Case Sequence:

Bystander Emotional Distress

Tobin v. Grossman, 24 N.Y.2d 609 (1969).

Bovsun v. Sanperi, 61 N.Y.2d 219 (1984).

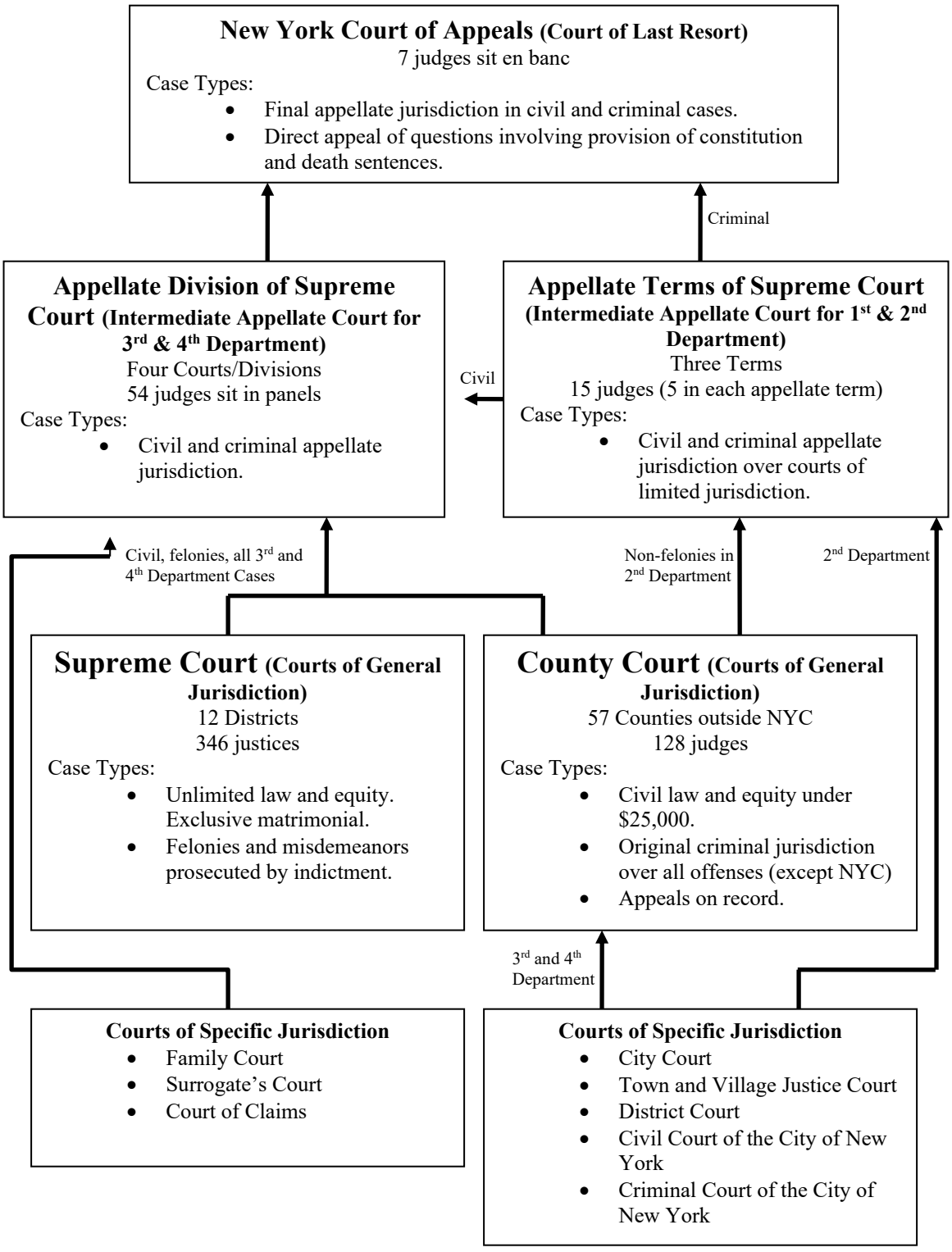
Trombetta v. Conkling, 82 N.Y.2d 549 (1993).

Guan v. Tuscan Dairy Farms, 24 A.D.3d 725 (2nd Dept 2005).

Greene v. Esplanade Venture Partnership, 172 A.D.3d 1013 (2nd Dept 2019).

Greene v. Esplanade Venture Partnership, 144 N.Y.S.3d 654; 36 N.Y.3d 513; 168 N.E.3d 827; 2021 N.Y. LEXIS 104.

New York State Court Chart



Tobin v. Grossman

Court of Appeals of New York

January 23, 1969, Argued ; April 24, 1969, Decided

No Number in Original

Reporter
24 N.Y.2d 609 *; 249 N.E.2d 419 **; 301 N.Y.S.2d 554 ***; 1969 N.Y. LEXIS 1328 ****

Judges: Chief Judge Fuld and Judges Burke, Scileppi, Bergan and Jasen concur with Judge Breitel; Judge Keating dissents and votes to reverse in a separate opinion.

Opinion by: BREITEL

Opinion

[*611] [**419] [***554] The issue is whether a mother may recover against a tort-feasor for her own mental and physical injuries caused by shock and fear for her two-year-old [****5] child who suffered serious injuries in an automobile accident. The appeal rises on the pleading alone which alleges that the accident [***555] occurred in the mother's full view and presence. In fact, the examination before trial taken of the mother, and somehow made a part of the record, * reveals that the accident did not occur in the mother's presence, but while she was nearby and heard the screech of automobile brakes. She immediately went to the scene, a few feet away, and saw her injured child lying on the ground.

It is concluded that under the well-established [****6] applicable doctrines no [**420] cause of action lies for unintended harm sustained by one, solely as a result of injuries inflicted directly upon another, regardless of the relationship and whether the one was an eyewitness to the incident which resulted in the direct injuries. Consequently, the order dismissing such a cause of action was proper and should be affirmed.

Until 1968 no upper court case in this country had held that a mother could recover for her own injuries due to shock and fear for her child as a result of an accident occurring in her view (but for English precedent, compare *Boardman* v. *Sanderson*, 1 W. L. R. 1317 [C. A., 1964] with *King* v. *Phillips*, [1953] 1 Q. B. 429). In 1968 the Supreme Court of California, by a closely divided court, overruled its five-year old holding to contrary effect, also by a closely divided court of somewhat [*612] different composition, and permitted recovery but only where the accident had occurred in the mother's presence (*Dillon* v. *Legg*, 68 Cal. 2d 728, overruling *Amaya* v. *Home Ice, Fuel & Supply Co*., 59 Cal. 2d 295). No American case has held that a mother can recover for her own injuries [****7] due to shock and fear for her child as a result of an accident which she did not view. One English case holding otherwise has been thereafter distinguished (compare *Hambrook* v. *Stokes Bros*., [1925] 1 K. B. 141 [C. A.] with *Bourhill* v. *Young*, [1943] A. C. 92).

It is in this context of pleading and variant pretrial proof, against a background of top-heavy precedential authority and doctrine denying a cause of action, that this appeal is before the court.

Plaintiff mother's cause of action was sustained at Special Term on motion by defendant to dismiss for insufficiency the third and relevant cause of action (55 Misc 2d 304). The Appellate Division unanimously reversed and dismissed the cause of action (30 A D 2d 229).

Taking the allegations as true, as one must, on a motion addressed to the pleadings (*Kober* v. *Kober*, 16 N Y 2d 191, 193), [***556] the following appears: On September 18, 1966, defendant, negligently operating his automobile, struck plaintiff's two-year-old son, Gregory, causing severe injuries, including cerebral damage, to him, and emotional and physical injuries to plaintiff, in whose full view and presence the accident occurred. [****8] Of course, as already noted, the pretrial examination of the mother reveals that in fact the mother was inside a neighbor's home, outside of which the momentarily unattended child was struck, and she did not see the accident. But she did hear the screech of brakes, noted the absence of her child, went instantly outside, and saw him lying on the ground.

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* Special Term had denied the moton to dismiss the third cause of action for insufficiency. Thereafter, the examination was conducted and defendant moved for reargument on the basis of what it revealed. That motion was also denied. On appeal from both orders, the Appellate Division reversed on the first order and dismissed the appeal from the denial of reargument. Plaintiff has appealed to this court only from the order reversing Special Term.

While the court is limited to a determination of the sufficiency of the pleading, this court, unlike the California high court, cannot practically limit its consideration to the pleaded facts before it and leave, as that court said, to a case-by-case development any extensions to be evolved (*Dillon* v. *Legg, supra*, p. 740). In this case, the additional undisputed and varying facts of the pretrial examination are before the court in the record. It is already evident that this action, if it were to go to trial, would involve a mother who was not an eyewitness.

[*613] The problem presented is double-faceted. The first is the recoverability for injuries sustained solely as a result of an initial mental or psychological impact, but with ensuing mental illness and physical injury. The second is the scope of duty to one who [****9] is not directly the victim of an accident causing severe physical injury to a third person.

On the first facet, there is no longer any question. Since *Battalla* v. *State of New York* (10 N Y 2d 237) the rule is now settled that one may have a cause of action for injuries sustained although precipitated by a negligently [**421] induced mental trauma without physical impact. As much had been presaged in *Ferrara* v. *Galluchio* (5 N Y 2d 16), albeit that case involved a somewhat narrower holding (*id*., p. 22).

It is the second facet which presents both novelty and difficulty, namely, whether the concept of duty in tort should be extended to third persons, who do not sustain any physical impact in the accident or fear for their own safety. Unlike the problem in the first facet, there are no parallels. Its solution does not depend upon advances in medical science, namely, that mental traumatic causation can now be diagnosed almost as well as physical traumatic causation. The question is profounder than that, because there is now urged the creation of a new duty and therefore an entirely new cause of action.

In recent years this court has expanded many tort concepts, [****10] but they have been only expansions rather than significant creations of entirely [***557] new causes of action. Thus, in the *Battalla* and *Ferrara* cases (*supra*), the reality of psychological causation with consequent mental and physical harms was recognized in an area where previously even the slightest physical impact would have been sufficient to establish a cause of action. Although in *Millington* v. *Southeastern Elevator Co.* (22 N Y 2d 498) it was necessary to strike down a bar to a wife's recovery for loss of consortium, the fact of such harm was always evident and recovery had always been allowed to the husband in the converse situation. The explanation for the discrimination was an historical anomaly and rested on a purely conceptual distinction. Although in *Gelbman* v. *Gelbman* (23 N Y 2d 434) the immunity from suit between parent and child for nonintentional tort was abandoned, there was no such intra-family immunity for intentional tort, and precisely the same [*614] conduct between others would give rise to a cause of action. In *Bing* v. *Thunig* (2 N Y 2d 656) the immunity enjoyed by charitable hospitals for negligent "medical" [****11] acts of its employees was struck down. In any other context there would have been a cause of action.

Similarly, *Woods* v. *Lancet* (303 N. Y. 349) involved well-understood harms but for which recovery had theretofore been barred only because of difficulties in recognizing the personality as entitled to sue. In that case plaintiff was permitted to recover for injuries sustained while a fetus *in utero* resulting from impact on the mother. Plaintiff, who had been the direct object of the harm inflicted, would have had a cause of action, except for the conceptual difficulty of not having been a legal person with capacity to sue at the time the wrong was committed.

On the other hand, the court was unanimous in denying a cause of action for an alleged wrong which the law had never before recognized as a wrong at all (*Williams* v. *State of New York*, 18 N Y 2d 481, 483). The *Williams* case involved an action by an illegitimate child conceived in a State mental hospital of a mentally deficient mother who was not protected from sexual attack. Damages were sought for a "wrongful life". The court, in discussing its recent expansions of tort concepts, observed: "In none [****12] of these were we asked to, nor did we, go so far as to invent a brand new ground for suit" (p. 483).

Of course, the common law is not circumscribed by syllogisms, however constructed out of precedents, and this case presents an acute issue that will not pass merely by the incantation of a logical formula.

If that were not so, the developments in the field of products liability would never have taken place. True, the landmark cases [**422] in that area did not acknowledge creation of new causes of action or describe new [***558] harms as compensable, but they certainly broadened the range of duty and, therefore, of liability (e.g., *MacPherson* v. *Buick Motor Co*., 217 N. Y. 382; *Greenberg* v. *Lorenz*, 9 N Y 2d 195; *Goldberg* v. *Kollsman Instrument Corp*., 12 N Y 2d 432). Thus, for all practical purposes, in a limited sense, new causes of action were created when liability was imposed on others than the mere purveyors of goods or services.

[*615] The impact on a mother of a serious injury to her child of tender years is poignantly evident. This has always been so. Unlike the factors which have brought about most

expanding tort concepts, here there [****13] are no new technological, economic, or social developments which have changed social and economic relationships and therefore no impetus for a corresponding legal recognition of such changes. Hence, a radical change in policy is required before one may recognize a cause of action in this case.

To resolve the issue, the many converging policy factors must be considered. In both the *Amaya* and *Dillon* cases (*supra*), decided in the California court, the several opinions on both sides of the issue are exhaustive and of great value in analyzing the policy factors.

The several factors most often considered in discussion of this problem are foreseeability of the injury, proliferation of claims, fraudulent claims, inconsistency of the zone of danger rule, unlimited liability, unduly burdensome liability, and the difficulty of circumscribing the area of liability. It is quickly evident that the factors are not mutually exclusive but overlap in various degrees.

On foreseeability, it is hardly cogent to assert that the negligent actor if he could foresee injury to the child that he should not also foresee at the same time harm to the mother who, especially in the case of children [****14] of tender years, is likely to be present or about (Prosser, Torts [3d ed.], p. 353). But foreseeability, once recognized, is not so easily limited. Relatives, other than the mother, such as fathers or grandparents, or even other caretakers, equally sensitive and as easily harmed, may be just as foreseeably affected. Hence, foreseeability would, in short order, extend logically to caretakers other than the mother, and ultimately to affected bystanders.

This court has rejected as a ground for denying a cause of action that there will be a proliferation of claims. It suffices that if a cognizable wrong has been committed that there must be a remedy, whatever the burden of the courts. Similarly, it has rejected the argument that recognizing a right of recovery may increase the number of fraudulent claims, so long as the damages are not too conjectural. (*Battalla* v. *State of New York*, 10 N Y 2d 237, 241-242, [***559] *supra*.) Thus, in the *Battalla* [*616] case, it was said: "Although fraud, extra litigation and a measure of speculation are, of course, possibilities, it is no reason for a court to eschew a measure of its jurisdiction. 'The argument from mere [****15] expediency cannot commend itself to a Court of Justice, resulting in the denial of a logical legal right and remedy in *all* cases because in *some* a fictitious injury may be urged as a real one.' * * * The only substantial policy argument * * * is that the damages or injuries are somewhat speculative and difficult to prove. However, the question of proof in individual situations should not be the arbitrary basis upon which to bar all actions * * * In the difficult cases, we must look to the quality and genuineness of proof, and rely to an extent on the contemporary sophistication of the medical profession and the ability of the court and jury to weed out the dishonest claims. Claimant should, therefore, be given an opportunity to prove that her injuries were proximately caused by defendant's negligence" (pp. 240-242; emphasis in original).

[**423] Quite relevant to the present problem is the zone of danger rule. In some of the States a parent has been permitted to recover for the inseparable consequences of fear for his child's safety as well as his own, if at the time of the accident he, himself, was in the zone of danger created by the negligent actor (*Bowman* v. [****16] *Williams*, 164 Md. 397; see, also, *Amaya* v. *Home Ice, Fuel & Supply Co., supra*, pp. 305-306; Restatement, 2d, Torts, § 313, Comment d). This has been said to be a rather arbitrary limiting rule which has the unpalatable consequence that a mother who also fears for herself may recover while, if she does not or has no such similar opportunity, she may not recover (*Dillon* v. *Legg, supra*, p. 747).

The problem of unlimited liability is suggested by the unforeseeable consequence of extending recovery for harm to others than those directly involved in the accident. If foreseeability be the sole test, then once liability is extended the logic of the principle would not and could not remain confined. It would extend to older children, fathers, grandparents, relatives, or others *in loco parentis*, and even to sensitive caretakers, or even any other affected bystanders. Moreover, in any one accident, there might well be more than one person indirectly but seriously affected by the shock of injury or death to the child.

[*617] The factor of unduly burdensome liability is a kind of dollars-and-cents argument. It does not vanish, however, by reference to wide-spread [****17] or compulsory insurance. Constantly advancing insurance costs can become an undue burden as well, and the aggregate recoveries in a [***560] single accident of this kind are not likely to stay within ordinary, let alone, compulsory insurance liability limits.

The final and most difficult factor is any reasonable circumscription, within tolerable limits required by public policy, of a rule creating liability. Every parent who loses a child or whose child of any age suffers an injury is likely to sustain grievous psychological trauma, with the added risk of consequential physical harm. Any rule based solely on eyewitnessing the accident could stand only until the first case comes along in which the parent is in the immediate vicinity but did not see the accident. Moreover, the instant

advice that one's child has been killed or injured, by telephone, word of mouth, or by whatever means, even if delayed, will have in most cases the same impact. The sight of gore and exposed bones is not necessary to provide special impact on a parent. Again, the logical difficulty of excluding the grandparent, the relatives, or others *in loco parentis*, and even the conscientious and sensitive [****18] caretaker, from a right to recover, if in fact the accident had the grave consequences claimed, raises subtle and elusive hazards in devising a sound rule in this field.

This case is particularly illustrative -- just because the pretrial examination reveals that if the pleaded cause of action is sustained the trial court will be faced not with an eyewitness mother, but with one who comes upon the scene immediately following the accident.

