9 NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Alaska recognizes the tort of negligent infliction of emotional distress or NIED. However, a plaintiff may only recover for "severe" or "serious" emotional distress.[1] Serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case, including neuroses, psychoses, chronic depression, phobia, and shock. Serious mental distress generally does not include temporary fright, disappointment, or regret. The plaintiff's emotional distress need not be medically diagnosable or objectifiable. It is generally a question for the jury whether a plaintiff suffered severe or serious mental distress.

Alaska has rejected the traditional view that a plaintiff must suffer physical injury in order to recover damages for emotional distress.[2] To recover for damages for NIED, it must be reasonably foreseeable that the defendant's negligent conduct would result in emotional distress and the plaintiff must have suffered physical injury, or the defendant owed a preexisting duty to the plaintiff, or the plaintiff must be a "bystander." A resolution of the question of whether a plaintiff can assert a claim for NIED is essentially an inquiry into whether the defendant should reasonably foresee the injury to the plaintiff and thus owes the plaintiff a duty of care. The courts apply the concepts of foreseeability and duty to NIED claims, with a view toward a policy favoring reasonable limitations on liability.[3]

The first exception to the requirement of physical injury arises when the defendant owes the plaintiff a preexisting duty.[4] If such preexisting duty exists, then the potential emotional distress to the particular plaintiff is considered sufficiently foreseeable to permit recovery. A defendant must stand in either a fiduciary or contractual relationship with the plaintiff in order to create such a preexisting duty. The general duty of care owed to all other members of the public is not specific enough to meet this requirement.[5]

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[1] *Chizmar v. Mackie*, 896 P.2d 196 (Alaska 1995).

[2] *Id.*

[3] *Beck v. State, Dep't of Transp. and Pub. Facilities*, 837 P.2d 105 (Alaska 1992).

[4] *See Chizmar v. Mackie*, 896 P.2d 196 (Alaska 1995).

[5] *Kallstrom v. U.S.*, 43 P.3d 162 (Alaska 2002).

In evaluating whether the defendant owed the plaintiff a duty of care, the court generally utilizes the *D.S.W.* factors.[6] These considerations include (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered an injury, (3) the closeness of the connection between the defendant's conduct and the plaintiff's injury, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing further harm, (6) the extent of the burden to the defendant and consequences to the community of imposing a duty of care, and (7) the availability, cost and prevalence of insurance for the risk involved.[7] The foreseeability of harm is the most significant factor.

While a preexisting duty may arise from a contractual relationship, ordinary contracts do not give rise to such a duty. The only contracts that will are those that are "highly personal and laden with emotion" such as contracts to marry, to conduct a funeral, to sell a sealed casket, to conduct a cesarean birth, or to surgically rebuild a nose.

The second exception to the physical injury requirement involves those properly characterized as "bystanders" under the three-part test in *Dillon v. Legg*.[8] The test, which is used to determine whether the risk of harm to the plaintiff was reasonably foreseeable, requires that: (1) the plaintiff is located near the scene of the accident, (2) the shock results from a direct emotional impact from the sensory and contemporaneous observance of the accident, and (3) a close relationship exists between plaintiff and victim.[9]

Not surprisingly, Alaska courts have taken a liberal approach in applying the first two requirements. The court follows the general principle that one who is thrust, either voluntarily or involuntarily, into such dramatic events and who makes a sudden sensory observation of the traumatic injuries of a close relative in the immediate aftermath of the event which produced them is no less entitled to assert a claim for his or her emotional injuries than one who actually witnessed the event. By contrast, one who learns of the injury or death of a loved one, or who observes the pain and suffering or the injuries only after a considerable period of time has elapsed since the accident, suffers a harm which, while foreseeable, policy and reason dictate the law should not regard as compensable.[10] In one case, the court permitted a NIED claim by a father who

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[6] *See D.S.W. v. Fairbanks N. Star Borough Sch. Dist.*, 628 P.2d 554, 555 (Alaska 1981).

[7] *Hawks v. Dep't of Public Safety*, 908 P.2d 1013 (Alaska 1995).

[8] *Dillon v. Legg*, 441 P.2d 912, 920 (Cal. 1968).

[9] *Kallstrom v. U.S.*, 43 P.3d 162 (Alaska 2002).

[10] *Beck v. State, Dep't of Transp. and Public Facilities*, 837 P.2d 105 (Alaska 1992).

observed his severely injured daughter a few minutes after she had been hit by a drunk driver, even though the father did not contemporaneously observe the accident itself.[11] On the other hand, the court rejected an NIED claim by a father who had an opportunity to "steel himself" for the shock of seeing his injured child at the hospital in another city over 150 miles away.[12]

The court, however, has not taken a similarly liberal approach to the third requirement of a "close relationship." In Alaska, this close relationship has always involved a blood relationship between plaintiff and victim.[13]

Additionally, although it is a matter of policy interpretation that may vary with the language of the insurance policy at issue, Alaska courts have readily accepted NIED claims as separate and independent (non-derivative) claims for purposes of triggering a separate "per person" limit of liability and/or uninsured and underinsured coverage.[14] By contrast, and absent policy language requiring a different result, a claim for loss of consortium (including emotional distress) by one family member who was not injured in the same accident as another family member will not trigger a separate "per person" limit of liability and/or uninsured/underinsured coverage.[15]

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[11] *Tommy's Elbow Room, Inc. v. Kavorkian,* 727 P.2d 1038 (Alaska 1986).

[12] *Mattingly v. Sheldon Jackson College,* 743 P.2d 356 (Alaska 1987).

[13] *Kallstrom v. U.S.,* 43 P.3d 162 (Alaska 2002).

[14] *See Wold v. Progressive Preferred Ins. Co.,* 52 P.3d 155 (Alaska 2002); *State Farm Mut. Auto. Ins. Co. v. Lawrence,* 26 P.3d 1074 (Alaska 2001).

[15] *State Farm v. Houle*, 258 P.3d 833 (Alaska 2011).