1957

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Recommended Citation
Naoma Lee Stewart, Premenstrual Tension in Automobile Accidents, 6 Clev.-Marshall L. Rev. 17 (1957)

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Premenstrual Tension In Automobile Accidents

Naoma Lee Stewart*

"PART-TIME WITCHES" was the picturesque description of many women used by Dr. Erle Henriksen, head of the University of Southern California Department of Gynecology. He was describing women suffering from premenstrual tension. Speaking at the annual Congress of the American College of Surgeons held October, 1956, in San Francisco, Dr. Henriksen said that he and his colleagues estimate that about one-half of all their women patients between the age of thirty and menopause suffer from periodic witchiness.

Although it has been known for many years that approximately fifty percent of women suffer mental and physical distress during the premenstrual fortnight, little attention has been paid to this problem except in extremely severe instances. Only in 1931 was the first paper on the subject written by Robert T. Frank, pioneer endocrinologic gynecologist, who indicated the scientific existence of premenstrual tension and attributed its cause to hormonal imbalance. Since Frank's article there has been a widespread interest in the causation and treatment of this common syndrome. Howard L. Oleck, then a law professor at New York Law School and now of Cleveland-Marshall Law School, in 1953 first suggested that this scientific phenomenon must have far-reaching legal effects.

With the increased knowledge of premenstrual tension and its acceptance as a settled scientific fact comes the inescapable conclusion that novel legal problems are posed as to the criminal and civil responsibility of women suffering from this involuntary dysfunction. The realistic student of law readily appreciates that the law cannot be pure philosophy completely di-

* B. A., Western Michigan College of Education & L. Arts, and a Second Year Student at Cleveland-Marshall Law School.
1 The significance of Premenstrual Tension as a legal fact was originally suggested by Howard L. Oleck, in, Legal Aspects of Premenstrual Tension, 166 Intntnl. Record of Medicine, 492-501 (1953).
2 Time Magazine—Medicine, p. 71 (October 22, 1956).
vored from the scientific facts of life. "Most modern legal realists understand that law is largely a somewhat tardy philoso-
phic synthesis of rules based on general acceptance of scient-
ific and social conclusions."

In the past, the conservatism of some members of the legal profession has often been a stubborn obstacle to the progress of the law. It will be remembered that professional resistance by some leading lawyers long delayed the enactment of married women's rights legislation; nevertheless such legislation was eventually enacted. It is to be anticipated that similar resistance to recognition of severe premenstrual tension as a legal fact is inevitable, despite the fact that as early as 1902 such authorities as Krafft-Ebing have urged that judges give consideration to the abnormal personality changes that occur in innumerable women at this time.

The scope of possible legal problems involved in the existence of this physical and mental dysfunction is very wide. For the sake of brevity the writer would like to separate the discussions of criminal and civil responsibility, and make this initial study one which is specifically limited to the civil rights and liabilities of women involved in automobile accidents. It is emphasized that the effects of premenstrual tension in torts are not as clearly pertinent as they are in crimes. But they are pertinent.

Before discussing the legal concepts which are applicable to this problem, a brief description of some of the physical and mental effects accompanying a severe case of premenstrual tension may serve a twofold purpose. First, to the unfortunate female who is bedeviled by this common affliction, it may be a source of comfort to know that her feeling of being strictly broomstick material for a portion of each month has a logical scientific explanation. Despite her fears to the contrary, generally she is not a full fledged female neurotic, but is simply suffering from premenstrual tension. To her harassed husband, who periodically flees to the nearest bar to growl imprecations into his badly needed drink, it should be a source of some comfort to know that his plight is not unique. Despite his convictions to the contrary, he personally did not corner the market

5 Oleck, H. L., Legal Aspects of Premenstrual Tension, 166 Inntal. Record of Medicine, 495 (1953).
6 Ibid. Oleck, H. L.
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on unreasonable women when he took unto himself a wife. Her irritable and irrational behavior could be caused by premenstrual tension.

Secondly, and more important, the primary purpose is to acquaint the reader with mental and physical reactions which affect a woman’s standard of conduct, thereby affecting her legal responsibilities.