Confronted with these considerations, the courts, for the most part, have refused to extend the duty of the negligent actor to cover the mother of the small child (see Ann.: Damages-Shock-Witnessing Injury, 18 ALR 2d 220). Interestingly, the textwriters and commentators have generally taken a contrary view of what should be the law (e.g., Prosser, Torts [3d ed.], pp. 352-354; 2 Harper and James, The Law of Torts, pp. 1035-1036; Tymann, Bystanders' Recovery for Psychic Injury in New York, 32 Albany L. Rev. 489; case note, 43 N. Y. U. L. Rev. 1252). The Restatement of Torts originally carried a caveat [*618] suggesting that a parent or spouse might be entitled to recover for harm suffered as a result of injury to the child or other spouse (2 [****19] Restatement, Torts, § 313, Caveat). In Restatement, Second, Torts, the caveat was stricken, not because there were not those who wished it to remain, [**424] but because case authority had settled that there was no liability (2 Restatement, 2d, Torts, § 313; 4 Restatement, 2d, Torts, Appendix to § 313, p. 11). In this State, the courts have split on the question (compare *Napolitano* v. *Town of Chili*, 47 Misc 2d 920, affd. 29 A D 2d 845; *Lahann* v. *Cravotta*, 228 N. Y. S. 2d 371; *Berg* v. *Baum*, 224 N. Y. S. 2d 974; with *Bond* v. *Smith*, 52 Misc 2d 186; and *Haight* v. *McEwen*, 43 Misc 2d 582).

[***561] Assuming that there are cogent reasons for extending liability in favor of victims of shock resulting from injury to others, there appears to be no rational way to limit the scope of liability. Prosser, the reporter for the Restatement, Second, in Torts, and a stalwart in favor of extending liability, confesses that there is no way out of the problem of unlimited liability except by establishing arbitrary distinctions which he recommends doing (Prosser, *op. cit*. p. 354).

In the *Dillon* case (*supra*) the court suggested three limiting [****20] standards: "(1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the accident victim were closely related, as contrasted with the absence of any relationship or the presence of only a distant relationship" (*id*., pp. 740-741). Indeed, these limiting conditions were suggested by Dean Prosser (Prosser, *loc. cit*.). For reasons already discussed or suggested, none of these standards are of much help if they are to serve the purpose of holding strict rein on liability and if the test is to be a reasonably objective one.

In this very case, as already noted, the eyewitness limitation provides no rational practical boundary for liability. The distance from the scene and time of notice of the accident are quite inconsequential for the shock more likely results from the relationship with the injured party than what is seen of the [*619] accident. The age of the child, [****21] always assumed to be relevant, is difficult to define or limit. Indeed, it may be callous to assess as lesser the loss or injury of an older child than a younger one. Nor can the father, the grandparents, the siblings and other relatives, or even others *in loco parentis*, be excluded on any acceptable rational basis, although, to be sure, distinctions can be made and verbalized. It is quite significant, too, that the now discarded caveat in the first Restatement referred to spouses as possibly being entitled to recover for shock and its consequences. Indeed, whichever way one turns in permitting a theory of recovery one is entangled in the inevitable ramifications which will not stay defined or limited. There are too many factors and each too relative to permit creation of only a limited scope of liability or duty.

Beyond practical difficulties there is a limit to attaining essential justice in this area. While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences [****22] of wrongs to a controllable degree. The risks of indirect [***562] harm from the loss or injury of loved ones is pervasive and inevitably realized at one time or another. Only a very small part of that risk is brought about by the culpable acts of others. This is the risk of living and bearing children. It is enough that the law establishes liability in favor of those directly or intentionally harmed.

Accordingly, the order of the Appellate Division should be

affirmed, without costs.

Dissent by: KEATING

Dissent

Keating, J. (dissenting). The majority opinion effectively demolishes every legalism and every policy argument [**425] which would deny recovery to a mother who sustains mental and physical injuries caused by fear or shock, upon learning that her child has been killed or injured in an accident. It has shown that every element necessary to build a case for tortious liability in negligence is here present. There is an important interest worthy of protection, there is proximate cause, there is injury, and there is foreseeability. Yet, having shown all this, inexplicably, recovery is denied.

[*620] The rationalization for the result reached here is the supposed terror [****23] of "unlimited liability". The characterization of this argument as a "rationalization" may appear harsh but, nevertheless, it seems fully justified. Not one piece of evidence is offered to prove that the "dollar-and-cents" problem will have the dire effects claimed. More important, the manner in which the argument about infinite liability is explicitly rejected one day only to be revived the next is indicative of what may be described as a rather erratic method of decision. (Compare *Bernardine* v. *City of New York*, 294 N. Y. 361; *Bing* v. *Thunig*, 2 N Y 2d 656; *Greenberg* v. *Lorenz*, 9 N Y 2d 195; *Goldberg* v. *Kollsman Instrument Corp*., 12 N Y 2d 432; with *Steitz* v. *City of Beacon*, 295 N. Y. 51; *Motyka* v. *City of Amsterdam*, 15 N Y 2d 134; *Riss* v. *City of New York*, 22 N Y 2d 579.) One can easily recognize the ad hoc nature of the argument by comparing passages in our opinions where we have chosen to do what modern concepts of justice demands with those cases where we have hesitated to follow through on the basic currents in the law of torts for the past generation. (Compare, for example, *Bing* v. *Thunig, supra*, p. 664 [tort [****24] immunity of charities], with *Steitz* v. *City of Beacon, supra*, p. 55 [tort immunity of municipalities]. The statements in these opinions cannot be reconciled. Moreover, in refusing recovery, the majority ignores the rationale of our recent decision in *Millington* v. *Southeastern Elevator Co*. (22 N Y 2d 498) [***563] permitting the wife to sue for loss of consortium. Ever since *MacPherson* v. *Buick Motor Co*. (217 N. Y. 382) was decided more than a half century ago, there has been an expanding recognition that the argument concerning unlimited liability is of no merit, yet the aberrations persist. One would imagine that we were here involved with a catastrophic loss. There have already been decisions imposing liability of far greater dimension than can ever arise if we should embark upon a search for "essential justice" in the bystander class of cases.

I also agree with the majority that any limitation on bystander recovery is indeed arbitrary and, therefore, there should be none. Any limitations, if needed, should be developed on a case by case basis, using proximate cause and foreseeability as a means to avoid anomalous results. The only real requirement, [****25] however, which policy and justice dictate, is stringent [*621] evidence of causation and of actual injury to deter those who would use a sound and just rule as a cover for spurious claims.

I do not deem it necessary to dwell upon the lack of logic, policy or justice in the result reached by the majority opinion. As the majority notes, its position has found little, if any, support by legal scholars. California took little more than five years to overturn its prior rejection of any change in the law (*Dillon* v. *Legg*, 68 Cal. 2d 728 [1968], overruling *Amaya* v. *Home Ice, Fuel & Supply Co*., 59 Cal. 2d 295 [1963]). I can only [**426] hope that it will not take as long before New York corrects this error.

The order of the Appellate Division should be reversed.

Bovsun v. Sanperi

Court of Appeals of New York

December 13, 1983, Argued ; February 23, 1984, Decided

No Number in Original

Reporter
61 N.Y.2d 219 *; 461 N.E.2d 843 **; 473 N.Y.S.2d 357 ***; 1984 N.Y. LEXIS 4062 ****

Judges: Chief Judge Cooke and Judges Jasen and Meyer concur with Judge Jones; Judge Kaye dissents and votes to affirm in a separate opinion in which Judges Wachtler and Simons concur; Judge Wachtler dissents in a dissenting memorandum in which Judge Simons also concurs.

Opinion by: JONES

Opinion

[*223] [**844] [***358] **OPINION OF THE COURT**

Where a defendant's conduct is negligent as creating an unreasonable risk of bodily harm to a plaintiff and such conduct is a substantial factor [****11] in bringing about injuries to the plaintiff in consequence of shock or fright resulting [*224] from his or her contemporaneous observation of serious physical injury or death inflicted by the defendant's conduct on a member of the plaintiff's immediate family in his or her presence, the plaintiff may recover damages for such injuries.

These two appeals pose the same question of law -- whether in addition to or apart from other damages to which a plaintiff may be entitled in consequence of the negligence of the defendant, he may recover for emotional distress occasioned by his witnessing injury or death caused by the defendant's conduct to a member of the plaintiff's immediate family. The courts below have answered this question in the negative. We now reverse in each case.

Bovsun v Sanperi

In Bovsun, a father, mother and daughter commenced an action for personal injuries sustained by them in a two-car collision. The father, who had been driving the station wagon in which his wife and daughter were passengers, settled before trial. The mother and daughter are now appellant plaintiffs before us.

On May 24, 1975, due to mechanical difficulties the station wagon in which [****12] the members of the Bovsun family were riding had stopped at the side of the Southern State Parkway in Nassau County. Jack Bovsun, father and driver, alighted from the vehicle, went around to the rear, and leaned inside the open tailgate window. Selma Bovsun, his wife, remained seated in the front passenger seat, and Mara Beth Bovsun, their daughter, was in the rear seat. At this point the Bovsun station wagon was struck in the rear by an automobile owned by defendant Rosario Sanperi and driven by defendant Gary T. Sanperi. Jack Bovsun was seriously injured when he was pinned between the two vehicles. The mother and daughter were thrown about the station wagon by the force of the impact but suffered less serious physical injuries than Jack Bovsun. Although neither mother nor daughter actually saw the Sanperi car strike their station wagon (they were facing forward or to the side), both were instantly aware of the impact and the fact that Jack Bovsun must have been [*225] injured and each thereafter immediately observed their seriously injured husband and father. [1]

[****13] [**845] [***359] At the start of the trial as jurors were being selected, defendants' attorney objected to any reference being made to emotional distress plaintiffs might have suffered as a result of observing Jack Bovsun's injuries. After hearing arguments from counsel and with an awareness of the significant factual elements of plaintiffs' case, the trial court ruled that the proof would be limited to

[1] In neither of these cases does the record contain a particularized description of precisely what occurred or the detailed sequence of events. Each case has been disposed of by the courts below on procedural applications in the nature of motions to dismiss based on a general description of the evidence that plaintiffs asserted would be offered. Inasmuch as plaintiffs' claims have been denied in each case on the broad proposition that our courts do not allow recovery for emotional distress caused by observation of injuries to another, no careful attention has been paid to whether the particular facts in either case would meet any one of the several tests under which recovery has elsewhere been allowed. Accordingly, we do not now address the sufficiency of the evidence to meet the standard we hold applicable. Our present decision is only that in both cases it was error to foreclose plaintiffs from proceeding to trial.

plaintiffs' own direct physical injuries and that no mention could be made during the *voir dire* of any injuries attributable to emotional distress. To expedite appellate review, defendants' motion to preclude plaintiffs from examining the prospective jurors as to plaintiffs' emotional distress was deemed a motion to dismiss plaintiffs' claims for damages with respect thereto, and that relief was granted.

On plaintiffs' appeal, the Appellate Division affirmed, citing *Kugel v Mid-Westchester Ind. Park* (90 AD2d 496). Thereafter, the Appellate Division granted plaintiffs leave to appeal to our court.

Kugel v Westchester Industrial Park, Inc.

In Kugel, plaintiffs, a father and mother, were riding with their two infant daughters in the family car along a roadway in [****14] the Mid-Westchester Mall in Cortlandt, New York, on June 3, 1978. As alleged in their verified complaint and bill of particulars, plaintiff Lawrence Kugel was driving the vehicle, his wife, plaintiff Lydia Kugel, was in the front passenger seat with their one-year-old daughter Stephanie in her lap, and their other daughter Karen, four years old, was also seated in the car. The Kugel car was struck by an automobile owned by defendant Barbara B. Rooney and driven by defendant Thomas Rooney, allegedly [*226] in a reckless manner and at an excessive speed. Lydia Kugel suffered a fractured clavicle in the collision, Lawrence sustained a broken finger, and Karen suffered abdominal injuries. Stephanie Kugel died a few hours after the accident as a result of her various, severe injuries, alleged in the complaint to have been observed by plaintiffs. [2]

Plaintiffs served a summons and complaint to commence this action, seeking, *inter alia*, in their fourth cause of action damages [****15] for "the immediate severe emotional trauma of seeing Stephanie Kugel suffer extreme physical injury within their close proximity." By notice of motion, defendant Mid-Westchester Industrial Park, Inc., which owns and operates the Mid-Westchester Mall, moved for partial summary judgment dismissing the fourth cause of action (along with the fifth and sixth causes of action), contending that it did not allege a legally cognizable claim. Defendants Thomas and Barbara Rooney thereafter also moved for summary judgment dismissing those causes of action. Special Term granted the motions and dismissed the causes of action, ruling that New York does not permit a cause of action to be maintained for the emotional distress suffered by the parents of an infant child who is killed in an accident.

Plaintiffs appealed the Special Term order to the Appellate Division. While that appeal was pending, plaintiffs settled or discontinued all causes of action other than those for emotional trauma attributable to the injury and death of their daughter Stephanie, which were expressly reserved. [3] The Appellate Division thereafter affirmed, holding that Special Term had correctly concluded that there is [****16] no cause of action in New York for emotional trauma suffered by the [**846] [***360] parents of a child injured or killed as the result of negligence. According to the court, plaintiffs' direct involvement in the accident is only relevant insofar [*227] as it creates a cause of action on their own behalf for injuries directly inflicted on them. The court reasoned that the inability to circumscribe liability in a reasonable fashion and the possibility of unlimited liability would require dismissal of plaintiffs' emotional distress claims regardless of whether plaintiffs were directly involved in the accident. The Appellate Division thereafter granted plaintiffs' motion for leave to appeal to our court.

[****17] Analysis of Legal Issues

Traditionally, courts have been reluctant to recognize any liability for the mental distress which may result from the observation of a third person's peril or harm. The law in California relating to bystander recovery was greatly altered, however, by that State's Supreme Court ruling in *Dillon v Legg* (68 Cal 2d 728) that damages may be recovered for the emotional trauma caused when a plaintiff witnesses the injury or death of a close relative even though the plaintiff is not himself within the zone of danger of physical injury, provided that the emotional injury is reasonably foreseeable. [4] [****19] Soon after the *Dillon*

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[2] (See n 1, *supra*, p 225.)

[3] Plaintiffs had also sought in their fifth cause of action to recover damages for the emotional distress they suffered between the time of the accident and Stephanie Kugel's death, including the trauma of her funeral and their subsequent mourning for her, and had sought recovery in their sixth cause of action for the ongoing trauma caused by the loss of their daughter and the resulting change in their family. Plaintiffs have withdrawn those causes of action in our court.

[4] Courts in 13 other States have chosen to adopt the *Dillon v Legg* (68 Cal 2d 728) rule and allow a bystander who is outside the zone of danger to sue for the emotional distress of observing a relative's injury or death. (*Leong v Takasaki*, 55 Hawaii 398; *Barnhill v Davis*, 300 NW2d 104 [Iowa]; *Dziokonski v Babineau*, 375 Mass 555; *Culbert v Sampson's Supermarkets*, 444 A2d 433 [Me]; *Toms v McConnell*, 45 Mich App 647; *Entex, Inc. v McGuire*, 414 So 2d 437, 444 [Miss]; *Corso v Merrill*, 119 NH 647; *Portee v Jaffee*, 84 NJ 88; *Ramirez v*

decision, our court in *Tobin v Grossman* (24 NY2d 609) rejected this foreseeability approach to bystander recovery. In *Tobin*, a mother, who had been in no danger of bodily harm herself, sought damages for the mental distress that she suffered in viewing the serious injuries sustained by her child when the child was struck by an automobile. We recognized in that case that foreseeability is not the sole test of whether a legally cognizable duty is owed. In reliance on rationale grounded in public policy -- that liability to [****18] the foreseeable bystander could not be limited in any rational way and could lead to unlimited liability for negligent conduct -- we declined to recognize a cause of action for the emotional distress suffered by the foreseeable [*228] observer of an accident. [5] In so doing, in [**847] [***361] obiter dictum we questioned the zone-of-danger analysis.

[****20] In disposing of the appeal in *Tobin* we were not, however, required to confront the precise issue presented to us for the first time in the two appeals now before us inasmuch as the plaintiff in *Tobin* had not been within the zone of danger of bodily harm. We there phrased the legal question posed as "whether the concept of duty in tort should be extended to third persons, who do not sustain any physical impact in the accident or fear for their own safety" (24 NY2d, p 613). We did note that the approach of permitting recovery "for the inseparable consequences of fear for" a relative's safety, as well as one's own safety, where the plaintiff is in the zone of danger "has been said to be a rather arbitrary limiting rule" (24 NY2d, p 616). We have also elsewhere recognized, however, that arbitrary distinctions are an inevitable result of the drawing of lines which circumscribe legal duties (*Kennedy v McKesson Co*., 58 NY2d 500, 507), and that delineation of limits of liability in tort actions is usually determined on the basis of considerations of public policy (*De Angelis v Lutheran Med. Center*, 58 NY2d 1053, 1055; *Pulka v Edelman*, 40 NY2d 781; see Prosser, Torts [4th [****21] ed], § 3, pp 14-16).

