



Negligence: Damages Must Be “Reasonably Foreseeable”

— by Jeffrey D. Eberhard

The situation is a familiar one - a claimant is involved in multiple motor vehicle accidents and alleges that a subsequent accident aggravated his or her original injuries. Under Oregon law, the negligent driver in the later accident will be liable for any aggravations caused by that accident. The more interesting question is when will the negligent driver in the first accident be held liable for aggravations caused by later accidents? The Oregon Court of Appeals recently addressed this question, holding that the original defendant is only liable for aggravations that were reasonably foreseeable at the time the original accident occurred.

In Wallach v. Allstate Ins. Co., Civ No. A124340, in the Court of Appeals for the State of Oregon (May 17, 2006), the plaintiff was involved in three separate motor vehicle accidents between October 1997 and October 1999. The first accident occurred when another vehicle swerved into plaintiff's lane (without making contact), forcing plaintiff into a guardrail. The identity of the "phantom vehicle" was never determined. Plaintiff allegedly aggravated his injuries in two subsequent accidents.

In October 1999, plaintiff filed suit alleging his insurer breached the PIP and UM provisions of his insurance contract after the October 1997 accident. He alleged chronic pain and sought additional damages for aggravation of his injuries in the later accidents. The trial court granted summary judgment in plaintiff's favor on defendant's liability under the policy, and a trial on damages followed. The trial jury returned a verdict awarding plaintiff \$50,000 in UM damages and \$25,000 in PIP damages. Defendant appealed.

On appeal, defendant argued the court had improperly instructed the jury regarding damages for subsequent "aggravation" of the injuries plaintiff suffered in the first accident. The trial court had rejected defendant's proposed instruction, and instead delivered the following jury instruction:

"The contract entered into by the plaintiff and the defendant sets forth that the

defendant will provide coverage for all the natural, direct and proximate consequences of the wrongful acts of the driver of the phantom vehicle. If you find that the plaintiff was injured by those acts in the accident of October 24th, 1997, and then had a subsequent accident in which the plaintiff suffered further injury which would not have occurred but for the original injury, the defendant may then be held liable for the enhancement or aggravation of the plaintiff's injuries caused by the subsequent accident."

The court of appeals held this instruction was both confusing and a misstatement of the law, noting that the instruction allowed the jury to determine defendant's liability for the aggravation injuries retrospectively - i.e. based on the jury's assessment of what probably actually happened. Under Oregon law, a jury must judge a defendant's liability prospectively - i.e. based on the jury's assessment of what a defendant should reasonably have foreseen to be the consequences of his or her unreasonable conduct. The court explained that a proper instruction would have instructed the jury that "defendant could be liable only for injuries that were the reasonably foreseeable consequences of the phantom vehicle driver's unreasonably risky conduct."

The court reversed and remanded for a new trial limited to the issue of damages. ❖

Claims Pointer: When assessing damages in a negligence case, a jury may only award those damages that were reasonably foreseeable as a result of the defendant's unreasonable conduct. The jury may not consider damages "retrospectively" - that is, based on the jury's assessment of what actually happened rather than what was foreseeable by the defendant.

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