OMG, That Could Have Been Me!
A New Federal Standard for Negligent Infliction of Emotional Distress Claims?

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The Ninth Circuit recently addressed the requirements for pleading a maritime cause of action for negligent infliction of emotional distress in *Stacy v. Rederiet Otto Danielsen, A.S.*, 609 F.3d 1033 (9th Cir. 2010). In so doing, the court arguably broadened the reach of this relatively recently recognized maritime cause of action.

I. Background: A Maritime Law Cause of Action for Negligent Infliction of Emotional Distress is Inadvertently Created by the Supreme Court

Historically, federal maritime law did not recognize a negligence claim for solely an emotional injury. Today, most federal courts recognize a general maritime cause of action for negligent infliction of emotional distress.[1] The genesis of this maritime cause of action is the Supreme Court's 1994 decision in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), a case arising under the Federal Employers' Liability Act (FELA), a federal statute that allows railroad employees to sue their employers for injury or death resulting from the employer's negligence.

At the time *Gottshall* was decided, most states recognized some form of negligent infliction of emotional distress claim. Similarly, most states had developed a test designed to balance the goals of compensating individuals for meritorious emotional claims and, simultaneously, limiting the field of potential plaintiffs so as to avoid a flood of unwarranted, and possibly frivolous, emotional injury claims. *Gottshall*, 512 U.S. at 545. To this end, three common law tests had emerged: the "relative bystander" test, the "physical impact" test, and the "zone of danger" test. *Id.* at 537 (1994)(citing *Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355 (1993)). The relative bystander test essentially limits recovery for emotional distress claims to those individuals suffering injury that results from observing a physical injury to a closely related third person, which was negligently caused. *Id.* at 548-49. The physical impact test requires an individual to have sustained some physical impact or injury as a result of the alleged negligent conduct in order to recover. *Id.* at 547. The zone of danger test allows for recovery only when an individual has suffered an emotional injury as a result of being negligently placed in harm's way. *Id.* at 547-48.

After a detailed review of the various tests adopted by state courts, and consideration of the fact that FELA has been liberally construed to facilitate the goal of creating a safe work environment for railroad workers, the Supreme Court adopted the "zone of danger" test. *Id.* at 557. The Supreme Court described the test as follows:

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[1] Negligent infliction of emotional distress is distinguished from pain and suffering in that it is an independent claim that is not the result of any physical injury. *Consolidated Rail Corp., v. Gottshall*, 512 U.S. 532, 544 (1994).

> Perhaps based on the realization that a near miss may be as frightening as a direct hit, the zone of danger test limits recovery for emotional injury to those plaintiffs who sustain physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct. That is, those within the zone of danger of physical impact can recover for fright, and those outside it cannot.

Id. at 548-49 (internal citations and quotations omitted).

Gottshall was decided on appeal from the Third Circuit and involved the claims of two separate Plaintiffs, James Gottshall and Alan Carlisle, who both sought recovery from Conrail for wholly emotional injury. Gottshall was admitted to a psychiatric institution after he witnessed a coworker die of a heart attack under allegedly hot and strenuous work conditions. Carlisle had a nervous breakdown as the result of allegedly long, erratic work hours and stressful work conditions. Interestingly, the Third Circuit did not apply any of the common law tests, but instead applied its own crafted "genuineness" test, which focused on a threshold for establishing the legitimacy of the alleged emotional injury and reverting to a traditional negligence analysis with a focus on forseeability. *Id.* at 550-51. In so doing, the Third Circuit concluded that both Gottshall and Carlisle passed the genuineness threshold, such that they were entitled to pursue their claims for negligent infliction of emotional distress. The Supreme Court rejected the Third Circuit's approach and remanded Gottshall's claims for application of the zone of danger test.[2] As for Carlisle, the Court held that he categorically did not meet zone of danger test. *Id.* at 558.

The *Gottshall* dissent disagreed with the adoption of the zone of danger test, concluding that it is too restrictive and preferring the approach taken by the Third Circuit, which would encompass the claims of both Gottshall and Carlisle. Further, the dissent opined that the risk of a flood of illegitimate litigation could be remedied by requiring "objective medical proof" to substantiate a negligent infliction of emotional distress claim, rather than limiting the category of potential claims. *Id.* at 571.

