

CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

ERNEST A. LONG

Alternative Dispute Resolution

❖ Resolution Arts Building ❖

2630 J Street, Sacramento, CA 95816

ph: (916) 442-6739 • fx: (916) 442-4107

elong@ernestalongadr.com • www.ernestalongadr.com

Mealy v B-Mobile, Inc. (5/24/11)

Loss of Consortium, Total or Partial; Negligent Infliction of Emotional Distress

Donald Mealy, born in 1925, and Adelaide Mealy, born in 1927, were married in 1951. Adelaide was stricken with polio in 1952, and suffered almost complete paralysis in both legs. Confined to a wheelchair, she was able to drive and work outside the home. She had five children and worked as a counselor for Catholic Social Services for 30 years until she retired in 1990 at age 63.

As mobility declined, Adelaide used a device known as a Hoyer lift to transfer her from the bed to a wheelchair beginning in 2000. She would rest on a sling suspended from an arm by two chains. She fell from the device in 2006, suffering a broken hip. She recuperated within one year. The Mealys replaced the Hoyer lift with a Guldman lift system that allowed Donald to transfer his wife in and out of bed and from the bedroom to the bathroom using the lift. She was able to do household chores such as mop and sweep the floor, clean house, cook and garden. She also participated in leisure activities away from home such as lunch with friends, visiting family, and going to parks and art galleries. Apart from being transferred in and out of bed she was very independent.

In August 2008, part of the sling gave way as Donald was transferring his wife. She suffered a hip fracture as a result of a fall, and spent extended time in the hospital and a rehabilitation center. Adelaide now requires assistance in almost every aspect of her daily living. She is unable to groom herself as before. She is able to sit in the wheelchair for only two hours, after which she requires bed rest to relieve the pain. She is incontinent, which she was not before the fall. She is

unable to do household chores or participate in leisure activities as she did before. Donald has become her fulltime caretaker.

Plaintiffs Donald and Adelaide sued for negligence, products liability and breach of warranty, along with Donald's claim for loss of consortium and negligent infliction of emotional distress. At trial, Donald testified affirmatively on cross examination that he was with his wife now more than before, that he loved her just as much, that his wife loved him more than before and that "this hasn't hurt your relationship with each other, has it?" Defendants moved for judgment after plaintiffs' case in chief on Donald's two claims, and the trial court granted the motion. Judgment was entered on the claims for Adelaide's injuries in the amount of \$555,127.99, with no relief granted to Donald. He appealed the judgment.

Before the Second District Court of Appeal, Division Three, Donald Mealy contended the trial court erroneously concluded loss of consortium must be complete rather than partial in order to justify an award of damages and that his overall satisfaction with the marital relationship negated any loss of consortium. He also argued the court wrongly concluded he must suffer a certain amount of emotional distress to justify an award of damages for negligent infliction of emotional distress, and thus, the evidence does not support the findings that he suffered no damages.

The standard of review of a judgment entered after the granting of a motion for judgment is the same as that of a judgment entered after a completed trial. The court's factual findings are reviewed under the substantial evidence standard and questions of law are independently reviewed. (*Allegretti & Co. v County of Imperial* (2006) 138 Cal.App.4th 1261)

Consortium refers to the "non-economic aspects of the marriage relation, including conjugal society, comfort, affection, and companionship." (*Boeken v Philip Morris USA, Inc.* (2010) 48 Cal 4th 788) Consortium also encompasses sexual relations, moral support and household services. (*Rodriguez v Bethlehem Steel Corp.* (1974) 12 Cal.3d 382) A person who suffers a loss of consortium as the result of a negligent or intentional injury to his or her spouse is entitled to

recover damages from the tortfeasor. The Second DCA referred to the Supreme Court's discussion in Rodriguez:

“An important aspect of consortium is thus the moral support each spouse gives the other through the triumph and despair of life. A severely disabled husband may well need all the emotional strength he has just to survive the shock of his injury, make the agonizing adjustment to his new and drastically restricted world, and preserve his mental health through the long years of frustration ahead. Accordingly, the spouse of such a man cannot expect him to share the same concern for her problems that she experienced before his accident. As several of the cases have put it, she is transformed from a happy wife into a lonely nurse. Yet she is entitled to enjoy the companionship and moral support that marriage provides no less than its sexual side, and in both cases no less than her husband. If she is deprived of either by reason of a negligent injury to her husband, the loss is hers alone.” (Id. at p. 405-406)

Here, the trial court determined that loss of consortium as defined in Rodriguez means, “a complete loss of consortium for a definite period of time or a non-determinable length of time and is not to be confused with the inevitable physical, mental, and emotional damage normally or usually suffered by one spouse when the other has been wrongfully injured.” The trial court quoted from Park v Standard Chem. Way Co. (1976) 60 Cal.App.3d 382, for the proposition that a loss of consortium must be “complete” rather than “partial.”