The zone-of-danger rule, which allows one who is himself or herself threatened with bodily harm in consequence of the defendant's negligence to recover for emotional distress resulting from viewing the death or serious physical injury of a member of his or her immediate family, is said to have [*229] become the majority rule in this country. [6] [****23] It is premised on the traditional negligence concept that by unreasonably endangering the plaintiff's physical safety the defendant has breached a duty owed to him or her for which he or she should recover all damages sustained including those occasioned by witnessing the suffering of an immediate family member who is also injured by the defendant's conduct. Recognition of this right to recover for emotional distress attributable to observation of injuries suffered by a member of the immediate family involves a broadening of the duty concept but -- unlike the *Dillon* approach -- not the creation of a duty to a plaintiff to whom the defendant is not already recognized as owing a duty to avoid bodily harm. In so doing it permits recovery for an element of damages not heretofore allowed. Use of the zone-of-danger [****22] rule thus mitigates the possibility of unlimited recovery, an overriding apprehension expressed in *Tobin*, by restricting liability in a much narrower fashion than does the *Dillon* rule. Additionally, the circumstances in which a plaintiff who is within the zone of danger suffers serious emotional distress

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Armstrong, 100 NM 538; *Paugh v Hanks*, 6 Ohio St 3d 72; *Sinn v Burd*, 486 Pa 146; *D'Ambra v United States*, 114 RI 643; *Apache Ready Mix Co. v Creed*, 653 SW2d 79 [Tex]; *Bedgood v Madalin*, 589 SW2d 797 [Tex], revd in part on other grounds 600 SW2d 773; *Landreth v Reed*, 570 SW2d 486 [Tex].)

[5] Courts in many jurisdictions have also rejected the *Dillon v Legg* rule of liability to the foreseeable observer of an accident. (*Tyler v Brown-Service Funeral Homes Co*., 250 Ala 295; *Slovensky v Birmingham News Co*., 358 So 2d 474, 477 [Ala]; *Keck v Jackson*, 122 Ariz 114 [*en banc]; Howard v Bloodworth*, 137 Ga App 478; *Strickland v Hodges*, 134 Ga App 909; *Hayward v Yost*, 72 Idaho 415, 427; *Rickey v Chicago Tr. Auth*., 98 Ill 2d 546; *Smith v Manchester Ins. & Ind. Co*., 299 So 2d 517, 524 [La], cert den 302 So 2d 617; *Cambrice v Fern Supply Co*., 285 So 2d 863 [La]; *Dupuy v Pierce*, 285 So 2d 321 [La]; *Stadler v Cross*, 295 NW2d 552 [Minn]; *Welsh v Davis*, 307 F Supp 416 [D Mont -- applying Montana law]; *Fournell v Usher Pest Control Co*., 208 Neb 684; *Owens v Childrens Mem. Hosp*., 480 F2d 465 [8th Cir -- applying Nebraska law]; *Whetham v Bismarck Hosp*., 197 NW2d 678 [ND]; *Shelton v Russell Pipe & Foundry Co*., 570 SW2d 861 [Tenn]; *Guilmette v Alexander*, 128 Vt 116; *Hughes v Moore*, 214 Va 27, 34-35; *Grimsby v Sampson*, 85 Wn 2d 52; see, also, *Williamson v Bennett*, 251 NC 498.) Three States' highest courts have left open the issue of whether to adopt the *Dillon* rule (*Towns v Anderson*, 195 Col 517, 520; *Amodio v Cunningham*, 182 Conn 80; *Norwest v Presbyterian Intercommunity Hosp*., 293 Ore 543, 559, n 18; see, also, *Robb v Pennsylvania R. R*., 58 Del 454, 458; *Bedgood v Madalin*, 600 SW2d 773, 776 [Tex]).

[6] (Note 33 Me L Rev 303, 305; Note 25 Hast L Rev 1248, 1252; see *Keck v Jackson*, 122 Ariz 114, 116 [*en banc]; Hopper v United States*, 244 F Supp 314 [D Col -- applying Colorado law]; *Farrall v Armstrong Cork Co*., 457 A2d 763, 771 [Del]; *Mancino v Webb*, 274 A2d 711, 713-714 [Del]; *Rickey v Chicago Tr. Auth*., 98 Ill 2d 546; *Resavage v Davies*, 199 Md 479; *Stadler v Cross*, 295 NW2d 552, 555 [Minn]; *Fournell v Usher Pest Control Co*., 208 Neb 684, 687; *Owens v Childrens Mem. Hosp*., 480 F2d 465, 467 [8th Cir]; *Whetham v Bismarck Hosp*., 197 NW2d 678, 684 [ND]; *Shelton v Russell Pipe & Foundry Co*., 570 SW2d 861, 864 [Tenn]; *Vaillancourt v Medical Center Hosp*., 139 Vt 138, 143; *Guilmette v Alexander*, 128 Vt 116, 119; *Klassa v Milwaukee Gas Light Co*., 273 Wis 176, 181-185; *Waube v Warrington*, 216 Wis 603, 608-615.)

from observing severe physical injury or death of a member of the immediate family may not be altogether common. [7]

The zone-of-danger rule has also been adopted in the Restatement of Torts, Second, as it had been at the time of our [**848] [***362] decision in *Tobin*. Subdivision (2) of section 436 provides that "If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to another otherwise than by subjecting him to fright, shock, or other similar and immediate emotional disturbance, the fact that such harm results solely from the internal operation [*230] of fright or other emotional disturbance does not protect the actor from liability." Subdivision (3) of that section further provides that "The rule stated in Subsection (2) applies where the bodily harm to the other results from his shock or fright at harm or peril to a member of his immediate family occurring in his presence." [****24] Thus, section 436 would subject a defendant to liability for a plaintiff's immediate emotional distress from viewing bodily harm to an immediate family member where the defendant's negligent conduct also threatens bodily harm to the plaintiff. [8] The American Law Institute explains that the rationale for "this exception to the general rule that there cannot be recovery for emotional disturbance, or its consequences, arising from the peril of a third person lies in the fact that the defendant, by his negligence, has endangered the plaintiff's own safety and threatened him with bodily harm so that the defendant is in breach of an original duty to the plaintiff to exercise care for his protection." (Restatement, Torts 2d, § 436, subd [3], Comment *f*.)

[****25] Inasmuch as the zone-of-danger rule provides a circumscribed alternative to the apparently sweeping liability recognized in *Dillon v Legg* (68 Cal 2d 728, *supra*) and does so within the framework of traditional and accepted negligence principles by using an objective test of whether the plaintiff was unreasonably threatened with bodily harm by the conduct of the defendant, we view it as comporting with the requirements set out in *Tobin* of a "reasonably objective" standard which will "serve the purpose of holding strict rein on liability" (*Tobin v Grossman*, 24 NY2d 609, 618, *supra*). [9] [****26] We therefore hold that where a defendant [*231] negligently exposes a plaintiff to an unreasonable risk of bodily injury or death, the plaintiff may recover, as a proper element of his or her damages, damages for injuries suffered in consequence of the observation of the serious injury or death of a member of his or her immediate family -- assuming, of course, that it is established that the defendant's conduct was a substantial factor bringing about such injury or death. [10]

[**849] [***363] In so holding, we reject any suggestion that the zone-of-danger rule is overly susceptible to fraudulent claims or that the emotional injuries claimed here are incapable of acceptable proof. We previously disposed of these arguments in *Battalla v State of New York* (10 NY2d 237, 240-242): "Although fraud, extra litigation and a measure of speculation are, of course, possibilities, it is no reason for a court to eschew a measure of its jurisdiction. 'The argument from mere expediency cannot commend itself to a Court of justice, resulting in the denial of a logical legal right and remedy in *all* cases because in *some* a fictitious injury may be urged as a real one.' * * * [****27] The only substantial policy argument * * * is that the damages or injuries are somewhat speculative and

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[7] It is somewhat surprising that our research reveals only two reported appellate decisions actually upholding recovery in those jurisdictions that apply the zone-of-danger approach. (*Bowman v Williams*, 164 Md 397; *Vinicky v Midland Mut. Cas. Ins. Co*., 35 Wis 2d 246, 252-253.)

[8] Comment *f* to subdivision (3) of section 436 explains that this rule "applies where the defendant's negligent conduct threatens bodily harm to the plaintiff through direct impact upon his person, or in some other way than through emotional disturbance, and the bodily harm is brought about instead by the plaintiff's emotional disturbance at the peril or harm of a third person. In such a case the defendant is subject to liability if the third person is a member of the plaintiff's immediate family, and the peril or harm to such a person occurs in the plaintiff's presence. In other words, the rule stated in Subsection (2) applies in such cases, even though the plaintiff's shock or fright is not due to any fear for his own safety, but to fear for the safety of his wife or child."

[9] Another alternative to the *Dillon* rule adopted by some courts allows recovery for the emotional distress of viewing the death or injury of a member of the immediate family where the plaintiff was struck by the same force that caused the death or injury of the family member. (*Beaty v Buckeye Fabric Finishing Co*., 179 F Supp 688, 697-698 [ED Ark -- applying Arkansas law]; *Cadillac Motor Car Div. v Brown*, 428 So 2d 301 [Fla], app pending; *National Car Rental System v Bostic*, 423 So 2d 915 [Fla], pet for rev den 436 So 2d 97, 99; *Champion v Gray*, 420 So 2d 348 [Fla], app pending; *Howard v Bloodworth*, 137 Ga App 478; *Strickland v Hodges*, 134 Ga App 909; *Preece v Baur*, 143 F Supp 804 [D Idaho -- applying Idaho law]; *Kaiserman v Bright*, 61 Ill App 3d 67.) We decline to adopt this impact rule (although there was such impact in each of the two appeals now before us) inasmuch as it is conceptually inconsistent with our holding in *Battalla v State of New York* (10 NY2d 237), where we abolished the impact requirement in negligent infliction of emotional distress cases.

[10] Incidentally, the application of the zone-of-danger principle in cases such as these will obviate the practical difficulties that juries otherwise have to face in seeking to separate the emotional distress suffered by a plaintiff attributable to his own physical injuries or fear thereof from the plaintiff's emotional distress in consequence of observing an injured or dying family member.

difficult to prove. However, the question of proof in individual situations should not be the arbitrary basis upon which to bar all actions * * * In the difficult cases, we must look to the quality and genuineness of proof, and rely to an extent on the contemporary sophistication of the medical profession and the ability of the court and jury to weed out the dishonest claims."

We are not suggesting that any trifling distress would be sufficient to support recovery of damages under the zone-of-danger rule. Rather, the emotional disturbance suffered must be serious and verifiable (see Restatement, Torts 2d, § 436, subd [3], Comment *g*). Additionally, the compensable [*232] emotional distress must be tied, as a matter of proximate causation, to the observation of the serious injury or death of the family member and such injury or death must have been caused by the conduct of the defendant.

The zone-of-danger rule that we adopt here is not inconsistent with the past decisions of our court that have denied recovery for emotional distress attributable to a family member's [****28] death or injury (e.g., *Lafferty v Manhasset Med. Center Hosp.*, 54 NY2d 277; *Vaccaro v Squibb Corp.*, 52 NY2d 809; *Becker v Schwartz*, 46 NY2d 401; *Howard v Lecher*, 42 NY2d 109). None of those cases involved plaintiffs who had themselves been subjected to a danger of bodily harm, although some of the plaintiffs had been present during, had observed, and even had participated in the negligent conduct. In *Becker v Schwartz* (46 NY2d 401, *supra*), in which the plaintiffs were not exposed to bodily harm, it is significant that although no recovery was allowed for emotional distress, the plaintiffs were allowed to seek recovery for pecuniary losses sustained in consequence of the defendant's breach of due care owed them in that regard. Similarly, in our most recent decision in this area, *Kennedy v McKesson Co.* (58 NY2d 500, *supra*), although the plaintiff there was also allowed to seek recovery for his pecuniary losses, recovery of damages for emotional disturbance was denied -- he had not been exposed to a risk of bodily harm by the negligence of the defendant. Moreover, in *Kennedy* the person whose death the plaintiff witnessed was not a member of his immediate [****29] family. In none of these cases would the result have been different under the rule that we apply in this case.

We recognize that our decision in these two appeals may be perceived as overruling, or at least as rejecting in a significant respect, the rationale on which our decision in *Tobin* was predicated, notwithstanding that the precise issue presented in the appeals now before us was not presented in *Tobin*. [11] In the factual situation posed in *Tobin* we would today reach the same conclusion that was reached in that case inasmuch as the plaintiff mother there [*233] was not within the zone of danger and the defendant [**850] [***364] breached no duty of reasonable care owed to her. We are not today creating a new cause of action which has not heretofore existed under the tort law of New York; rather we are recognizing the right of a plaintiff to whom the defendant has owed but breached a duty of reasonable care (as determined under traditional tort principles) to recover as an element of his or her damages, those damages attributable to emotional distress caused by contemporaneous observation of injury or death of a member of the immediate family caused [****30] by the same conduct of the defendant. [12] There may be an enlargement of the scope of recoverable damages; there is no recognition of a new cause of action or of a cause of action in favor of a party not previously recognized as entitled thereto. In conformity with traditional tort principles, the touchstone of liability in these cases is the breach by the defendant of a duty of due care owed the plaintiff.

[****31] Application of the Law to These Appeals

Turning, then, to the appeals before us, the factual situations claimed bring both cases within the zone-of-danger rule. In each case plaintiffs assert that they were subjected to an unreasonable risk of bodily injury by negligent conduct on the part of defendants. In each, the seriously injured or deceased person was a member of the immediate family of plaintiffs, each of whom alleges serious emotional trauma as a result of observing the injury or death. [13] Although plaintiffs in Bovsun did not actually see their husband and father being injured, they do assert their instantaneous

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[11] With respect to claims under the Workers' Compensation Law, we have rejected the underlying rationale of *Tobin* (*Matter of Wolfe v Sibley, Lindsay & Curr Co.*, 36 NY2d 505; see *Lafferty v Manhasset Med. Center Hosp.*, 54 NY2d 277, 280).

[12] That the recovery allowed in these cases is not conceptualized as a new, discrete cause of action but as an element of damages cognizable in a familiar action in negligence for personal injuries may raise problems of impermissible splitting of a single cause of action. Such might have been the situation in the present instance in Kugel had not the settlement of plaintiffs' causes of action for direct bodily injury been accompanied, by stipulation of the parties, by an express reservation of the claims now allowed.

[13] Inasmuch as all plaintiffs in these cases were married or related in the first degree of consanguinity to the injured or deceased person, we need not now decide where lie the outer limits of "the immediate family".

awareness that he had been injured as well as their observation of him immediately after he was struck by defendants' automobile. Plaintiffs in Kugel claim similar observations. Thus the claims in both cases are sufficient, if substantiated by the evidence, to entitle plaintiffs [*234] to recover for their asserted emotional distress damages.

[****32] For the reasons stated, in Bovsun, the order of the Appellate Division should be reversed, with costs, defendants' motion to dismiss denied and the causes of action dismissed, reinstated. In Kugel, the order of the Appellate Division should be reversed, with costs, and defendants' motions for summary judgment denied.

Dissent by: KAYE; WACHTLER

Dissent

Kaye, J. (dissenting). Permitting recovery for emotional distress from observing physical injury to another is a departure from precedent and recognition of a new duty. Because sound policy considerations supported this court's decisions consistently denying such recovery, because no reason is given for a change, and because the limitations now imposed are artificial and arbitrary, and must in fairness give way to far-reaching liability affecting the public generally, I respectfully dissent.

On no less than six occasions during the last 15 years, this court has considered, and rejected, claims for emotional distress allegedly resulting from observing injury negligently inflicted upon another. [1] Those decisions reflect a recognition that to allow recovery for such injuries would require the creation of a new duty and therefore an [**851] [****33] [***365] entirely new cause of action (*Tobin v Grossman*, 24 NY2d 609, 613), because "there is no duty to protect from emotional injury a bystander to whom there is otherwise owed no duty, and, even as to a participant to whom a duty is owed, such injury is compensable only when a direct, rather than a consequential result of the breach." (*Kennedy v McKesson Co*., 58 NY2d 500, 506.) This is so even where a single negligent act concurrently injures both the plaintiff and the third person. Each may recover for personal pecuniary, bodily and psychic injury, but not for the trauma of seeing the other harmed. (*Kennedy v McKesson Co*., 58 NY2d 500, *supra; Becker v Schwartz*, 46 NY2d 401.)

To suggest, as the majority does, that it is neither creating a new [****34] duty nor overruling those decisions because we are today presented with different facts, is merely to [*235] sidestep the issue. Our decisions, from *Tobin* to *Kennedy*, were not unrelated factual determinations. They rested on sound policy considerations.

A review of those decisions reveals the significance of the step taken today. In *Tobin v Grossman* (24 NY2d 609, *supra*) we denied recovery for psychic injuries suffered by a mother whose child was struck by an automobile. The Restatement "zone-of-danger" rule was rejected. "This has been said to be a rather arbitrary limiting rule which has the unpalatable consequence that a mother who fears for herself may recover while, if she does not or has no such similar opportunity, she may not recover." (*Id*., p 616.) A broader rule, allowing recovery by witnesses to an accident, was also rejected because such a limitation "could stand only until the first case came along in which the parent is in the immediate vicinity but did not see the accident." (*Id*., p 617.)

The *Tobin* court focused on the real issue presented, which is whether recovery for all emotional trauma caused by injuries to others should be [****35] compensable. In *Tobin* it was recognized that "[there] are too many factors and each too relative to permit creation of only a limited scope of liability or duty" (*id*., p 619) and that there was no "reasonable circumscription, within tolerable limits required by public policy, of a rule creating liability" (*id*., p 617). The court then determined, as a matter of policy, that "no cause of action lies for unintended harm sustained by one, solely as a result of injuries inflicted directly upon another, regardless of the relationship and whether the one was an eyewitness to the incident which resulted in the direct injuries" (*id*., p 611) because the recognition of such a cause of action would inevitably lead, through compulsory insurance, to an undue burden on the public (*id*., p 617), and the nature of this harm is such that the cost should not be borne by society: "Beyond practical difficulties there is a limit to attaining essential justice in this area. While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripplings of the waters, without [****36] end. The problem for the law is to limit the legal consequences of wrongs to a [*236] controllable degree. The risks of indirect harm from the loss or injury of loved ones is pervasive and inevitably realized at one time or another. Only a very small part of that risk is brought about by the culpable acts of

[1] (*Kennedy v McKesson Co*., 58 NY2d 500; *Lafferty v Manhasset Med. Center Hosp*., 54 NY2d 277; *Vaccaro v Squibb Corp*., 52 NY2d 809; *Becker v Schwartz*, 46 NY2d 401; *Howard v Lecher*, 42 NY2d 109; *Tobin v Grossman*, 24 NY2d 609.)

others. This is the risk of living and bearing children. It is enough that the law establishes liability in favor of those directly or intentionally harmed." (*Id*., p 619.)

