

Client Alert

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Recovery for Negligent Infliction of Emotional Distress Under California Law Gains a Greater Clarity

By William D. Janicki

The recent decision in *Wilson v. Southern California Edison Co.*, __ Cal. App. 4th __, 2015 WL 522578, provides increased clarity into the California rule permitting claims for negligent infliction of emotional distress (NIED) by direct victims who do not suffer a physical injury. Direct victim cases are those in which the plaintiff's claim of emotional distress is not based upon witnessing an injury to someone else, but rather upon the violation of a duty owed directly to the plaintiff.¹ *Wilson* holds that an NIED claim will not survive unless the alleged breach of duty threatens an actual physical injury.

NIED claims in California have bewildered both the plaintiff and defense bars for decades. Determining the set of circumstances sufficient to permit recovery for serious emotional distress caused by the negligence of another when there is no physical injury has proved to be a difficult task.² While some states draw a bright-line rule requiring a physical injury as a predicate for an NIED claim, a rule intended to reduce the danger of false claims for pure emotional distress, this is not the rule in California.³

California has long permitted recovery for serious emotional distress without physical injury.⁴ The courts, however, recognize that a person's psychological reaction to an event may not be foreseeable and that pure psychological injuries are much more susceptible to being faked than physical injury.⁵ While California permits claims only in specialized circumstances, the case law does not provide a general rule for recovery. One California court described the uncertainty of injury and the danger of malingering in a pure emotional distress claim as follows:

One can always worry oneself sick, almost as a matter of will. The reality of psychological injury remains [] a subject of intense philosophical debate. There is always the suspicion that extending the tort duty gives plaintiffs an incentive to mangle or worry themselves into a state of depression. Suffice [it] to say for purposes of this case that certainty of injury is something that we do not have. Yes, the question of the reality of injury can go to a jury, but that is not the point. Psychological symptoms are much more susceptible to being faked than more palpable effects.⁶

¹ *Wooden v. Raveling*, 61 Cal. App. 4th 1035, 1038 (1998).

² See California Civil Jury Instruction 1620.

³ A different set of criteria applies to bystanders who witness physical injury to another.

⁴ *Molien v. Kaiser Foundation Hospitals*, 27 Cal. 3d 916, 923 (1980).

⁵ *Lawson v. Management Activities, Inc.*, 69 Cal. App. 4th 652, 657-58 (1999).

⁶ *Id.* at 658-59.

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The *Lawson* court quoted above recognized the lack of a general theory of recovery by stating, “[w]e will not attempt, in this opinion, to articulate any great general rules for emotional distress cases-the Supreme Court will have its hands full when, if ever, it attempts to articulate one grand unified theory in the area.”⁷

Without articulating a unified general rule, courts allow recovery for NIED only in certain specialized cases such as “[w]here the negligence is of a type which will cause highly unusual as well as predictable emotional distress” or “when the negligence arises in a situation involving breach of fiduciary or quasi-fiduciary duties.”⁸

In fact, the California Supreme Court has allowed NIED actions of “direct victims” without physical injury in only three specific types of specialized factual situations: (1) the negligent mishandling of corpses (*Christensen v. Superior Court*, 54 Cal. 3d 868, 879 (1991)); (2) the negligent misdiagnosis of a syphilis, resulting in severe emotional distress to spouse (*Molien v. Kaiser Foundation Hospitals*, 27 Cal. 3d 916, 923 (1980)); and (3) the negligent breach of a duty arising out of a preexisting relationship (*Burgess v. Superior Court*, 2 Cal. 4th 1064, 1076 (1992)).

Whether plaintiffs may bring NIED claims in California under factual circumstances where they fear for their own safety but suffer no physical injury has presented a difficult challenge for the courts. What’s more, recent medical diagnosis and research into psychological injuries such as post-traumatic stress disorder (PTSD) threaten to blur the distinction between purely psychological and physical injuries. The rationale that nervous shock equals physical injury destroys the traditional distinction between what the ordinary person would think of as emotional distress and palpable bodily injury.⁹

Wilson addresses, in part, the standards for pursuing a claim for NIED by a direct victim who has not suffered a physical injury. The plaintiff in *Wilson* brought a pure emotional distress claim against a utility company based on unsafe electrical wiring at her house. The plaintiff demonstrated at trial that Edison allowed uncontrolled stray electrical currents to enter her home for a period of years. The plaintiff was able to feel low levels of electricity when touching her shower fixtures, and Edison was aware of the stray voltage in the house but was unable to eliminate it. Following exposure to the electricity, plaintiff claimed that she experienced nausea and vomiting, physical weakness, muscle fatigue and spasms, and hand tremors.

At trial, plaintiff presented expert evidence that Edison violated standards in the electrical distribution industry by allowing low levels of electricity to be present at plaintiff’s home. However, plaintiff presented no evidence that her physical symptoms were caused by exposure to stray voltage. Edison’s expert testified that such exposure does not cause physical injuries and that the amount of electricity claimed is routinely used in a variety of medical procedures without injury.

The court in *Wilson* held that “because the only injury Wilson claimed in her loss was emotional distress, she was required to show that Edison’s breach threatened physical injury to her.” *Wilson*, 2015 WL 522578, at *19. Here, the court concluded that plaintiff’s NIED claim failed because she failed to establish any breach of a duty by Edison that threatened physical injury to her. *Id.* at *20. The court explained that plaintiff could not proceed with her NIED claim because even though “it might be argued that the stray voltage found at Wilson’s gas meter could

⁷ *Id.* Ad 652, 656.

⁸ *Branch v. Homefed Bank*, 6 Cal. App. 4th 793, 800 (1992).

⁹ *Waller v. Truck Ins. Exchange Inc.*, 11 Cal. 4th 1, 23 (1995).

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demonstrate a potential threat of physical injury to the extent it could cause an explosion, the evidence showed that Edison acted to eliminate that threat.” *Id.* at *19, n.30.

California courts will continue to be faced with a variety of factual circumstances where plaintiffs allege NIED but have not suffered physical injuries. Although there is no comprehensive rule as to when these claims may be permitted, the alleged breach of duty must threaten physical injury for the claim to survive.

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