

Negligent Infliction of Emotional Distress

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NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

The following memorandum of law is taken from an actual litigated matter where a “common law husband” sought general damages for the wrongful death of his “common law wife”. Please note that Indiana no longer recognizes common law unions. The “common law” tag is used simply for illustrative purposes. The names of the participants have been changed for this article.

Factual Background

On April 1, 2003, insured driver was involved in motor vehicle collision. The driver of the claimant vehicle died, presumably, as a result of the injuries she received in the collision. Per the accident report, Insured was driving on 600 N towards Taylorsville, IN at approximately 30 – 40 mph. Insured claims that she saw an oncoming vehicle approaching and then all of a sudden, they were struck. She indicated that she was not sure what happened.

The passenger / witness to the collision indicated that he was teaching his daughter Nicole to drive. She was asking whether she was doing well. He affirmed that she was doing fine. He reached down to the floor to pick up a soft drink, took his eyes from the road and the next thing the crash occurred.

Per the police investigation, a reconstruction was performed. The results of the reconstruction revealed the following opinions as to the cause of the accident.

The Insureds were visiting friends in New Hope, IN and were returning home. As Insured drove westbound she observed an eastbound vehicle, she asked her father how she was doing. He advised her she was doing fine and to stay away from the centerline.

Shortly thereafter her right side tires drove off the north side of the roadway into the grass, approximately one to one and a half feet from the edge of the roadway. As Insured steered back onto the roadway her vehicle crossed over the westbound lane of travel, going left of centerline and into the path of an eastbound GMC “Jimmie” driven by decedent. The left front of Insured’s vehicle collided with the left front of Decedent’s vehicle. Insured’s vehicle continued across the eastbound lane colliding with an earthen embankment on the south side of the roadway, coming to rest blocking the eastbound lane.

After impact, Decedent’s vehicle began skidding sideways and off the south side of CR 600 N coming to rest in a field. Insured was admitted for internal injuries. Decedent was pronounced dead in the emergency room.

It was also noted in the police investigation that decedent was not wearing a seatbelt at the time of the collision. Further, it was noted that the accident would probably have not been fatal had decedent been properly belted at the time of the collision.

Per plaintiff’s attorney, Claimant had been the life partner of decedent. Claimant was not involved in the accident but claims to have come upon the accident shortly after it occurred. Claimant claims to have tried to save and free Decedent from the wreckage but was not able to do so. Claimant claims to have stayed with Decedent until she was freed and taken to the hospital and pronounced dead. Claimant claims to be entitled to compensatory damages for his loss. In addition to general damages of emotional distress, Claimant claims to have undergone counseling sessions with Family Services, Columbus, IN.

Legal Analysis

Negligent Infliction of Emotional Distress

The claim proffered by Claimant seems to sound in negligent infliction of emotional distress.

Indiana has long followed the impact rule, under which damages for mental or emotional distress or for shock and fright are recoverable only if they arise from a contemporaneous physical injury which was the natural and

direct result, not the remote consequence, of the injury. In other words, Indiana requires that damages for emotional distress are recoverable only when accompanied by and resulting from a physical injury. The rationale behind such rule is that, absent physical injury, 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. *Cullison v Medley*, 570 NE2d 27 (Ind. 1991), *remanded on other grounds* 619 NE2d 937 (Ind.Ct.App. 1993), *rehearing denied and transfer denied* (1994).

Application of the impact rule means that fright to one person, occasioned by imminent danger and peril to another person, cannot be the basis of recovery of damages by the first person. Under the traditional rule, this was true even of a parent's fright when his or her child was placed in danger. *Cleveland C.C.&S.L.R. Co. v Stewart*, 24 Ind. App. 374, 56 NE 917 (1900).

In recent times the strict application of the impact rule has been lessened. In 1991, the Indiana Supreme Court modified the impact rule from its prior application. In so finding, the Court stated:

Three reasons are traditionally given in support of retaining the impact rule and denying recovery for mental distress unrelated to physical injuries: (1) fear that a flood of litigation will result if claims of this nature are allowed; (2) concern that fraudulent claims will be made (and rewarded); and (3) difficulties in proving a causal connection between the negligent conduct and the emotional distress.

Shuamber v Henderson, 579 NE2d 452, 455 (Ind. 1991).

The Court continued, in rejecting the strict adherence to the impact rule:

We are satisfied that these policy reasons are no longer valid concerns in the context of negligent infliction of emotional distress, and we perceive no reason under appropriate circumstances to refrain from extending recovery for emotional distress to instances where the distress is the result of a physical injury negligently inflicted upon another.

Id.