In November, 1953, the International Record of Medicine and General Practice Clinics published a detailed report of a Symposium on Premenstrual Tension which had been held in New York City earlier that year. The moderator of this symposium was Dr. Joseph Morton of New York City, one of the leading endocrinologists of this era. The causes, effects, and treatment of this common syndrome were exhaustively reviewed by outstanding men in the fields of Gynecology, Obstetrics, Endocrinology, and Psychiatry. In addition to the medical aspects, a comprehensive discussion of the legal aspects of premenstrual tension was presented by Howard L. Oleck. It was repeatedly pointed out that women suffering from the severest symptoms of premenstrual tension are afflicted with physical and emotional changes so profound that their entire patterns of behavior frequently became irrational, uncontrolled, and completely unpredictable.

"Whenever the monthly tension reaches its maximum height, the manic activity of the patient beggars description. The physical unrest, causeless irritability, hairtrigger temper, insomnia, vertigo, and headaches, in addition to recurring episodes of depression and hebetude, tax the endurance of both the patient and her family. A weight gain of from 4 to 6 pounds is not unusual during the time of the symptoms. Occasionally, premenstrual tension is dramatized by nymphomania or ulcerative stomatitis, either of which may be the only important complaint. As with any clinical entity not all of the symptoms may be present in a single patient. Most frequent, however, is the periodic and spectacular alteration of personality, taking in general the form of either recurrent frenzy or catonic-like depression."

8 Israel, S. L., Premenstrual Tension, 110 J. A. M. A., 1721 (1938).
There is still a diversity of opinion as to the precise causes of all the physical and emotional effects which are manifested premenstrually. Many women are painfully aware of severe headaches (comparable to migraine), abdominal bloating, breast engorgement, blurred vision, and an unexplained weight increase, without knowing that this is a premenstrual syndrome which results from abnormal fluid retention. Unfortunately, the specific physiological mechanism that produces this abnormal fluid retention is still not clear. Generally speaking, it has been attributed to the sodium retaining property of the sex hormones to the action of the posterior pituitary through the antidiuretic hormone and conceivably to defective mineralocorticoid action. The fluid is thought to be retained primarily in the extracellular spaces, but a certain amount may be retained intercellularly.

With treatment by any of the new mercurial diuretics the patient suffering from abnormal fluid retention has received dramatic relief from many of her most painful symptoms. The best guess as to why draining off of excess water improves the emotional state is the fact that when the extracellular tissues of the body retain water so does the brain.

While the abnormal retention of fluid has long been conceded to be a cause of the premenstrual syndrome, one new finding independently discovered by Harris, Billig, and Morton deserves particular elaboration. This finding is spontaneous hypoglycemia.

Hypoglycemia is a condition produced by the lowering of the blood sugar values below the normal level. This lowered level usually presents signs and symptoms that vary proportionately with the degree of fall and with individual sensitivity to this fact. The signs and symptoms resemble in all details the effects

11 Morton, J. H., Treatment of Premenstrual Tension, 166 Intnatl. Record of Medicine, 11 (Nov., 1953).


of an overdose of insulin. If the attack is mild there may be only moderate discomfort with nervousness, weakness, trembling, perspiration, apprehension, craving for foods or sweets, nausea, abdominal pain, and speech impairment.

Major attacks may assume extremely severe proportions with convulsions, prostration, temporary unconsciousness, and marked mental disturbances. In extreme cases coma and death ensue. The central nervous system's deprivation of its necessary carbohydrate supply is responsible for the various psychic and nervous manifestations.  

The relation between hypoglycemia and criminology is not a new discovery and has been thoroughly covered by Joseph Wilder in his "Sugar Metabolism and Its Relation to Criminology."  

Spontaneous hypoglycemia in relation to severe premenstrual tension and its effect on the victim from the legal viewpoint are of great interest to us here. According to Wilder some of the principal important effects are marked "impairment of judgment," hazy thinking "impairment of self control," loss of association, negativism, and strengthening of aggressive drives.  

It is now known, for example, that hypoglycemia is associated with prolonged stress. Considering the legal aspects of proof of premenstrual tension, it is of paramount interest to note that scientific tests of sugar content of the blood would be a matter of objective evidence which could be verified after the event resulting in litigation, even if no previous medical record of the hypoglycemia in relation to premenstrual tension existed. Periodicity of recurrence of physiological changes, measurable by scientific methods, enable charts to be drawn for many women, clearly indicating, by objective evidence, their psychosomatic condition at a given past date. The legal possibilities suggested by this fact are enormous.