The Justices stated that this proposition is erroneous, possibly an unfortunate choice of words apparently intended to distinguish loss of consortium from more general or less serious emotional distress resulting from a spouse's injury. (See, Carlson v Wald (1984) 151 Cal.App.3d 598) The California Supreme Court recognized the right to recover damages for the loss or impairment of the plaintiff's rights of consortium and there is no basis to conclude that a loss of consortium must be so extensive as to be considered complete in order to be compensable. Instead, a partial loss, or diminution, of consortium is compensable. (Carlson, at p. 602)

The trial court in attempting to reconcile language from Park with the statement in Rodriguez stated that a loss of consortium is compensable only if the overall

relationship is harmed and that the relationship needed to be “completely destroyed.” The trial court found the evidence failed to show any detrimental effect on the overall spousal relationship. The Second DCA concluded this narrow focus on particular testimony by Donald Mealy improperly disregarded other evidence and obscured what is readily apparent from the record. Adelaide Mealy suffered a debilitating injury that impaired her mobility and independence, to the point that she required 24 hour care, most of which is provided by her husband. A woman in her condition necessarily cannot provide the same conjugal society, comfort and moral support that she once could.

The Justices continued: “Donald Mealy’s testimony that he and his wife love each other as much as before and the changes in their lives as a result of this unfortunate event have not harmed their relationship is typical of a loving and faithful husband. Those supportive comments do not negate the tangible impact of his wife’s injury on Donald Mealy and the inevitable loss of conjugal society, comfort, affection, moral support and other noneconomic elements of the marital relationship resulting from his becoming virtually a full-time caregiver for his wife. We conclude the evidence compels the conclusion that Donald Mealy suffered a compensable loss of consortium and that the trial court’s finding to the contrary is not supported by substantial evidence. Accordingly, Donald Mealy is entitled to a new trial limited to determining the amount of damages for loss of consortium.”

Donald Mealy’s second contention is that the trial court misapplied the law to the undisputed evidence he suffered shock, anxiety, and fear contemporaneous with observing the product failure and Adelaide’s resulting injuries. A defendant has a duty to avoid causing emotional distress to a limited class of persons who observe conduct that causes harm to others. (*Burgess v Superior Court* (1992) 2 Cal.4th 1064) This is known as the bystander theory of recovery. A plaintiff may recover damages for emotional distress caused by observing an injury negligently inflicted on another person only if the plaintiff: (1) is closely related to the injury victim, (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness. (*Thing v LaChusa* (1989) 48 Cal.3d 644)

The third element requires “serious emotional distress--a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances. (*Thing*, at p. 668) Here, the trial court discussed the law and concluded there was no evidence that Donald Mealy had suffered any emotional distress as a result of witnessing the incident, as distinguished from the after effects of the injury and his wife’s recovery. The court noted that no testimony was placed in evidence as to the existence of damage from witnessing the event. No evidence was offered as to an emotional response to witnessing the event, such as nightmares, nor any kind of health care being required as a result of seeing his wife injured.

The Justices concluded there was no indication the trial court misconstrued the law or committed any legal error. The fact that emotional distress could result from observing a spouse’s injury in these circumstances does not necessarily mean that emotional distress was proved in this case. Donald Mealy did not testify to any severe emotional reaction to witnessing his wife’s fall. Thus, the evidence supported the trial court’s finding that he suffered no compensable emotional distress.

The judgment is affirmed as to the denial of relief on the count for negligent infliction of emotional distress and reversed as to the denial of relief on the count for loss of consortium, with directions to conduct a new trial limited to determining the amount of damages for loss of consortium, liability having been established. Each party must bear its own costs on appeal.