



www.PavlackLawFirm.com

May 3

2012



by: Colin E. Flora
Associate Civil Litigation Attorney

Damages Pt. 4 – Damages for Negligently Inflicted Emotional Distress

In the long history of the law governing torts there has been, perhaps, no more contentious form of damages than those for emotional distress. The result of the long series of battles to expand emotional distress injuries has resulted in – as is so very often the case – the creation of a very complex and often confusing area of law. In the realm of confusing law on emotional injuries, Indiana is no exception. In this fourth installment in our series regarding damages the attorneys at Pavlack Law endeavor to bring some clarity to an otherwise befuddling area of law.

To understand how the law on this issue became so very complicated it is necessary to start at the beginning. Historically, American courts were loath to expand recovery into the realm of emotional injuries. The rationale for this proposition was that courts feared the difficulty of proving what claims for emotional trauma were in fact legitimate and what claims were exaggerations so as to increase a would-be plaintiff's claim for damages above those actually incurred. Throughout the 20th century courts began to trust in the developments in scientific research regarding emotional trauma. As a result, courts across the country began to carve out exceptions to the classic rule that barred recovery for

emotional distress altogether. This gave rise to what is now referred to as Negligent Infliction of Emotional Distress (NIED).

I. The Zone of Danger Rule and the Impact Rule

Along with the carve outs for allowing the primary victim to recover for emotional trauma, courts also began to recognize that individuals who were nearby the injury causing event might also suffer recognizable emotional trauma. The result of these carve outs and inclusions of bystanders was the creation of the Zone of Danger Rule and the Impact Rule. The Zone of Danger Rule permitted recovery for a person who was within the immediate proximity of the injury causing event. The purpose of this approach was to compensate a person who was either directly injured or but for the most fortuitous circumstance would have been directly injured by the negligence of another. The other rule, the Impact Rule, required a person seeking to recover for emotional harm to have actually been physically impacted by the injury causing event. Indiana is among the many states to have adopted the Impact Rule.

Under Indiana's version of the Impact Rule, to recover for emotional injuries a plaintiff must have proven that he or she: (1) suffered an impact (2) that caused physical injury to him or her and (3) that the plaintiff suffered emotional distress as a result. The rationale for creating this rule was the fear that if a person sought recovery for emotional damages without suffering a physical injury then the "mental anguish is speculative, subject to exaggeration, likely to lead to fictitious claims, and often so unforeseeable that there is no rational basis for awarding damages." However, as noted above, courts across the country slowly began to outgrow their fears of the reliability of proving emotional harm.

II. The Relative Bystander Test

The continued growth in reliance on medical evidence spawned a third approach to emotional distress claims in the 1968 California case *Dillon v. Legg*. The Supreme Court of California in *Dillon* created the approach that has come to be known as the Relative Bystander Test for recovery. In addition to the person who was the direct victim of the negligent act a person who was neither physically impacted nor even within imminent danger of the act could recover under certain circumstances. The Dillon factors were later modified by the Supreme Court of California in the 1989 decision *Thing v. La Chusa*. After *Thing* the Relative Bystander Test required a bystander seeking to recover for emotional distress to prove that he or she: (1) is closely related to the direct victim; (2) was present at the scene of the direct victim's injury and was aware of the injury; and (3) that as a result the plaintiff suffered severe emotional distress. The result of the creation of

the Relative Bystander Test was two fold. First, it dramatically expanded the pool of persons who could recover for their emotional injuries – though not as far as it ought to have expanded. Second, it firmly created an entirely separate category for bystanders seeking to recover for their emotional injuries.

Indiana was not as quick to adopt the Relative Bystander Test as other states. Instead, Indiana continued to apply the Impact Rule to all cases seeking recovery for emotional distress. As more and more courts and judges realized the unjust results that were caused by rigid application of the Impact Rule, courts began to perform feats of extreme mental gymnastics to satisfy the requirements of the Impact Rule. In the 1991 Supreme Court of Indiana decision *Shaumber v. Henderson*, the court removed the requirement that a person actually be physically injured, replacing it with the requirement that a person merely be physically impacted. This created what is referred to as the Modified Impact Rule.

The best example of the mental gymnastics exercised by a court trying to apply the Modified Impact Rule to modern sensibilities was the case *Conder v. Wood*. In *Conder*, the plaintiff brought an action to recover emotional damages suffered when she witnessed a coworker, who was walking beside her, being struck and killed by a passing truck. As the truck was running over her coworker, the plaintiff pounded on the side of the truck as it passed to catch the attention of the driver. The Supreme Court of Indiana found that the impact requirement was satisfied by the plaintiff's pounding on the truck and noted that an impact need not be initiated by the tortfeasor. While I firmly support the result of the case in favor of the plaintiff, the method that the Court took for that result is a travesty occasioned by the overdue delay in adopting the Relative Bystander Test. It is of worthy note that under the Relative Bystander Test as applied in Indiana today the plaintiff in *Conder* would not be able to recover as she was not "closely related" to the direct victim.