At this point it might be pertinent to point out how few women recognize the complaint from which they suffer. It creeps up on them gradually beginning in their late twenties and reaches a peak of severity around the age of forty. Some

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16 Himerich, H. E., Brain Metabolism & Cerebral Disorders (Baltimore, Williams & Wilkins Co., 1951).
18 Ibid., Wilder, p. 98.
20 Oleck, supra, n. 5.
think of their premenstrual discomfort and depression as a part of the price they must pay for womanhood. They try to dismiss it but do not succeed, and their families suffer as a consequence. Too many doctors have a tendency to dismiss a tense, depressed patient with comments like "It's all in your head. . . . You're just too nervous."

Dr. S. Charles Freed, Adjunct in Medicine, Mount Zion Hospital, San Francisco, California, said,

"The diagnosis of this condition is quite simple. When the question is asked of a woman 'How do you feel a few days before your menstrual period?' the answer comes out promptly. It is a distinct pleasure as a physician to observe the relief and gratitude in his patients when it is explained that this is a normal occurrence and not 'imagination' or 'neuroses.'" 21

Dr. Henriksen, in his talk before the American College of Surgeons, commented on the failure of the average woman suffering from premenstrual tension to recognize the cause of her trouble. Not only does the patient not recognize the source of her complaint, but many physicians do not properly diagnose the problem. In 18 years, Dr. Henriksen said, he had treated 400 patients suffering from premenstrual tension; and in only one case did the referring physician mention it as the patient's specific complaint. 22

The possible legal responsibility of a woman who has a physical disability of which she is not consciously aware presents an interesting problem in terms of law.

In late 1953, following the publication of Professor Oleck's paper, Dr. L. G. Balsam of California reported on a study of premenstrual tension in automobile accidents. In a two year study of 500 major automobile accidents involving women, premenstrual tension was found to be a direct causative factor in very many cases. Unwilling to rely on so small a study, he pointed out its startling statistical conclusions, and urged further research on premenstrual tension by the National Research Counsel Committee on Highway Safety. 23 As to this, see the discussion below, especially after note 43.

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23 Balsam, Women's Periodic Driving Danger, 11 Women's Life (4) 71 (Fall, 1953); and see, Greenblatt, Premenstrual Tension Syndrome, 11 G. P., 66 (1955).
To establish legal liability of a woman driver who has become involved in an automobile accident, the proximate cause of which accident is her temporary physical disability resulting from a severe case of premenstrual tension, of course it is necessary to prove that the woman driver is guilty of negligence. Negligence is defined as "conduct which falls below the standard established by law for the protection of others against unreasonably great risk of harm." 24

The idea of risk necessarily involves a recognizable danger. This, in turn, rests upon some knowledge or duty to know of the existing facts, and some reasonable duty to know that harm may follow. 25 A risk is a danger which is apparent, or should be apparent, to one in the position of the actor. The culpability of the actor's conduct must be judged in the light of the possibilities apparent to him at the time, and not by looking backward "with the wisdom born of the event." 26 It is not enough that everyone can see now that the risk was great, if it was not apparent when the conduct occurred. 27 The court must put itself in the actor's place. At the same time the standard fixed must be an external one, based upon what society demands of the individual rather than upon his own notion of what is proper.

In the light of the recognizable risk, the conduct in order to be negligent, must be unreasonable. Nearly all human acts carry some remote possibility of harm, and no person theoretically so much as drives an automobile without some chance of an accident. The risks against which the actor is required to guard are those which society recognizes as sufficiently great to demand precaution. No person can be expected to guard against events which are not reasonably to be anticipated. On the other hand, if the risk is an appreciable one, and the possible consequences are serious, the question is not one of strictly mathematical probability.

Against this probability of the risk must be balanced in every case the necessity and utility of the type of conduct in question. Consideration must also be given to the inconvenience and the cost of any alternative course open to the actor.

