 3 (1923).

⁸ Pick, *Traumatic Genesis of Sarcomas*, 17 *Med. Klin.* 406 (1921).

⁹ Knox, *op. cit. supra* n. 1 at 495.

postulates for proving causal relations between trauma and cancer are:¹⁰

- (1) Previous integrity of the wounded part,
- (2) Nature and authenticity of the trauma,
- (3) Adequacy or severity of the trauma,
- (4) Diagnosis of the cancer,
- (5) Origin of the cancer at the place of inquiry,
- (6) Reasonable time relation between the date of the trauma and the appearance of the cancer, and
- (7) Character or structure of the resulting growth.

There are many cases on the books, and time does not permit a discussion of all of them. The most significant one is the case of *Dennison v. Wing*.¹¹ It was the plaintiff's claim that she had a fracture of the left clavicle and a contusion of the left shoulder and upper chest. There was no original breast injury. Four weeks later, it was claimed that there was a swelling over the clavicle with tenderness and discoloration extending down from the clavicle to the upper chest. Approximately two months after the accident, she developed a pimple on her left breast in the armpit. This was observed at the end of November, 1946. In March of 1950, the pimple became as hard and big as a nut. A breast cancer was diagnosed and the breast was removed. The only witness called was an expert. None of the treating physicians were produced.

The facts, in my opinion, are relatively unimportant. The important thing concerning this case is a statement by Mr. Justice Peck. He states in substance that it is not the duty of the Court to resolve the question as to whether or not trauma could produce cancer of the breast. He does, however, state:

Even in such medical opinion as would recognize the possibility of trauma leading to cancer, certain Postulates must be satisfied before a connection can be considered established. Two of such Postulates are pertinent to the present case; the cancer must develop exactly at the site of the injury and the cancer must not develop until there has been a sufficient time interval after the injury for it to develop and reach a detectable size.¹²

¹⁰ Ewing, *op. cit. supra* n. 5. Mock and Ellis had previously set up similar postulates. See, Mock & Ellis, *Trauma and Malignancy*, 86 J. A. M. A. 257 (1926).

¹¹ 279 App. Div. 494, 110 N. Y. S. 2d 811 (1952).

¹² *Id.* at 813.

The court then continues, and says that these facts are "inconsistent with the Postulates."

Later, the court went even further and stated:

Plaintiff should be expected in that event, to have doctors who observed and treated plaintiff's wife after her accident, give such testimony as they might be able and qualified to give as to whether the injuries they observed could have caused the cancer in the location in which it developed. The surgeon who performed the breast operation should be called for such relevant testimony as he might give, *and one or more recognized authorities on breast cancer should be called.*¹³

Judge Shientag, while he concurred, disagreed in part with Judge Peck. He stated that he was not prepared to formulate requirements which must be satisfied before a connection can be considered to have been established between a trauma and a cancerous growth.

This decision is an amazing and revolutionary one. No court has, to my knowledge, ever incorporated in a judicial decision medical postulates which must be proven before a case can be established. In the average case, a general practitioner has the right to make a statement with reasonable certainty as to either an orthopedic injury, injury to the brain, or injury to any other part of the human body. No matter how eminent the medical gentlemen who are produced against him, this still does not deprive the litigant of the right to have a jury pass upon his or her case. Of course, the jury then has the right to determine which testimony it will give greater credence. We now have, however, incorporated into the law on the subject of trauma and cancer, definite medical minimal requirements.

In the case of *Sikora v. Apex Beverage Corp.*,¹⁴ Judge Peck again rendered an opinion concerning this most vital subject. This dealt with the aggravation of a previous condition where the plaintiff testified he first noticed the lump about the size of a pea on his right breast about a week after the accident, and within a few months a lump the size of a walnut, diagnosed as cancer, and requiring radical breast surgery. The blow in this case was concededly an indirect one. A pathologist and a

¹³ *Id.* at 814 (italics added).

¹⁴ 282 App. Div. 193, 122 N. Y. S. 2d 64 (1953), *aff'd*, 306 N. Y. 917, 119 N. E. 2d 601 (1954).

radiologist testified to aggravation and acceleration. They stated that the transmission of force to the breast region, by a fall on the back, was sufficient to satisfy the Postulate. Experts called by the defendant denied it.

The court stated:

In the absence of a direct blow to the site of the cancer or spreading into surrounding areas, there is no adequate basis for believing that the growth of the cancer was in any way affected or accelerated by the plaintiff's fall.¹⁵

Again the court took upon itself to enunciate medical principles as a matter of law. While the case was affirmed by the Court of Appeals, it does not, however, indicate of necessity that the Court of Appeals endorsed this doctrine. The plaintiff had likewise failed to prove a cause of action in negligence in the opinion of the court.