In *Howard v Lecher* (42 NY2d 109) the issue presented was whether parents could recover from a doctor, who negligently failed to advise them of the risk, for the mental [**852] [***366] distress they suffered as a result of their infant daughter having been born with a genetic degenerative disease. Recovery for such psychic injury was again denied because "to afford the parents relief as against the doctor would require the extension of traditional tort concepts beyond manageable bounds". (*Id*., p 111.) There was no question that the parents' suffering was genuine and provable. Recovery was denied on policy grounds: "[The] law has repeatedly denied recovery for mental and emotional [****37] injuries suffered by a third party as a result of physical injuries sustained by another (*Tobin v Grossman*, 24 NY2d 609, and cases cited therein; *Shaner v Greece Cent. School Dist. No. 1*, 51 AD2d 662; *Bessette v St. Peter's Hosp*., 51 AD2d 286; *Roher v State of New York*, 279 App Div 1116). No cause of action exists, irrespective of the relationship between the parties or whether one was a witness to the event giving rise to the direct injury of another, for the unintentional infliction of harm to a person solely by reason of that person's mental and emotional reaction to a direct injury suffered by another. Thus, in *Tobin v Grossman* (*supra*), we denied recovery to a mother traumatized by the injuries suffered by her child as the result of the negligent operation of an automobile by another. Our court there recognized, as we now do, that the plaintiff parent suffered as genuinely as if she herself were the object of the injury which resulted from the impact suffered by the child. However, we also recognized then, as now, that the law must establish, circumscribe and limit the rules ascribing liability in a manner which accords with reason and practicality." [****38] (42 NY2d, p 112.)

When the *Howard* dissenters contended that *Tobin* did not apply on its facts and that the mother should recover [*237] because, as the patient of the defendant doctor, she was in the "sphere of duty," but the father should not, the court simply saw this as an example of the wisdom of applying the *Tobin* rule that, as a matter of policy, no duty exists: "Sound policy reasons and unlimited hypothesis present themselves. To now extend the perimeter of liability would inevitably lead to the drawing of artificial and arbitrary boundaries. Indeed, the dissenting opinion illustrates the arbitrary nature of such a holding, for it would allow the mother of the deformed child to recover while the father is entitled to no relief. Yet, both parents contend that the injury to them stemmed from the trauma occasioned by viewing the degeneration of their daughter. Can it be said that the mother's injury was more direct or of a greater magnitude? The law of liability should not turn on hypertechnical and fortuitous considerations of this type." (*Id*., p 113.)

One year later in the companion cases of *Becker v Schwartz* and *Park v Chessin* (46 NY2d 401, [****39] *supra*) parents again asserted causes of action for emotional distress caused by doctors' failure to advise them of the risk that their child would be born with a serious impairment. In *Becker* the mother gave birth to a brain-damaged infant who would suffer her entire life from Downs' syndrome, and in *Park* the child had a hereditary polycystic kidney disease, from which the child suffered and eventually died. The causes of action by the parents for psychic injury due to observing the injuries to their children were dismissed, again for the policy reason that such a duty, once recognized, could not be limited within acceptable boundaries, even though the court recognized a concurrent duty to the parents had been breached by the doctors, entitling the parents to recover the pecuniary expenses of the necessary care furnished to their impaired children: "Of course, this is not to say that plaintiffs may recover for psychic or emotional harm alleged to have occurred as a consequence of the birth of their infants in an impaired state. The recovery of damages for such injuries must of necessity be circumscribed. Controlling on this point is *Howard v* [**853] [***367] [****40] *Lecher* * * * While sympathetic to the plight of these parents, this court declined for policy reasons to sanction the recovery [*238] of damages for their psychic or emotional harm occasioned by the birth and gradual death of their child. To have permitted recovery in *Howard*, we observed, would have 'inevitably led to the drawing of artificial and arbitrary boundaries.'" (46 NY2d, pp 413-414.) Two years later, a cause of action by parents for psychic harm due to the birth of a daughter without limbs allegedly caused by ingestion of a drug during pregnancy was dismissed in *Vaccaro v Squibb Corp*. (52 NY2d 809) for the reasons set forth in *Howard* and *Becker*.

In *Lafferty v Manhasset Med. Center Hosp*. (54 NY2d 277) a unanimous court denied recovery to a plaintiff for psychic injury she suffered by observing her mother-in-law receive a transfusion of mismatched blood and thereafter participating in the effort to save her. Once again, the basis for the denial was the policy set forth in *Tobin* that such a duty running to persons who observe injuries to others cannot be recognized because, once it is, it cannot reasonably be contained: "In essence the case [****41] merely represents another effort to extend existing principles of law so as to expand the liability of the negligent actor to include third parties who suffer shock as a result of direct injury to others (*Tobin v Grossman*, 24

NY2d 609; *Howard v Lecher*, 42 NY2d 109; *Becker v Schwartz*, 46 NY2d 401; *Vaccaro v Squibb Corp*., 52 NY2d 809). As we noted in the *Tobin* case, the major obstacle to recognizing this theory of recovery is that 'there appears to be no rational way to limit the scope of liability' (*Tobin v Grossman, supra*, p 618)." (54 NY2d, p 279.) The court in *Lafferty* also explained that *Johnson v State of New York* (37 NY2d 378), which allowed recovery for mental trauma without the threat of physical injury, did not require a different result, as that was not, as here, a claim for psychic injury based upon a breach of duty causing physical injury to another: "Our recent decision in *Johnson v State of New York* (37 NY2d 378) holding the defendant liable for erroneously informing the plaintiff of her mother's death, does not represent an abandonment of these concerns. That case did not involve an extension of the defendant's liability for negligently [****42] injuring or causing the death of the plaintiff's mother, who had not been injured by the defendant and [*239] was not in fact dead. Liability was based entirely on a duty the defendant had undertaken to inform the plaintiff of her mother's status. That duty was owed directly to the plaintiff and was breached when the defendant erroneously informed the plaintiff that her mother had died. Although it was also noted in that case that injury to the plaintiff was foreseeable, that alone is not sufficient to establish liability when, as here, there is no showing of any duty owed to the plaintiff (see, e.g., *Tobin v Grossman, supra*, p 615; cf. *Pulka v Edelman*, 40 NY2d 781, 785)." (54 NY2d, p 280.)

Only last term, in *Kennedy v McKesson Co*. (58 NY2d 500, *supra*), recovery for psychic injury was denied to a dentist who, due to defendants' negligent repair and labeling of an instrument, unknowingly administered nitrous oxide instead of oxygen, resulting in his patient's death. Recovery was denied even though there was a contemporaneous breach by defendants of a duty to plaintiff, for which he would be able to recover his own pecuniary losses. Once again, this result [****43] flowed from the reasons expressed in the prior cases, from *Tobin* to *Lafferty*: "The rule to be distilled from those cases is that there is no duty to protect from emotional injury a bystander [**854] [***368] to whom there is otherwise owed no duty, and even as to a participant to whom a duty is owed, such injury is compensable only when a direct, rather than a consequential, result of the breach." (58 NY2d, p 506.)

The *Kennedy* court expressly rejected the contention of the Appellate Division dissenters (88 AD2d 785) that the concurrent breach of duty to plaintiff made the psychic injuries caused by viewing the physical injuries to another more "direct" or that, in effect, to permit recovery of such psychic injuries would not require the establishment of a new duty because such injuries would just be another item of damages flowing from the breach of a duty to plaintiff. That contention is indeed very close to the view adopted by the majority today.

The *Kennedy* dissenters in this court urged that the psychic injury suffered by the plaintiff was not "vicarious injury, that is one sustained by virtue of observing an injury to another" but was instead a direct [****44] injury "as a [*240] result of being made, by virtue of the defendants' negligence, an active participant in his patient's death." (58 NY2d, p 511 [Jasen, J., dissenting].) It was acknowledged that the "policy concern" expressed in *Tobin* limited liability "at the point of the third party observer -- that being a person who suffered solely by virtue of the emotional trauma of observing another being injured as a result of defendant's breach of duty *owed that other person*" and that, even though a duty to plaintiff was breached as well, "[had] he alleged that his trauma resulted from observing a patient die, rather than causing her death * * * *Tobin* would bar the cause of action". (*Id*., p 518 [emphasis added].)

Thus, there can be no doubt that this court's denial of recovery for emotional distress caused by observing physical injury negligently inflicted upon another has not been grounded on particular factual nuances but instead reflects both a limitation of the concept of duty to that which is personal and direct, even when injury to the plaintiff and the third person is caused by a single negligent act, and a consistent policy determination to circumscribe [****45] liability in the public interest.

What then has changed? The imposition of a new duty of course requires "extreme care, for legal duty imposes legal liability." (*Pulka v Edelman*, 40 NY2d 781, 786.) In declining to recognize the very duty established today, this court explained almost 15 years ago that: "Unlike the factors which have brought about most expanding tort concepts, here there are no new technological, economic, or social developments which have changed social and economic relationships and therefore no impetus for a corresponding legal recognition of such changes. Hence, a radical change in policy is required before one may recognize a cause of action in this case." (*Tobin v Grossman*, 24 NY2d 609, 615, *supra*.) With no impetus in new technological, economic or social developments, and no other explanation, the majority today allows recovery where a plaintiff in the "zone of danger" experiences "serious and verifiable" emotional distress resulting from witnessing serious physical injury inflicted by defendant on a member of plaintiff's immediate family. Just such boundaries were previously recognized [*241] as "artificial and arbitrary," and "hypertechnical [****46] and fortuitous."

To suggest that even these limitations can contain liability, once the duty to compensate for observing injury to another is recognized, is to ignore this court's own teachings. At the least, limitations such as "zone of danger" and "serious and verifiable" emotional disturbance present jury questions that will make it difficult ever to have claims for such injuries dismissed prior to trial. [2] The apparent dearth of appellate [**855] [***369] opinions on this topic (majority opn, p 229, n 7) is not a reliable signal that recoveries will be few. What is overlooked is the universe of litigation that stops short of appellate review and the practice among insurance carriers to pass along added costs to their consumers -- the very danger recognized in *Tobin*.

[****47] The *Tobin* rule is defensible, in that for articulated policy reasons recovery has been uniformly denied. This is a recognition of two principles firmly rooted in our law: first, that in the interest of the public generally, which must eventually bear the cost, not every injury can be compensable, even when suffered as a consequence of another's negligence. (*De Angelis v Lutheran Med. Center*, 58 NY2d 1053, 1055; *Albala v City of New York*, 54 NY2d 269, 274.) Second, in a negligence action a "plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another." (*Palsgraf v Long Is. R. R. Co.*, 248 NY 339, 343.)

The rule articulated today both lacks certainty and imposes limitations that are not fair. [3] [****49] The central limiting [*242] factor is that plaintiff be in the "zone of danger," described as the majority rule in this country. [4] But there is no rational relation between the "zone of danger" and the recovery allowed today. The "zone of danger" is a concept tied to a breach of duty to a person subjecting him to risk of personal physical injury. The recovery allowed today, however, is not for a breach [****48] of that duty but rather for observing the effect of a defendant's breach of duty to another that in fact causes serious physical injury to that other person. Any duty not to subject a person to emotional distress from observing physical injuries to another would be breached when the other person is injured, whether or not the observer is within the "zone of danger." (See *Tobin v Grossman*, 24 NY2d 609, 617, *supra*.) Moreover, as a matter of fairness, one parent is no more entitled to recover for mental distress from observing a child's injury than another who suffered the same anguish though not technically within the "zone of [**856] danger." It is perhaps for these reasons that so many other jurisdictions have, like [***370] this court in the past, sharply criticized the "zone-of-danger" rule. [5]

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[2] The majority's treatment of the actual cases before this court itself illustrates the point. In the Bovsun case, the injury to Jack Bovsun did not take place in plaintiffs' presence. While on the one hand requiring that the injury to an immediate family member take place in plaintiff's "contemporaneous observation," the majority reverses a dismissal of the complaint because plaintiffs became "instantly aware of * * * the fact that Jack Bovsun must have been injured". (Majority opn, pp 224-225.) Thus, for purposes of legal sufficiency of a complaint, the requirement that injury take place in plaintiff's presence has not even survived the articulation of the new rule. Similarly, in Kugel, it appears that the injuries from which the infant Stephanie Kugel succumbed at some time after the accident were internal. There is no allegation or showing that "serious physical injury" ascertainable by "contemporaneous observation," under the majority's test, occurred. Nonetheless both complaints are sustained. Although essential elements of the new formula are absent in both cases, the majority concludes that "it was error to foreclose plaintiffs from proceeding to trial" (majority opn, p 225, n 1).

[3] The new rule is marked by inconsistencies and uncertainties. The actual "zone of danger" is necessarily different for every case. From the treatment of the cases before the court today it is apparent that contemporaneous observation and contemporaneous injury are inexact concepts. The requirement of "serious and verifiable" emotional disturbance, which may be shown by lay testimony, will not deter persons from pressing claims for more indirect and tenuous psychic injuries before juries. The court's failure to define "the outer limits of "the immediate family"" (majority opn, p 233, n 13) similarly leaves open a host of questions. The complexity of such questions for juries will plainly far exceed any difficulties being obviated by the new rule (majority opn, p 231, n 10).

[4] Under the court's articulation of the new rule, one can recover for psychic injuries caused by witnessing a third person's physical injury even without fear for one's safety. The only requirement is that, as an objective matter, the plaintiff was threatened. It is far from clear that a majority of States would allow recovery in the absence of the plaintiff's fear for his or her own safety (see, e.g., *Strazza v McKittrick*, 146 Conn 714; *Klassa v Milwaukee Gas Light Co.*, 273 Wis 176; but see *Bowman v Williams*, 164 Md 397).

[5] The zone-of-danger rule has been repeatedly criticized in other jurisdictions as hopelessly artificial (*Dillon v Legg*, 68 Cal 2d 728, 733); harsh and artificial (*Barnhill v Davis*, 300 NW2d 104, 107 [Iowa]); lacking "strong logical support" because it inadequately measures foreseeability of plaintiff's mental distress (*Dziokonski v Babineau*, 375 Mass 555, 564); representing "an unnecessarily narrow and rigid limit on liability" (*Culbert v Sampson's Supermarkets*, 444 A2d 433, 436 [Me]); "based upon a fact now deemed irrelevant" in light of the abandonment of the impact rule (*Toms v McConnell*, 45 Mich App 647, 653); "[imposing] unjust limitations on recovery" (*Corso v Merrill*, 119 NH 647, 658); an "arbitrary formality" (*Portee v Jaffee*, 84 NJ 88, 96); "unduly restrictive" (*Paugh v Hanks*, 6 Ohio St 3d 72); "[ignoring] that the emotional impact was most probably influenced by the event witnessed -- serious injury to or death of the child -- rather than the plaintiff's awareness of personal exposure to danger" (*Sinn v Burd*, 486 Pa 146, 157-158); and "[denying] psychological reality" (*D'Ambra v United States*, 114 RI 643, 657).

[****50] The other barriers erected today similarly are not rationally related to the new cause of action but are, like the [*243] "zone-of-danger" rule, simply responses to the court's well-founded fears about massive verdicts, the cost of which will ultimately be borne by the public. Given the absence of any demonstrated reason to change the rule in this jurisdiction, these concerns would be better addressed by adherence to the *Tobin* rule.

Wachtler, J. (dissenting). I concur completely in Judge Kaye's dissenting opinion. Even if this court were not comfortable with the limitation of liability and broadbased rationale first announced in *Tobin v Grossman* (24 NY2d 609) and consistently applied in our decisions until today, it should nevertheless resist the temptation to abandon or depart from that rule. The institutional stability of a court is more important than any desire to remedy what may be perceived as a harsh application of the rule in a given case.

Trombetta v. Conkling

Court of Appeals of New York
November 16, 1993, Argued ; December 20, 1993, Decided
No. 260

Reporter
82 N.Y.2d 549 *; 626 N.E.2d 653 **; 605 N.Y.S.2d 678 ***; 1993 N.Y. LEXIS 4348 ****

Judges: Chief Judge Kaye and Judges Simons, Titone, Hancock, Jr., Smith and Levine concur.

Opinion by: Bellacosa, J.

Opinion

[*550] [653] [***678]** Bellacosa, J.

Plaintiff-appellant's case poses a significant tort duty question for this Court. We must now decide whether plaintiff, the niece of a woman who was killed in an accident in plaintiff's presence and with whom plaintiff shared a long and strong emotional bond, may qualify to bring suit as a bystander for the negligent infliction of emotional injuries under the *Bovsun v Sanperi* (61 NY2d 219) "zone of danger" rule. If we were **[****3]** to conclude, as Supreme Court did, that plaintiff can be deemed a member of the victim's "immediate family", her cause of action lies. We agree with the Appellate Division's reversal of Supreme Court and the dismissal of the complaint and, accordingly, we affirm the Appellate Division order. **[*551]**

I.

