

Product Liability & Toxic Torts

A Guide to the Elements of a Portee Claim

When the effects of negligence reach a loved one

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One of the most significant expansions of negligence liability in the past 40 years was the creation of the Portee claim, which provides recovery to those who witness the death or serious injury of a loved one as a result of the negligence of another, but who were not in the zone of danger themselves. This type of claim frequently accompanies a products-liability lawsuit. Below is a comprehensive survey of the evolution of New Jersey's Portee claim and the issues that arise in the application of the claim's four elements.

The Original Decision

In *Portee v. Jaffee*, 84 N.J. 88 (1980), the New Jersey Supreme Court recognized—for the first time—a cause of action for negligent infliction of emotional distress for bystanders who witness the wrongful death or serious injury of

another. In *Portee*, a mother sought to recover for mental and emotional distress caused by observing her son's injuries and eventual death while trapped in an elevator shaft. For more than four-and-a-half hours, the boy's mother observed her son sustain "multiple bone fractures and massive internal hemorrhaging." During the struggle, the plaintiff's mother "watched as her son moaned, cried out and flailed his arms" in agony, while "she was restrained from touching him." In the aftermath of the incident, the plaintiff "became severely depressed and seriously self-destructive," culminating in her attempted suicide. Thereafter, the plaintiff required "extensive counseling and psychotherapy to help overcome the mental and emotional problems caused by her son's death."

The plaintiff filed suit against the elevator company and owner of the building, seeking, in part, to recover for her emotional distress. The trial court summarily dismissed the plaintiff's emotional distress claim and the plaintiff appealed.

Upon directly certifying the case for review, the Supreme Court reversed the trial court's rejection of the plaintiff's theory of liability. In so doing, the court created a new cause of action for "negligent infliction of emotional injuries unaccompanied by the risk of physical harm." The court held that proof of the following four elements was required for a bystander to succeed on a claim for negligent infliction of emotional distress:

1. The death or serious injury of another caused by defendant's negligence;
2. A marital or intimate, familial relationship between plaintiff and the injured person;
3. Observation of the death or injury at the scene of the accident; and
4. Resulting severe emotional distress.

Throughout its decision, the court balanced the competing interests of "redress[ing] suffering wrongfully caused by others" and not "inflict[ing] undue harm by imposing an unreasonably excessive measure of liability." The court cautiously noted that it was "deviating from common law" and "imposing a new species of negligence liability" that was distinct from other theories of liability requiring a plaintiff to be in a "zone of risk[.]" The court tempered its deviation from common law by carefully crafting specific elements to ensure that juries did not "impose liability that is not commensurate with the culpability of defendant's conduct."

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Elements of the Claim

Portee claims have given rise to a significant body of law discussing, interpreting and applying the four elements of the claim. In certain instances, courts have refined these elements to adapt to the unique circumstances of plaintiffs.

• *Death or Serious Physical Injury*

Of the four elements, the requirement that a plaintiff prove “death or serious physical injury of another caused by the defendant’s negligence” has received the least attention from courts. Simply put, if a plaintiff cannot prove death or serious physical injury to any member of his immediate family, that plaintiff’s Portee claim will be dismissed. For example, in *Henderson v. Morristown Mem’l Hosp.*, 198 N.J. Super. 418 (App. Div. 1985), the court declined the right to recover to a plaintiff seeking compensatory and punitive damages based on the defendant hospital’s alleged negligence and malpractice in preparation of a child-study team report. Another example is *Brehm v. Pine Acres Nursing Home*, 190 N.J. Super. 103 (App. Div. 1983), where the court denied a wife’s emotional distress claim arising from a nursing home’s improper transfer and failure to readmit her husband. The remedy afforded by *Portee* is “clearly designed to provide a recovery for a plaintiff’s severe emotional distress resulting from the death or serious physical injury to a close relative.” *Henderson*, 198 N.J. Super. at 431.