While *Gottshall* was not a maritime case, the Supreme Court's holding has resulted in most federal courts recognizing a cause of action for negligent infliction of emotional distress under the general maritime law. The adoption is a natural one in light of the fact that the Jones Act, a federal maritime statute that allows seamen to sue their vessel-owning employers for negligence, explicitly incorporates FELA's liability standard. Thus, it is common practice for federal courts to rely on FELA decisions as precedent when deciding Jones Act matters. Once a standard is incorporated into the application of the Jones Act, courts appear to be inclined to extend any applicable principles to the general maritime law, for the sake of uniformity.

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[2] On remand, the Third Circuit concluded that Gottshall was not in the zone of danger as he was not "subjected to the threat of physical impact," nor was he "placed in immediate risk of physical harm." *Gottshall v. Consolidated Rail Corp.*, 56 F.3d 530 (3d Cir. 1995).

One month after the Supreme Court issued its decision in *Gottshall*, the Ninth Circuit in *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994), a case involving emotional distress claims of cruise ship passengers, held that claims for emotional injury should likewise be recognized by the general maritime law. However, while the Ninth Circuit concluded that a federal maritime cause of action for negligent infliction of emotional distress now exists, the court declined to explicitly adopt *Gottshall*'s zone of danger test, but instead concluded that none of the common law tests would allow recovery in *Chan*, and thus, left open the question of what test would be applicable to these claims.[3]

A few years later, the Sixth Circuit in *Szymanski v. Columbia Transp. Co.*, 154 F.3d 591 (6th Cir. 1998), held that *Gottshall*'s zone of danger test applies to claims arising under both the Jones Act and under the doctrine of unseaworthiness,[4] which is governed by general maritime law. The basis for extending the test to claims for unseaworthiness found by the Sixth Circuit was that "[a] seaman's claim under either the Jones Act or the unseaworthiness doctrine is fundamentally a single cause of action, and remedies under one must be congruent with remedies under the other." *Szymanski*, 154 F.3d at 596. However, the Sixth Circuit subsequently held that the standard does not apply to maintenance and cure claims, which are akin to workers' compensation claims and do not require a showing of negligence. *West v. Midland Enters.*, 227 F.3d 613 (6th Cir. 2000).

II. The *Stacy* Decision

By the time the Ninth Circuit revisited the issue in *Stacy v. Rederiet Otto Danielsen, A.S.*, 609 F.3d 1033 (9th Cir. 2010), it was accepted without question that federal maritime law recognized a cause of action for negligent infliction of emotional distress and that the *Gottshall* zone of danger test was the applicable standard for allowing recovery. *Stacy*, 609 F.3d at 1035. The primary issue that was decided in *Stacy*, however, was whether the zone of danger test implicitly required a plaintiff, who did not suffer any physical impact, to have actually witnessed an accident causing injury to another. *Id.* at 1036. The Ninth Circuit found that it did not. *Id.* at 1037.

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[3] It is noted that the Ninth Circuit contradicts itself in this regard. With respect to two plaintiffs that were not present at the scene of the subject accident, the court found that none of the common law tests for negligent infliction of emotional distress would allow recovery. However, with respect to a plaintiff that was present at the scene of an accident where another individual died, the Ninth Circuit concluded that the zone of danger test was met and allowed the claim for emotional injury to go to the jury. *Chan*, 39 F.3d at 1410. Thus, arguably the court implicitly adopted the zone of danger test, despite its attempt to leave the question open.

[4] Note that in the context of an unseaworthiness claim, the cause of action would presumably only be available when the alleged unseaworthiness resulted from negligence, such as that of a crew member. To the extent that some unseaworthiness claims do not require a showing of negligence, the extension of a negligent infliction of emotional distress claim arising out of a vessel's unseaworthiness would arguably be inappropriate.

