

OREGON CASE UPDATE

Oregon Expands Liability for Negligent Infliction of Emotional Distress

case in point...

From the desk of Jeff Eberhard: Since 1986, Oregon has followed the impact rule in claims for negligent infliction of emotional distress. This rule prohibited recovery in claims for emotional distress unless the plaintiff was physically injured. In this case, the Oregon Supreme Court was asked to reject this rule and adopt another rule that would allow the plaintiffs to proceed when there was no physical impact. Read on to see how the Court addressed this issue.

Claims Pointer: In this negligence action arising out of a claim for emotional distress after two brothers witnessed the death of their seven-year-old brother caused by a negligent driver, the Oregon Supreme Court held that the plaintiffs stated a claim upon which relief could be granted, despite not being physically harmed. In so holding, the Court rejected the “impact rule” and the “zone of danger” test, adopting in their place the “bystander rule.” Plaintiffs now must (a) witness the event causing injury or death to a third person as it happens, and (b) be a close family member of the injured or deceased third person to recover in a claim for negligent infliction of emotional distress. The case may also allow additional cases to proceed for negligent infliction of emotional distress in cases where no one is physically injured.

Philibert v. Kluser, 360 Or 698 (December 22, 2016)

Three brothers, ages seven, eight and twelve, were crossing a street in a crosswalk with the walk signal when a driver negligently drove his pickup truck through the crosswalk, striking and killing the youngest boy. The two older boys narrowly avoided injury, but they suffered serious emotional injuries as a result of witnessing their brother’s death.

Through a guardian ad litem, the two surviving brothers (“Plaintiffs”) sued the driver, alleging negligence and seeking to recover for their emotional injuries, including severe emotional distress, depression, post-traumatic stress disorder, aggression, and severe anxiety. The driver, Dennis Kluser (“Kluser”), moved to dismiss their complaint for failure to state a claim upon which relief can be granted, arguing that because Plaintiffs were bystanders who were not physically injured by him, they could not recover for emotional distress. The trial court granted the motion, applying the “impact rule” from a 1986 Oregon Court of Appeals case, and the Court of Appeals affirmed. The Oregon Supreme Court granted review.

The Court began its analysis by noting that Oregon law permits recovery for emotional distress when the plaintiff is physically injured, when the defendant acted intentionally, or when a defendant negligently causes foreseeable emotional distress and also infringes on some other legally protected interest. At issue in this case is the latter theory of recovery.

The Court also noted that unlike physical harms, emotional harms occur frequently, and it is foreseeable that a countless number of people suffer emotional distress as a result of a single negligent act. For example, a negligent airline that causes the death of a beloved celebrity can foresee that the celebrity’s fans will sustain genuine emotional harm, but a court could not possibly permit recovery for every fan. Thus, foreseeability alone is insufficient to serve as a limit on the scope of liability for emotional injuries. As the Court stated, without some additional limiting principle, “permitting recovery for emotional injuries would create indeterminate and potentially unlimited liability.”



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As stated above, Oregon common law allows recovery for foreseeable emotional damages when the defendant's conduct "infringed some legally protected interest" other than causing the claimed distress. A legally protected interest in this context is "an independent basis of liability separate from the general duty to avoid foreseeable risk of harm."

Oregon has allowed claims for negligent infliction of emotional distress in a number of contexts other than bodily injury when the harm was foreseeable and one of plaintiff's legally protected interests was infringed. For example, in one prior case cited by the Philibert Court, a plaintiff's claim for emotional distress was permitted when the plaintiff's name was signed without his consent on a telegram to the governor. *Hinish v. Meier & Frank Co.*, 166 Or 482 (1941). The plaintiff, an employee of the federal government, was prohibited by statute and US Civil Service Commission rules from engaging in political activities, and he alleged that the defendants jeopardized his job and pension by signing his name and sending the telegram. After reviewing decisions from other jurisdictions, the Court held that the plaintiff's complaint stated a cause of action for breach of the plaintiff's right of privacy because assuming the facts alleged to be true, the defendants appropriated the plaintiff's name, personality, and influence without his consent and against his will and then "injected them into a political controversy." They therefore violated the plaintiff's right to privacy, and the plaintiff was permitted to proceed on that theory. Notably, the Court declined to allow the plaintiff to recover damages on the theory that the defendants endangered his position or his pension because they could not assume he would have been penalized given he did not send the telegram.

In another case, the Supreme Court upheld a father's claim for emotional damages against a

lawyer who delivered a passport to the mother that resulted in the mother leaving the country with the couple's child. *McEvoy v. Helikson*, 277 Or 781 (1977). In doing so, the lawyer violated a court order to keep the passport until the father had custody of the child. The Court determined that when the judge issued that order, it was foreseeable that the mother might take the child with her back to Switzerland and that the primary purpose of the order was to protect plaintiff against the happening of that very danger.

In a third case, the Supreme Court determined that a plaintiff stated a claim for recovery of emotional distress damages when she alleged that police officers violated a statutory duty to arrest her ex-spouse, who later threatened her. *Nearing v. Weaver*, 295 Or 702 (1983). The plaintiff had a legally protected interest created by a statute designed to protect victims of domestic abuse.

