

THE PRESUMED EGGSHELL PLAINTIFF RULE: DETERMINING LIABILITY WHEN MENTAL HARM ACCOMPANIES PHYSICAL INJURY

*[I]n what we like to believe is an enlightened age, is not damage to the mental integrity of the individual to be considered at least as serious as severe physical injury?*¹

INTRODUCTION

Although mental harm can be as detrimental to a person's well being as physical harm, the law regarding liability for physical injuries that cause mental harm is woefully lacking. The "almost universal"² rule courts use to determine liability for physical injuries is the eggshell plaintiff rule³: a defendant is liable for *all* injuries he causes a plaintiff regardless of foreseeability.⁴ Although courts uniformly apply the eggshell plaintiff rule to physical injuries,⁵ there is little consensus about its application to mental injuries and what limitations, if any, should apply.⁶ The most difficult issues courts must grapple with are whether a plaintiff sustains mental injury and, if so, whether the defendant caused it. If the defendant caused the plaintiff's mental harm, courts must determine if the defendant caused all

1. *A. A. v. New York*, 252 N.Y.S.2d 800, 810 (Ct. Cl. 1964).

2. PAGE KEETON & WILLIAM PROSSER, PROSSER AND KEETON ON THE LAW OF TORTS 291 (W. Page Keeton ed., West Pub. Co. 1984) (1941).

3. The eggshell plaintiff rule is also referred to as the eggshell-skull rule, which is defined as follows: "The principle that a defendant is liable for a plaintiff's unforeseeable and uncommon reactions to the defendant's negligent or intentional act. . . . Also termed eggshell-plaintiff rule; thin-skull rule; special-sensitivity rule; old-soldier's rule." BLACK'S LAW DICTIONARY 555 (8th ed. 2004).

4. *Id.* If the plaintiff suffered from a preexisting physical condition, the defendant will only be liable for the aggravation of that condition and not any harm the plaintiff would have suffered from the condition regardless of the defendant's act. *Maurer v. United States*, 668 F.2d 98, 100 (2d Cir. 1981).

5. KEETON & PROSSER, *supra* note 2.

6. See J. Stanley McQuade, *The Eggshell Skull Rule and Related Problems in Recovery for Mental Harm in the Law of Torts*, 24 CAMPBELL L. REV. 1, 2-3 (2001).

the mental harm, activated a latent mental condition, or aggravated a preexisting mental condition. This distinction is crucial. If a plaintiff had a latent mental condition and the defendant activated it, then the defendant is liable for all of the plaintiff's mental harm.⁷ On the other hand, if a plaintiff had a preexisting mental condition, then the defendant is only liable for any aggravation of the condition.⁸

The difficulty in making the legal distinction between latent and preexisting mental conditions arises because the law in this area is ambiguous and inconsistent. Different jurisdictions use different approaches to determine liability for mental harm that accompanies physical injuries.⁹ These approaches are inconsistent with one another, leaving injured parties and defendants in different states subject to sometimes drastically different liability standards. The various approaches are also ill defined. Consequently, courts—even within the same state—have no consistent, systematic regime to determine liability for mental harm that accompanies physical injuries. A solution is essential to avoid future arbitrary rulings and to protect the rights of those who suffer.

7. *See, e.g.*, *Salas v. United States*, 974 F. Supp. 202, 209 (W.D.N.Y. 1997) (explaining that a defendant “may be liable for damages for aggravation of a pre-existing illness or for precipitation of a latent condition”); *Calcagno v. Kuebel, Fuchs P’ship*, 01-691 (La. App. 5 Cir. 11/14/01); 802 So. 2d 746, 752 (holding the defendant liable for all of the plaintiff’s mental harm because the physical injury activated age-related changes in the plaintiff’s brain that were asymptomatic before the injury); *LaSalle v. Benson Car Co.*, 00-1459 (La. App. 5 Cir. 1/30/01); 783 So. 2d 404, 408-09 (holding the defendant liable for all of the plaintiff’s mental harm because the plaintiff had no psychological problems before the physical injury, but required treatment in a psychiatric hospital after the injury).

8. *See Salas*, 974 F. Supp at 209; *Touchard v. Slemco Electric Found.*, 99-3577, ¶ 1 (La. 10/17/00); 769 So. 2d 1200, 1202 (explaining that because the plaintiff had preexisting mental injuries, the jury must decide whether the defendant aggravated them).

9. *See, e.g.*, *Poole v. Copland, Inc.*, 498 S.E. 2d 602, 605 (N.C. 1998) (allowing recovery for mental harm only if an “ordinary” person would have suffered mental harm); *Trull v. Volkswagen of America, Inc.*, 320 F.3d 1, 8 (1st Cir. 2002) (upholding the lower court’s damages award and refusing to address the plaintiff’s preexisting mental condition); *Doty v. Sewall*, 908 F.2d 1053, 1059 (1st Cir. 1990) (allowing the plaintiff to introduce evidence that the defendant aggravated her mental condition); *Stoleson v. United States*, 708 F.2d 1217, 1221 (7th Cir. 1983) (implying that the eggshell plaintiff rule applies equally to physical and mental harm). Louisiana courts apply a presumption that the physical injury caused the mental condition. *See Calcagno*, 01-691, 802 So. 2d at 752; *LaSalle*, 00-1459, 783 So. 2d at 408.

2007]

THE PRESUMED EGGSHELL PLAINTIFF RULE

This Note suggests a solution: a three-step approach to determine liability for mental harm that accompanies physical injury. Using the presumed eggshell plaintiff test, courts would determine liability by analyzing whether: (1) the injured person was in good mental health before the physical injury; (2) the mental condition manifested itself shortly after the physical injury; and (3) the medical evidence indicates a reasonable causal connection between the physical injury and the mental condition.¹⁰

The case of Hileen Salas illustrates how courts struggle to determine liability when mental harm accompanies physical injuries.¹¹ Salas was a forty-nine year old woman with a Masters degree who taught high school Spanish and was active in the community.¹² In November 1991, the defendant ran a stop sign and hit Salas' car.¹³ The emergency room doctor diagnosed Salas with minor physical injuries, yet she continued to suffer severe symptoms out of proportion to her physical injuries.¹⁴ At the time of trial in 1996, Salas continued to suffer from "extreme anxiety, confusion, pain in virtually every part of her body, and limited affect."¹⁵ The doctors agreed Salas was not "malingering,"¹⁶ but was suffering pain and effects disproportionate to the severity of the accident, thus suggesting a psychological component to her pain.¹⁷

The court rejected the defendant's argument that Salas had a preexisting mental condition that would have caused her

10. *Calcagno*, 01-691, 802 So. 2d at 752; *LaSalle*, 00-1459, 783 So. 2d at 408.