Finally the Court, initiating the change in the impact rule, opined:

When, as here, a plaintiff sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person, we hold that such a plaintiff is entitled to recover for that emotional trauma without regard to whether the emotional trauma arises out of or accompanies any physical injury to the plaintiff.

Id at 456.

The above language established the clear shift away from the need for physical injury. However, the Court indicated that direct impact was still required. However, this condition and measure of damages would continue to suffer erosion. As of the *Shuamber* decision, a plaintiff (including a bystander) was required to suffer a direct impact from the conduct.

The decisions would change and no longer require direct impact as to family members. In further opening the tort of negligent infliction of emotional distress, the Court found that family members did not have to satisfy the direct impact element. In *Groves v Taylor*, 729 NE2d 569 (Ind. 2000), the Indiana Supreme Court held that family members were excluded from the direct impact requirement. In so holding, the Court opined as follows, relying upon Wisconsin decisions:

Historically, the tort of negligent infliction of emotional distress has raised two concerns: (1) establishing the authenticity of the claim and (2) ensuring fairness of the financial burden placed upon a defendant whose conduct was negligent.

Id. at 572 citing *Bowen v Lumbermen's Mut. Cas. Co.*, 183 Wis.2d 627, 517 NW2d 432 (1994).

In relying upon the Wisconsin analysis, the Indiana Supreme Court developed a three part test further defining the recovery in negligent infliction of emotional distress claims. The Court held:

[1] First, a fatal injury or a physical injury that a reasonable person would view as serious can be expected to cause severe distress to a bystander. Less serious physical harm to a victim would not ordinarily result in severe emotional distress to a reasonable bystander of average sensitivity.

[2] Second, emotional distress may accompany the death or severe injury of persons such as friends, acquaintances, or passerby. But the emotional trauma that occurs when one witnesses 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 is unique in human experience and such harm to a plaintiff’s emotional tranquility is so serious and compelling as to warrant compensation.’ *Id.* (footnote omitted). Limiting recovery to those plaintiffs who have the specified relationship with the victim acknowledges the special quality of such relationships yet places a reasonable limit on the liability of the tortfeasor. *Id.*

[3] Third, “[w]itnessing either an incident causing death or serious injury or the gruesome aftermath of such an event minutes after it occurs is an extraordinary experience, distinct from the experience of learning of a ‘loved one’s death or severe injury by indirect means.’ *Id.* at 444-45.

[4] We therefore hold that 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 tortious conduct.

Id. at 572-73.

Accordingly, the current state of the law requires a plaintiff seeking damages for negligent infliction of emotional distress to either (1) pass the direct impact test or (2) establish that they came upon the scene immediately and the injured party was a family member analogous to a spouse, parent, child, grandparent, grandchild, or sibling. With regard to each of the familial categories, Claimant fails the test. Relative to Decedent, Claimant is not: a spouse, a parent, a child, a grandparent, a grandchild or a sibling. Accordingly, under strict review of the precedent, Claimant has no claim.

Analogous to a Spouse

Claimant may attempt to argue that his status as life partner (20 years) properly characterizes him as “analogous to a spouse”. This is an argument that could cause considerable difficulty in obtaining a proper interpretation under Indiana law.

Claimant’s claim sounds in common law marriage. Common law marriages have been deemed void in Indiana since the late 1950s. The fact that such unions are void by action of the legislature means courts are not free to ignore such public policy. The Indiana Court of Appeals recognized this limitation on court power as follows:

This is not to say, however, that if the Indiana legislature should speak to the question of unstructured domestic unions, Indiana courts could refuse to listen or that Indiana courts may ignore I.C. 34-1-6-1. Claims brought as a common law spouse under the current dissolution of marriage or intestate succession statutes would clearly not be actionable.

Glasgo v Glasgo, 410 NE2d 1325, 1331 (Ind. Ct. App. 1980) *reh den.*

The meaning of the term spouse is clear and unambiguous. It is not subject to interpretation. Blacks Law Dictionary defines spouse as one’s husband or wife. *Blacks Law Dict.*, 1402 (6th Ed. 1990). It also defines wife as a “woman united to a man by marriage; a woman who has a husband living and

undivorced.” *Id.*

The Indiana legislature has made it clear that its intent is to not lend spousal rights and benefits to those not legally married. *See, e.g., Williams v Williams*, 460 NE2d 1226, 1228 (Ind. Ct. App. 1984) (The legislature’s repeal of the statute validating common law marriages and simultaneous enactment of a statute prohibiting common law marriages is a clear expression of intent not to recognize marriages such the Williams’); *Barajas v State*, 627 NE2d 437, 439 (Ind. 1994) (refusing to extend the privilege not to testify against one’s spouse to those not legally husband and wife); I.C. 22-3-3-19(a) (The term wife as used in this section of the Worker’s Compensation Act shall exclude a common law wife unless such common law relationship was entered into before January 1, 1958).