Stacy involved an incident wherein a large cargo ship plowed through a group of vessels fishing in dense fog, with "near zero" visibility, ultimately colliding with one of the fishing vessels, destroying the vessel and killing the captain. *Stacy*, 609 F. 3d at 1034. Plaintiff, Brian Stacy, was the owner and operator of another fishing vessel in the area. Stacy had seen the cargo ship on his radar heading straight for him and he signaled to the ship his location. The cargo ship apparently adjusted course and avoided Stacy's vessel, but passed at "close quarters," such that Stacy could hear the engine and machinery and feel the cargo vessel's wake. *Id.* The collision occurred thereafter and Stacy did not allege that he "saw, heard, felt, or otherwise perceived the collision." *Id.* at 1038. Stacy learned that a collision occurred and assisted in a search for persons in the water, which was called off before anyone was found. *Id.* Four days later, Stacy learned that the captain of the other fishing vessel had died as a result of the collision with the cargo ship. *Id.* Plaintiff filed suit against the owners and operators of the cargo ship alleging that the vessel's negligence put him in grave and imminent risk of death or great bodily harm resulting in emotional injury. *Id.* at 1034-35. The Ninth Circuit concluded that the allegation was sufficient to sustain a cause of action for negligent infliction of emotional distress under the *Gottshall* zone of danger test. *Id.* at 1037.

The majority opinion in *Stacy* is brief and concludes that nothing in *Gottshall* or *Chan* requires a "witness" element to the zone of danger test. Since Stacy claimed that he was in the zone of danger and suffered fright as a result of the negligence of the cargo ship, his cause of action was valid. *Id.* at 1035. The decision turned on the sufficiency of the complaint, rather than evaluation of whether the elements of the test were met under the facts of the case. Thus, there is little analysis in the majority opinion.

The dissent on the other hand offers a lengthy analysis. Although likewise focused on *Gottshall* and *Chan*, the dissent concludes that *Chan* mandates a witness element and the rationale in *Gottshall* supports the witness requirement for "stand-alone" negligent infliction of emotional distress claims, i.e. claims like Stacy's that do not result in physical impact. Contrary to the majority view, the dissent believed that the zone of danger test articulated in *Chan* could not be read as dicta despite the *Chan* Court's claim that it was not adopting the zone of danger test. This conclusion was based on the fact that the test was actually applied by the panel to the one plaintiff in *Chan* that was present at the accident scene. Thus, the Ninth Circuit had *de facto* adopted the test. Significant in this regard was the fact that, in *Chan*, a stand-alone zone of danger claim was defined to allow recovery "so long as the plaintiff (1) witnessed peril or harm to another and (2) is also threatened with physical harm as a consequence of the defendant's negligence." *Id.* at 1040 (citing *Chan*, 39 F.3d at 1409). The dissent viewed this iteration of the test as a mandate that a plaintiff witness harm to another to be in the zone of danger. *Id.* at 1040-41.

The dissent also emphasized language quoted in *Gottshall* stating that "those within the zone of danger of physical impact can recover for *fright*, and those out-side of it cannot" as supporting this reading. *Id.* at 1041 (emphasis added). Further, in rejecting the Third Circuit's foreseeablity test the Supreme Court focused on the fact that it may be foreseeable that individuals far removed from the scene of an accident would suffer emotional impact as a result, but that does not necessarily warrant the right to recover for same. The zone of danger test was

intended to limit the field of potential plaintiffs, not to broaden it. Thus, the dissent felt that a plaintiff must allege that some psychological impact, i.e. "shock" or "fright," occurred while actually in the zone of danger, not at some later time. *Id.* at 1044.

The majority dismisses the dissent in one long, somewhat rambling, and conclusory footnote. Interestingly, the majority faults the dissent for failure to distinguish between "direct and derivative emotional harm." *Id.* at 1035, n. 2. The meaning of this distinction is not explained, but the majority apparently views "direct" emotional harm as that resulting from a "near miss" to the plaintiff himself; whereas a "derivative" emotional harm would result from witnessing injury to another. The majority presumably views the zone of danger test as allowing recovery for "direct" emotional harm, whereas a relative bystander test, such as those applied in some states and rejected by the Supreme Court, would result from "derivative" harm, i.e. witnessing harm to another. Thus, the majority appears to be saying that a "derivative" test would have a witness element, while the "direct" zone of danger test does not. While this may be a fair distinction to make, the majority's rationale would arguably allow an individual to recover even if no accident or injury occurred so long as Plaintiff was placed in harm's way. Such a broad reading of the zone of danger test would seemingly conflict with the intent of the *Gottshall* Court to limit the field of potential plaintiffs, rather than to widen it.