• *Marital or Intimate, Familial Relationship*

Case law interpreting the second element of a Portee claim reveals a careful balance between acknowledging evolving family dynamics while not imposing an unreasonably excessive measure of liability. In adopting that relational standard, the court in *Portee* explained that “it is the presence of deep, intimate, familial ties between the plaintiff and the physically injured person that makes the harm to emotional tranquility so compelling.” Courts have since held that “intimate familial relationship” is “not necessarily limited to relationships of marriage or blood.” *Dunphy v. Gregor*, 136 N.J. 99, 104 (1994). In *Dunphy*, the court held

that an injured man’s live-in fiancée could recover for negligent infliction of emotional injury. The plaintiff, who witnessed her fiancé being struck by a car and propelled through the air, came to his aid and subdued him while he thrashed about on the ground. The following day, the plaintiff’s fiancé died. As a result of the incident, the plaintiff underwent psychiatric and psychological treatment for depression and anxiety and later sued to recover damages for her emotional injuries.

Although the plaintiff lacked a traditional “familial relationship” with the victim, the New Jersey Supreme Court permitted her claim to proceed. In so holding, the court reasoned that a plaintiff should not be foreclosed from making a claim based on emotional harm simply “because her relationship with the injured person does not carry a particular label.” The court announced several factors for consideration when faced with Portee claims of co-habiting parties: the duration of the relationship between the parties; the degree of mutual dependence; the extent of their common contribution to life together; the extent and quality of their shared experiences; whether the plaintiff and the accident victim were members of the same household; emotional reliance on each other; particulars of their day-to-day relationship; and the “manner in which they related to each other in attending to life’s mundane requirements.” In *Dunphy*, the couple co-habited for about two-and-a-half years, shared expenses through a joint checking account, jointly purchased an automobile, and had taken out life insurance policies naming each other as beneficiary. Accordingly, the court concluded that the relationship between the plaintiff and her fiancé constituted an “intimate familial relationship.” In so holding, the court emphasized that application of the relational standard should focus on “the nature and integrity of the relationship” as opposed to the existence of a “strict blood relationship.”

Notwithstanding that limited expansion of bystander liability, however, New Jersey courts have readily declined to extend the Portee claim to cases involving more attenuated or superficial relationships. In *Eyrich ex. Rel. Eyrich v. Dam*, 193 N.J. Super. 244 (App. Div.), cert. den., 97 N.J. 583 (1984), the Appellate Division held that a “close friend” and “neighbor”

did not meet the relational standard for a Portee claim. There, a husband and wife had brought the child of their close friend and neighbor to a circus. When the child passed by the leopard cage, the leopard broke out of its cage and attacked the child. Both the husband and wife asserted bystander liability claims, but the court refused to acknowledge either claim.

With respect to the husband, who was in the zone of danger and suffered a physical injury, the court concluded that his right to recover did not sound in bystander liability, but rather in “rescuer liability,” due to his participation in the incident. The wife, however, for whom the only cognizable theory of liability was bystander liability pursuant to *Portee*, was not permitted to proceed with her claim, because she was “not bound to the child by intimate family ties.” Citing its limited function as “an intermediate appellate court,” the court explained that “since the compensability of Mrs. Eyrich’s harm would involve a clear departure from the strict limitations of *Portee*, that extension of the Portee doctrine should come not from us but from the Supreme Court.”

In respect of pets, the New Jersey Supreme Court has held that a dog owner is not entitled to compensation for the emotional distress caused by watching its dog be attacked and killed. In *McDougall v. Lamm*, 211 N.J. 203, 226 (2012), the court stated that: “Lesser relationships do not suffice because they lack the requisite underpinnings that make foreseeable the severe emotional distress that the bystander suffered, or claims to have suffered, in response to the negligent act.”

• *Observation at the Scene*

Perhaps the most controversial element of a Portee claim is that requiring a plaintiff to have *observed* a victim’s death or serious injury “at the scene of the accident.” The Supreme Court in *Portee* “expressly held that observing the death or serious injury of another while it occurs is an essential element of a cause of action for negligent infliction of emotional distress.” This requirement of “direct sensory and contemporaneous observance[.]” the court explained, “reflect[s] a limitation of the liability rule to *traumatic distress occasioned by immediate perception*.” Although some lower courts have found

limited exceptions to that general rule in certain circumstances, immediate perception remains an essential element.