And in a fourth case, the city of Burns, Oregon, mistakenly buried a husband's remains in the wrong plot and then disinterred the remains and moved them to the proper plot without seeking permission from or notifying the wife. *Hovis v. City of Burns*, 243 Or 607 (1966). The Supreme Court allowed a claim for emotional damages on the basis of infringement of the right of a surviving spouse to have the remains of a deceased spouse undisturbed.

With respect to this case, the Court noted that the plaintiffs here watched as their younger brother was crushed by a pickup truck, a violation of their legally protected interest in not witnessing such a shocking and tragic event. The Court concluded that the plaintiffs had alleged a violation of their legally protected common law interest to be free from the kind of emotional distress injury caused by defendant's negligence.

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The Court next considered three tests that courts across the country have used to evaluate whether to allow recovery for a claim for negligent infliction of emotional distress: the impact test, the zone of danger test, and the Restatement approach, also known as the bystander rule.

Impact Test

Under the impact test, a person can only recover for emotional distress if there is a direct physical injury to that person. The rule has significant benefits: it provides a bright line test for liability, it presents a clean question of proof (was there a physical injury), and it guarantees that the emotional distress is genuine. However, the test also has significant problems. As the Court noted, it sets the bar to recovery too high because there is no good reason to deny recovery simply because the physical contact was with another person rather than the plaintiff. For example, in this case, Plaintiffs witnessed the death of their brother, but applying the impact rule would deny them recovery because they escaped unharmed. As the Court pointed out, Plaintiffs' distress at witnessing their brother's death was likely not related to the fact that the truck narrowly missed them. For the Court, denying recovery would be "arbitrary" and would fail to protect their interest in not witnessing the negligently caused death of their brother.

Similarly, the impact rule sets the bar too low in other cases because the impact itself is often minor and plays no part in causing the emotional harm. Prior cases have allowed claims where the impact is a slight blow, a minor burn, dust in the eye, or even smoke inhalation. Noting that Oregon was one of only four states continuing to apply the impact rule, the Court rejected the rule because it bars claims for genuine serious emotional distress and fails to treat similar claims similarly.

Zone of Danger Test

Under the zone of danger test, a plaintiff may recover for serious emotional distress caused by witnessing a fatal injury to a third person only if the plaintiff was personally within the zone of danger of physical impact from the defendant's negligence.

The Court noted that California abandoned the zone of danger test in a 1968 case in which a child's sister, standing close by, and her mother, standing down the block, observed a negligent driver hit and kill the child. The zone of danger test would have allowed the sister to recover, but not the mother. The California Supreme Court abandoned the rule and allowed both witnesses to recover, explaining that rejecting the zone of danger rule logically followed rejecting the impact rule, because the only reason for the requirement that the plaintiff be in the zone of danger "lies in the fact that one within it will fear the danger of impact." The Oregon Supreme Court was persuaded by this reasoning and declined to adopt the zone of danger test, pointing out that in practice, the test results in unfairly denying recovery to plaintiffs located outside the zone of physical danger but who witness the physical injury to the third person just the same as if they had been in that zone.

Restatement Rule (Bystander Rule)

Finally, the Court examined the Restatement Rule, or bystander rule, which allows claims for negligent infliction of emotional distress provided that the plaintiff (a) witnesses the event as it happens, and (b), is a close family member of the person suffering the bodily injury. For the Court, this rule properly protects the legally protected interest not to witness a loved one's injury or death while also recognizing necessary limits on potential liability and providing some guidance to courts and juries. Accordingly, the Court adopted the rule.

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The Court also announced the elements of this newly adopted rule. First, the bystander must witness a sudden, serious physical injury to a third person negligently caused by the defendant. Second, the plaintiff must have suffered serious emotional distress. Third, the plaintiff must have perceived the events that caused the injury to the third person as they occurred. (The Court did not go into depth on whether, for example, merely hearing an accident would qualify as contemporaneous “perception” of the events, instead only stating that observing the scene of an accident after it has happened is insufficient.) Fourth, the physically injured person must be a close family member of the plaintiff. (Notably, the Court acknowledged that whether a person is a “close family member” may be a close question, and a live-in grandparent might qualify while a rarely seen cousin might not. Additionally, the Restatement section the Court pulled from acknowledges that people sometimes live in a nuclear family without formal legal family ties, commenting that courts should take into account changing practices and social norms when determining what constitutes a “close family relationship.” This issue will likely be the source of litigation in the future, and it may prevent motions for summary judgment in some cases.)

The Court acknowledged that the bystander recovery rule may give rise to false or inflated claims, but it opted to rely on juries to discern truth from self-serving fiction when plaintiffs testify about their emotional injuries, just as they do in cases involving physical injuries. For the Court, when the elements of the bystander test are met, a plaintiff’s claims of subjective emotional distress are more likely to be genuine.

Application

Returning to the facts of this case, the Court held that because Plaintiffs alleged that their brother was killed as a result of Kluser’s negligence, that they saw the collision and watched their brother die, and that, as a result, they have suffered severe emotional distress, they stated a claim for relief for bystander recovery under the newly adopted test. The Court of Appeals and the trial court were reversed, and the case was remanded to the trial court for further proceedings.

View full opinion at: <http://www.publications.ojd.state.or.us/docs/S063738.pdf>

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