1511 PERSONAL INJURIES: NEGLIGENT INFLICTION OF SEVERE EMOTIONAL DISTRESS (SEPARATE OR DIRECT CLAIM)

(Plaintiff) has alleged that (he) (she) sustained severe emotional distress as a result of the (accident) (incident) involved in this case [independent of (his) (her) claim of physical injuries] [in the absence of physical injuries.] Emotional distress is compensable with or without physical injuries if (defendant) was negligent with respect to the (accident) (incident) involved in the case, the (accident) (incident) caused the (plaintiff) emotional distress, and the emotional distress is severe. Therefore, there are three things that (plaintiff) must prove by the greater weight of the credible evidence to a reasonable certainty:

1. (defendant) was negligent with respect to the (accident) (incident) involved in the case;
2. the (accident) (incident) was a cause of (plaintiff)'s emotional distress; and
3. the emotional distress is severe.

First, as to negligence:

INSERT INSTRUCTION ON NEGLIGENCE (WIS JI-CIVIL 1005)

Second, as to emotional distress, "emotional distress" is sometimes referred to as mental suffering or mental anguish. [It is sometimes described as post-traumatic stress disorder.] It includes all highly unpleasant mental reactions such as fright, grief, anger and worry, and it may include physical manifestations of emotional distress such as nausea,

insomnia, and hysteria.

However, in order for emotional distress to be an independent or direct legal claim, the emotional distress must be severe. Complete emotional tranquility is seldom attainable in this world, and some degree of emotional distress is part of the price of living among other people. The law permits a claim for emotional distress separate from physical injuries or in the absence of physical injuries only where the emotional distress is so severe that no reasonable person could be expected to endure it.

Third, as to cause:

INSERT INSTRUCTION ON CAUSE (WIS JI-CIVIL 1500)

If you are satisfied from the evidence that (defendant) was negligent with respect to the (accident) (incident) involved in this case and the (accident) (incident) was a cause of emotional distress to (plaintiff), and the emotional distress was severe, you should award fair and reasonable compensation for the claim of severe emotional distress. If you are not satisfied, make no allowance for the claim of severe emotional distress and confine your award to fair and reasonable compensation for any other injuries to (plaintiff) that were caused by the (accident) (incident).

COMMENT

This instruction and comment were approved in 2005. The comment was updated in 2006 and 2018. This revision was approved by the Committee in September 2023; it updated case law citations in the comment.

Overview. This comment should be read together with the comment to Wis JI-Civil 1510, "Negligent Infliction of Emotional Distress (Bystander Claim)." Together, these comments provide assistance in understanding negligent infliction of emotional distress both historically and conceptually. As with Wis JI-Civil 1510, which follows the Bowen framework for a bystander claim, this instruction follows the Bowen framework for a separate or direct claim of negligent infliction of emotional distress. Bowen v. Lumbermens Mut. Casualty Co., 183 Wis.2d 627, 517 N.W.2d 432 (1994). See also Camp v. Anderson, 2006 WI App 170, 295 Wis.2d 714, 721 N.W.2d 146; Wosinski v. Advance Cast Stone Co., 2017 WI App 51, 377 Wis.2d 596, 901 N.W.2d 797.

The tort of negligent infliction of emotional distress was discussed at length in Bowen. The Bowen court recognized that "[m]yriad circumstances may give rise to claims for negligent infliction of emotional distress." Id. at 631. The court outlined the elements of the claim as: "(1) that the defendant's conduct fell below the applicable standard of care, (2) that the plaintiff suffered an injury, and (3) that the defendant's conduct was a cause-in-fact of the plaintiff's injury." Id. at 632. Borrowing from the tort of intentional infliction of emotional distress, Alsteen v. Gehl, 21 Wis.2d 349, 124 N.W.2d 312 (1963), the Bowen court indicated that "in a cause of action for negligent infliction of emotional distress the injury a plaintiff must prove is severe emotional distress; but the plaintiff need not prove physical manifestations of that distress." Id.

Therefore, the framework for a claim of negligent infliction of emotional distress follows the traditional rules applicable to negligence claims, i.e., "negligent conduct, causation and injury (here severe emotional distress)." Id. at 652. Nevertheless, the claim has proven and continues to prove troublesome to the courts. As stated in Bowen at 637-38:

> The tort of negligent infliction of emotional distress has troubled this court and other courts for many years. . . . Historically, this court and other courts have been reluctant to compensate plaintiffs for emotional suffering. While courts are willing to compensate emotional harm incident to physical injury in a traditional tort action, they have been loath to recognize the right to recover for emotional harm alone. The common law traditionally distrusted emotion. Emotional suffering was deemed genuine and compensable only if it was associated with a provable physical injury claim in an accepted tort cause of action.

One of the major reasons for the historical distrust of claims for emotional harm is the difficulty with authenticating such claims. The Bowen court considered this difficulty and concluded that the traditional framework of negligent conduct, cause, and injury coupled with public policy considerations would sufficiently protect against spurious or feigned claims. (see, Bowen at 655).