In *Mercado v. Transport of N.J.*, 176 N.J. Super. 234 (Law Div. 1980), a trial court held that a mother had sufficiently alleged observation of death or injury at the scene of an accident, despite the fact that she did not actually witness her son being hit by a bus. The plaintiff's complaint asserted that she learned of the accident minutes after it occurred when her daughter rushed into the home, and the plaintiff hurried outside and saw her son in street, severely injured and unconscious. The court explained that "[t]he requirement of 'direct ... sensory and contemporaneous observance' stated in the Portee opinion relates not to witnessing the moment of actual impact, but to witnessing the suffering of the victim."

More recently, a New Jersey trial court judge opted for an even broader interpretation of the "contemporaneous observation" element. *Ortiz v. John D. Pittinger Builder*, 382 N.J. Super. 552 (Law Div. 2004). There, the plaintiffs' emotional distress claims arose out of their daughter's/granddaughter's death following a fire at their home. The child's injuries took place after she was separated from the plaintiffs while they were trying to escape. During that time, the plaintiffs did not actually witness the child's injuries. Nevertheless, the Law Division—relying on out-of-state cases—held that "fire cases are unique[,] because the flames shield victims from the view of the plaintiffs and, as a result, concluded that the plaintiffs' claims were viable in light of the plaintiffs' "experiential perception" of the child's injuries and their "sensorial[] aware[ness]" of the fire. The *Ortiz* decision is a marked departure from the high standard carefully crafted by the Supreme Court in *Portee* and applied in decisions ever since.

Similarly, in *Mansour v. Leviton Manufacturing Co.*, 382 N.J. Super. 594 (App. Div. 2006), the court held that a father effectively "witnessed" his daughter's injuries when he heard her screams as she was being burned in an adjacent room and immediately rushed to her aid. The court reasoned that the "observation" required by *Portee* involves sensory perception, and that "[h]earing is a form of perception that constitutes an observation." Thus, because the father had alleged

"auditory observation" of the traumatic accident, the court did not need to:

determine whether seeing the immediate results of such an accident, without having perceived the moment of that accident (like coming upon an injured child lying in the street after being hit, without having actually seen or heard the collision), would itself be enough to meet the Portee requirement.

The court further explained that it was "inconceivable that a court would fail to recognize the claim of a blind parent who was in the room and heard the child's screams as she was being burned, simply because the parent could not see the accident."

The courts' holdings in *Ortiz* and *Mansour* have since been limited to their facts. See *Hinton v. Meyers*, 416 N.J. Super. 141 (App. Div. 2010); *Vargas v. Quinones*, 2007 WL 4462330 (App. Div. Dec. 21, 2007). In *Hinton*, the court held that the third requirement was not satisfied by a plaintiff's proof of knowledge or awareness of death or injury, in the absence of any contemporaneous sensory perception. According to the court, the plaintiff father's observation of "medical personnel's non-negligent resuscitative efforts upon his daughter at the hospital," after she had been struck by a car while in the care of her mother, was insufficient to state a claim for bystander liability. Significantly, the court distinguished the father's claim from that asserted in *Mercado*, because the father "did not see his daughter until well after the accident."

And, in *Vargas*, a father was not permitted to pursue his Portee claim where he observed his wife in an ambulance, bleeding, crying and holding her stomach, but did not personally observe the death of his unborn child at the scene of the accident. The Appellate Division held that Mr. Vargas was not 'sensorially aware' in any way of Mrs. Vargas's car accident and the resulting harm to the fetus, because he was at home when the accident occurred." *Hinton* and *Vargas* demonstrate that the mere presence at the aftermath of an accident where a plaintiff is able to witness the paramedics attend to a family member

does not satisfy the essential element of contemporaneous observation. See also *Vasilik v. Federbush*, 327 N.J. Super. 6 (App. Div. 1999), affirming dismissal of a Portee claim because the plaintiff father "did not witness the occurrence of the tragic event, but instead happened upon the scene some minutes later and sadly witnessed the unsuccessful resuscitation efforts" performed on his son.