11. *See Salas*, 974 F. Supp. at 209, 211. With little guidance from the eggshell plaintiff rule it cited, the court analyzed causation, malingering, whether deterioration was unavoidable regardless of the accident, and whether Salas failed to mitigate her damages. *Id.* at 208-11. The court eventually rested its decision on the fact that Salas was highly functional before the accident and mentally disabled after the accident. *Id.* at 209, 211-13.

12. *Id.* at 203-04.

13. *Id.* at 204.

14. *Id.*

15. *Id.* Affect here refers to "a person's disposition to react emotionally in certain specific ways . . . the fluctuating, subjective aspect of emotion." ROBERT JEAN CAMPBELL, *CAMPBELL'S PSYCHIATRIC DICTIONARY* 15 (Oxford University Press 2004) (1940).

16. Malingering is intentionally exaggerating physical symptoms. CAMPBELL, *supra* note 15, at 383.

17. *Salas*, 974 F. Supp. at 205.

deterioration regardless of the accident.¹⁸ But the court never explicitly stated whether Salas had no prior mental condition at all or had a latent mental condition.¹⁹ The court also failed to explain how it reached its conclusion.²⁰ It did not list any factors or create a test that future courts could use to make this determination.²¹ Although the court acknowledged the need to analyze preexisting and latent mental conditions, it left those conditions ill defined and did not explain the liability ramifications of finding a preexisting or latent mental condition.²² The decision in Salas' case highlights the lack of clarity in the law regarding liability for mental harm that accompanies physical injury.

Part I of this Note illustrates the range of approaches courts use to analyze liability for mental harm that accompanies physical injury, highlighting the inconsistencies and varying liability standards in the law. Part II proposes and explains a three-step approach for analyzing liability for mental harm in these cases. Part III discusses cases in which plaintiffs do not meet all three elements of the approach, indicating that they had a preexisting mental condition. This suggested approach will provide courts with a unified, consistent, and well-defined solution to the problems of determining liability for mental harm that accompanies physical injury.

I. VARIOUS APPLICATIONS OF THE EGG SHELL PLAINTIFF RULE TO MENTAL HARM

Although courts universally recognize liability for mental harm, they vary greatly in how they apply the eggshell plaintiff rule to mental harm that accompanies physical injury.²³ The most important issue that remains unanalyzed among all jurisdictions is the difference between latent and preexisting mental conditions. A latent mental condition is a dormant

18. *Id.* at 211.

19. *Id.* at 208-13.

20. *Id.*

21. *Id.*

22. *Id.* (although the court reached the proper conclusion—mentioning Salas' steady work record, expert medical testimony, and inability to cope after the accident—it failed to discuss specific factors or create a clear test for determining liability for mental harm in such cases).

23. *See* McQuade, *supra* note 6 (discussing stand alone emotional harm).

2007]

THE PRESUMED EGGSHELL PLAINTIFF RULE

“disorder that has not erupted into full-blown psychotic symptoms.”²⁴ In the context of this Note, a latent mental condition is a condition that existed before the physical injury in question, was asymptomatic, and did not affect the plaintiff’s ability to function in daily life until activated by the physical injury.²⁵ In contrast, a preexisting mental condition is a condition that existed before the physical injury occurred, was symptomatic, and affected the plaintiff’s functioning in daily life.²⁶ Analyzing three different approaches states take in determining liability for mental harm that accompanies physical injury reveals the need for a clear test for evaluating whether a plaintiff had a latent or preexisting mental condition.²⁷ Because

24. CAMPBELL, *supra* note 15, at 366 (latent mental conditions are sometimes also called prepsychotic, borderline, or incipient).

25. For an example of a latent mental condition, see *Walton v. William Wolf Baking Co.*, 406 So. 2d 168, 171-72 (La. 1981). After the plaintiff sustained relatively minor physical injuries in a car accident, he developed a conversion reaction, a type of somatoform disorder. *Id.* at 172. A somatoform disorder is a disorder characterized by physical symptoms for which there is no physical explanation. CAMPBELL, *supra* note 15, at 616. Walton had limited range of motion in his spine and lost use of his left arm and hand, but there was no physical explanation for the disability. *Walton*, 406 So. 2d at 172-73. Despite the defendant’s arguments that Walton had a preexisting mental condition, the court held the defendant liable for Walton’s disability, noting Walton’s health before the accident. *Id.* at 171, 175. Although the court’s rationale is unclear, the holding suggests that Walton either had no mental condition before the accident or had a latent mental condition.

26. For an example of a preexisting mental condition, see *Touchard v. Slemco Electric Found.*, 99-3577, ¶ 1 (La. 10/17/00), 769 So. 2d 1200, 1202. The plaintiff was rear-ended by the defendant in a car accident. *Id.* The plaintiff suffered physical ailments from several prior car accidents and had been hospitalized for substance abuse, a suicide attempt, and depression. *Id.* Given the similarity between the plaintiff’s symptoms and the plaintiff’s functionality before and after the accident, the court held that the defendant did not aggravate any of the plaintiff’s preexisting physical or mental conditions. *Id.* at 1206.

27. *See, e.g.*, *Trull v. Volkswagen of America, Inc.*, 320 F.3d 1, 8 (1st Cir. 2002) (implying vaguely that the eggshell plaintiff rule should apply equally to mental and physical injuries, but failing to address preexisting or latent conditions); *Doty v. Sewall*, 908 F.2d 1053, 1059 (1st Cir. 1990) (suggesting that a defendant can be liable for aggravating a plaintiff’s mental condition, but failing to analyze latent or preexisting conditions); *Steinhauser v. Hertz Corp.*, 421 F.2d 1169, 1173-74 (2d Cir. 1970) (explaining that a defendant may be entitled to a reduction in damages if he can prove the plaintiff had a preexisting condition as opposed to a latent predisposition, but giving no guidance on how a defendant should go about proving this); *Blake v. Clein*, 2002-CA-00786-SCT (Miss. 2005), 903 So. 2d 710, 729-30 (holding that a defendant is liable for any aggravation of a preexisting condition unless the jury is unable to apportion the

the finding that plaintiffs had latent or preexisting conditions often determines liability in these cases, such clarification would enable courts to accurately and consistently determine liability for mental harm that accompanies physical injury.

