Lowe v. Philip Morris, USA, 344 Ore. 403

Supreme Court of Oregon (2007)

Facts

Plaintiff, Lowe, brought a negligence case against the defendant cigarette manufacturer, Philip Morris. In the typical torts case a plaintiff must prove (1) duty (2) causation (3) breach and, (4) damages. The focus in this case is the 4th element of negligence – damages. Plaintiff Lowe smoked a pack of cigarettes a day for five years. The damages she claimed to suffer were: (A) a significantly increased risk of lung cancer and (B) financial harm because she will have to undergo periodic monitoring in the future.

Issue

In a case like this where the plaintiff is arguing a risk of future harm, not current harm, is that enough to create a claim of negligence?

Arguments

Torts claim usually result from incidents where an injury has already occurred, not incidents where an injury *might* occur in the future. Plaintiff has pointed out that the Court has allowed others to recover in incidents where the injury had not yet manifested. For example, a patient injected with HIV infected blood was able to recover without showing they had developed AIDS, and individuals showing symptoms of asbestos-related illness were able to recover without having to wait for a full-blown cancer to develop. The defendant in this case argued that in this case, the threat of future harm was too speculative and too far away to constitute damages in a negligence claim. As the defendant pointed out, proof of damages is essential, and here the plaintiff is unable to prove that they have actually suffered any harm. Rather, they are arguing that they might suffer harm in the future.

Holding

The Oregon Supreme Court dismissed the plaintiff's claim, holding that they were unable to show damages at this time. The Court noted, "Oregon law has long recognized that the fact that a defendant's negligence poses a threat of future physical harm is not sufficient, standing alone, to

constitute an actionable injury." While the Court did acknowledge that there were a few cases where the threat of future harm was enough to constitute damages, they did not feel the risk here was sufficient enough to satisfy the elements of negligence. The Court also noted that cost of medical monitoring was not the type of harm that could stand alone as damages in a negligence case.

Review Plaintiff's Negligence Claim

1) Plaintiff smoked a pack of cigarettes a day for five years.
2) Plaintiff alleged that she had an increased risk of developing lung cancer and that she had increased medical costs because she had to be monitored so closely.
3) Plaintiff argued her negligence case as follows

    a. **Duty**: Defendant Philip Morris had a duty to act as a reasonable manufacturer of a consumable product.

    b. **Breach**: Defendant breached this duty by manufacturing and selling a product (cigarettes) they knew, or should have known, contained toxic and hazardous substances likely to cause cancer.

    c. **Causation**: Defendant has caused my damages by producing and selling cigarettes.

    d. **Damages:** I, plaintiff, have suffered an increased risk of lung cancer and must also pay more medical fees because I have to be monitored for lung cancer periodically.

Discussion / Essay Questions – Problems with "increased risk"

The goal of a court in a negligence case is to restore the injured plaintiff to the position they were in before the injury occurred. In this case, the plaintiff is arguing that she has an increased risk of lung cancer and will have pay more medical fees in the future.

1. Do you think the plaintiff has suffered damages that the Court can or should remedy?
2. How do you remedy an increased risk of getting a disease? If it just an increased risk, it is not certain you are to get the disease. What if a court made a defendant give a plaintiff money because they had an increased risk of getting cancer, but then the plaintiff never got cancer?

3. Do you think this conundrum is part of the reason that the Oregon Supreme Court felt the risk of harm in the future is not enough to make a defendant liable before any harm has occurred has actually occurred?
4. Do you ever think an increased risk of a disease can be a damage that a court would be willing to make a defendant liable for?

Another Negligence Topic – Comparative Negligence and Assumption of Risk

What if the plaintiff is partially responsible for the injury? If a defendant is not the only person who was negligent, the defendant can argue this point in court as an affirmative defense to negligence charge. If they can show someone else also caused the injury it may reduce or eliminate their liability to the plaintiff.

Comparative Negligence: If a plaintiff's own negligence contributes to the harm they suffer then they can only collect damages for the portion of the harm that the defendant caused instead of the whole amount. To claim comparative negligence, a defendant will have to prove the four elements of negligence just like a plaintiff would have to.

Example: Mark and Kenzie are driving to the movies. Mark runs a red light and a car hits them. Kenzie was not wearing her seat belt and is severely injured.

If Kenzie sues, does Mark have any defense?

Since there are seatbelt laws Mark will likely be able to prove that that Kenzie was negligent in not wearing a seat belt. It will then likely be up to a jury to decide how much they think Kenzie's negligence contributed to her injury – 10%, 30%, 50%, etc. Sometimes more than 50% means a plaintiff cannot collect at all.

Assumption of Risk: If a plaintiff chooses to partake in a dangerous activity, they are said to be "assuming the risk" of that dangerous activity. This means, if a person is injured in a way related to the inherent danger of the situation they can claim damages.

Example: Joey decides to take up boxing on the weekends. While at the local boxing ring Joey gets punched several times by Bob and is knocked out cold. Joey suffers a concussion and a broken nose.

Joey sues Bob, do you think he will win?

Not likely! Joey assumed the risk of being injured when he decided to box Bob.

What about this: While Joey is boxing Sandra, Sandra pulls out a knife and stabs Joey in the leg. Joey sues Sandra, but Sandra says Joey assumed the risk – do you agree with Sandra? NO!! A person only assumes the natural risks of a situation, with a boxing that means getting punched in the ring, maybe tripped, but certainly not stabbed in the leg with the knife!

Discussion / Essay Question

It is widely known that smoking cigarettes is not a healthy habit. Do you think that Philip Morris, the defendant cigarette manufacturer, should be able to argue that the plaintiff, Lowe, was either comparatively negligent, or assumed the risk of smoking cigarettes?