24 Restatement of Torts, Sec. 282.
25 Seavey, Negligence—Subjective or Objective, 41 Harv. L. R. 1, 5-7 (1927).
27 "Nothing is so easy as to be wise after the event." Bramwell, B., in Cornman v. Eastern Counties R. Co., 1859, 4 H. & N. 781, 786.
It is fundamental that the standard of conduct which is the basis of the law of negligence is determined by balancing the risk and the probability and extent of harm, against the value of the interest which the actor is seeking to protect.\textsuperscript{28} For this reason, it is seldom possible to reduce negligence to precisely definite rules. It is "relative to the need of the occasion."\textsuperscript{29} In negligence, it is considered that no wrong at all has occurred unless the defendant's conduct has been unreasonable in the light of the risk, and the burden is upon the plaintiff from the outset to establish this fact.

What is this standard of conduct which is the basis of the law of negligence? The standard of conduct required of an individual is the supposed conduct of the law's most famous fictitious person, the \textit{reasonable man} of ordinary prudence. "This excellent but odious character stands like a monument in our Courts of Justice, vainly appealing to his fellow-citizens to order their lifes after his own example . . . and in all that mass of authorities which bear upon this law (of the reasonable man) there is no single mention of the reasonable woman,"\textsuperscript{30}

The courts have gone to unusual pains to emphasize the abstract character of this mythical person. He is not to be identified with any ordinary individual who might occasionally do unreasonable things. He is a prudent and careful man who is always up to standard.\textsuperscript{31} Nor is it proper to identify him with any member of the jury which is to apply the standard. He is rather a personification of a community ideal of reasonable behavior, determined by the jury's social judgment.\textsuperscript{32}

The conduct of the reasonable man will vary with the situation with which he is confronted. "It would appear that there is no standardized man; that there is only in part an objective test; that there is no such thing as reasonable or unreasonable conduct except as viewed with reference to certain qualities of the actor—his physical attributes and his intellectual powers."\textsuperscript{33} The physical characteristics of the reasonable man may be said to be identical with those of the actor.

\textsuperscript{29} Cardozo, C. J., Babington v. Yellow Taxi Corp., 250 N. Y. 14, 164 N. E. 726, 727 (1928).
\textsuperscript{30} Herbert, A. P., Misleading Cases in the Common Law, 12-16 (1930).
\textsuperscript{31} Reynolds v. City of Burlington, 52 Vt. 300, 308 (1880).
\textsuperscript{32} Freeman v. Adams, 63 Cal. App. 225, 218 P. 600 (1923).
\textsuperscript{33} Seavey, Negligence—Subjective or Objective, Harv. L. R. 1, 27 (1927).
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In terms of tort law, premenstrual tension, with its periodic hypoglycemia and abnormal fluid retention (both involuntary dysfunctions over which the victim has no control) is analogous to a physical disability or defect. Physical disability is incapacity caused by physical defects or infirmities, or bodily imperfections, or mental weakness, and it may be temporary. Disability may result as well from the condition of the mind and nerves as from other causes.

What standard of conduct is required of a person with a physical disability? In *Hill v. City of Glenwood*, the court said:

"The streets are for the use of the general public without discrimination; for the weak, the lame, the halt and the blind, as well as for those possessing perfect health, strength, and vision. The law casts upon one no greater burden of care than upon the other."

The court then went on to say there is no fixed rule for determining what is ordinary care applicable to all cases, but that each case must be determined according to its own facts. Here, the plaintiff's blindness is simply one of the facts which the jury must consider in finding whether he did or did not act with the care which a reasonably prudent man would ordinarily exercise when burdened by such an infirmity.

In discussing the standard of care required of a member of "the weaker sex," in *Hassenary v. Michigan Central R. Co.*, Justice Cooley said:

"Women may enter upon and follow any of the occupations of life; they may be a surgeon if they will, but they cannot claim any privilege of exemption from the care and caution required of men. A woman may be engineer of a locomotive if she can obtain the employment, but the law will expect and require of her the same diligence to avoid mischief to others which men must observe. The rule of prudent regard for the rights of others knows nothing of sex. . . ."

