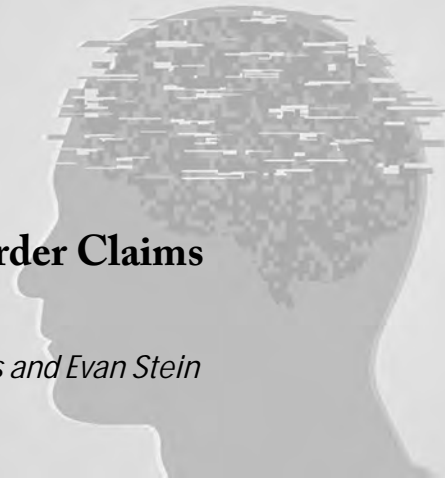


Personal Injury:

Navigating Post-Traumatic Stress Disorder Claims in Nebraska Injury Cases

by Rachel Collins and Evan Stein



What is Post Traumatic Stress Disorder?

The term post-traumatic stress disorder, or PTSD, entered the psychiatric lexicon in 1980, and the new focus of psychiatry on this age-old condition would create a dramatic shift in the legal landscape.¹ As awareness to this disorder increased, the 21st century saw new developments with respect to documenting both the causes and effects of PTSD, particularly in light of the U.S. wars in Afghanistan and Iraq.

While sometimes used in an overly broad or inappropriately casual way to describe post-incident/event mental impact, PTSD actually has specific criteria that must be met before

an official diagnosis is appropriate. In 2013, the American Psychiatric Association (APA) published its Diagnostic and Statistic Manual of Mental Disorders, Fifth Edition (DSM-5), which outlined the two key criteria for PTSD diagnoses:

Criterion A (1 required): The person was exposed to: death, threatened death, actual or threatened serious injury, or actual or threatened sexual violence, in the following way(s):

- Direct exposure
- Witnessing the trauma
- Learning that the trauma happened to a close relative or close friend
- Indirect exposure to aversive details of the trauma, usually in the course of professional duties (e.g., first responders, medics)

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Criterion B (1 required): The traumatic event is persistently re-experienced, in the following way(s):

- Unwanted upsetting memories
- Nightmares
- Flashbacks
- Emotional distress after exposure to traumatic reminders
- Physical reactivity after exposure to traumatic reminders²

The evolution of the neurological and psychiatric understanding of PTSD has been reflected in Nebraska's tort law in terms of relatedness and compensability in both workers' compensation and negligence claims. However, the scope and breadth of the application of PTSD in these cases is continuously evolving.

PTSD can factor into a personal injury scenario in many ways. For example, the event causing the personal injury could satisfy Criterion A for an individual who has never experienced PTSD previously, resulting in a wholly new diagnosis for that person. Alternatively, an individual who has already been diagnosed with PTSD prior to the personal injury event may be more profoundly impacted by the effect of a subsequent stressor, given their pre-injury condition. We see PTSD sometimes implicated in car accidents, traumatic injuries, near-death experiences, and also fatality cases both by the victims themselves as well as among families and caretakers. However, PTSD is not limited to the most severe accidents or injuries. Whether or not PTSD can be a potential avenue for additional recovery in a personal injury case is highly fact-specific, with a lack of finite guidance in the Nebraska caselaw, given the complex and very individualized nature of PTSD from person to person.

Because of the paucity of personal injury cases that specifically address this matter, it can be helpful to examine how the Nebraska Workers' Compensation Court has addressed PTSD before exploring PTSD in personal injury cases.

Workers' Compensation and PTSD

Under Nebraska law,

mental injuries and mental illness arising out of and in the course of employment unaccompanied by physical injury are not considered compensable if they result from any event or series of events which are incidental to normal employer and employee relations, including, but not limited to, personnel actions by the employer such as disciplinary actions, work evaluations, transfers, promotions, demotions, salary reviews, or terminations.³

Thus, mental injuries triggered by normal work-related events, and without an injury, are not a basis for recovery.

However, exceptions can be made. For example, first responders can be compensated for mental injuries unaccompanied by physical injury under certain circumstances.⁴ Additionally, proposed changes under LB5 would allow those employees who have experienced workplace violence—including mass shootings—to receive compensation.⁵ Thus, the landscape for PTSD as an avenue of recovery continues to evolve.

For those cases that do involve an injury, it is important to note that psychological distress is only compensable if it is the culmination of a "natural and continuous sequence" arising from the injury in particular; whereas if the mental condition was caused by the stress of the litigation or compensation process, it is not compensable.⁶ Thus, it is imperative that the injury event be the trigger for the PTSD/psychological distress versus the legal aftermath, if it is to be an avenue of relief.