Finally, in 2000 – a year after *Conder* – the Relative Bystander Test was finally recognized under Indiana law. In the case *Groves v. Taylor* the Supreme Court adopted a slightly modified version of the Relative Bystander Test announced in *Thing*. The Court stated:

where the direct impact test is not met, a bystander may nevertheless establish “direct involvement” by proving that the plaintiff actually witnessed or came on the scene soon after the death or severe injury of a loved one with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling caused by the defendant's negligent or otherwise tortuous conduct.

Not only did this approach bring the Relative Bystander Test to Indiana but it actually expanded the test. It is often overlooked by practitioners and commentators that the *Groves* Test, as it is known, is actually more inclusive than the test in *Thing*. Under *Thing* the plaintiff must have been present and perceived the injury causing event. Under *Groves* the plaintiff only has to have arrived soon after the death or severe injury of a loved one. Additionally, the adoption of the *Groves* Test does not replace – or abrogate in lawyer speak – the Impact Rule. The *Groves* Test acts as a supplement to the Impact Rule and is designed to cover persons who are not otherwise included under the Impact Rule.

III. Is NIED an Independent Cause of Action?

While it would seem that with the creation of the *Groves* Test NIED law would finally be much more comprehensible, sadly this is still not the case. The next big issue in the development of NIED law in Indiana was whether a claim for NIED was itself an independent tort. In most cases whether NIED is a standalone cause of action is fairly irrelevant. However, there are several areas of law governed by statute which may bar the claim of the primary victim. If that is the case then if NIED is an independent cause of action a bystander can bring the claim on his or her own behalf even where the direct victim is otherwise barred from doing so. However, if NIED is not a standalone cause of action, then it is a parasitic claim which must be attached to a claim by the direct victim.

In the 2006 case *Doe v. Lafayette School Corp.*, the Court of Appeals unequivocally stated, “negligent infliction of emotional distress is not an independent tort.” Then, in the same year, the Court of Appeals spoke once more on the matter, stating, in *Sate Farm v. Jakupko*, “To the extent that this court, in *Doe*, misunderstood the discussion of this issue . . . we hereby reiterate that a negligent infliction of emotional distress claim is an independent tort.” The Court of Appeals reiterated the position that NIED is an independent cause of action in *Elliott v. Allstate Insurance Company*.

Despite the fact that both *Jakupko* and *Elliott* were granted transfer to the Supreme Court and both received an opinion affirming the Court of Appeals decision without any discussion about NIED as an independent tort, in December 2011 the Supreme Court decided that the Court of Appeals was dead wrong and that NIED is not an independent cause of action. In *Spangler v. Bechtel*, the Supreme Court stated:

The right to seek damages for emotional distress in actions for negligence often referred to as actions for negligent infliction of emotional distress, is carefully circumscribed under Indiana

jurisprudence. We have never permitted, nor do we today, an action seeking damages for emotional distress predicated upon a breach of an alleged duty not to inflict emotional injury on another. **Such independent, stand-alone actions for negligent infliction of emotional distress are not cognizable in Indiana.**

This decision is simply jaw dropping in light of the fact that the Supreme Court, if it truly had “never permitted” an NIED claim to be brought as an independent tort, made absolutely no mention that the Court of Appeals was in gross error when it stated in *Jakupko* and *Elliot* that NIED was a stand alone cause of action. The Court had ample opportunity to correct the “errors” of the Court of Appeals and did not do so. Moreover, it is difficult to find any other meaning to the phrase “plaintiff is entitled to maintain an action to recover for that emotional trauma” than that which the Court of Appeals applied to find an independent cause of action – the quoted language taken from the Supreme Court’s decision in *Shaumber*.

It is difficult to speculate as to what the Supreme Court would find if this matter were to come before it once more in the near future as the court will have replaced two justices by the time such a case could present itself. As the juxtaposition of *Jakupko* and *Doe* indicates, much can change within a single year with regard to interpreting NIED law.

IV. Can a Direct Victim Recover Under NIED?

In light of the entirety of Indiana case law developing NIED claims it is flabbergasting to me that this was ever a question that made its way to the Supreme Court of Indiana, but nevertheless it did. Although I disagree with the holding of the Court in *Spangler* with regards to whether NIED is an independent cause of action, it is impossible to take quarrel with the Court’s holding on this issue.