"But no doubt also the law ought under all circumstances where they become important, to make allowances for any differences existing by nature between men and women." 37

The reasonable woman (Mr. A. P. Herbert notwithstanding) would be most reluctant to ask special privileges for functions

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36 124 Iowa 479, 100 N. W. 522 (1904).
which by nature's whim she is obligated and normally proud to perform. But on the other hand, in all justice the reasonable woman is also reluctant to be penalized for dysfunctions which by nature's whim she is unable to control. At the risk of being accused of prejudice, this writer is in complete accord with Justice Cooley's contention that the law should make allowances for any differences existing by nature between men and women. It is interesting to contemplate what reaction might be registered by the learned judge if he found words uttered by him in 1882 quoted in defense of the acceptance of premenstrual tension as a legal fact in 1957.

The reader will recall that it was pointed out above that one of the interesting aspects of premenstrual tension is the patient's frequent failure to realize the medical basis of her problem, thereby being unprepared to take adequate safety precautions for her standard of conduct during this period. An automobile driven by a woman who unknowingly suffers from the severest symptoms of premenstrual tension would be a dramatic example of "the accident looking for some place to happen." 38

From the legal standpoint, to what extent would the driver be responsible for damages resulting from this type of situation? In Cohen v. Petty, 39 the defendant became suddenly ill, and lost consciousness and control of the car which he was driving, thereby causing injury to the plaintiff. The court held:

"One who is suddenly stricken by an illness, which he had no reason to anticipate while driving an automobile, which renders it impossible for him to control the car, is not chargeable with negligence."

But one who knows of his own condition (i.e., an epileptic) may be guilty of criminal negligence in driving a car. 40

Slattery v. Haley, 41 is a leading case in support of the theory that a defendant cannot be found negligent for committing an act which was the proximate result of an unanticipated illness. Here, without any preliminary symptoms, the defendant became unexpectedly ill and lost consciousness while driving his

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38 See n. 23, above.
39 65 F. 2d 820 (App., D. C., 1933).
40 N. Y. Penal L., Sec. 1503-a; and cases cited in Oleck, 1 NCS 41 (1955). But see below, at n. 44.
The automobile ran up on the sidewalk and killed the plaintiff's son. The defendant was absolved of liability.

The court said:\(^\text{42}\)

"Does the sudden illness which overcame him excuse him from the failure to discharge that duty (to operate the car with due care) or is his duty so absolute as to render him liable even though his failure arises from something he had no power to anticipate, was powerless to prevent? It is singular how little law can be found dealing with the question.... I think that it may now be regarded as settled law that to create liability for an act which is not wilful and intentional but merely negligent, it must be shown to have been the conscious act of the defendant's volition. He must have done that which he ought not to have done, or omitted that which he ought to have done as a conscious being. Failing this the occurrence is a 'mere accident,' a 'pure accident' or, as is often but not accurately put, 'an inevitable accident.'"

In Armstrong v. Cook,\(^\text{43}\) the plaintiff was a guest in an automobile driven by her daughter. The evidence disclosed that the driver was "tired and worn out." While crossing an intersection she lost consciousness or fainted, thus losing control of the car, which collided with a pole. The Supreme Court of Michigan held:

"Where sole proximate cause of automobile striking pole was driver's fainting or losing consciousness, guest passenger could not recover damages for injuries received; fainting or losing consciousness not being actionable for negligence."

Judge Lee E. Skeel of the Ohio Court of Appeals, writing the opinion in Weldon Tool Co. v. Kelley,\(^\text{44}\) said:

"By the great weight of authority one who becomes suddenly stricken or loses consciousness due to an unforeseen cause, while driving an automobile, and as a proximate cause thereof injures another, cannot be charged with negligence under such circumstances." (Italics added.)

Blashfield's Cyclopedia of Automobile Law and Practice (Volume I, Sec. 656) states the following rule:

"Fainting or momentary loss of consciousness by the driver of an automobile, due to fatigue, is not in itself actionable negligence, and, if a driver stricken by paralysis or seized


\(^{43}\) 250 Mich. 180, 229 N. W. 433 (1930).

by an epileptic fit still continues with his hand on the wheel of an automobile while he is driving, and unconscious so directs it as to cause its collision with another, he cannot be held negligent for the way in which he controls it."

Not so, of course, if he knew of his epileptic condition, as is pointed out above.

This writer has no hesitancy in agreeing that there are few ordinary agencies so fraught with danger to life and property as an automobile proceeding upon the highway freed from the direction of a conscious mind. For the sake of fairness, let us consider the other side of our hypothetical situation involving a car driven by a woman suffering from premenstrual tension. Under the facts to be considered now, the woman is aware that she has monthly symptoms of physical and mental maladjustments. With knowledge of her disability, is the woman guilty of negligence or contributory negligence if she attempts to drive a car?