On November 10, 1989, plaintiff Darlene Trombetta and her aunt, Phyllis Fisher, were crossing Wurz Avenue in Utica, New York. Plaintiff noticed a tractor-trailer bearing down on them. Realizing that the **[**654]** truck was **[***679]** not going to stop, plaintiff grabbed her aunt's hand in an attempt to pull her out of the truck's path. The effort failed. Plaintiff, who was not physically touched or injured, watched as the wheels of the truck ran over her aunt, killing her instantly.

Plaintiff commenced this action against defendants Fred J. Conkling and Universal Waste, Inc., the driver and the owner of the vehicle, respectively, asserting only a claim for negligent infliction of emotional distress. At an examination before trial, plaintiff testified that she and her aunt shared a close relationship. Allegedly, plaintiff's mother had died when plaintiff was 11, and **[****4]** her aunt became the maternal figure in her life. They always lived close by and enjoyed many activities together on a daily basis. At the time of the accident, plaintiff was 37 and her aunt was 59.

After discovery, defendants moved to dismiss the complaint and for summary judgment. Noting that *Bovsun v Sanperi* explicitly left open the issue of "where lie the outer limits of 'the immediate family' " (61 NY2d 219, 233, n 13, *supra),* Supreme Court denied defendants' motion and held that the intimate familial relationship in this case was sufficient to state a cause of action (154 Misc 2d 844).

The Appellate Division reversed and dismissed the complaint, confining the class of potential plaintiffs who may assert a claim of negligent infliction of emotional distress to the "immediate family" (187 AD2d 213). The Court declined to impose liability on defendants upon a showing that a "strong bond" existed between plaintiff and the deceased, citing the "difficult proof problems and the danger of fictitious claims" *(id.,* at 215). This Court granted plaintiff leave to appeal (81 NY2d 711). Because we share the Appellate Division's concerns, we now affirm and answer explicitly **[****5]** the question the Court left open in *Bovsun.* Recovery of damages by bystanders for the negligent infliction of emotional distress should be limited only to the immediate family *(Bovsun v Sanperi,* 61 NY2d 219, 233, n 13, *supra).*

II.

Historically, New York hesitated for a long time before **[*552]** recognizing a very circumscribed right of recovery for bystanders based on the negligent infliction of emotional distress. In *Tobin v Grossman* (24 NY2d 609), a mother sought recovery for emotional trauma caused by her witnessing from afar an automobile negligently operated by the defendant striking her two-year-old child. We determined that the mother did not state a cause of action and refused to adopt the California "foreseeability" standard in this area *(see, Dillon v Legg,* 68 Cal 2d 728, 441 P2d 912). The Court stated that, absent the establishment of arbitrary distinctions, there was no "reasonable circumscription, within tolerable limits required by public policy, of [such] a rule creating liability" *(id.,* at 617; *see also, Lafferty v Manhasset Med. Ctr. Hosp.,* 54 NY2d 277). Thereafter, we also denied entitlement to recovery for emotional damages **[****6]** when a defendant's negligent act simultaneously breached a duty owed to the plaintiff bystander *(see, Vaccaro v Squibb Corp.,* 52 NY2d 809; *Howard v Lecher,* 42 NY2d 109), although the plaintiff could recover pecuniary losses resulting from the defendant's conduct *(see, Kennedy v McKesson Co.,* 58 NY2d 500; *Becker v Schwartz,* 46 NY2d 401).

In *Bovsun v Sanperi* (61 NY2d 219, *supra),* our closely divided

Court opened a narrow avenue to bystander recovery, adopting a "zone of danger" theory. *Bovsun* marked a significant deviation from the long-standing absolute bar on bystander claims. We reasoned that because the defendant had breached a duty owed to the plaintiff by **[**655]** exposing the **[***680]** plaintiff to an unreasonable and negligent risk of bodily injury or death, a plaintiff should be able to recover all damages sustained as a result of a defendant's breach, including mental and physical injuries resulting from witnessing death or serious bodily injury to a member of the immediate family *(id.,* at 229-231). Under the fact pattern and *ratio decidendi* of that case, only the immediate family members of the victims were entitled to claim **[****7]** damages for emotional trauma. The Court saw no necessity to define the boundaries of "the immediate family", expressing its forbearance in a footnote *(id.,* at 233, n 13).

Supreme Court in this case inferred from the forbearance that since this Court had not confined the immediate family definition, the nisi prius court was not foreclosed from extending the zone of danger rule to aunts, uncles and other persons sharing a strong emotional bond with the victim--"immediate family" members. We agree with the Appellate Division that Supreme Court's step beyond the footnote concerning the **[*553]** breadth of the rule is not warranted. Although plaintiff suffered a personal tragic loss, that cannot justify the significant extension of defendants' obligation to be answerable in damages for her emotional trauma. On firm public policy grounds, we are persuaded that we should not expand the cause of action for emotional injuries to all bystanders who may be able to demonstrate a blood relationship coupled with significant emotional attachment or the equivalent of an intimate, immediate familial bond.

Despite *Bovsun v Sanperi* (61 NY2d 219, *supra),* we have been precise and **[****8]** prudent in resolving tort duties, because the significant expansion of a duty "must be exercised with extreme care, for legal duty imposes legal liability" *(Pulka v Edelman,* 40 NY2d 781, 786, *rearg denied* 41 NY2d 901). It remains part of this Court's important common-law tradition and responsibility to define the orbits of duty. Sound policy and strong precedents justify our confinement and circumscription of the zone of danger rule to only the immediate family as surveyed in *Bovsun (see, Strauss v Belle Realty Co.,* 65 NY2d 399, 402-403; *De Angelis v Lutheran Med. Ctr.,* 58 NY2d 1053, 1055). Otherwise, the narrow avenue will ironically become a broad concourse, impeding reasonable or practicable limitations.

In *Dillon v Legg* (68 Cal 2d 728, 441 P2d 912, *supra),* the California Supreme Court suggested guidelines for determining the degree to which a defendant owes a duty to a plaintiff bystander *(see, id.,* 68 Cal 2d, at 740-741, 441 P2d, at 920-921; Prosser and Keeton, Torts § 54, at 366 [5th ed]; *but see, Elden v Sheldon,* 46 Cal 3d 267, 758 P2d 582). The reviewing court would determine whether a particular plaintiff bystander's emotional injury **[****9]** was foreseeable on a case-by-case basis, after balancing certain factors *(Dillon v Legg,* 68 Cal 2d, at 740-741, 441 P2d, at 920-921, *supra).* We have twice declined to adopt the *Dillon* approach because we were troubled by the potential sweeping liability and the unwarranted complication imposed on the judicial role, which the adoption of indefinite and open-ended analysis would entail *(see, Bovsun v Sanperi,* 61 NY2d 219, 230, *supra; Tobin v Grossman,* 24 NY2d 609, 618, *supra).*

As a policy matter, we continue to balance the competing interests at stake by limiting the availability of recovery for the negligent infliction of emotional distress to a strictly and objectively defined class of bystanders. In addition to the **[*554]** prevention of an unmanageable proliferation of such claims--with their own proof problems and potentiality for inappropriate claims--the restriction of this cause of action to a discrete readily determinable class also takes cognizance of the complex responsibility that would be imposed on the **[**656]** courts in this area to assess an enormous **[***681]** range and array of emotional ties of, at times, an attenuated or easily **[****10]** embroidered nature. We have said before and it has special application here:

"Beyond practical difficulties there is a limit to attaining essential justice in this area. While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree" *(Tobin v Grossman,* 24 NY2d 609, 619, *supra).*

Thus, while plaintiff was, without doubt, within the zone of danger when defendants' truck killed her aunt, the claim for the negligent suffering of emotional distress was properly dismissed because plaintiff is not within the deceased's "immediate family" as defined and limited by *Bovsun.*

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Kaye and Judges Simons, Titone, Hancock, Jr., Smith and Levine concur.

Order affirmed, with costs.

Jun Chi Guan v. Tuscan Dairy Farms

Supreme Court of New York, Appellate Division, Second Department

December 27, 2005, Decided

2004-09712

Reporter
24 A.D.3d 725 *; 806 N.Y.S.2d 713 **; 2005 N.Y. App. Div. LEXIS 14771 ***; 2005 NY Slip Op 10100 ***

Judges: SONDRA MILLER, J.P., DAVID S. RITTER, GLORIA GOLDSTEIN, ROBERT A. LIFSON, JJ. RITTER, GOLDSTEIN and LIFSON, JJ., concur. S. MILLER, J.P., dissents and votes to affirm the order insofar as appealed from.

Opinion

[*725] [**713] In a consolidated action, inter alia, to recover damages for personal injuries and wrongful death, etc., the defendants Tuscan Dairy Farms, doing business as Dellwood Dairies, and William Piro appeal from so much of an order of the Supreme Court, Kings County (Douglas, J.), dated September 16, 2004, as denied that branch of their motion which was for summary judgment dismissing the third cause of action in the complaint interposed in the action originally commenced under Index No. 25874/98 insofar as asserted against them.

Ordered that the order is reversed insofar as appealed from, on the law, [***2] with costs, that branch of the motion which was for summary judgment dismissing the third cause of action in the complaint interposed in the action originally commenced under Index No. 25874/98 is granted, that cause of action is dismissed insofar as asserted against the appellants, and that cause of action is severed insofar as asserted against the remaining defendants.

[**714] This consolidated action, inter alia, to recover damages for personal injuries and wrongful death arises from an accident wherein a delivery truck owned by the defendant Tuscan Dairy Farms, doing business as Dellwood Dairies, and driven by the defendant William Piro (hereinafter referred to collectively as the appellants), allegedly struck the plaintiff Shao Zhen Kwan (hereinafter the plaintiff) as she was pushing a stroller conveying her two year-old grandson, the decedent Jackie Guan (hereinafter the infant). The impact allegedly caused the plaintiff to sustain serious physical injuries and caused the infant's death. The Supreme Court denied that branch of the appellants' motion which was for summary judgment dismissing the third [*726] cause of action in the complaint [****2] interposed in the action originally commenced under [***3] Index No. 25874/98 insofar as asserted against them, which sought to recover damages for injuries the plaintiff allegedly sustained from observing the accident in which the infant was killed. We reverse.

It is now settled that "where a defendant negligently exposes a plaintiff to an unreasonable risk of bodily injury or death, the plaintiff may recover, as a proper element of his or her damages, damages for injuries suffered in consequence of the observation of the serious injury or death of a member of his or her immediate family--assuming, of course, that it is established that the defendant's conduct was a substantial factor bringing about such injury or death" (*Bovsun v Sanperi*, 61 NY2d 219, 230-231, 461 NE2d 843, 473 NYS2d 357 [1984]). Here, the plaintiff argues that, given the culture of the Chinese family, which resulted in her being the person who was with the infant during most of his waking hours, the infant was within the infant's "immediate family." However, we are not writing on a clean slate. The Court of Appeals has exercised its prerogative to balance the competing interests and announce the public policy of this state to limit liability to the class of persons identified as "immediate [***4] family" in *Bovsun* (*supra* at 230-231). This class of persons does not include a plaintiff's grandson, and it is not appropriate for this court to expand the class absent further direction from the Court of Appeals or the New York State Legislature.

In *Bovsun v Sanperi* (*supra*), the Court of Appeals announced the availability of bystander recovery in this state in two cases brought by the spouses, parents, and/or children of the injured or deceased person. In a footnote, the Court stated: "Inasmuch as all plaintiffs in these cases were married or related in the first degree of consanguinity to the injured or deceased person, we need not now decide where lie the outer limits of "the immediate family.' " (id. at 234 n 13.)

In *Trombetta v Conkling* (82 NY2d 549, 626 NE2d 653, 605 NYS2d 678 [1993]), the Court of Appeals was asked to find

that an aunt was within the "immediate family" of the plaintiff niece. The plaintiff in *Trombetta* was seeking to recover damages for emotional injuries she allegedly suffered witnessing her aunt being run over and killed by a tractor-trailer. The plaintiff argued that her aunt should be considered her "immediate family" given [***5] their familial relationship and the close emotional bond she had shared with her aunt, who had become her maternal figure after her mother died. In rejecting this argument, the Court of Appeals noted that *Bovsun* "opened a narrow avenue" to a "very circumscribed right of recovery" (*Trombetta*, 82 NY2d 549, 552, 626 NE2d 653, 605 NYS2d 678 [1993]). The Court [*727] held: "On firm public policy grounds, we are persuaded [**715] that we should not expand the cause of action for emotional injuries to all bystanders who may be able to demonstrate a blood relationship coupled with significant emotional attachment or the equivalent of an intimate, immediate familial bond." The Court continued: "It remains part of this Court's important common-law tradition and responsibility to define the orbits of duty. Sound policy and strong precedents justify our confinement and circumscription of the zone of danger rule to only the immediate family as surveyed in *Bovsun*" (id. at 553.) Finally, the Court noted: As a policy matter, we continue to balance the competing interests at stake by limiting the availability of recovery for the negligent infliction of emotional distress to a strictly and objectively [***6] defined class of bystanders. In addition to the prevention of an unmanageable proliferation of such claims--with their own proof problems and [****3] potentiality for inappropriate claims--the restriction of this cause of action to a discrete [and] readily determinable class also takes cognizance of the complex responsibility that would be imposed on the courts in this area to assess an enormous range and array of emotional ties of, at times, an attenuated or easily embroidered nature." (*id.* at 554-555.)

The case at bar is analogous to *Trombetta*, and the expansion of the class sought must be denied on the same rationale. Here, as in *Trombetta*, the plaintiff is arguing that a blood relationship, coupled with a significant emotional attachment and intimate, immediate familial bond, gave rise to an "immediate family" relation in the form of a de facto maternal figure (albeit here the status of the plaintiff is that of the de facto maternal figure, whereas in *Trombetta* it was the contrary). This argument was rejected in *Trombetta* and must be rejected here. Indeed, the argument is even less compelling in the case at bar. Here, unlike in *Trombetta*, [***7] the infant's mother was not deceased at the time of the accident. In sum, the class of persons in a plaintiff's "immediate family" does not include his or her grandchild. Ritter, Goldstein and Lifson, JJ., concur.

Dissent by: MILLER

Dissent

S. Miller, J.P., dissents and votes to affirm the order insofar as appealed from with the following memorandum: My colleagues have concluded that binding precedent from our Court of Appeals precludes a finding that the plaintiff Shao Zhen Kwan is a member of her grandson's "immediate family" for the purpose of permitting her to maintain a cause of action for her emotional injuries sustained as a result of her having witnessed the tragic death of her grandson. I do not agree that such a conclusion is contrary to established precedent. Moreover, I find that the [*728] plaintiff grandmother was, as a matter of fact, a part of her grandson's immediate family, and that the governing rationale to limit the availability of damages to such immediate family members is by no means compromised by recognizing the plaintiff grandmother's immediate family status. Accordingly, I dissent.

The plaintiffs' decedent, Jackie Guan, age 2 1/2, was being pushed in his stroller [***8] by his grandmother, the plaintiff Shao Zhen Kwan (hereinafter the plaintiff grandmother), at a Brooklyn street fair when both were allegedly struck by a truck owned by the defendant Tuscan Dairy Farms, doing business as Dellwood Dairies, and driven by the defendant William Piro (hereinafter the appellants). The truck crushed the stroller and the child, causing his death. Simultaneously the plaintiff grandmother was thrown into the air and knocked into partial [**716] unconsciousness. She sustained a fractured thigh and other serious but nonfatal injuries. It was the plaintiff grandmother's daily routine to care for her grandson from 7:00 a.m. to 7:00-8:00 p.m. while his parents worked. She had quit her job as a garment factory worker in 1995 to be available to provide full-time care for her grandson six days of every week.

In the ensuing action, the plaintiff grandmother sought, inter alia, damages for her [****4] own physical injuries and for her "psychic injuries and/or mental anguish." Insofar as these claims included psychological injuries she sustained from witnessing the death of her grandson, the appellants moved for summary judgment dismissing these claims contending that she was not entitled [***9] to recovery since she was not a member of the child's "immediate family." They also argued that because she was knocked

unconscious she did not actually witness her grandson's death and was therefore barred from recovery under New York law. The Supreme Court denied the appellants' motion.

The state of the law in New York prior to 1984 was that there was no recovery for emotional harm suffered by a plaintiff who witnessed the death or injury of another (*see Tobin v Grossman*, 24 NY2d 609, 249 NE2d 419, 301 NYS2d 554 [1969]). This rule was grounded upon policy considerations that focused primarily upon the ease with which a bystander might feign emotional injury, and upon concerns of limitless liability (*id.*, *see* Note, *Bystander Emotional Distress: Missing an Opportunity to Strengthen the Ties that Bind*, 61 Brooklyn L Rev 1399, 1404-1406 [1995]). Thus, in *Tobin*, a mother who witnessed her two-year-old son run down by the defendant's car was denied a cause of action for the emotional distress she suffered as a result of her traumatic observations.

That rule changed in 1984 with the decision in *Bovsun v* [*729] *Sanperi* (61 NY2d 219, 461 NE2d 843, 473 NYS2d 357 [1984]). That appeal consisted of two consolidated [***10] appeals involving automobile accidents. In *Bovsun*, a father was crushed by a car as he stood behind his disabled auto on the Southern State Parkway. Although his wife and daughter did not actually see the car strike their station wagon, both were instantly aware of the impact and of the fact that the father had been injured. The companion appeal, *Kugel v Mid-Westchester Indus. Park* (61 NY2d 219, 461 NE2d 843, 473 NYS2d 357 [1984]), also involved an automobile collision; there, the car occupied by the plaintiff husband and wife and their one- and four-year-old daughters, was struck by the defendant's auto. All suffered injuries and the one-year-old infant died hours later. The parents sought to recover, inter alia, for their emotional trauma in watching their infant daughter die. In both cases, the family members' claims for emotional distress were dismissed by the trial court. In both cases, the Court of Appeals reversed and sustained the claims for emotional distress resulting from the parties' observation of their family members' injury and death.