• *Severe Emotional Distress Resulting from Observation*

Emotional distress damages are only compensable if the plaintiff's anguish is "sufficiently palpable, severe, or enduring." *Decker v. Princeton Packet*, 116 N.J. 418 (1989); *Maldonado v. Leeds*, 374 N.J. Super. 523 (App. Div. 2005); *Trisuzzi v. Tabatchnik*, 285 N.J. Super. 15 (App. Div. 1995). Although a plaintiff's emotional distress need not be accompanied by physical injury to recover under *Portee* (see *Abuzaid v. Mousard Gardens Assocs.*, 207 N.J. 67 (2011)), mere aggravation, embarrassment, an unspecified number of headaches, loss of sleep, and lack of interference with the everyday routine do not, as a matter of law, constitute severe emotional distress. *Buckley v. Trenton Savings Fund Society*, 111 N.J. 355 (1988). In determining if emotional distress damages are sufficiently severe, courts consider several factors, including whether the plaintiff has undergone psychiatric hospitalization and whether the plaintiff has encountered significant interference with his or her lifestyle or employment.

"Severe emotional distress means any type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Maldonado*, 374 N.J. Super. at 529. In *Taylor v. Metzger*, 152 N.J. 490 (1998), for example, the court held that post-traumatic stress qualifies as emotional distress for purposes of a Portee claim. That does not mean, however, that any diagnosis will suffice. See *Trisuzzi*, 285 N.J. Super. at 26-27. Nor does that mean that psychological treatment or counseling is required to satisfy this element. See *Ortiz*, 382 N.J. Super. at 566.

In *Trisuzzi*, the plaintiff witnessed the defendant's 85-pound German shepherd attack her husband for what "seemed [like] 'an eternity[.]'" The husband fought

back against the dog's attacks, but the dog repeatedly jumped on him and bit his hands, stomach, groin and legs. The husband eventually fended off the dog with a small stick. During the attack, the plaintiff claimed she was "frozen with fear" and "cried hysterically." In the aftermath, the plaintiff saw a psychologist for a brief period, had a phobia of unleashed dogs, never walked or bicycled alone, avoided the area of the attack and "carried a stick or mace with her at all times." The plaintiff's psychologist diagnosed her as suffering from a simple phobia of dogs running loose. Her symptoms included nightmares, anticipatory anxiety and feelings of guilt because she became paralyzed with fear at the time of the attack and was unable to protect her daughter. However, the psychologist opined that, had the plaintiff continued her recommended therapy, her phobia would have been resolved. In dismissing the plaintiff's claim, both the trial court and the Appellate Division concluded that, as a matter of law, the plaintiff's emotional distress damages were not severe enough to impose liability under *Portee*.

In keeping with a strict adherence to the "severe emotional distress" requirement, courts have stressed the importance of applying an objective standard when assessing a plaintiff's emotional distress in order to "ensure...that defendants are not held liable when hypersensitive plaintiffs suffer severe emotional trauma from conduct that would not seriously wound most people." *Taylor*, 152 N.J. at 516. That being said, individualized issues will not be ignored. "[I]n order to evaluate fairly whether plaintiff's emotional distress was idiosyncratic, the average person must be one similarly situated to the plaintiff." *Maldonado*, 374 N.J. Super. at 529. In *Maldonado*, the appellate court determined that the plaintiff's decision not to seek psychological treatment until several years after the accident did not preclude recovery under *Portee* where the plaintiff was uninsured, there was nothing in the record to indicate that the plaintiff knew of the availability of the free clinics, and the diagnosis of the plaintiff's treating physician supported her claim that she was suffering severe emotional distress in

the form of post-traumatic stress and panic disorders.

The element of "severe emotional distress" has eluded a straightforward, black-letter definition and instead requires a fact-sensitive case-by-case analysis, which can be guided by the foregoing examples. An additional source of guidance can be found in decisions addressing similar claims arising in the medical malpractice context. Courts in those cases have defined the requisite level of severity as the type that "destroy[s] the plaintiff's basic emotional security." *Fertile v. St. Michael's Med. Ctr.*, 334 N.J. Super. 43, 55 (App. Div. 2000) aff'd in part, rev'd in part, 169 N.J. 481 (2001).

There is a wealth of case law interpreting the elements of the *Portee* claim. Although courts have provided significant clarity on many issues, some discrete questions still remain. It is the authors' hope that this summary will provide a useful reference guide for practitioners and courts as they encounter *Portee* claims and seek to navigate the nuances of bystander liability in New Jersey. ■