There does not need to be a single finite event to trigger PTSD. To the contrary, mental injury can be compensable if it is the result of successive and cumulative events.⁷ Significantly, PTSD has also been found to be compensable even if it pre-existed a work-related injury but was aggravated by it.⁸ With the rise of the availability and acceptability of mental health care over the past two decades, the diagnoses of PTSD and other mental health conditions have escalated. A pre-existing diagnosis is not a barrier to additional recovery in a workers' compensation case or a personal injury case; however, it will be important to distinguish how the condition was aggravated or escalated by the injury-causing event.

PTSD can also be associated with other diagnoses or ancillary conditions including depression, anxiety, and substance abuse. Looking to the Workers' Compensation Court provides some persuasive authority for how other conditions that result from PTSD may also be compensable. For example, in *Kim v. Gen-XClothing, Inc.*,⁹ the Nebraska Supreme Court addressed whether the Workers' Compensation Court correctly ordered an employer to pay for chemical dependency treatment that an employee underwent after being shot at work. The treating physician testified that the employee's prior drug use was recreational, that he was not dependent before the shooting and subsequent PTSD, and that the inpatient treatment was likely necessary because the shooting.¹⁰ The employer's expert opined that the employee was a lifelong drug user and that his current use and inpatient treatment was unrelated to his PTSD diagnosis.¹¹ The Court afforded greater weight to the treating physician, linking the chemical dependency to the PTSD.¹² Certainly this is a more extreme example—with a particularly traumatic intentional act causing the initial harm—but the analysis has potential applicability to personal injury cases with ancillary mental health diagnoses stemming from the injury-producing event.

Workers' compensation claims, like personal injury claims, can also involve the consideration of permanent disability. In the workers' compensation context, when the injury is sus-

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tained to an area not involving the trunk of the body (meaning the head, neck, back, organs, etc.), it is classified as a “scheduled member” injury. Thus, a scheduled member injury will typically involve injuries to the upper or lower extremities. Two cases discussed below address how a scheduled member injury can escalate to a whole-body injury with reference to PTSD.

In *Bishop v. Specialty Fabricating Company*¹³ and *Madlock v. Square D Company*,¹⁴ the Nebraska Supreme Court held that when a whole-body injury is the result of a scheduled member injury, the injury should be considered in the assessment of whole-body impairment. The Court further determined that under such circumstances, the trial court should not enter a separate award for the member injury in addition to the award for loss of earning capacity because to allow both awards would create an impermissible double recovery. *Madlock* was decided prior to *Bishop* with different scheduled member injuries and different whole-body impairments. However, the same analysis applies. The employee in *Bishop* tried to argue that her case was distinguishable from *Madlock* because her scheduled member injury did not constitute an “essential factor” with respect to her whole-body impairment resulting from PTSD and depression:

Specifically, [the employee] argues that because her wrist injury was not “required for the continued existence of her mental and emotional restrictions” in the same sense as the foot injury and resulting

gait impairment were linked to the back injury in *Madlock*, she was entitled to a separate award for the scheduled member injury. This argument focuses too narrowly on the “essential factor” language in *Madlock* and ignores what precedes and follows that phrase. Read in context, the phrase “essential factor” as used in *Madlock* pertains to causation. In this case, as in *Madlock*, both the scheduled member injury and the whole body injury arose from the same accident. If [the employee] had not injured her wrist, she would not have sustained a compensable psychological injury inasmuch as a work-related injury caused by a mental stimulus is not compensable.¹⁵

The *Bishop* Court thus established that PTSD can be an element of a whole-body injury that did not merit a separate award.¹⁶

Even this brief review of a sample of the relevant workers’ compensation caselaw in Nebraska makes it clear that PTSD and the availability of benefits and relatedness to the injury-causing event is highly fact-specific and complex.

Personal Injury and PTSD

Nebraska courts have long defined “personal injury” to be broader than physical injury and to include “every variety of injury to a person's body, feelings, or reputation.”¹⁷ Personal injury actions are negligence claims that sound in tort.



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To prevail in a negligence action, a plaintiff must satisfy the following elements:

- **Duty:** The plaintiff must show that the defendant had a duty to exercise care when engaged in an activity that creates a risk of harm.¹⁸ The activities can include, but are certainly not limited to, operating a motor vehicle or ensuring that premises are free of unreasonable hazards. “The duty in a negligence case is to conform to the legal standard of reasonable conduct in the light of the apparent risk.”¹⁹ In other words, an actor must exercise the degree of care that would be exercised by a “reasonable person.”²⁰

- **Breach:** The plaintiff must show that the defendant breached its duty of care to the plaintiff. A breach of duty can include ignoring risk, like a homeowner creating a dangerous traffic obstruction and failing to remedy it, or engaging in inherently, unreasonably risky behavior that directly imperils others, like failing to obey traffic signals.²¹ Importantly, foreseeability factors into the element of breach—that is to say, a harm resulting from a breach must have been reasonably foreseeable.²²