Development of the law. The Bowen court traced the development of the tort of negligent infliction of emotional distress. The court pointed out that the law has long permitted a claim for emotional suffering if it is a component of a claim for physical injury sustained in an accident. Emotional harm associated with physical injuries is defined in Wis JI-Civil 1767 as "worry, distress, embarrassment, and humiliation."

From 1935 until 1984, the Supreme Court struggled with the doctrinal rule that compensable emotional harm had to accompany physical injuries. The so-called "impact rule" was replaced by the "zone of danger" rule in Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935). The "zone of danger" rule was broadened to "fear for one's own safety" in Klassa v. Milwaukee Gas Light Co., 273 Wis. 176 77 N.W.2d 397 (1953). The requirement of physical injuries was modified to "physical manifestations of emotional distress" in Ver

Hagen v. Gibbons, 47 Wis.2d 220, 177 N.W.2d 83 (1970). When "physical manifestations of emotional distress" still proved problematic, the Court carved out exceptions to it on a case-by-case basis. (See, for example, La Fleur v. Mosher, 109 Wis.2d 112, 325 N.W.2d 314 (1982) and Garrett v. City of New Berlin, 122 Wis.2d 223, 362 N.W.2d 137 (1985)).

Observer or participant. In Garrett v. City of New Berlin, Connie Garrett, and her brother, Raymond, were among a group of teenagers watching an outdoor movie along a fence line at the edge of the theater owner's property. Connie was at the fence; her brother was about 15 feet away, lying on a blanket. With headlights off and using a spotlight, a police officer in his police vehicle swept the area to round up the group. In the process, he ran over Raymond. Connie witnessed the police vehicle run over her brother and saw the bloody aftermath of her brother's severe injuries. She brought suit for negligent infliction of emotional distress even though she sustained no physical injuries and never feared for her own safety.

The Supreme Court upheld her claim, but the court could not agree on the proper legal analysis. Three of the six-justice plurality sought to overrule Waube, and three other justices distinguished the facts of Waube from those in Garrett. The latter three "characterized the plaintiff in Waube as an observer who was not directly involved in the incident. They characterized Connie Garrett as a participant in the incident who was entitled to recover even though she had not feared for her own safety, had not suffered a physical symptom of her distress any more severe than insomnia, and had not been in the zone of danger." Bowen at 649.

The distinction between observer and participant was later approved by the Court of Appeals in Westcott v. Mikkelson, 148 Wis.2d 239, 434 N.W.2d 822 (Ct. App. 1988). In this medical malpractice action, Westcott, the mother of a stillborn baby, brought both a direct claim for negligent infliction of mental distress, alleging she sustained emotional harm as a result of the delivery of her stillborn baby, and a derivative claim for damages as a result of the baby's wrongful death. Both claims were allowed by the appellate court. The court found that the plaintiff-mother was not just an observer of her baby's stillbirth; she was a participant in the activity that resulted in the baby being stillborn. The court wrote that whether Westcott "is an observer or a participant, it is difficult to imagine a more clear-cut example of the latter than a mother giving birth to a child in distress." Id. at 242.

This distinction between being an observer and being a participant was also a basis for the Supreme Court's holding in Mullen v. Walczak, 2003 WI 75, 262 Wis.2d 78, 664 N.W.2d 76; and Pierce v. Physicians Insurance Fund of Wisconsin, Inc., 2005 WI 14, 278 Wis2d 82 and 692 N.W.2d 558.

In Mullen, Mullen and his wife were involved in an automobile accident. Mullen was seriously injured, and his wife was killed in the accident. Mullen brought three claims: first, a derivative claim for his wife's wrongful death; second, a claim for his physical injuries sustained in the accident; and third, a claim for the emotional distress he suffered in witnessing his wife's death at the scene. The parties stipulated to a resolution of Mullen's wrongful death claim and his personal injury claim. At issue was only whether Mullen could recover damages for the emotional distress he suffered solely as a result of witnessing his wife's death. The Supreme Court allowed the emotional distress claim. It noted that Mullen was not a bystander under the Bowen rubric because he was involved in the accident that led to his wife's death and, therefore, was a participant in that event.

In Pierce, the court dealt with "the narrow issue of whether a mother who suffers the stillbirth of her infant as a result of medical malpractice has a personal injury claim involving negligent infliction of emotional distress, which includes the distress arising from the injuries and stillbirth of her daughter, in

addition to her derivative claim for wrongful death of the infant." The court answered in the affirmative, holding that the mother may recover as a parent for the wrongful death of the infant and as a patient for her personal injuries, including the negligent infliction of emotional distress. "Pierce was not a witness but rather a participant as a patient." Id. at par. 27.

> "a patient who has suffered medical malpractice can bring a direct claim. The fact that the same patient may also have a derivative claim for wrongful death is unusual, and likely to arise in cases like this where the patient is also a victim/participant in the events at issue." Id. at par. 15.