A. The Restrictive Ordinary Eggshell Plaintiff Rule: Precludes Latent Conditions

North Carolina's restrictive version of the eggshell plaintiff rule would likely preclude recovery for plaintiffs with latent mental conditions. For plaintiffs to recover for mental harm, the jury must find that "a person of ordinary mental condition" would have suffered mental harm.²⁸ If the jury finds the plaintiff is "ordinary," then the defendant is liable for all harm to the plaintiff, no matter how "unusually extensive."²⁹ Additionally, a North Carolina jury instruction applies the ordinary eggshell plaintiff rule to "any injury."³⁰ If a plaintiff suffers from a preexisting mental or physical condition, the defendant is only liable for any aggravation of the plaintiff's preexisting conditions.³¹ This makes clear that plaintiffs with a preexisting mental condition could recover for aggravation of the condition. The rule leaves unanswered, however, whether plaintiffs with latent mental conditions are "ordinary" so they could recover for activation of the latent condition.

The ordinary eggshell plaintiff approach is vague because it requires juries to speculate about what defines an ordinary

damages between the preexisting condition and the aggravation, in which case a defendant is liable for all of the mental harm, but giving no rule or test for distinguishing between latent and preexisting conditions); *Bartolone v. Jeckovich*, 481 N.Y.S.2d 545, 547 (N.Y. App. Div. 1984) (holding that a defendant is liable for all of a plaintiff's mental harm where the defendant "aggravated" the plaintiff's "quiescent" mental condition, explaining only that the plaintiff was functional before the accident but not after); *Letoski v. United States*, 488 F. Supp. 952, 959 (M.D. Pa. 1979) (finding that the defendant was liable for all plaintiff's mental harm because the plaintiff was "handling life's pressures without difficulty" before the accident); *Bonner v. United States*, 339 F. Supp. 640, 650 (E.D. La. 1972) (holding a defendant liable for a plaintiff's total disability where the plaintiff was healthy and functional before the accident, but continuously deteriorated after the accident until she was completely disabled).

28. *Poole v. Copland, Inc.*, 498 S.E.2d 602, 605 (N.C. 1998).

29. *Id.*

30. *Gattis v. Royster*, 591 S.E.2d 598, slip op. (N.C. Ct. App. 2004), 2004 WL 194002, at *2.

31. *Id.*

2007]

THE PRESUMED EGGSHELL PLAINTIFF RULE

person and does not address activation of latent mental conditions.³² Are people with latent mental conditions “ordinary” thus making defendants liable for activating the latent conditions? The courts have failed to define latent or preexisting mental conditions or explain the application of this ordinary eggshell plaintiff rule to plaintiffs having either condition. Although not explicitly stated, plaintiffs with latent mental conditions will likely not be able to recover if an ordinary person would not have sustained mental injury in the same situation.³³

*B. The Vague and Ill-Defined Blanket Eggshell Plaintiff Rule:
Treating Mental Harm Like Physical Injury*

Some courts have implied that a blanket eggshell plaintiff rule governs mental injuries that accompany physical injuries.³⁴ These courts treat mental harm like physical harm: a defendant is liable for any mental harm that results from any physical injury he causes a plaintiff,³⁵ regardless of any latent or preexisting mental condition the plaintiff had.³⁶ Under this rule, although stand alone emotional distress is not compensable,³⁷ minor physical injuries are enough to trigger liability for mental harm.³⁸ This approach fails to directly address, define, or analyze liability for mental injuries when the injured party has a latent or preexisting mental condition. How do courts determine if the physical injury caused the mental harm? Is a defendant liable for all mental harm even if the plaintiff had a preexisting mental condition? Because the blanket eggshell plaintiff rule is vague and ill defined, it provides courts little guidance for determining liability for mental harm.³⁹

32. See McQuade, *supra* note 6, at 39.

33. See Poole, 498 S.E.2d at 605.

34. Trull v. Volkswagen of America, Inc., 320 F.3d 1, 8 (1st Cir. 2002); Doty v. Sewall, 908 F.2d 1053, 1059 (1st Cir. 1990); Stoleson v. United States, 708 F.2d 1217, 1221 (7th Cir. 1983).

35. RESTATEMENT (SECOND) OF TORTS § 456 (1965).

36. RESTATEMENT (THIRD) OF TORTS § 31 (Proposed Final Draft No. 1 2005).

37. Stoleson, 708 F.2d at 1221.

38. Letoski v. United States, 488 F. Supp. 952, 953-54 (M.D. Pa. 1979); Bonner v. United States, 339 F. Supp. 640, 643 (E.D. La. 1972).

39. See McQuade, *supra* note 6 (noting Judge Posner’s lack of analysis in applying the eggshell plaintiff rule equally to mental and physical injuries in

Applying the blanket eggshell plaintiff rule, some courts have held defendants liable for all mental injuries to plaintiffs if there was no significant indication of mental illness before the injury and the defendants' tortious acts triggered the plaintiffs' mental harm.⁴⁰ Because a latent mental condition is asymptomatic before a triggering event, are defendants liable for activating latent conditions? The blanket eggshell plaintiff rule fails to address how significant a predisposition to mental illness must be in order to constitute a preexisting condition that would limit a defendant's liability. Although the blanket eggshell plaintiff approach is less restrictive and slightly more well defined than the ordinary eggshell plaintiff approach, it too fails to adequately address latent and preexisting mental conditions.

C. The Presumed Eggshell Plaintiff Rule: Practical and Fair

The presumed eggshell plaintiff approach creates a presumption of causation in certain cases where physical injury causes mental harm.⁴¹ Under this approach, although a plaintiff must still prove causation by a preponderance of the evidence, the preceding physical injury will be the presumed cause of the mental condition if: (1) the person was in good mental health before the physical injury; (2) the mental condition manifested itself shortly after the physical injury; and (3) the medical evidence indicates a reasonable causal connection between the physical injury and the mental condition.⁴² To overcome this presumption, a defendant "must show that some other particular incident could have caused the injury in question."⁴³ These

Stoleson v. United States, 708 F.2d 1217 (7th Cir. 1983)). For a similar example of inadequate analysis regarding latent and preexisting mental conditions, see *Trull*, 320 F.3d at 8. In *Trull*, a boy was severely injured in a car accident and was unable to live on his own. *Id.* at 10. The court did not discuss the boy's preexisting condition, but held that the defendant was not entitled to any reduction in damages because of it. *Id.* The lack of analysis implies a blanket eggshell plaintiff rule, like in *Stoleson*, 708 F.2d at 1221.

40. *Letoski*, 488 F. Supp. at 959; *Bonner*, 339 F. Supp. at 650.

41. *Calcagno v. Kuebel, Fuchs P'ship*, 01-691 (La. App. 5 Cir. 11/14/01); 802 So. 2d 746, 752; *LaSalle v. Benson Car Co.*, 00-1459 (La. App. 5 Cir. 1/30/01); 783 So. 2d 404, 408.

42. *Calcagno*, 01-691, 802 So. 2d at 752; *LaSalle*, 00-1459, 783 So. 2d at 408.