As shown above, there are numerous areas where the legislature has spoken regarding limiting spousal rights and benefits to “legal spouses”. In those areas, the courts are not free to ignore the mandate. In this case Claimant is not a spouse. Based upon the clear and unambiguous meaning of spouse, there is nothing “analogous to a spouse”. Therefore the language of the decisions relative to recovery of damages for negligent infliction of emotional distress should be considered inapplicable here. The clear meaning of the law in Indiana is to apply the ability to recover to somewhat immediate family members.

The damages in this case arise from the death of Decedent. Wrongful death actions in Indiana are purely statutory. *Ed Wiersma Trucking v Pfaff*, 643 NE2d 909 (Ind. Ct. App. 1994), *adopted on transfer, Ed Wiersma Trucking v Pfaff*, 678 NE2d 110 (Ind. 1997). At common law, there was no tort liability for killing a person. *Id.* Because wrongful death actions are creatures of statute, they are strictly construed. Therefore, only those damages prescribed by the statute may be recovered. *Id.* In examining whether a fiancé could recover under the Wrongful Death Act, the Indiana Court of Appeals held as follows:

The wrongful death statute does not prescribe that damages may be recovered by a fiancé. Therefore Ward does not have a cause of action for the death of his fiancé under IC 34-1-1-2.

Ward acknowledges that IC 34-1-1-2 does not allow a cause of action to a fiancé, but he argues that “under the totality of the circumstances in this case”, he should be entitled to bring suit. The circumstances are that Ward and the decedent had lived together for two years, had received a marriage license, and were going to marry in six days.

The circumstances that Ward and his fiancé had lived together for two years is not legally significant. In Indiana, there can be no common law marriage unless it was entered into before 1958. IC 31-7-6-5 (1993), *recodified at* IC 31-11-8-5 (Supp. 1997). Even the law governing common law marriages holds that cohabitation does not equate to marriage. *Anderson v Anderson*, 235 Ind. 113, 131 NE2d 301, 306 (1956). As to the scheduled wedding, it serves only to emphasize the fact that they were not yet married. The statute and precedent are clear; a fiancé has no cause of action under IC 34-1-1-2.

Manczunski v Frye, 689 NE2d 473, 474 (Ind. Ct. App. 1997).

In this matter, Claimant was clearly barred from recovering damages for the wrongful death of Decedent. The same analysis should apply to the recovery of negligent infliction of emotional distress damages.

Finally, the only language we could locate substantially similar to “analogous to a spouse” was found in the Indiana criminal code.

IC 35-42-2-1.3(2) defines domestic battery and provides that the commission of such crime is a Class A Misdemeanor. In particular, the statute provides as follows:

A person who knowingly or intentionally touches another person who:

- (1) is or was the spouse of the other person;
- (2) is or was living *as if a spouse of the other person*; or
- (3) has a child in common with the other person;

in a rude, insolent or angry manner that results in bodily injury to the person described in subdivision (1), (2), or (3) commits domestic battery, a Class A Misdemeanor.

IC 35-42-2-1.3(2).

The Indiana Court of Appeals, in reviewing a criminal conviction for domestic battery found the statute unconstitutional. In *Vaughn v State*, 782 NE2d 417 (Ind. Ct. App. 2003), the Court found that “as if a spouse of the other person” was vague and capable of multiple interpretations. It should therefore be stricken and could not serve as the basis of criminal conviction. In particular, the court held:

Living as if a spouse of another person may be based on many things, depending upon the individual interpreting the facts. It is because different people may interpret those words so differently that the General Assembly must clarify what categories of individuals should receive the protection of the statute and conversely what persons should be subject to punishment for violation of the statute.

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Regardless of one’s view of whether these relationships would qualify as “living as if a spouse” of another, there can be little dispute that only living in the same home and having a sexual relationship does not equate to being a spouse.

Id. at 421-22.

The same rationale should apply in this case. The Indiana Supreme Court must clarify what it intends by the language “analogous to a spouse, parent, child, grandparent, grandchild, or sibling”. We believe that allowing Claimant to fit within the definition opens a watershed of litigation and opens a whole new set of potential plaintiffs; i.e., those friends who consider themselves “like a child to the decedent”, “like a parent to the decedent”, “like a brother or sister” to a close friend, fiancés, and common law marriage partners. To allow Claimant to recover in effect gives credence to common law marriages, where such unions are void under Indiana law and recognized in a not a single other instance under statutory or common law.

Accordingly, based upon the facts set forth above and the current state of the law, we believe that Claimant’s only valid claim may be negligent infliction of emotional distress under a direct impact theory.