In *Spangler*, the trial court granted summary judgment for the defendant finding that plaintiff could not sustain her NIED claim because she was the direct victim. As the Court made clear in *Groves*, the Modified Impact Rule was not abrogated but rather supplemented. What this means is that the case law governing the Modified Impact Rule is still good law. The *Groves* Test is a wholly separate issue that only applies to bystanders. However, just because the focus of recent appellate cases dealing with NIED is in application of the *Groves* Test does not mean that the Modified Impact Rule is dead. It still very clearly applies to the direct victim as it always has. The *Spangler* court is entirely in agreement as it stated, “An action seeking emotional distress damages, if predicated not on the bystander rule but on the modified impact rule, does not require the negligent

infliction of injury on a person other than the plaintiff.”

I am at an utter loss for how the trial court held otherwise. Without access to the briefs in that case or the transcript of the hearing on summary judgment I decline to speculate as to the basis for the trial court’s conclusion.

V. Summary

To summarize, the current status of Indiana law: (1) finds that NIED is not an independent/standalone cause of action; (2) there are two different approaches to NIED under which a plaintiff might seek recovery – (a) the Modified Impact Rule and (b) the *Groves* Test; and (3) a direct victim may bring a claim for NIED under the Modified Impact Rule. The future of NIED claims is a very interesting area of law and an area in which this author is extremely well versed having recently published a research article on the subject.

If you desire a more thorough discussion of the state of NIED claims for bystanders throughout the country and to read a call for the development of an alternative approach consider reading this author’s article in the Rutgers Law Record – though it lacks discussion on *Spangler* as that decision was handed out only days after final edits were due. As always, if you find yourself injured it is important to find an attorney who understands the complexities of Indiana law, has experience defending the rights of injured persons, and who can zealously advocate for your rights. Remember, no matter how much monetary compensation you may receive for your injuries, it will never be enough to truly make you whole. That is why the most important thing you can do is avoid injury. Safety first, Pavlack Law second.

Join us again for the next post in the series on damages.

- Pt. 1 – Introduction to Damages and Loss of Consortium
- Pt. 2 – Duty to Mitigate Damages
- Pt. 3 – Diminished Value of Vehicle Due to Traffic Accident
- Pt. 5 – Assessing Damages When Injured Person is Partially at Fault
- Pt. 6 – Availability of Prejudgment Interest
- Pt. 7 – Indiana Crime Victim's Relief Act
- Pt. 8 – Ability to Recover by Piercing the Corporate Veil
- Pt. 9 – Damages for the Loss of Chance of Survival from Medical Malpractice
- Pt. 10 – Punitive Damages Under Indiana Law
- Pt. 11 – Wrongful Death
- Pt. 12 – Contract Damages

Sources

- *Dillon v. Legg*, 68 Cal.2d 728 (1968).
- *Thing v. LaChusa*, 48 Cal.3d 644, 771 P.2d 814 (1989).
- *Shaumber v. Henderson*, 579 N.E.2d 452 (Ind. 1991).
- *Conder v. Wood*, 716 N.E.2d 432, 434 (Ind. 1999).
- *Groves v. Taylor*, 729 N.E.2d 569 (Ind. 2000).
- *Doe v. Lafayette Sch. Corp.*, 846 N.E.2d 691 (Ind. Ct. App.2006).
- *State Farm Mut'l Auto. Ins. Co. v. Jakupko*, 856 N.E.2d 778 (Ind. Ct. App. 2006), *aff'd*, 881 N.E.2d 654 (Ind. 2008).
- *Elliott v. Allstate Ins. Co.*, 859 N.E.2d 696 (Ind. Ct. App. 2007), *aff'd*, 881 N.E.2d 662 (Ind. 2008).
- *Spangler v. Bechtel*, 958 N.E.2d 458 (Ind. 2011).
- For further reading consider: Colin E. Flora, *Special Relationship Bystander Test: A Rational Alternative to the Closely Related Requirement of Negligent Infliction of Emotional Distress for Bystanders*. 39 Rutgers L. Rec. 28 (2012).

***Disclaimer:** The author is licensed to practice in the state of Indiana. The information contained above is provided for informational purposes **only** and should not be construed as legal advice on any subject matter. Laws vary by state and region. Furthermore, the law is constantly changing. Thus, the information above may no longer be accurate at this time. No reader of this content, clients or otherwise, should act or refrain from acting on the basis of any content included herein without seeking the appropriate legal or other professional advice on the particular facts and circumstances at issue.