As it stands, there is little doubt that the zone of danger test will apply to maritime claims for negligent infliction of emotional distress. As of this writing, no federal cases have cited the *Stacy* decision, nor have there been any notable maritime decisions on the issue of negligent infliction of emotional distress. The Supreme Court has also denied the petition for certiorari in the *Stacy* case. It will remain to be seen whether other federal courts will follow the lead of the Ninth Circuit in broadening the zone of danger test or whether federal judges will be persuaded by the issues raised in the *Stacy* dissent. Thus, at least for the time being, negligent infliction of emotional distress claims in the Ninth Circuit will not require a plaintiff to have witnessed injury to another, so long as the plaintiff was physically in the zone of danger.

III. Objective Physical Manifestation Requirement

A peripheral issue remains as to whether "stand alone" claims for negligent infliction of emotional distress also include an objective physical manifestation requirement. While this issue is not addressed in *Stacy* or the other cases cited above, for the sake of completeness, it warrants mentioning. It appears to be undisputed that negligent infliction of emotional distress claims resulting from "physical impact," rather than the "immediate risk of physical harm," do not have a physical manifestation requirement.[5] However, federal case law is murky as to whether physical manifestation is required where emotional injury results exclusively from exposure to harm.

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[5] See *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997), the seminal case addressing what constitutes "physical impact" in negligent infliction of emotional distress cases. *See also Tassinari v. Silva*, 480 F. Supp. 2d 1318 (S.D. Fla. 2007).

The Supreme Court touched on the physical manifestation requirement in *Norfolk & Western Ry. v. Ayers*, 538 U.S. 135 (2003), wherein it held that an individual can recover for negligent infliction of emotional distress for fear of developing cancer as a result of exposure to asbestos if it can be established that the emotional injury is genuine and serious. The Court referenced the physical manifestation requirement in passing, but only in the context of a pain and suffering attendant to a physical injury claim, in which case, the Court indicated that objective physical manifestation was not required. The Court did not, however, opine on the requirement in the context of a "stand alone" negligent infliction of emotional distress case. Notwithstanding, the Eleventh Circuit, reversing itself, viewed *Ayers* as binding precedent that precluded application of an objective physical manifestation requirement for purely emotional injuries. *Jones v. CSX Transp.*, 337 F.3d 1316 (11th Cir. 2002). No other circuit court appears to have decided the issue.

The trend at the district court level, however, now appears to include a physical manifestation requirement in negligent infliction of emotional distress claims where there is no physical impact. Interestingly, the Southern District of Florida cites *Ayers* for the opposite proposition as *Jones*, concluding that where there is no physical impact, physical manifestation of emotional distress is required. *Tassinari v. Silva*, 480 F. Supp. 2d 1318 (S.D. Fla. 2007); *see also Carrier v. Jardaan*, 746 F. Supp. 2d 1341 (S.D. Ga. 2010). The Southern District of New York has also held that stand alone negligent infliction of emotional distress claims require a showing of objective physical manifestation. *Stepski v. The M/V Norasia Alya*, 2010 Dist. LEXIS 16602 (Jan. 14, 2010). Thus, even where an individual may meet the "zone of danger" test, if the plaintiff did not suffer some physical impact, a showing of some objective physical manifestation of emotional distress may be required.

A Note About Piracy

A possible area for future litigation of negligent infliction of emotional distress claims could be in the context of piracy. Actual piratical hijackings or attacks have the potential to have a negative psychological impact on vessel crew members. As such, seafarers working on vessels in areas such as Somalia, where piracy is a known problem, may be able to make out a claim against the vessel owner under the proper circumstance for an emotional injury resulting from such an attack. While there have been no decisions on the issue yet, crew member suits against employers for piracy related injuries have been filed against U.S. vessel owners. It may only be a matter of time before the issue of negligent infliction of emotional distress will arise in the context of a piracy case. In this regard, it may be of note that the Seamen's Church Institute's Center for Seafarers' Rights has teamed up with the Disaster Psychiatry Outreach of Mount Sinai and the New York Psychoanalytic Society and Institute to initiate a comprehensive multi-year clinical study into the psychological impact of piracy on seafarers and their families. The stated goal of the study is to help vessel owners protect their crews and prepare for any trauma that may occur. The results, however, could also impact the legitimacy, or lack thereof, of future negligent infliction of emotional distress claims arising out of piracy situations. Thus, the results of the study may be something to keep in mind both from a prevention standpoint and with respect to dealing with tort claims that may arise in the future.

Information regarding the study is available online at seamenschurch.org.