- **Causation:** The plaintiff must show that the breach of the duty was the proximate cause of the injury. To satisfy this, the plaintiff will want to provide as much evidence as possible to show that the specific traumatic event giving rise to the claim is responsible for the diagnosis/resulting injury. Medical records and opinions from treating physicians and/or other experts can facilitate a favorable finding. The requirements for causation are outlined as follows: “(1) Without the negligent action, the injury would not have occurred, commonly known as the ‘but for’ rule; (2) the injury was a natural and probable result of the negligence; and (3) there was no efficient intervening cause.” This last prong is critical, as an intervening cause can sever the causal relationship. With respect to PTSD specifically, such medical records and documentation need to attribute the symptoms (or exacerbation of symptoms if the condition was pre-existing) to the triggering event. Understanding that records discussing, addressing, or diagnosing PTSD are most often created following counseling or medical appointments that the patient considers to be a confidential and safe space for the patient to share concerns, it is understandable that there can be discomfort in furnishing these records, even for purposes of a potential payout. That concern alone can be enough for some plaintiffs to want to abandon the PTSD component of their claim. However, particularly in pre-suit matters and negotiations, redacted records that protect the confidentiality of the intimate details of the appointments can be sufficient to provide the causal link necessary to attribute PTSD to the breach and therefore obtain some level of compensation for that injury without full disclosure of the record contents.

- **Damages:** Finally, in order to prevail on a negligence claim, the plaintiff must demonstrate actual damages. This

will include “medical expenses and loss of earnings, which are essentially economic loss, and mental and physical pain, which is noneconomic loss.”²⁴ With respect to PTSD as a component of a personal injury claim, the economic damages could include costs incurred from appointments for counseling or diagnosis, expenses for medication, and time off work as recommended by medical professionals. However, it is most often the noneconomic loss that is the most significant and difficult to quantify. PTSD symptoms can range from fully controlled to completely debilitating, based on the individual and the triggering event. Severe PTSD can affect job opportunities, social interactions, relationships, and physical health. Both pre-suit and at trial, a plaintiff is likely to receive more non-economic damages for PTSD when they are also able to produce quantifiable and tangible economic damages (e.g., missed work, medical bills, and loss of earning potential). Fortunately for plaintiffs, Nebraska uses the private party rate as the measure of damages in personal injury cases rather than the discounted rate,²⁵ but it may nevertheless be necessary to secure expert testimony if the defendant disputes the necessity of medical services or even the basis for the diagnosis, something that may be more likely with what many jurors may still consider to be a subjective diagnosis like PTSD.

While most cases addressing PTSD are considering the physically injured party, the negligent infliction of emotional distress on another individual is another potential avenue for relief in a personal injury case. Being diagnosed with PTSD requires an initial traumatic event; however, that event does not necessarily need to be experienced firsthand. This means that PTSD may manifest in a person after hearing that a close family member has died.

Nebraska recognizes negligent infliction of emotional distress (NIED), although the requirement is strict if a plaintiff is to prevail. A plaintiff must show:

either (1) that he or she is a reasonably foreseeable “bystander” victim based upon an intimate familial relationship with a seriously injured victim of the defendant’s negligence or (2) that the plaintiff was a “direct victim” of the defendant’s negligence because the plaintiff was within the zone of danger of the negligence in question. . . . [S]uch plaintiffs whose only injury is an emotional one must show that their emotional distress is medically diagnosable and significant and is so severe that no reasonable person could have expected to endure it.²⁶

The “zone of danger” requirement means that a plaintiff must not have simply witnessed the negligent act but must have “clearly foreseeable plaintiffs” to the negligent actor.²⁷


Further, Nebraska cases have set a high bar for what constitutes distress “so severe that no reasonable person could have expected to endure it.” In *Hamilton v. Nestor*, the Court found

that plaintiff was in the “zone of danger” when he was involved in a motor vehicle accident and “did experience diagnosable and clinically significant emotional distress resulting from the accident,” his distress—diagnosed as PTSD—“was not of sufficient severity to be actionable under our case law.”²⁸ Naturally, this significantly curtails the application of this doctrine. Thus, while NIED is available in Nebraska, it requires a high burden that will be difficult to satisfy in a majority of cases.

Conclusion

The reality is that PTSD claims remain challenging for a variety of reasons. In addition to the stigma on mental health that may prevent the plaintiff from seeking proper diagnosis and treatment and therefore not having adequate objective documentation of the condition, the plaintiff may also struggle with the idea of disclosing the contents of their mental health records even if it means a potential for financial compensation.