Yielding to the growing body of national authority permitting such claims, a sharply divided Court of Appeals adopted the California "zone of danger" [***11] rule holding that "where a defendant negligently exposes a plaintiff to an unreasonable risk of bodily injury or death, the plaintiff may recover, as a proper element of his or her damages, damages for injuries suffered in consequence of the observation of the serious injury or death of a member of his or her immediate family--assuming, of course, that it is established that the defendant's conduct was a substantial factor bringing about such injury or death" (*Bovsun*, 230-231 [**717]). Thus the family members' claims were reinstated.

Bovsun makes it clear that the following elements must exist in order for a plaintiff to recover for emotional distress. First, the defendant's conduct must be negligent and must expose the plaintiff to an unreasonable risk of bodily injury or death. Merely an unreasonable risk of injury is required, not physical injury to the plaintiff. Second, the plaintiff so exposed must observe the serious injury or death of a family member. Based upon the facts of *Bovsun*, literal "witnessing" of the event is not required as the wife and daughter therein did not actually see the incident where the father was injured but were contemporaneously aware thereof. Rather, [***12] it appears that contemporary awareness rather than actual visible observation is the required element. Third, the family member whose injury or death causes the plaintiff emotional distress must be a member of the plaintiff's [****5] "immediate family."

Significantly relevant to this appeal is the *Bovsun* Court's [*730] single reference to the meaning of the phrase "immediate family." That single reference is relegated to a mere footnote:

"Inasmuch as all plaintiffs in these cases were married or related in the first degree of consanguinity to the injured or deceased person, we need not now decide where lie the outer limits of the "immediate family."

(*Bovsun*, 61 NY2d at 234 n 13.)

It is therefore clear beyond doubt that the Court of Appeals expressly chose not to define the term "immediate family" or to circumscribe its limits in *Bovsun*.

It was not until nine years later, in 1993, that the Court of Appeals was again presented with the opportunity to define the limits of "immediate family." In *Trombetta v Conkling* (82 NY2d 549, 626 NE2d 653, 605 NYS2d 678 [1993]) a tractor-trailer struck and killed 59-year-old Phyllis Fisher as she crossed a street in Utica. [***13] Her 39-year-old niece, the plaintiff Darlene Trombetta, tried to pull her aunt to safety but was unsuccessful. Trombetta was not hit by the truck, nor did she sustain any physical injuries. Fisher had raised Trombetta since age 11 when Trombetta's mother died; there was apparently no dispute that Fisher was Trombetta's de facto mother.

Trombetta sued the driver and the owner of the truck,

seeking damages for her emotional injuries in witnessing the death of her beloved aunt. The Court of Appeals held that Trombetta had no such claim. An aunt, no matter how closely bonded to the plaintiff, who had literally served as a substitute mother, could not qualify as a member of the "immediate family." Largely for the policy reasons initially cited by the *Tobin* Court, to limit liability to reasonable bounds, the *Trombetta* Court stated that: "[a]lthough plaintiff suffered a personal tragic loss, that cannot justify the significant extension of defendants' obligation to be answerable in damages for her emotional trauma. On firm public policy grounds, we are persuaded that we should not expand the cause of action for emotional injuries to all bystanders who may be able to demonstrate [***14] a blood relationship coupled with significant emotional attachment or the equivalent of an intimate, immediate familial bond" (*Trombetta*, 82 NY2d at 553). Most significantly, the Court further stated: "[s]ound policy and strong precedents justify our confinement and circumscription of the zone of danger rule to only the immediate family *as surveyed in [**718] Bovsun*" (*id*. at 553, [emphasis added]).

Contrary to the conclusion of my colleagues, I find the *Trombetta's* Court's reference to the *Bovsun* "survey" to be ambiguous, and even puzzling. As noted above, *Bovsun's* sole reference [*731] to "immediate family" is in footnote 13 where the Court expressly declined to define the outer limits of the "immediate family." Thus, to date, the Court of Appeals has expressly refrained from providing guidance on the discrete issue we are required to determine in this case, *i.e.*, whether a grandparent is a member of the "immediate family."

[****6] Independent research confirms that no New York case has prohibited recovery of damages for emotional injuries sustained by a grandparent who witnessed the death of or injury of a grandchild or by a [***15] grandchild who witnessed the death or injury of a grandparent. Nor has any New York case permitted recovery of damages under those circumstances.

Nationally, several cases and statutes exist permitting recovery by a grandparent in the context of this litigation (*see Fernandez v Walgreen Hastings Co.*, 1998 NMSC 39, 126 NM 263, 968 P2d 774 [1998]; *Genzer v City of Mission*, 666 SW2d 116 [Tex App 1983]) or by a grandchild (*see Dickerson v Lafferty*, 750 So 2d 432 [La Ct App 2000]; *Thomas v Schwegmann Giant Supermarket, Inc.*, 561 So 2d 992 [La Ct App 1990]; *see generally* Annotation, *Relationship Between Victim and Plaintiff-witness as Affecting Right to Recover Under State Law for Negligent Infliction of Emotional Distress Due to Witnessing Injury to Another Where Bystander Plaintiff is Not Member of Victim's Immediate Family*, 98 ALR.5th 609, § 14). Most significantly, no authorities have been found nationally prohibiting recovery by a grandparent or a grandchild.

The special status of grandparents has long been recognized in New York statute and case law. Domestic Relations Law § 72 [***16] and the New York Court of Appeals have provided standing for grandparents seeking visitation rights with their grandchildren (*see Matter of Emanuel S. v Joseph E.*, 78 NY2d 178, 577 NE2d 27, 573 NYS2d 36 [1991]). In 2000, the United States Supreme Court opined on the entitlement of grandparents to visitation when opposed by the child's parents (*see Troxel v Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49 [2000]). No other relationship is afforded such standing or consideration. Such special recognition is understandable when we consider the increasingly large numbers of grandparents who have assumed full responsibility for the care and custody of their grandchildren. According to the 2000 census published by the Census Bureau of the US Department of Commerce, over 4.5 million infants, youngsters, and teens live in households headed by a grandparent. The census points out that America's grandparents are increasingly being called upon to raise their grandchildren (*see* US Census 2000, US Department of Commerce, Statistics Administration issued October 2003; <http://www.census.gov.population/www/socdemo/grandparents.html>, cached at <http://www.courts.state.ny.us/reporter/webdocs/grandparents_grandchildren.html>).

[*732] In 2003 New York enacted its "Grandparent Caregivers' Rights Act" (L 2003, ch 657). [***17] In so doing, the Legislature recognized: "that, with 413,000 children living in grandparent headed household in New York state, grandparents play a special role in the lives of their grandchildren and are increasingly functioning as care givers in their grandchildren['s] lives. In recognition of this critical role that many grandparents play in the lives of their grandchildren, the Legislature finds it necessary to provide guidance regarding the ability of grandparents to obtain [**719] standing in custody proceedings involving their grandchildren." (L 2003, ch 657, § 1.) Currently this law is the most expansive statutory grant of rights to grandparent caregivers in any state (*see Matter of Tolbert v Scott*, 15 AD3d 493, 790 NYS2d 495 [2005]; *see also* Wallace, *Enabling Kincaregivers to Raise Children*, New York State Kincare Coalition and AARP, New York, June,

2005 [discussing the special role of grandparent caregivers]).

Although the plaintiff grandmother in this case was not the legal custodian of her deceased grandson, she served in an intimate, critical, and consistent capacity from the time of his birth, caring for him daily "in loco parentis" while his parents were both employed. [***18] There is no reason in law or equity to find that she is anyone less than a member of her grandson's "immediate [****7] family."

To the extent that concerns about limitless liability must be considered, the inclusion of grandparents does not pose that threat. Grandparents are a discreet, identifiable group and their inclusion does not infer or require that other relatives closely-bonded emotionally and practically to family members must be included as well.

Finally, I reject the appellants' contention that the plaintiff grandmother should be denied the right to recover for emotional injury because she did not actually see her grandson being hit by the truck or his body after the collision. The appellants' contention is based upon the plaintiff grandmother's deposition testimony where she stated, through the services of a Cantonese interpreter, that she suffered a state of partial unconsciousness after the impact and that she did not actually see her grandson being tossed in the air or crushed by the truck. However, in evaluating her somewhat stilted testimony, she was clearly aware that something terrible had happened, although she could not describe the details of the accident. [***19] She knew she had been hit and was "tossed up and dropped on the ground." She also knew that the stroller had been hit; she let go of it upon impact. She knew she had been pushing the stroller when the truck [*733] knocked her unconscious. Although she was unable to identify exactly what had occurred, she knew something had happened to her grandson--that his body had been "thrown."

Virtually every time she repeated that she lost consciousness and could not provide details she also explained that she was "scared"; "I was so scared and I didn't know what happened to my grandson." Clearly the plaintiff grandmother suffered emotional trauma. She knew that she and the stroller had been hit by a truck, she was hurt and bleeding, and her grandson was nowhere to be seen.

Accordingly, for the reasons stated above, I conclude that the Supreme Court correctly denied that branch of the appellants' motion which was for summary judgment dismissing the third cause of action in the complaint interposed in the action originally commenced under Index No. 25874/98 insofar as asserted against them.

End of Document

Greene v Esplanade Venture Partnership

Supreme Court of New York, Appellate Division, Second Department

May 15, 2019, Decided

2017-02080

Reporter
172 A.D.3d 1013 *; 101 N.Y.S.3d 99 **; 2019 N.Y. App. Div. LEXIS 3802 ***; 2019 NY Slip Op 03771 ****; 2019 WL 2112900

Judges: RUTH C. BALKIN, J.P., CHERYL E. CHAMBERS, ROBERT J. MILLER, SYLVIA O. HINDS-RADIX, FRANCESCA E. CONNOLLY, JJ. BALKIN, J.P., CHAMBERS and CONNOLLY, JJ., concur. MILLER, J., dissents.

Opinion

[100] [*1014]** In an action, inter alia, to recover damages for personal injuries and wrongful death, the defendant Esplanade Venture Partnership appeals, and the defendants Blue Prints Engineering, P.C., and Maqsood Faruqi separately appeal, from an order of the Supreme Court, Kings County (Richard Velasquez, J.), dated December 12, 2016. The order, insofar as appealed from, granted that branch of the plaintiffs' motion which was for leave to amend the amended complaint to add a cause of action sounding in negligent infliction of emotional **[***2]** distress.

Ordered that the order is reversed insofar as appealed from, on the law, with one bill of costs to the appellants appearing separately and filing separate briefs, and that branch of the plaintiffs' motion which was for leave to amend the amended complaint to add a cause of action sounding in negligent infliction of emotional distress is denied.

On May 17, 2015, debris consisting of "masonry, stucco and/or concrete" allegedly fell from the facade of a commercial building located at 305 West End Avenue in Manhattan. The falling material struck and killed Greta Devere Greene (hereinafter the decedent), who was two years old, and injured her grandmother, the plaintiff Susan Frierson. The plaintiff Stacy Greene, as administrator of the decedent's estate, and Frierson commenced this action against the defendants, asserting two causes of action sounding in negligence and wrongful death.

Approximately nine months after the commencement of this action, the plaintiffs moved, inter alia, for leave to amend the amended complaint to add a cause of action on behalf of Frierson sounding in negligent infliction of emotional distress. The proposed cause of action, denominated in the proposed **[***3]** second amended complaint as the fourth cause of action, alleged that Frierson "was present with [the decedent], and she observed the accident while within the 'zone of danger' of said accident," and **[**101]** that Frierson "sustained a severe shock to her nervous system, was caused to suffer severe mental anguish as a result thereof and feared the imminent injuries and death **[****2]** of her granddaughter." In an affidavit in support of the motion, Frierson averred that she had a close relationship with the decedent and watched her regularly while her parents were at work.

The defendant Esplanade Venture Partnership, and the defendants Blue Prints Engineering, P.C., and Maqsood Faruqi (hereinafter collectively the defendants), separately opposed the motion, arguing that Frierson and the decedent were not "immediate family" members and, thus, Frierson could not **[*1015]** maintain a cause of action sounding in negligent infliction of emotional distress. The Supreme Court, inter alia, granted that branch of the plaintiffs' motion which was for leave to amend the amended complaint to add a cause of action sounding in negligent infliction of emotional distress. The defendants appeal.

Although leave to amend a pleading **[***4]** should generally be freely granted in the absence of prejudice or surprise to the opposing party (*see* CPLR 3025 [b]; *Sudit v Labin*, 148 AD3d 1073, 50 NYS3d 430 [2017]), the motion to amend should be denied where the proposed amendment is palpably insufficient or patently devoid of merit (*see e.g. Jones v LeFrance Leasing Ltd. Partnership*, 127 AD3d 819, 7 NYS3d 352 [2015]; *Hylan Elec. Contr., Inc. v MasTec N. Am., Inc.*, 74 AD3d 1148, 903 NYS2d 528 [2010]; *Greco v Christoffersen*, 70 AD3d 769, 896 NYS2d 363 [2010]). For the reasons that follow, the proposed amendment was patently devoid of merit, and leave to amend should have been denied.

In *Bovsun v Sanperi* (61 NY2d 219, 224, 461 NE2d 843,

473 NYS2d 357 [1984]), the Court of Appeals held that a plaintiff may recover damages for emotional distress "occasioned by his [or her] witnessing injury or death caused by the defendant's conduct to a member of the plaintiff's *immediate family*" (emphasis added). *Bovsun* stands for the proposition that spouses and their children are immediate family members (*see id.* at 233-234). In a footnote, the Court of Appeals stated: "Inasmuch as all plaintiffs in these cases were married or related in the first degree of consanguinity to the injured or deceased person, we need not now decide where lie the outer limits of 'the immediate family' " (*id.* at 233 n 13).

Subsequently, in *Trombetta v Conkling* (82 NY2d 549, 551, 626 NE2d 653, 605 NYS2d 678 [1993]), the Court of Appeals held that a niece could not recover damages for negligent infliction of emotional distress for witnessing the death of her aunt, despite the fact that the niece's mother had died when **[***5]** the niece was 11 years old, and the aunt had allegedly been the maternal figure in the niece's life. At the time of the accident, the plaintiff was 37 years old and her aunt was 59 years old (*see id.* at 551). In rendering its determination, the Court of Appeals stated: "On firm public policy grounds, we are persuaded that we should not expand the cause of action for emotional injuries to all bystanders who may be able to demonstrate a blood relationship coupled with significant emotional attachment or the equivalent of an intimate, immediate familial bond" (*id.* at 553).

In *Jun Chi Guan v Tuscan Dairy Farms* (24 AD3d 725, 806 NYS2d 713 [2005]), this Court held that the relationship of grandparent and grandchild does not constitute "immediate family" so as to **[*1016]** permit recovery for negligent infliction of emotional distress. In *Jun Chi Guan*, the **[**102]** plaintiff grandmother was pushing her infant grandson in a stroller, when a truck owned and operated by the defendants struck the stroller, killing the infant (*see id.* at 725). This Court rejected the grandmother's argument that she should be considered immediate family because she was the family member who spent the most time with the infant during his waking hours (*see id.* at 726). Further, this Court held that "it is not appropriate for this Court to **[***6]** expand the class [of persons constituting immediate family] absent further direction from the Court of Appeals or the New York State Legislature" (*id.*).

Accordingly, on constraint of *Jun Chi Guan*, the plaintiffs' proposed cause of action sounding in negligent infliction of emotional distress was patently devoid of merit and, thus, the Supreme Court should not have granted the plaintiffs leave to amend the amended complaint to assert it (*see Jun Chi Guan v Tuscan Dairy Farms*, 24 AD3d 725, 806 NYS2d 713 [2005]; *see also Thompson v Dhaiti*, 103 AD3d 711, 712, 959 NYS2d 522 [2013]; *Santana v Salmeron*, 79 AD3d 1122, 1123, 913 NYS2d 584 [2010]). Balkin, J.P., Chambers and Connolly, JJ., concur.

Dissent by: MILLER

Dissent

Miller, J., dissents, and votes to affirm the order insofar as appealed from, with the following **[****3]** memorandum, in which HINDS-RADIX, J., concurs: We are called upon in this case to apply a line of precedent that, from its inception until the present day, has been marked by controversy and criticism, and subjected to repeated challenge. This line of cases originally was premised on generalized sentiments of "public policy" which have been so thoroughly rejected that it was long ago considered the "threshing [of] old straw" to dismantle them (Prosser & Keeton, Torts § 54 at 360 [5th ed 1984]). While I recognize the importance of precedent in our common-law system, the genius of that system **[***7]** lies in its ability to evolve as experience is gained and the expectations of society progress. Indeed, "the common law of this State is not an anachronism, but is a living law which responds to the surging reality of changed conditions" (*Gallagher v St. Raymond's R. C. Church*, 21 NY2d 554, 558, 236 NE2d 632, 289 NYS2d 401 [1968]).

Accordingly, where, as here, a court is asked to mechanically apply a court-made rule that lacks justification in theory, and which, in practice, produces arbitrary and disparate results, it is the duty of the court to inquire into its continued viability and, if appropriate, reformulate the rule or abolish it completely. As the Court of Appeals has recognized, "[w]e act in the finest common-law tradition when we adapt and alter decisional **[*1017]** law to produce common-sense justice" (*Woods v Lancet*, 303 NY 349, 355, 102 NE2d 691 [1951]).

For the reasons that follow, I conclude that the plaintiffs' proposed fourth cause of action is not palpably insufficient or patently devoid of merit. Accordingly, I vote to affirm the order insofar as appealed from, and must respectfully dissent.