43. *LaSalle*, 00-1459, 783 So. 2d at 408. This approach parallels the exceptions to the eggshell plaintiff rule regarding physical injuries in federal law. *Maurer v. United States*, 668 F.2d 98, 100 (2d Cir. 1981). Typically a plaintiff's damages cannot be reduced because of a weakness or susceptibility

2007]

THE PRESUMED EGGSHELL PLAINTIFF RULE

elements make this test more specific and easier to apply than the ordinary eggshell plaintiff or blanket eggshell plaintiff approaches. The presumed eggshell plaintiff rule also hints at addressing latent and preexisting mental conditions by considering a plaintiff's health before the physical injury, which is logically consistent with the eggshell plaintiff rule and parallels its application to physical injuries.⁴⁴ Finally, this test is fair because it ensures that a defendant compensates a plaintiff when, although it may be impossible to conclusively prove that a physical injury caused the mental harm, it is the only logical explanation.

Although it may be impossible to definitively prove what causes a plaintiff's mental harm, if the evidence points to a physical injury as the only event causing such harm, the defendant should be required to compensate the plaintiff for that harm.⁴⁵ The presumed eggshell plaintiff approach is currently the most useful and thorough approach, providing courts with a consistent standard for determining liability when mental harm accompanies physical injuries.⁴⁶ On its face, this test appears to only establish causation. But in its application, this test also determines whether a plaintiff had a latent or preexisting mental condition.

The presumed eggshell plaintiff test is superior to both the ordinary eggshell plaintiff and blanket eggshell plaintiff approaches. Although the blanket eggshell plaintiff rule is less restrictive than the ordinary eggshell plaintiff rule and more directly analyzes a plaintiff's mental health before the physical injury, it is still inadequate. The blanket eggshell plaintiff rule focuses courts on a plaintiff's functionality before and after the

to injury. *Id.* The two exceptions to this rule are: (1) if the plaintiff was disabled before the accident, or (2) had a preexisting condition that would inevitably worsen. *Id.* In either case, the defendant is only liable for any aggravation of the preexisting condition. *Id.*

44. See *Maurer*, 668 F.2d at 100.

45. In *LaSalle*, 00-1459, 783 So. 2d at 406, a healthy and functioning husband and father suffered severe mental injury after a car accident in which he sustained mild physical injuries. Finding no alternate explanation for the sudden deterioration, the court logically and fairly held the defendant liable for the plaintiff's mental injuries. *Id.* at 409.

46. *Cf. McQuade*, *supra* note 6, at 39 (arguing that the North Carolina rule is "probably unacceptable" and that a blanket eggshell application is the "fairest" approach regarding purely mental harm with no physical injury).

physical injury,⁴⁷ making it less limited than the ordinary eggshell plaintiff rule. Courts deem causation established and hold a defendant liable for all physical and mental harm he causes if: (1) there is “nothing of significance indicating a predisposition toward mental illness”⁴⁸ before the physical injury, and (2) there is not an intervening act between the tortious act and the mental harm.⁴⁹ But what about a plaintiff’s mental health before the physical injury? Both the ordinary and blanket eggshell plaintiff tests neglect to explicitly address latent or preexisting mental conditions. Yet this issue is central to liability. Addressing latent and preexisting mental conditions is critical because a defendant is liable for any resulting mental harm if he *activates* a latent condition. However, if a defendant *aggravates* a preexisting condition, he is only liable for the aggravation of the condition. Because this finding fundamentally affects a defendant’s liability, courts need more precise guidelines for determining whether a plaintiff has a latent or preexisting condition.

Although the presumed eggshell plaintiff test is fairer than the ordinary or blanket eggshell plaintiff approaches, and comes closer to directly analyzing latent and preexisting conditions, this approach still needs development. To provide aid in judicial analysis, each element of the presumed eggshell plaintiff test must be clearer and easier to analyze. Also, the concepts of latent and preexisting mental conditions need better definition, as do the consequences of finding that a plaintiff had one or the other. The next section of this Note suggests factors courts should consider when applying the presumed eggshell plaintiff test. In fleshing out these factors, this Note also defines latent and preexisting mental conditions and explores the ramifications of finding whether a plaintiff had such a condition.

II. THE PRESUMED EGGSHELL PLAINTIFF AND LATENT PSYCHOLOGICAL CONDITIONS

With the addition of clarifying factors, the presumed eggshell plaintiff approach provides courts with a solid framework to determine liability for mental harm that

47. *Letoski v. United States*, 488 F. Supp. 952, 959 (M.D. Pa. 1979).

48. *Id.*

49. *Id.*

2007]

THE PRESUMED EGGSHELL PLAINTIFF RULE

accompanies physical injury. Most importantly, this three-prong test will assist courts in determining causation and whether a plaintiff had a latent or preexisting mental condition. The three elements of the test are whether: (1) the person was in good mental health before the physical injury; (2) the mental condition manifested itself shortly after the physical injury; and (3) the medical evidence indicates that there is a reasonable causal connection between the physical injury and the mental condition.⁵⁰ If a plaintiff can establish all three elements, she can prove her health before the physical injury and thus the defendant either caused the entire mental condition or activated a latent condition.⁵¹ Therefore, by establishing these three elements, a plaintiff also shows that she did not have a preexisting condition that would warrant apportionment of damages.⁵² This test creates a rebuttable presumption of causation that a defendant may overcome by showing “that some other particular incident could have caused the injury in question.”⁵³

The presumed eggshell plaintiff test is useful even if a plaintiff cannot satisfy all of the elements. By applying this test courts will be able to determine if a plaintiff sustained mental harm, the extent of the harm, and whether a plaintiff had a latent or preexisting mental condition. If the plaintiff is unable to establish all three elements, the rebuttable presumption of causation does not apply, but the court can still apply this test to determine whether the defendant aggravated a preexisting mental condition.⁵⁴

50. *Calcagno v. Kuebel, Fuchs P’ship*, 01-691 (La. App. 5 Cir. 11/14/01); 802 So. 2d 746, 752; *LaSalle*, 00-1459, 783 So. 2d at 408.

51. *But see* *McQuade*, *supra* note 6, at 8 (arguing that stand alone “mental harm . . . seldom if ever gives rise to serious long-lasting impairments in the absence of prior predisposing conditions.”). Whether mental harm can exist without some “predisposing condition” is a question for psychologists and beyond the scope of this Note. For the liability issues addressed in this Note the distinction is irrelevant because whether a defendant causes all of a plaintiff’s harm or simply activates a latent condition, the defendant is still liable for all of the mental harm.

52. *Cf. Touchard v. Slemco Electric Found.*, 99-3577 (La. 10/17/00); 769 So. 2d 1200, 1202-05.