If the PTSD is linked to a physical injury and the opposing side disputes the basis of the diagnosis, securing the testimony of an expert to affirm that the PTSD is causally related to the incident that gave rise to the physical injury will be critical. Absent any kind of physical injury, it may be necessary to show that the plaintiff was at least threatened with bodily harm, causing the resulting PTSD. As with any case involving injury, it is imperative to provide complete and accurate medical records with professional diagnoses and exhaustive documentation that speaks to lost wage, loss of earning potential, and other ways in which the plaintiff's life was affected by the PTSD.

PTSD continues to be a fecund area of study in psychological and neurological literature, and undoubtedly our understanding of the condition will continue to grow by leaps and bounds in the coming years. Practitioners must be vigilant in staying abreast of these developments and their relationship with the legal landscape to effectively represent clients. Additionally, an understanding of the basics of PTSD coupled with an empathetic approach can help to both normalize and validate the client's experience, providing them with valuable support as they recover both physically and mentally from the event that brought them to the lawyer in the first place. 

Endnotes

- ¹ Alan A. Stone, *Post-Traumatic Stress Disorder and the Law: Critical Review of the New Frontier*, 21 BULL. AM. ACAD. PSYCHIATRIC L. 1 (1993).
- ² AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).
- ³ NEB. REV. STAT. § 48-101.01(5) (West 2022). See also *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007) (holding that physical changes to a brain resulting from non-physical stimuli are not compensable).
- ⁴ NEB. REV. STAT. § 48-101.01(2) (West 2022).
- ⁵ Johan Marin, *Nebraska Bill Could Expand Workers' Compensation, Prioritizing Mental Health*, WOWT (Feb. 21, 2023), <https://www.wowt.com/2023/02/22/nebraska-bill-could-expand-workers-compensation-prioritizing-mental-health/>.
- ⁶ *Sweeney v. Kerstens & Lee, Inc.*, 268 Neb. 752, 759–60, 688 N.W.2d 350, 355–56 (2004).
- ⁷ *Hynes v. Good Samaritan Hosp.*, 291 Neb. 757, 768–69, 869 N.W.2d 78, 88–90 (2015).
- ⁸ See *Scott v. Drivers Mgmt., Inc.*, 14 Neb. App. 630, 714 N.W.2d 23 (2006).
- ⁹ 287 Neb. 927, 845 N.W.2d 265 (2014).
- ¹⁰ *Id.* at 272.
- ¹¹ *Id.*
- ¹² *Id.* at 273.
- ¹³ 277 Neb. 171, 760 N.W.2d 352 (2009).
- ¹⁴ 269 Neb. 675, 695 N.W.2d 412 (2005).
- ¹⁵ *Bishop*, 277 Neb. 171 at 177–78.
- ¹⁶ *Id.* at 178.
- ¹⁷ *Gallion v. O'Connor*, 242 Neb. 259, 262, 494 N.W.2d 532, 534 (1993). See also *Jacobsen v. Poland*, 163 Neb. 590, 608, 80 N.W.2d 891, 903 (1957) (holding that “[i]n an action for personal injury plaintiff may recover all the damages proximately caused by the tort under a general allegation of the whole amount of the damages caused, including any damages for impairment of his capacity to earn money”).
- ¹⁸ RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (2010).
- ¹⁹ *A.W. v. Lancaster Cnty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010).
- ²⁰ *Latzel v. Bartek*, 288 Neb. 1, 846 N.W.2d 153 (2014).
- ²¹ *Id.* at 15–16.
- ²² *A.W.*, 280 Neb. 205 at 215–17.
- ²³ *Wilke v. Woodhouse Ford, Inc.*, 278 Neb. 800, 815, 774 N.W.2d 370, 382 (2009).
- ²⁴ *Gallion*, 242 Neb. 259 at 262. See also *Sabrina W. v. Willman*, 4 Neb. App. 149, 540 N.W.2d 364 (1995) (“[I]n Nebraska, plaintiffs are entitled to recover for mental anguish . . .”).
- ²⁵ NEB. REV. STAT. § 52-401 (West 2022).
- ²⁶ *Catron v. Lewis*, 271 Neb. 416, 420–21, 712 N.W.2d 245, 248–49 (2006).
- ²⁷ *Id.* at 421.
- ²⁸ *Hamilton v. Nestor*, 265 Neb. 757, 767–69, 659 N.W.2d 321, 329–30 (2003). See also *Sell v. Mary Lanning Memorial Hosp.*, 243 Neb. 266, 498 N.W.2d 522 (holding that a mother who was erroneously told her son had been killed did not experience a level of distress sufficient to meet the NIED standard); *Andreasen v. Gomes*, 244 Neb. 73, 504 N.W.2d 539 (1993) (holding that parents who had experienced the stillbirth of a child at the hand of negligent physicians had not experienced actionable emotional distress).

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