1. Factual and Procedural Background

The plaintiffs alleged that on May 17, 2015, the plaintiff

Susan Frierson and her two-year-old granddaughter, Greta Devere Greene, were sitting on an outdoor bench in front of a building located **[***8]** at 305 West End Avenue in Manhattan. While they sat on the bench, they were suddenly struck by falling debris which separated and fell from the facade of the building. The debris—variously described as "masonry, stucco and/or concrete"—struck Frierson's knee and ankle, and struck her granddaughter in the head.

[103]** The plaintiffs alleged that after the debris had fallen, the granddaughter was left lying on the ground in the fetal position. Frierson lifted her granddaughter back onto the bench and tried to call 911, but Frierson was shaking too hard to complete the call. Seeing that her granddaughter was not breathing, Frierson tried to administer mouth-to-mouth resuscitation, but she was unable to do so because her granddaughter's jaw was "locked shut." Frierson eventually was able to stimulate her granddaughter's breathing by blowing air into her nostrils. Paramedics responded to the scene and transported the granddaughter to a hospital by ambulance. Frierson was then transported to the hospital in a separate ambulance, where she received treatment for the injuries to her legs. Despite medical intervention, Frierson's granddaughter died from her injuries the following day.

Frierson described **[***9]** the emotional trauma that she suffered as a result of witnessing her granddaughter's fatal injuries. Frierson stated that she has been under the care and treatment of various medical professionals since the accident, and has been diagnosed with post-traumatic stress disorder and depression. Frierson outlined the various medications that have been prescribed to treat her depression, and described the persistent flashbacks and recurring panic attacks that she experiences. Among other things, Frierson described flashbacks where she is forced to re-live her failed attempt to pry her granddaughter's mouth open to administer CPR.

The plaintiffs alleged that the granddaughter's death and the injuries sustained by Frierson were the direct result of the defendants' negligence. The plaintiffs alleged that a piece of **[*1018]** the façade had fallen from the subject building about 14 months before the accident. They further alleged that despite notice of the dangerous condition of the façade, the defendants repeatedly failed to inspect or make necessary repairs to it, which left it in a dangerous state of disrepair and ultimately resulted in the falling debris which killed the granddaughter and injured Frierson. **[***10]**

After commencing this action, the plaintiffs amended their complaint as of right pursuant to CPLR 3025 (a). The amended complaint contained two causes of action. As relevant here, the first cause of action sought to recover damages for "conscious pain and suffering." The first cause of action alleged, among other things, that Frierson, as a result of being struck by the falling debris, sustained severe and permanent personal injuries, which required ongoing medical care and treatment.

After retaining new counsel, the plaintiffs moved for leave to amend the amended complaint pursuant to CPLR 3025 (b). As relevant here, the proposed second amended complaint asserted two causes of action on behalf of Frierson. The proposed third cause of action alleged that Frierson had been struck by the falling debris and, as a result, had "sustained severe and permanent injuries to her head, limbs, and body, a severe shock to her nervous system, certain internal injuries, and has been caused to suffer severe physical pain and mental anguish."

The proposed fourth cause of action incorporated the allegations contained in the third cause of action and further alleged that Frierson witnessed the fatal injury that was sustained by **[***11]** her granddaughter while Frierson herself was "within the 'zone of danger' " of the accident. As a result, Frierson allegedly "sustained a severe shock to her nervous system, was caused to suffer severe mental anguish . . . and feared the imminent injuries and death of her granddaughter."

The defendant Esplanade Venture Partnership, and the defendants Blue Prints **[**104]** Engineering, P.C., and Maqsood Faruqi, separately opposed the plaintiffs' motion for leave to amend the amended complaint. These defendants (hereinafter collectively the defendants) argued, inter alia, that the proposed fourth cause of action was palpably insufficient and patently devoid of merit. The defendants maintained that only an immediate family member of the deceased granddaughter could recover damages for negligent infliction of emotional distress under a "zone-of-danger" theory of liability, and, under binding case law from the Court of Appeals and this Court, a grandmother could not be considered an immediate family member as a matter of law, no matter the circumstances of their relationship.

[*1019] In the order appealed from, the Supreme Court rejected the defendants' contention that the proposed fourth cause of action was **[***12]** palpably insufficient and patently devoid of merit. The court granted the plaintiffs' motion for leave to amend the amended complaint, and the defendants appeal.

On appeal, the defendants argue that the Supreme Court improvidently exercised its discretion in granting that branch of the plaintiffs' motion which was for leave to amend the amended complaint to add the proposed fourth cause of action. The defendants contend that the proposed

fourth cause of action is palpably insufficient because "a grandparent cannot maintain a claim for negligent infliction of emotional distress arising from being in the 'zone of danger' and observing the serious injury or death of his or her grandchild." These contentions are without merit.

My colleagues in the majority, constrained by precedent, have concluded that the Supreme Court erred as a matter of law in granting that branch of the plaintiffs' motion which was for leave to add the proposed fourth cause of action. I disagree.

2. Historical Overview of Emotional Damages

Courts had traditionally been reluctant to permit recovery for what have been described as "emotional" or "mental" injuries, as opposed to "physical" ones (*see generally* Prosser & Keeton, **[***13]** Torts § 12 at 54-55 [5th ed 1984]; Restatement [Third] of Torts: Liability for Physical and Emotional Harm ch 8, Scope Note). Commentators have long criticized this judicial reluctance by noting, inter alia, that "all emotional disturbances are at the same time physiological so that the distinction between emotional distress and physical harm, as usually drawn by the courts, may not be strictly scientific" (Fowler V. Harper & Mary Coate McNeely, *A Re-Examination of the Basis for Liability for Emotional Distress*, 1938 Wis L Rev 426, 426 [1938]; *see* Herbert F. Goodrich, *Emotional Disturbance as Legal Damage*, 20 Mich L Rev 497 [1922]).

Although the early English and American courts were willing to permit recovery for some forms of emotional or mental injury when they were caused by intentional tortious conduct (*see e.g. Tierney v State of New York*, 266 App Div 434, 42 NYS2d 877 [1943] [false imprisonment]; *Williams v Underhill*, 63 App Div 223, 71 NYS 291 [1901] [assault]; *Cauverien v De Metz*, 20 Misc 2d 144, 188 NYS2d 627 [Sup Ct, NY County 1959] [willful conversion]), recovery was more strictly circumscribed when such injuries were caused by a defendant's negligence (*see Mitchell v Rochester Ry. Co.*, 151 NY 107, 45 NE 354, 3 NY Ann Cas 283 [1896]).

However, the Court of Appeals eventually recognized a "physical **[*1020]** contact" exception to the general prohibition against recovery for emotional harm caused by negligence (*see* **[**105]** *Comstock v Wilson*, 257 NY 231, 177 NE 431 [1931]). In that case, the plaintiff's testator was riding in the plaintiff's automobile when it was **[***14]** struck by the defendant's automobile (*see id.* at 233). After the collision, "[t]he plaintiff's [testator] stepped from the automobile and started to write down the defendant's name and license number" (*id.*). "While doing so, she fainted and fell to the sidewalk, fracturing her skull" (*id.*). She died about 20 minutes later (*see id.*). The plaintiff, claiming that the death of his testator was the result of the defendant's negligence, recovered a judgment in the amount of $5,000 against the defendant (*see id.*).

In determining whether the judgment should be upheld, the Court of Appeals recognized that the intermediate appellate courts of New York, along with the courts of other states, had adopted the view that "where there has been a physical impact, even though slight, accompanied by shock, there may be a recovery for damages to health caused by the shock even though that shock was the result produced by the impact and fright concurrently" (*id.* at 237; *see Jones v Brooklyn Hgts. R.R. Co.*, 23 App Div 141, 48 NYS 914, 5 NY Ann Cas 124 [1897]).

The Court of Appeals began its own analysis with a discussion of whether the defendant owed a duty of care to the plaintiff's testator: "Whether there can be a recovery for the consequences of fright caused by unintentional want of care, depends in the **[***15]** first place upon the question whether a legal right of the plaintiff has been invaded by the defendant's negligence" (*Comstock v Wilson*, 257 NY at 238).

The Court of Appeals, citing *Mitchell v Rochester Ry. Co.* (151 NY 107, 45 NE 354, 3 NY Ann Cas 283 [1896]), stated that "for practical reasons there is ordinarily no duty to exercise care to avoid causing mental disturbance, and no legal right to mental security" (*Comstock v Wilson*, 257 NY at 238). Accordingly, "where no wrong was claimed other than a mental disturbance, the courts refused to sanction a recovery for the consequences of that disturbance" (*id.* at 239).

However, the Court of Appeals noted in *Comstock* that, in this case, an independent duty of care had been breached: "The collision itself, the consequent jar to the passengers in the car, was a battery and an invasion of their legal right" (*id.*; *accord Jones v Brooklyn Hgts. R.R. Co.*, 23 App Div at 143-144). Accordingly, "[t]heir cause of action [was] complete when they suffered consequent damages" (*Comstock v Wilson*, 257 NY at 239). The Appellate Division's order affirming the judgment was therefore affirmed (*see id.*).

[*1021] As the Court of Appeals' determination in *Comstock* illustrates, "the relationship which the slight impact must bear to the fright or its consequences has come to be this: it need not be a cause at all, so long as its presence is shown" (Harold F. McNiece, *Psychic Injury and Tort Liability* ***[***16]*** *in New York*, 24 St John's L Rev 1, 52 [1949]; *see Jones v Brooklyn Hgts. R.R. Co.*, 23 App Div at 143-144).

In 1961, the Court of Appeals held that a litigant could state a valid cause of action to recover damages for purely mental trauma even in the absence of concurrent physical contact or injury (*see Battalla v State of New York*, 10 NY2d 237, 176 NE2d 729, 219 NYS2d 34 [1961]). In that case, the infant plaintiff was placed in a ski lift chair by an employee of the defendant (*see id.* at 239). The employee failed to secure the seatbelt and, "[a]s a result of this alleged negligent act, the infant plaintiff became frightened and hysterical upon the descent, with consequential injuries" (*id.*).

[106]** The Court of Appeals concluded that the complaint stated a cause of action to recover **[****4]** damages for negligently inflicted emotional distress (*see id.* at 242). In so doing, the Court explicitly rejected the rule it had promulgated in *Mitchell*, that there could be no recovery for injuries, physical or mental, incurred by fright negligently induced (*see id.*).

The Court of Appeals stated that "a rigorous application of [that] rule would be unjust, as well as opposed to experience and logic" (*id.* at 239). Furthermore, "resort to the somewhat inconsistent exceptions would merely add further confusion to a legal situation which . . . lacks that coherence which precedent should possess" (*id.*). **[***17]** The Court then proceeded to systematically reject the various policy justifications that had been offered in *Mitchell* (*see id.* at 240-242).

The Court of Appeals' determination in *Battalla* effectively recognized that the defendant owed the infant plaintiff a duty of care to ensure that she was properly secured in the ski lift chair, and, to the extent that the defendant's breach of that duty proximately caused the infant plaintiff mental trauma, she was entitled to recover therefor (*see id.* at 237; *see also Cohen v Varig Airlines*, 62 AD2d 324, 335-336, 405 NYS2d 44 [1978]). This reading is supported by subsequent cases from the Court of Appeals which recognize that "when there is a duty owed by defendant to plaintiff, breach of that duty resulting directly in emotional harm is compensable even though no physical injury occurred" (*Kennedy v McKesson Co.*, 58 NY2d 500, 504, 448 NE2d 1332, 462 NYS2d 421 [1983]; *see Ornstein v New York City Health & Hosps. Corp.*, 10 NY3d 1, 6, 881 NE2d 1187, 852 NYS2d 1 [2008]; *see also* 1-241 Warren's Negligence in New York Courts § 241.03 [3] [a] [2019]).

[*1022] Indeed, in *Tobin v Grossman* (24 NY2d 609, 613, 249 NE2d 419, 301 NYS2d 554 [1969]), the Court of Appeals stated that "the rule is now settled that one may have a cause of action for injuries sustained although precipitated by a negligently induced mental trauma without physical impact." However, the Court in that case refused to permit a mother to recover damages for emotional injuries sustained when she witnessed her young child sustain severe injuries **[***18]** after the child was struck by the defendant's negligently operated automobile (*see Tobin v Grossman*, 24 NY2d 609, 249 NE2d 419, 301 NYS2d 554 [1969]). Although the defendant clearly owed a duty of care to the plaintiff's child, the Court refused to recognize a concurrent duty to bystanders who were not "directly involved in the accident" (*id.* at 616), or to individuals who were otherwise "[the] victims of shock resulting from injury to others" (*id.* at 618).

In other words, the Court refused to recognize "derivative" liability under such circumstances (*cf.* Restatement [Third] of Torts: Liability for Physical and Emotional Harm § 48, Comment *d*), and the mother could not recover damages for her own emotional injuries that were proximately caused by the defendant's breach of a duty that was owed exclusively to her child (*see Tobin v Grossman*, 24 NY2d at 617).

In a subsequent case, the Court of Appeals confirmed that "there is no duty to protect from emotional injury a bystander to whom there is otherwise owed no duty" (*Kennedy v McKesson Co.*, 58 NY2d at 506). Moreover, "even as to a participant to whom a duty is owed, such injury is compensable **[**107]** only when [it is] a direct, rather than a consequential, result of the breach" (*id.*).

The Court of Appeals considered this latter situation in *Bovsun v Sanperi* (61 NY2d 219, 461 NE2d 843, 473 NYS2d 357 [1984]). In that case, a family was riding in an automobile when it incurred mechanical difficulties, and the **[***19]** family was forced to stop on the side of the road (*see id.* at 224). The father got out of the car, while the mother and the daughter remained inside it (*see id.*). At this point, the vehicle was struck by the defendant's vehicle, causing the father to become seriously injured (*see id.*).

The mother and the daughter sought to recover damages for, inter alia, emotional distress resulting from witnessing the father's injuries (*see id.*). The Court of Appeals concluded that, under the circumstances, their allegations stated a valid cause of action to recover such damages (*see id.* at 233-234).

In reaching this conclusion, the Court of Appeals stated that, "[i]n conformity with traditional tort principles, the touchstone of liability in these cases is the breach by the defendant of a duty of due care owed the plaintiff" (*id.* at 233). The Court **[*1023]** concluded that the defendants owed a duty of care directly to the mother and the daughter to refrain from exposing them "to an unreasonable risk of bodily injury or death" (*id.* at 231). If the plaintiffs demonstrated that the **[****5]** defendants had breached this duty of care owed to the mother and the daughter, then the

mother and the daughter were entitled to recover "as an element of [their] damages, **[***20]** those damages attributable to emotional distress caused by contemporaneous observation of injury or death of a member of [their] immediate family caused by the same conduct of the defendant" (*id.* at 233).

The Court of Appeals distinguished its determination in *Tobin v Grossman* (24 NY2d 609, 249 NE2d 419, 301 NYS2d 554 [1969]) by noting that the mother in that case had not been within the so-called "zone of danger" (*Bovsun v Sanperi*, 61 NY2d at 233). Since the mother in *Tobin* was not within the "zone of danger," she had not been exposed to an unreasonable risk of bodily injury or death and so she had failed to allege the breach of any duty owed directly to her (*id.*).

The Court of Appeals in *Bovsun* went on to make clear that it was "not . . . creating a new cause of action which has not heretofore existed under the tort law of New York" (*id.*). Although the Court stated that it was not recognizing any new duty of care, it acknowledged that its determination "may . . . enlarge[ ] . . . the scope of recoverable damages" in applicable cases (*id.*).

The Court of Appeals' last significant discussion of these "zone-of-danger" cases occurred in 1993 (*see Trombetta v Conkling*, 82 NY2d 549, 626 NE2d 653, 605 NYS2d 678 [1993]). In that case, the plaintiff sought to recover damages for the emotional shock and trauma she suffered upon witnessing her aunt's death after her **[***21]** aunt was run over by a truck (*see id.* at 551; *Trombetta v Conkling*, 187 AD2d 213, 214, 593 NYS2d 670 [1993]). The plaintiff, "who was not physically touched or injured" during the incident, "assert[ed] only a claim for negligent infliction of emotional distress" (*Trombetta v Conkling*, 82 NY2d at 551).

The Court of Appeals concluded that "while plaintiff was, without doubt, within the zone of danger when defendants' truck **[**108]** killed her aunt, the claim for the negligent suffering of emotional distress was properly dismissed" (*id.* at 554). The Court's determination was *not* based on a finding that the defendants did not owe any duty of care to the plaintiff (*see id.*). To the contrary, the Court expressed no disagreement with the principle that an individual generally owes a duty of care to refrain from exposing others to "an unreasonable and negligent risk of bodily injury or death" (*id.* at 552; *accord* Restatement **[*1024]** [Third] of Torts: Liability for Physical and Emotional Harm § 47 [a]).

Instead, the Court of Appeals' analysis was confined to the availability of damages to the plaintiff for emotional distress caused solely by the contemporaneous observation of her aunt's death (*see Trombetta v Conkling*, 82 NY2d at 552-553). The Court declined, on policy grounds, to expand the availability of such damages "to all bystanders who may be able to demonstrate a blood relationship coupled with significant emotional **[***22]** attachment or the equivalent of an intimate, immediate familial bond" (*id.* at 553). Since the plaintiff did not, as a matter of law, allege facts that would permit her to recover for the only type of emotional damages she sought, the Court held that the complaint was properly dismissed (*see id.*).

This Court subsequently applied the reasoning in *Trombetta* to dismiss a similar cause of action alleging that a bystander sustained negligently inflicted emotional distress (*see Jun Chi Guan v Tuscan Dairy Farms*, 24 AD3d 725, 806 NYS2d 713 [2005]). In that case, the defendants' vehicle struck the plaintiff while she was pushing her grandson in a stroller (*see id.* at 725). "The impact allegedly caused the plaintiff to sustain serious physical injuries and caused the infant's death" (*id.*).