53. *LaSalle*, 00-1459, 783 So. 2d at 408.

54. *See Touchard*, 99-3577, 769 So. 2d at 1204; *see also* *Salas v. United States*, 974 F. Supp. 202, 209 (W.D.N.Y. 1997); *Bartolone v. Jeckovich*, 481 N.Y.S.2d 545, 547 (N.Y. App. Div. 1984); *Ragsdale v. Jones*, 117 S.E.2d 114,

Although Louisiana is currently the only state employing the presumed eggshell plaintiff approach, many jurisdictions apply some or all of the elements of this approach in deciding cases where mental harm accompanies physical injury.⁵⁵ This part of the Note synthesizes case law from Louisiana and other jurisdictions to suggest factors for the courts to use in analyzing each element when determining liability for mental harm that accompanies physical injury.

A. Focus on Functionality: Good Health Before the Physical Injury

The first element of the presumed eggshell plaintiff test addresses whether a plaintiff was in good mental health prior to suffering the physical injury.⁵⁶ Rather than holding an injured

118 (Va. 1960); *Steinhauser v. Hertz Corp.*, 421 F.2d 1169, 1173-74 (2d Cir. 1970).

55. Several cases discuss a plaintiff's functionality in order to determine his or her mental health before the physical injury. *See, e.g.*, *Padget & North Plains Electrical Co-op v. Gray*, 727 S.W.2d 706, 709 (Tex. App. 1987) (noting that before the accident the plaintiff was "an active, outgoing individual who excelled as both a nurse and a mother . . . [but] after the accident she became depressed, withdrawn, short-tempered, and wanted to be alone"); *Salas*, 974 F. Supp. at 208 (finding that before the accident the plaintiff was "smiling, pleasant and active," and worked steadily); *Bartolone*, 481 N.Y.S.2d at 547 (holding that the plaintiff was able to function "in a relatively normal manner" before the accident); *Letoski v. United States*, 488 F. Supp. 952, 954-58 (M.D. Pa. 1979) (describing the plaintiff as "handling life's pressures without difficulty" before the accident). Some cases analyze whether symptoms of mental harm appeared after the physical injury and continued to manifest. *See, e.g.*, *Bonner v. United States*, 339 F. Supp. 640, 650 (E.D. La. 1972) (observing that the plaintiff was healthy before the accident, but afterward developed symptoms one after another until she was totally disabled); *Letoski*, 488 F. Supp. at 959 (pointing out that the plaintiff's symptoms of mental illness only appeared after the accident); *Salas*, 974 F. Supp. at 209, 211-13 (finding that the plaintiff was highly functional before the accident but mentally disabled after it). Many cases have discussed whether it was reasonably possible that the physical injuries caused the mental harm. *See, e.g.*, *Calcagno v. Kuebel, Fuchs P'ship*, 01-691 (La. App. 5 Cir. 11/14/01); 802 So. 2d 746, 752 (relying on the testimony of an elderly plaintiff's doctor and family and finding that the plaintiff was lucid until the injury activated age-related changes in her brain); *Fruehauf Corp. v. Prater*, 360 So. 2d 999, 1000-02 (Ala. Civ. App. 1978) (assuming that the severe burns and disfigurement the plaintiff suffered caused his mental disability); *Bonner*, 339 F. Supp. at 648-50 (finding that the accident triggered the plaintiff's slow mental deterioration that worsened until she was totally disabled); *Salas*, 974 F. Supp. at 212 (deciding the accident activated the plaintiff's latent mental disorders, not other stressors in her life).

56. *Calcagno*, 01-691, 802 So. 2d at 752; *LaSalle*, 00-1459, 783 So.2d at 408.

2007]

THE PRESUMED EGGSHELL PLAINTIFF RULE

person to an objective standard of normalcy,⁵⁷ courts should consider the plaintiff's overall functionality before and after the physical injury—including any suffering or symptoms before the physical injury,⁵⁸ hobbies and daily activities,⁵⁹ ability to work, ability to maintain relationships,⁶⁰ and overall personality and demeanor.⁶¹ In comparing a plaintiff's pre- and post-injury functionality, courts will not only determine the plaintiff's health before the physical injury, but will also evaluate the extent of the mental harm by examining the level of disability after the injury.

The comparison of pre- and post-injury functionality is the key to determining whether a plaintiff was mentally healthy before the physical injury. “[I]f a latent condition itself does not cause pain, suffering, etc., but that condition plus an injury caused such pain, the injury, and not the latent condition, is the proximate cause.”⁶² Similarly, if a plaintiff is able to manage a latent mental condition and then a physical injury later removes the ability to cope by activating the disabling mental condition, that plaintiff was mentally healthy until physically injured.

A pre- and post-injury functionality test prevents plaintiffs from having to satisfy an unattainable standard of mental health in order for courts to find they were healthy before the injury.⁶³ The case of Hileen Salas, discussed above, provides an illustrative example. Salas saw a social worker for depression during several difficult times in her life.⁶⁴ The least severe characterization of Salas' condition before the accident was depersonalization disorder and major depression.⁶⁵ Despite her conditions, the court noted Salas was never hospitalized, was

57. See *Poole v. Copland, Inc.*, 498 S.E.2d 602, 605 (N.C. 1998).

58. *Padget*, 727 S.W.2d at 709-11.

59. *Bartolone*, 481 N.Y.S.2d at 546.

60. *Letoski*, 488 F. Supp. at 954.

61. *Id.* at 957.

62. *Padget*, 727 S.W.2d at 711.

63. For example, in *Padget*, the plaintiff had occasionally received treatment for minor depression, but because this did not affect her ability to cope or work as a nurse and mother, it did not rise to the level of a preexisting mental condition that would decrease the defendant's liability. *Id.* Similarly, in *Bartolone*, the plaintiff led a somewhat unusual “loner” existence, but he had no complaints and was self-sufficient so the court rejected the notion that he had a preexisting mental condition. *Bartolone*, 481 N.Y.S.2d at 546.

64. *Salas v. United States*, 974 F. Supp. 202, 203-04 (W.D.N.Y. 1997).

65. *Id.* at 210.

infrequently medicated, and was always able to function (as evidenced by her steady work record).⁶⁶ Given her constant functionality, the court rejected the defendant's argument that Salas' emotional problems would have disabled her regardless of the accident.⁶⁷

Looking to a plaintiff's lifestyle to evaluate his or her mental health prevents courts from creating an unattainable standard for mental health that very few plaintiffs could live up to. For example, under an objective ordinary eggshell plaintiff test, a jury may not have found Salas to be "ordinary." Hence, she would not have recovered for her injuries even though she could no longer work, had undergone major personality changes, and could no longer manage the life she had before the accident.⁶⁸ Comparing a plaintiff's pre- and post-injury functionality also assists courts in determining the extent of the mental injury because courts will necessarily have to take note of the plaintiff's decreased functionality, if any, since the physical injury.