American Jurisprudence (Volume 5, Sec. 178) gives the following rule:

"The fact that one has a physical defect will not, in itself, render him liable for an injury resulting from the operation of an automobile, or prevent his recovery for an injury where the defect is not such as to render the operation of the car by him negligence. It is usually a jury question of fact in each case."

"The circumstances that one is subject to vertigo or other illness will not serve to make him contributorily negligent in his use of the public thoroughfares." 45

"Evidence of any physical defect or illness existing at the time of the accident upon the part of either the motorist or pedestrian is admissible at the trial. Respecting the motorist, such evidence is pertinent upon the issue as to whether due care was exercised in the operation of the vehicle while he was so disabled or affected, and to what extent, if any, such factor contributed to the accident." 46

The general rule is that the fact that the operator of a motor vehicle which became involved in an automobile accident has some physical defect will not in itself render him liable as a

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46 5 Am. Jur., Sec. 635.
matter of law, but may properly be taken into consideration by
the trier of facts in determining the question of negligence.47

The only annotation in any legal periodical mentioning
automobile accident in relationship to the menstrual period was
found in 28 ALR 2d which said:

"Testimony to the effect that the driver of the car during her
menstrual period became unconscious without warning
while driving in a careful way was held to authorize a ver-
App. 578, 26 S. E. 2d 306."

This case is not being emphasized too strongly, because a study
of the facts disclosed that the primary defense of the defendant
was not based on the premenstrual tension.

The writer has personal knowledge of another case involv-
ing a young girl of sixteen who periodically had behavior prob-
lems absolutely inconsistent with her normal pattern of be-
avior. The father, finally suspecting an association of her ab-
normal behavior with her monthly menstrual period, referred
the girl to Professor Oleck and Morton. By a series of blood
tests, vaginal smears, and other tests it was determined that she
suffered from a severe case of premenstrual tension. During
one of her periodic behavior lapses, the young lady participated
in the stealing and driving of an automobile which became in-
volved in an accident. Professor Oleck referred the girl's par-
ents to William L. Prosser, Dean of the Law School, University
of California. The California Juvenile Court which handled the
case released the defendant in the supervision of an attorney
suggested by Dean Prosser and a physician who was to give
medical treatment for the girl's temporary disability. Because
the legal action was taken in a Juvenile Court, there is no avail-
able record of the proceedings. For obvious personal reasons
the names of the parties involved cannot be revealed.

At the present time there is no adequate provision of legal
principles and rules to govern the use of premenstrual tension
as a defense. But members of the legal profession are urged to
view the inevitable necessity and possibility of such a defense
with an open mind. To the medical profession premenstrual ten-
sion is a settled scientific fact. The realistic lawyer should ap-
preciate that the law cannot indefinitely ignore the scientific
facts of life.

2d 165 (1943).
Could any attorney reasonably conclude that a woman's conduct should be considered negligent if such conduct was caused by a mental and physical disability of which she had no specific knowledge or over which she had no conscious control? Even if the woman is cognizant of the existence of premenstrual tension with its concomitant physical and mental effects, how is she to determine the extent to which these symptoms may develop? When does the defendant's conduct become unreasonable in the light of the risk which she is undertaking? Is it to be presumed that any woman suffering from premenstrual tension and having knowledge of it should, for instance, abandon the driving of an automobile? Against the probability of risk must be balanced the inconvenience and unreasonableness of demanding that a woman cease driving for ten to fourteen days of each month in anticipation of a risk which may never be realized. No person can be expected to guard indefinitely against events which cannot be reasonably anticipated.

The problems created by this common syndrome are infinite, varied, and complex. Remembering that premenstrual tension may be a matter of objective evidence which can be verified by scientific tests after the event as well as before, it behooves every attorney who is handling a case in which a female is involved, to investigate a possible connection between his client's legal problem and premenstrual tension. Until legislation or the cases build up a body of law dealing directly with the subject, it is imperative that the conscientious attorney give serious consideration to the acceptance of severe premenstrual tension as a modern legal fact.