In the case of *James Avesato v. Paul Tishman Co.*,¹⁶ Mr. Justice Spector was of the following opinion:

Plaintiff testified that the nipple of his left breast was knocked off and suspended by surrounding skin. Four months later, he was operated on for the removal of a tumor of the left breast. It was claimed originally that trauma was the cause of the carcinoma, but upon the trial the claim was changed to aggravation. Experts were called on both sides of the case. The defendant's experts claimed that it is unreasonable to assume that a cancer is ever dormant; that a claim of aggravation is nothing but speculation; that trauma does not affect unfavorably a cancer.¹⁷

The court states:

There was considerable discussion about Ewing's Postulates and Peck's Postulates in determining casual relationship. It was explained that even if all the Postulates were satisfied, it does not establish causation. The criteria was set up to illuminate all those cases unworthy of consideration . . . But if all criteria are satisfied, you still do not prove causation. These are merely screening devices to eliminate unmeritorious cases.¹⁸

After quoting from Judge Peck's decision in the *Sikora* case,¹⁹

¹⁵ *Id.* at 122 N. Y. S. 2d 67.

¹⁶ 142 N. Y. S. 2d 760 (Sup. Ct. 1955).

¹⁷ *Id.* at 763.

¹⁸ *Id.* at 768.

¹⁹ *Supra* n. 15.

Judge Spector then wisely continues:

If the converse is true, I submit that the court is writing into law conclusions concerning medical matters on which the medical profession itself is not agreed.²⁰

In the opinion of the writer, that is precisely what the higher courts have done.

I am likewise mindful of the fact that at the present time, scarification is being resorted to in an attempt to prevent the metastasis of cancer. Judge Spector comments briefly upon this and states: "In fact trauma to cancer kills the cells which are traumatized."

My opinion, for whatever it is worth, is that most of these cases, particularly where a female claims that she has been struck by a door and a malignancy has developed, are really cases of traumatic determinism in which attention is directed by the very occurrence of the accident, to a condition which already existed. Yet there are many medical statements and opinions recently from England in which the learned medical profession states in language substantially as follows: "One cannot rule out trauma as a cause of cancer." This, however, is of no avail to the lawyer. The lawyer should likewise bear in mind the Postulates of Selye; the effect of trauma and the consequent alarm reaction, its effect on the manufacture of adrenalin, the stimulation of the pituitary and the production of an increased amount of ACTH, also the fact that the increase of cortisone retards the formation of connective tissue and thus plays some part in a failure to restrain the cells.²¹

The great difficulty in establishing these cases is the Postulate dealing with a prior integrity of the part. Unfortunately, the physician fails to appreciate the problem of the lawyer and the proof that he seeks to elicit. The law has wisely stated that a medical case must be established with reasonable certainty. Webster's Dictionary defines *reasonable* as: "fair, just, and rational." *Certainty* is defined as: "the fact of being certain or assured in mind."

Why should the physician be frightened by these terms? In his practice each year, he makes his diagnosis of hundreds of thousands of people with reasonable certainty. The fact that he uses the term "may" or "might" does not change the circum-

²⁰ *Supra* n. 16 at 769.

²¹ Knox, *op. cit. supra* n. 1 at 474.

stances. When a physician advises a patient and predicts a medical condition in his own practice, in the great majority of instances he does so with so-called reasonable certainty. The number of cases in which he frankly admits that he has no opinion are rare.

Let us examine this term "reasonable certainty" in the light of our practical experience. When we board an airplane for a journey, there is always the possibility that it will plummet from the skies and crash into the earth. We are, however, "reasonably certain" that we will arrive at our destination safely. When we board an ocean going liner, there is always the possibility that it will sink into the inky depths of the sea. Yet, we know from practical experience that the ship will deposit us safely on shore. We know that an occurrence similar to the Titanic sinking is rare.

"Reasonable certainty" in our courts does not mean a statement made with a positiveness of the "Delphic Oracle." "Reasonable Certainty" does not mean a statement comparable to that of Moses to the Tribe of Israel when he handed down the Ten Commandments. What then does it mean? It means precisely what the words convey, "reasonable certainty." If these words are to be given a tortured meaning, then medicine had no right to make any diagnosis prior to the days of the x-ray, the arteriogram, the electroencephalogram, and the other numerous clinical aids available to medicine today. Yet, we know that competent diagnoses were and are being made without these aids, and with reasonable certainty.

I wonder why a physician, therefore, in a proper case cannot testify that a patient did not have a malignancy prior to the accident, bearing in mind the rules of "reasonable certainty" required by the law. I personally bemoan, with due deference, the decisions of our higher courts. In my opinion, juries can competently pass on these matters. I am aware of the constant bewilderment of doctors who cannot understand why lay people are entrusted with decisions on disputed matters of medicine. They always regale their friends socially with stories of how ignorant juries decided matters properly belonging in the medical field. The answer is simple. Miscarriages of justice on medical questions result either from the doctor's inability to articulate or the lawyer's lack of preparation, familiarity and ability to develop the inquiry.

Despite my personal views, where the proper proof existed I would try a case for the plaintiff where it was postulated that a trauma caused either a cancer or its aggravation. In my opinion, it is regrettable that the court saw fit to lay down these rules. It is not a lawyer's duty to decide these complicated questions of medicine.

If my belief or the belief of any other lawyer is to determine justice, let us close our courtrooms and let every lawyer be an arbiter on the justice or injustice of a cause. This, of course, would be a deplorable situation.

Great progress can be made towards an eventual solution of this most perplexing question, if the physician will appear more frequently in the courtroom, rather than in the Academic Halls of Medicine, and state his sincere beliefs with reasonable certainty, as to whether or not a trauma can cause or aggravate malignancy.