B. Timing and Intervening Causes: Symptoms Appear After the Injury and Continually Manifest

Once a court evaluates a plaintiff's health before the physical injury, under the second element of the presumed eggshell plaintiff test, the court must determine whether symptoms of mental injury appeared after the physical injury and continued to manifest. To determine this, courts should consider the length of time between the physical injury and the onset of symptoms of mental harm, as well as any possible intervening physical injuries that may have caused the symptoms.

1. Timing of Symptoms of Mental Harm

Timing is one important factor courts should consider in determining whether symptoms of mental harm appeared after the physical injury and continued to manifest. Despite the passage of time, if a physical injury causes mental harm that is mild at first and slowly degenerates into a disabling condition, a

66. *Id.*

67. *Id.* at 211.

68. *Id.* at 205.

2007]

THE PRESUMED EGGSHELL PLAINTIFF RULE

defendant is liable for all of the disabling mental harm.⁶⁹ If Salas' symptoms of mental injury started shortly after the accident, were minor, and worsened for about a year until she was completely disabled, the defendant would be liable for the total disability.⁷⁰ Timing is not dispositive. But defendants should be liable for all of the mental harm regardless of how long it takes the mental harm to become completely disabling.

In Salas' case, not much time passed between the accident and the onset of symptoms of mental injury.⁷¹ The defendant argued that the accident did not cause Salas' psychological problems, but rather other stressful events in her life—such as problems with her son and stress at work—triggered her somatoform disorder.⁷² The court rejected this argument, relying on expert testimony explaining that the accident had either caused the somatoform disorder or aggravated a preexisting condition, and that it was only *after* the accident that Salas lost her ability to cope.⁷³ The court agreed that Salas could have gone on functioning and coping with life, but instead the accident caused the disabling somatoform disorder.⁷⁴ If symptoms of mental injury manifest shortly after the physical injury and the medical evidence supports causation, then a plaintiff will most likely meet the causation requirement under the presumed eggshell plaintiff test.

A plaintiff may not carry the lightened causation burden if there is a long time lapse between the physical injury and the symptoms of mental harm, especially if the proof connecting the injury and the mental harm is insufficient.⁷⁵ If Salas' symptoms did not appear at all until a year or more after the accident, it would be harder for her to establish causation. If she made her mental harm claim consistently from the beginning of the trial

69. *Bonner v. United States*, 339 F. Supp. 640, 650 (E.D. La. 1972) (holding that because the plaintiff's psychological symptoms started after the physical injury caused by the defendant, and because her symptoms steadily intensified until they disabled her, the defendant was liable for the plaintiff's disability).

70. *See, e.g., id.*

71. *Salas*, 974 F. Supp. at 204-05.

72. *Id.* at 208. Somatoform disorders are “[a] group of disorders characterized by physical complaints for which no adequate physical explanation can be found.” CAMPBELL, *supra* note 15, at 616.

73. *Salas*, 974 F. Supp. at 208.

74. *Id.* at 210-11.

75. *See Stoleson v. United States*, 708 F.2d 1217, 1223 (7th Cir. 1983).

and had strong expert testimony, she may still be able to establish causation.⁷⁶ But with a long time lapse, any other factors of doubt would weaken Salas' case. A long time lapse between the physical injury and the symptoms of mental harm, particularly when combined with questionable medical evidence of causation, may prevent a plaintiff from meeting even the lightened causation requirement.

2. *Intervening Causes of Mental Harm*

In addition to timing, courts should also analyze whether any intervening physical injuries may have caused or aggravated a plaintiff's mental harm. Just as delayed deterioration does not relieve a defendant of liability,⁷⁷ neither will small intervening incidents during a plaintiff's psychological deterioration.⁷⁸ Suppose that Salas, although still not well, returned to work a little more than a month after the car accident. She continued to suffer from dizziness, insomnia, extreme fatigue, and anxiety. Then one day at work she lifted some books and suffered pain in her left arm and left chest. She then left work and returned a month later, but her previous symptoms intensified, so she left work again and had not returned as of trial. Also suppose several psychiatrists diagnosed Salas with mental conditions attributed to the accident.

Given such medical testimony, a court would likely find the book lifting incident was not a superseding force and did not interrupt the causal connection between the accident and Salas' problems.⁷⁹ If a defendant tortiously causes a plaintiff to suffer a physical injury that activates a latent mental condition, a minor incident that exacerbates the plaintiff's already deteriorating condition will not interrupt causation.⁸⁰ Although neither timing nor intervening physical injuries are dispositive, courts should consider both when analyzing whether symptoms of mental harm appeared after the physical injury and continued to manifest.

76. *Id.*

77. *See Bonner v. United States*, 339 F. Supp. 640, 650 (E.D. La. 1972).

78. *See Letoski v. United States*, 488 F. Supp. 952, 959 (M.D. Pa. 1979).

79. *See id.*

80. *See id.*

2007]

THE PRESUMED EGGSHELL PLAINTIFF RULE

C. Existence and Effect of Mental Harm: Medical Evidence and Causation

After evaluating a plaintiff's mental health pre- and post-physical injury, courts must finally decide if the medical evidence demonstrates a "reasonable possibility of a causal connection"⁸¹ between the physical injury and the mental injury.⁸² To establish that the physical injury could have reasonably caused the mental condition, a plaintiff does not have to present any expert medical testimony. If a plaintiff can establish the existence and effect of mental harm,⁸³ expert medical testimony is not necessary to prove the existence of a compensable mental disability.⁸⁴ Expert testimony is not required to prove mental harm because it is not required to prove physical disability and there is no "material difference in the difficulty of proof" between physical and mental injuries.⁸⁵

Also, a time lag between the physical injury and the complete development of the mental condition⁸⁶ is not alone sufficient to disprove the notion that the physical injury could have reasonably caused the mental harm. Expert testimony that refutes causation solely based on a time lapse between the physical injury and the onset of symptoms of mental injury will not defeat causation,⁸⁷ especially when there is opposing testimony and medical evidence establishing causation.

A plaintiff's choice to refuse a course of treatment recommended by one expert will likewise not disrupt causation.⁸⁸ In the case of Hileen Salas, Salas' treating psychiatrist and clinical psychiatrist both testified that the accident caused her

81. *Calcagno v. Kuebel, Fuchs P'ship*, 01-691 (La. App. 5 Cir. 11/14/01); 802 So. 2d 746, 752; *LaSalle v. Benson Car Co.*, 00-1459 (La. App. 5 Cir. 1/30/01); 783 So. 2d 404, 408. This superfluous "possibility" language is most likely the courts' effort to denote a plaintiff's lightened burden of proof regarding causation because of the presumption of causation discussed in the next section of this Note.

82. *Calcagno*, 01-691, 802 So. 2d at 752; *LaSalle*, 00-1459, 783 So. 2d at 408.

83. *Fruehauf Corp. v. Prater*, 360 So. 2d 999, 1002 (Ala. Civ. App. 1978); see also *Calcagno*, 01-691, 802 So. 2d at 752 (holding that one medical expert's unrefuted testimony was sufficient to reasonably establish causation).

84. *Fruehauf*, 360 So. 2d at 1002.

85. *Id.*

86. *Bonner v. United States*, 339 F. Supp. 640, 648-50 (E.D. La. 1972).

87. *Id.*

88. *Salas v. United States*, 974 F. Supp. 202, 212 (W.D.N.Y. 1997).

mental disorders that were preventing her from working, including depression, somatoform disorder, and posttraumatic stress syndrome.⁸⁹ One defense expert agreed with the diagnosis of somatoform disorder but did not comment on causation.⁹⁰ But another defense expert diagnosed Salas with schizo-affective disorder,⁹¹ depressive type, and borderline personality,⁹² much more serious mental disorders than those diagnosed by the other three experts.⁹³ This expert recommended that Salas take three medications, which Salas refused.⁹⁴ This same expert also concluded that Salas' mental condition was preexisting and that the accident had only aggravated it.⁹⁵ The defendant argued that Salas failed to mitigate her damages by rejecting this course of treatment.⁹⁶

The court rejected the defendant's duty to mitigate argument, holding that Salas made reasonable efforts to treat her condition.⁹⁷ The court found that Salas' "emotional problems were caused by the accident" because every expert testified that the accident activated a latent condition or aggravated a preexisting condition and that Salas was able to cope before the accident but not after.⁹⁸ A sole dissenting expert will not defeat causation even if a plaintiff refused a course of treatment.⁹⁹

Together, the second and third elements of the presumed eggshell plaintiff test define the parameters of a plaintiff's burden of proof for causation. A plaintiff can prove causation

89. *Id.* at 208.

90. *Id.* at 206-07.

91. Defined slightly differently in different systems, this can be a combination of schizophrenia and affective disorder or a stage in between the two. CAMPBELL, *supra* note 15, at 582.

92. Characterized by "instability in many areas of functioning (behavior, mood, self-image, interpersonal relationships); impulsive behavior that is potentially self destructive; shifting; inappropriate, or uncontrolled emotions; feelings of emptiness and boredom, cannot tolerate being alone, suicidal threats, self-mutilation, identity disturbance with uncertainty about self-image, long-term goals, values." *Id.* at 91.

93. *Salas*, 974 F. Supp. at 206-07.

94. *Id.*

95. *Id.*

96. *Id.* at 211.

97. *Id.* at 212.

98. *Id.* at 208-09.

99. *Id.* at 210.

2007]

THE PRESUMED EGGSHELL PLAINTIFF RULE

by establishing that her symptoms of mental harm appeared after the physical injury and continued to manifest, and the medical evidence reasonably shows that the physical injury caused the mental injury.

D. Rebuttable Presumption of Causation

If a court determines that a plaintiff has established all three elements of the presumed eggshell plaintiff test, the plaintiff has proven that she did not have a preexisting mental condition and there is a rebuttable presumption that the physical injury caused the mental condition. At first glance, a presumption of causation may seem to be a windfall for plaintiffs. It is not. First, this approach only applies in the specific factual situation where a plaintiff is functioning normally and suffers a physical injury that activates a latent psychological condition, presumably causing her mental harm.¹⁰⁰ Second, although the standard is less stringent, a plaintiff must still prove this rebuttable presumption of causation by a preponderance of the evidence.¹⁰¹ Third, even if a plaintiff establishes all three elements of the presumed eggshell plaintiff approach, the presumption of causation is rebuttable, so a defendant may defeat this presumption by disproving any of the three elements.¹⁰²

Lastly, although malingering and limitless liability are valid concerns in any personal injury case, there are already checks in the system to counter these concerns, even regarding mental harm.¹⁰³ Consistency and reliability have improved in the fields of psychiatry and psychology leading to more objective criteria and consistent determination of cases.¹⁰⁴ Also, expert testimony

100. See *Calcagno v. Kuebel, Fuchs P'ship*, 01-691 (La. App. 5 Cir. 11/14/01); 802 So. 2d 746, 752; *LaSalle v. Benson Car Co.*, 00-1459 (La. App. 5 Cir. 1/30/01); 783 So. 2d 404, 408.

101. *Calcagno*, 01-691, 802 So. 2d at 752; *LaSalle*, 00-1459, 783 So. 2d at 408.

102. *LaSalle*, 00-1459, 783 So. 2d at 408.

103. Scott M. Eden, Note, *I am Having a Flashback . . . All the Way to the Bank: The Application of the "Thin Skull" Rule to Mental Injuries - Poole v. Copland, Inc.*, 24 N.C. CENT. L.J. 180, 181 (2001) (predicting that the *Poole* decision "may create a flood of claims alleging that present outrageous conduct has caused a past traumatic event to resurface" and that damage awards may be higher).

104. See McQuade, *supra* note 6, at 29-30 (particularly mentioning three developments: "the standardized criteria provided in DSM IV and ICD-X, the new protocols which must be followed in interpreting test results, and physiological testing to support psychiatric diagnosis."). Cf. Eden, *supra* note

and “the vigilance of a discerning trial judge” will help minimize malingering and overcome difficulties in establishing the existence or cause of mental harm.¹⁰⁵ Courts would note any appearance of malingering since trial judges regularly make their observations of the plaintiffs part of the record in these cases.¹⁰⁶ Experts also regularly address malingering in their testimony.¹⁰⁷ As a last resort, if a plaintiff establishes causation, a defendant is unable to rebut it, and the damages imposed on the defendant are unjust, a court could limit the defendant’s liability using the doctrine of remoteness of damages.¹⁰⁸ The presumed eggshell plaintiff test synthesizes and clarifies the approach many courts are already taking to adjudicate cases where mental harm accompanies physical injury. Moreover, this approach incorporates all the safeguards against malingering and limitless liability already present in the court system.

III. THE PRESUMED EGGSHELL PLAINTIFF AND PREEXISTING PSYCHOLOGICAL CONDITIONS

If a court determines that a plaintiff has failed to establish mental health before the physical injury, then the plaintiff had a preexisting mental condition and does not benefit from a rebuttable presumption of causation.¹⁰⁹ Although the rebuttable presumption of causation will not operate, the other parts of the presumed eggshell plaintiff test are still helpful to courts in determining whether a defendant aggravated a plaintiff’s preexisting condition. For example, in *Touchard*, the defendant

103, at 181 (describing physical injuries as objective and mental injuries as “completely subjective in [their] diagnosis, origin, and treatment.”).

105. *Fruehauf Corp. v. Prater*, 360 So. 2d 999, 1001 (Ala. Civ. App. 1978).

106. *Id.* at 1002; *Salas v. United States*, 974 F. Supp. 202, 207 (W.D.N.Y. 1997); *Letoski v. United States*, 488 F. Supp. 952, 961 (M.D. Pa. 1979); *Bonner v. United States*, 339 F. Supp. 640, 642 (E.D. La. 1972).

107. *Salas*, 974 F. Supp. at 207; *Walton v. William Wolf Baking Co.*, 406 So. 2d 168, 171 (La. 1981).

108. *See Stoleson v. United States*, 708 F.2d 1217, 1224 (7th Cir. 1983). Even with causation established, the tortfeasor may not be liable if “the claim of damages . . . is so remote and so out of proportion to the culpability of the tortfeasor that, as a matter of public policy, [the court] conclude[s] that the defendants are not to be held liable for this element of damages.” *Id.* (quoting *Howard v. Mt. Sinai Hospital, Inc.*, 217 N.W.2d 383, 385 (Wis. 1974)).

109. *Calcagno v. Kuebel, Fuchs P’ship*, 01-691 (La. App. 5 Cir. 11/14/01); 802 So. 2d 746, 752; *LaSalle v. Benson Car Co.*, 00-1459 (La. App. 5 Cir. 1/30/01); 783 So. 2d 404, 408.

2007]

THE PRESUMED EGGSHELL PLAINTIFF RULE

rear-ended Mary Touchard, who claimed the defendant aggravated her preexisting mental (and physical) conditions.¹¹⁰ Before the accident, Touchard was in four car accidents that caused her back injuries from which she suffered constant pain.¹¹¹ She had also previously been hospitalized for drug and alcohol abuse and attempted suicide.¹¹² Her psychiatrist diagnosed her as suffering from “an anxiety disorder, . . . post traumatic anxiety, and a depression disorder that was a direct result of the pain which she had endured over the past fifteen years.”¹¹³ The court held that Touchard was not healthy before the injury because she had mental injuries before the subject accident as evidenced by her extensive medical record.¹¹⁴

Having determined that Touchard had a preexisting mental condition and therefore did not meet the first element of the presumed eggshell test, the court next addressed whether the defendant had aggravated her preexisting mental condition. The court applied the second element of the presumed eggshell plaintiff test by evaluating whether Touchard’s psychological symptoms appeared shortly after the physical injury and continued to manifest.¹¹⁵ Since she had a preexisting mental condition, the court compared her pre- and post-injury symptoms of mental harm to determine whether her symptoms intensified after the accident and considered intervening events that may have caused the aggravation.¹¹⁶ Several of Touchard’s friends testified that after the accident she was socially withdrawn, depressed, and cried, but the court held that these behaviors were consistent with Touchard’s actions before the accident and did not establish aggravation of her condition.¹¹⁷ Also, many other intervening events could have contributed to Touchard’s depression, including her loss of a friend to cancer, loss of a friend who died in a car accident, and the death of her

110. Touchard v. Slemco Electric Found., 99-3577 (La. 10/17/00); 769 So. 2d 1200, 1202.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 1204-05.

116. *Id.*

117. *Id.* at 1205.

mother.¹¹⁸ The court held that Touchard was unable to establish that her symptoms intensified after the accident and therefore had not proven the defendant aggravated her preexisting condition.¹¹⁹

Since there was no aggravation, there was no need for the court to analyze whether the medical evidence supported a finding of causation, but this would be helpful to courts in cases where there was aggravation of a preexisting mental condition. Although the presumed eggshell plaintiff test does not create a rebuttable presumption of causation in cases where a plaintiff has a preexisting condition, its second two elements are useful guides for courts in analyzing causation to determine whether a defendant aggravated a plaintiff's preexisting mental condition.

CONCLUSION

All jurisdictions compensate plaintiffs for mental harm that accompanies physical injury, recognizing that mental harm can be as debilitating and devastating to a person's life as physical harm. Yet the clear and consistent standards that courts need to accurately determine liability for mental harm do not exist. Rather than clear and universal rules like those applicable to physical injury, different states sometimes use drastically different approaches to determine liability for mental harm that accompanies physical injury. Under some of these approaches, plaintiffs often face insurmountable obstacles in recovering for mental harm that accompanies physical injury. Likewise, the law holds defendants to varying liability standards so they are not on notice of their liability risk. Even within a given jurisdiction the approaches for analyzing liability are often so vague that the courts cannot apply them accurately or consistently.

The presumed eggshell plaintiff test suggests a unified approach establishing fair and consistent liability principles under which plaintiffs can frame their cases and defendants can have notice. The presumed eggshell plaintiff test gets to the heart of the most difficult issues in determining liability for mental harm that accompanies physical injury because it directly addresses latent and preexisting mental conditions. This approach clarifies how courts should determine whether

118. *Id.*

119. *Id.* at 1205-06.

2007]

THE PRESUMED EGGSHELL PLAINTIFF RULE

plaintiffs had a latent or preexisting mental condition and the effect of this finding on liability. Also, the less stringent causation requirement allows courts flexibility in analyzing each plaintiff's case to ensure that a plaintiff disabled by mental harm is not denied recovery because of technical difficulties in proving mental harm. Regardless of whether a plaintiff establishes a latent or preexisting mental condition before the physical injury, the second and third elements of this test will guide courts in analyzing causation of the activation or aggravation of a plaintiff's mental condition. Courts should adopt the presumed eggshell plaintiff test because it fosters fair and consistent determinations of liability for mental harm that accompanies physical injury. By using this approach, courts will ensure that people suffering from mental harm will receive the same precise, accurate, and consistent liability determinations as people suffering from physical injuries.

*Candice E. Renka**

* B.A. University of Richmond, 2002; J.D. Candidate, Thomas Jefferson School of Law, May 2008. Words could never adequately express my appreciation for my mother's love and support, which enabled me to come to law school in the first place. I would like to express my gratitude to my editors for their constant hard work and motivating encouragement, especially Danwill Schwender, Tyler Ward, and Jennifer Suckow. Much thanks to Professor Eric Mitnick for his outstanding teaching and helpful guidance during this project. Thank you also to my friends who have supported me like family and provided laughs when I most needed them, especially Suzanne Nicholls and Michael Leonard.