Notably, the only cause of action at issue on that appeal was a cause of action "which sought to recover damages for injuries the plaintiff allegedly sustained from observing the accident in which the infant was killed" (*id.* at 726). Accordingly, the only component of damages at issue was "psychological injuries [the plaintiff] sustained from witnessing the death of her grandson" (*id.* at 728). This Court did not discuss the availability of any other types of damages, whether for physical or emotional harm (*see id.* at 727).

[*23]** This Court ultimately concluded, over a dissent by Justice Sondra Miller, that "the class of persons in a plaintiff's 'immediate family' does not include his or her grandchild" (*id.* at 727). Accordingly, the cause of action which sought to recover damages for injuries the plaintiff allegedly sustained as a result of observing the accident was dismissed (*see id.*). Justice Miller noted **[****6]** that "[t]he special status of grandparents has long been recognized in New York statute and case law" (*id.* at 731 [Miller, J., dissenting]). Citing the 2003 "Grandparent Caregivers' Rights Act" (*see* L 2003, ch 657), Justice Miller stated "this law is the most expansive statutory grant of rights to grandparent caregivers in any state" (*Jun Chi Guan v Tuscan Dairy Farms*, 24 AD3d at 732). Justice Miller opined that the plaintiff-grandmother in that case "served in an intimate, critical, **[*1025]** and consistent capacity from the time of [her grandson's] birth, caring for him daily 'in loco parentis' " (*id.*). Justice Miller concluded that "[t]here is no reason in law or equity to find that she is anyone less than a member of her grandson's 'immediate family' " (*id.*).

[109]** In *Shipley v Williams* (14 Misc 3d 682, 826 NYS2d 882 [Sup Ct, Richmond County 2006]), Justice Joseph Maltese, then sitting as a Justice of the Supreme Court, Richmond County, considered whether a brother was an immediate family member of his sister. Justice Maltese noted that "[s]ince the Court of Appeals [has] refrained from defining the term 'immediate family' as it pertains to those within the 'zone of danger,' this trial court must now deal with that issue in this case" (*id.* at 688).

In analyzing the issue, Justice Maltese engaged in a sweeping and comprehensive review of the various ways that the phrase " 'immediate family' " has been defined in statutory and regulatory law (*id.* at 687-688). Justice Maltese concluded that "[t]he legislature has defined [the term] 'immediate family' in . . . various statutes . . . which all include, at the very least, the terms siblings or brothers and sisters" (*id.* at 688). As relevant here, many of these statutes and regulations also define the term "immediate family" to include grandparents and grandchildren (*see e.g.* Public Health Law § 238 [8]; 9 NYCRR 2104.5 [a] [1]; 2520.6 [n]; 22 NYCRR 24.6 [f]).

Ultimately, Justice Maltese determined **[***24]** that "[t]o find that a brother and sister . . . are not members of their 'immediate family' is contrary to the definitions established by the State Legislature and legal reason" (*Shipley v Williams*, 14 Misc 3d at 688-689). Accordingly, the defendants' motion to dismiss the plaintiff's cause of action based upon the alleged emotional distress sustained while she was in the zone of danger observing her brother sustain serious injury and death was denied (*see id.* at 689).

In sum, the progression of case law pertaining to the negligent infliction of emotional distress has generally followed the same progression that occurred in the context of intentional torts (*see generally* 1 Thomas Atkins Street, Foundations of Legal Liability 460, 470 [1906]). That is, emotional damages were initially permitted when they could be "tacked on" to existing causes of action for which physical injuries were simultaneously sustained (*see Comstock v Wilson*, 257 NY at 239; *Jones v Brooklyn Hgts. R.R. Co.*, 23 App Div at 143). Eventually, the requirement of physical injury was eliminated, and it was recognized that damages for emotional or mental injuries were properly recoverable whenever a breach of a duty **[*1026]** of care running directly from the defendant to the plaintiff was the proximate cause thereof (*see Battalla v State of New York*, 10 NY2d at 242; *see also Ornstein v New York City Health & Hosps. Corp.*, 10 NY3d at 6; *Kennedy v McKesson Co.*, 58 NY2d at 504; *cf. Tobin v Grossman*, 24 NY2d at 616-617). Finally, the case **[***25]** law recognized that, when certain conditions were met, an *additional* component of damages was available for emotional injuries solely attributable to the observation of the death or physical injury of someone else (*see Bovsun v Sanperi*, 61 NY2d at 233).

3. Application of the Law to the Facts

As previously noted, the defendants on this appeal argue that the Supreme Court improvidently exercised its discretion in granting that branch of the plaintiffs' motion which was for leave to amend the amended complaint to add the proposed fourth cause of action. The defendants contend that the proposed fourth cause of action is palpably insufficient because "a **[**110]** grandparent cannot maintain a claim for negligent infliction of emotional distress arising from being in the 'zone of danger' and observing the serious injury or death of his or her grandchild."

"A party may amend his or her pleading . . . at any time by leave of court" (CPLR 3025 [b]). The decision of whether to grant leave to amend a pleading is a determination that is "within the motion court's discretion, the exercise of which will not be lightly disturbed" (*Pergament v Roach*, 41 AD3d 569, 572, 838 NYS2d 591 [2007] **[****7]** ; *see Hofstra Univ. v Nassau County, N.Y.*, 166 AD3d 861, 89 NYS3d 1 [2018]).

"In the absence of prejudice or surprise resulting directly from the delay in seeking leave, applications **[***26]** for leave to amend a pleading are to be freely granted 'unless the proposed amendment is palpably insufficient or patently devoid of merit' " (*Siragusa v Conair Corp.*, 153 AD3d 1376, 1376, 61 NYS3d 313 [2017], quoting *Lucido v Mancuso*, 49 AD3d 220, 222, 851 NYS2d 238 [2008]). This formulation, specifically the use of an adverb "palpably" to modify the term "insufficient," suggests that the standard is something even more deferential than a legal sufficiency analysis (*Lucido v Mancuso*, 49 AD3d at 222; *see generally* Siegel & Connors, NY Prac § 237 [6th ed 2018]).

As the Court of Appeals has stated, the key to determining whether a claim for emotional damages states a valid cause of action is the inquiry into the existence of a duty owed by the defendant to the plaintiff (*see Comstock v Wilson*, 257 NY at 238). "Without a duty running directly to the injured person there can be no liability in damages, however careless the **[*1027]** conduct or foreseeable the harm" (*Lauer v City of New York*, 95 NY2d 95, 100, 733 NE2d 184, 711 NYS2d 112 [2000]; *see Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 232, 750 NE2d 1055, 727 NYS2d 7 [2001]). " 'Proof of negligence in the air, so to speak, will not do' " (*Palsgraf v Long Is. R.R. Co.*, 248 NY 339, 341, 162 NE 99 [1928], quoting Frederick Pollock, The Law of

Torts 455 [11th ed 1920]).

At this point, it should be apparent that, no matter how this appeal is resolved, Frierson, based on the unchallenged claim asserted in the third cause of action, will be entitled to recover some measure of emotional damages so long as she sustains her burden of proof at trial. This fact is not, and cannot, be disputed.

The proposed third cause **[***27]** of action seeks to recover damages for physical injuries, including pain and suffering, sustained by Frierson when she was struck by the falling debris. Mental trauma and loss of enjoyment of life "are merely elements of conscious pain and suffering" (*Pallotta v West Bend Co.*, 166 AD2d 637, 640, 561 NYS2d 66 [1990]; *see Nussbaum v Gibstein*, 73 NY2d 912, 914, 536 NE2d 618, 539 NYS2d 289 [1989]; *McDougald v Garber*, 73 NY2d 246, 253-254, 536 NE2d 372, 538 NYS2d 937 [1989]; *Toscarelli v Purdy*, 217 AD2d 815, 818, 629 NYS2d 833 [1995]; *Lamot v Gondek*, 163 AD2d 678, 679, 558 NYS2d 284 [1990]), and "[a]n award for pain and suffering should include compensation to an injured person for the physical and emotional consequences of the injury" (NY PJI 2:280, Comment).

Accordingly, if she sustains her ultimate burden of proof at trial with respect to the third cause of action, Frierson would be entitled to recover damages for not only the emotional consequences of her physical injuries, but also for the emotional consequences of the fear or shock that she suffered as a result of the defendants' breach of the duty of care they owed to her (*see Comstock v Wilson*, 257 NY at 237; *Jones v Brooklyn Hgts. R.R. Co.*, 23 App Div at 143-144; *compare* NY PJI 2:280, **[**111]** *with* 2:284). The defendants do not dispute this fact. To the contrary, one of the defendants, in opposing the plaintiffs' motion, argued that the emotional distress alleged in the proposed fourth cause of action was "duplicative" of the emotional distress alleged in the proposed third cause of action.

The proposed fourth cause of action adds **[***28]** the allegation that Frierson witnessed the fatal injury that was sustained by her granddaughter while Frierson herself was "within the 'zone of danger' " of the accident and that, as a result of the defendants' negligence, Frierson "sustained a severe shock to her nervous system, was caused to suffer severe mental anguish . . . and feared the imminent injuries and death of her granddaughter."

These facts, as alleged, "fit within [a] cognizable legal theory" **[*1028]** (*Leon v Martinez*, 84 NY2d 83, 87-88, 638 NE2d 511, 614 NYS2d 972 [1994]). "A breach of the duty of care resulting directly in emotional harm is compensable even though no physical injury occurred when the mental injury is a direct, rather than a consequential, result of the breach and when the claim possesses some guarantee of genuineness" (*Ornstein v New York City Health & Hosps. Corp.*, 10 NY3d at 6 [internal quotation marks and citations omitted]; *see Ball v Miller*, 164 AD3d 728, 730, 83 NYS3d 169 [2018]; *Taggart v Costabile*, 131 AD3d 243, 252-253, 14 NYS3d 388 [2015]; *see also E.B. v Liberation Publs.*, 7 AD3d 566, 567, 777 NYS2d 133 [2004]; *Perry v Valley Cottage Animal Hosp.*, 261 AD2d 522, 522-523, 690 NYS2d 617 [1999]; *Hecht v Kaplan*, 221 AD2d 100, 105, 645 NYS2d 51 [1996]; *Losquadro v Winthrop Univ. Hosp.*, 216 AD2d 533, 534, 628 NYS2d 770 [1995]).

Here, the proposed fourth cause of action adequately alleges (1) the existence of a duty owed directly to Frierson, (2) a breach of that duty which unreasonably endangered Frierson's physical safety and caused her to fear for her own safety, and (3) emotional harm suffered by Frierson which resulted from being exposed to such danger (*see Ornstein v New York City Health & Hosps. Corp.*, 10 NY3d at 6; *see also* Restatement [Third] of Torts: Liability for Physical and Emotional Harm § 47 [a]).

Accordingly, if Frierson sustained **[***29]** her ultimate burden of proof at trial with respect to the proposed fourth cause of action, she would be entitled to recover damages to compensate her for the emotional consequences of the fear that she experienced as a result of the defendants' negligence in exposing her "to an unreasonable risk of bodily injury or death" (*Bovsun v Sanperi*, 61 NY2d at 231).

The proposed fourth cause of action thus set forth allegations that are not palpably insufficient or patently devoid of merit. Accordingly, the Supreme Court providently exercised its discretion in granting that branch of the plaintiffs' motion which was for leave to amend the amended complaint to add the proposed fourth cause of action (*see* CPLR 3025 [b]; *Mahler v North Shore Camp, LLC*, 145 AD3d 678, 679, 44 NYS3d 61 [2016]).

The defendants nevertheless maintain that the Supreme Court improvidently exercised its discretion because the fourth cause of action not only refers to Frierson's fear for her own safety, but also alleges that Frierson "feared the imminent injuries and death of her granddaughter." The defendants argue that emotional damages suffered as a consequence of this type of fear are only recoverable if the granddaughter was a member of Frierson's immediate family.

The zone of danger test for bystander recovery does not **[*1029]** pertain to **[***30]** the existence **[**112]** of a duty, it merely provides that an additional "element of . . . damages" is recoverable if the bystander can also establish

"damages for injuries suffered in consequence of the observation of the serious injury or death of a member of his or her immediate family" (*Bovsun v Sanperi*, 61 NY2d at 231). In other words, the duty owed by a defendant to a bystander does not depend on the bystander's relationship to the other victim. No new duty arises when the zone-of-danger test is satisfied, rather, the satisfaction of that test merely "permits recovery for an element of damages not heretofore allowed" (*id.* at 229).

It is clear that the key matter at issue on this appeal is the availability of a portion of the damages sought in connection with the proposed fourth cause of action, to wit, damages for the emotional injuries caused solely by Frierson's fear for her granddaughter's safety, as well as the anguish caused by witnessing the injuries that caused the granddaughter's death, as distinguished from the emotional injuries simultaneously caused by Frierson's fear for her own safety (*compare* Restatement [Third] of Torts: Liability for Physical and Emotional Harm § 47 [a], *with* § 48).

The parsing of Frierson's emotional trauma into discrete **[***31]** portions that correspond to concurrent causes has no basis in reality, and should not be compelled by the courts (*accord Comstock v Wilson*, 257 NY at 237; *Jones v Brooklyn Hgts. R.R. Co.*, 23 App Div at 143-144). As this case illustrates, the metaphysical gymnastics involved in such an enterprise are tortuous. Under the defendants' view, the jury would be entitled to compensate Frierson for damages for mental trauma resulting from (1) her fear experienced in connection with her own physical injuries, and (2) her fear experienced in connection with her own exposure to a risk of death, but not for (3) her simultaneous fear for her granddaughter, which was caused by the same acts of negligence. Under the circumstances of this case, Frierson should be entitled to recover damages for all of the emotional injuries she sustained as a result of this incident.

In the event that the zone-of-danger test is still viable where the plaintiff alleges concurrent, physical injury (*cf. Shanahan v Orenstein*, 52 AD2d 164, 167, 383 NYS2d 327 [1976]), the "immediate family" requirement should be replaced by a more functional approach that focuses on the nature of the relationship between the bystander and the injured third party. Such an approach will recognize the legitimacy of non-traditional family structures and evolving social practices. A bystander **[***32]** should be entitled to recover if they establish that they are a "close family member" of **[*1030]** the injured third party **[****8]** (Restatement [Third] of Torts: Liability for Physical or Emotional Harm § 48 [b]). Given the allegations contained in the proposed second amended complaint and the procedural posture of this case, the determination of this issue cannot be made as a matter of law at this time.

Under the zone-of-danger test, as presently formulated, "where a defendant negligently exposes a plaintiff to an unreasonable risk of bodily injury or death, the plaintiff may recover, as a proper element of his or her damages, damages for injuries suffered in consequence of the observation of the serious injury or death of a member of his or her immediate family—assuming, of course, that it is established that the defendant's conduct was a substantial factor bringing about such injury or death" (*Bovsun v Sanperi*, 61 NY2d at 230-231).

[113]** Specifically addressing the "immediate family" requirement, this Court has stated that "[t]he Court of Appeals has exercised its prerogative to balance the competing interests and announce the public policy of this state to limit liability to the class of persons identified as 'immediate family' in *Bovsun*" (*Jun Chi Guan v Tuscan Dairy Farms*, 24 AD3d at 726). This Court has previously held that "[t]his **[***33]** class of persons does not include a plaintiff's grand[child]" (*id.*).

In its most recent effort to justify these boundaries, the Court of Appeals revived the old policy arguments that it has alternatively embraced and rejected throughout the last century (*see Trombetta v Conkling*, 82 NY2d at 553-554; *cf. Bovsun v Sanperi*, 61 NY2d at 231-232). The Court stated: "As a policy matter, we continue to balance the competing interests at stake by limiting the availability of recovery for the negligent infliction of emotional distress to a strictly and objectively defined class of bystanders. In addition to the prevention of an unmanageable proliferation of such claims—with their own proof problems and potentiality for inappropriate claims—the restriction of this cause of action to a discrete readily determinable class also takes cognizance of the complex responsibility that would be imposed on the courts in this area to assess an enormous range and array of emotional ties of, at times, an attenuated or easily embroidered nature" (*Trombetta v Conkling*, 82 NY2d at 553-554).

If this bright-line test "objectively" defines those who may recover, it does so arbitrarily. The use of consanguinity as a crude proxy for emotional harm is to sanction the arbitrary and unjust results that will inevitably follow when, **[***34]** for instance, a child is denied recovery because he or she does not live within a traditional family structure (*cf. Thompson v Dhaiti*, 103 AD3d 711, 959 NYS2d 522 [2013]; **[*1031]** *see generally* Thomas T. Uhl, Note, *Bystander Emotional Distress: Missing an Opportunity to Strengthen the Ties That Bind*, 61 Brooklyn L Rev 1399, 1426 [1995]). "To be sure, line drawing is often

an inevitable element of the common-law process, but [it] . . . does not justify our clinging to a line that has proved indefensible" (*Broadnax v Gonzalez*, 2 NY3d 148, 156, 809 NE2d 645, 777 NYS2d 416 [2004]).

Given such arbitrary results, it is not difficult to understand why this "settled" rule continues to be challenged to this day (*Jun Chi Guan v Tuscan Dairy Farms*, 24 AD3d at 726). Nor is it difficult to understand why the bulk of modern legal authority has moved away from the formalistic approach of the "immediate family" prerequisite and toward a more pragmatic standard that inquires into the functional nature of the bystander's relationship with the injured third party.

For example, the Second Restatement of Torts took the view that "where the defendant's negligent conduct threatens bodily harm to the plaintiff through direct impact upon his person . . . and the bodily harm is brought about instead by the plaintiff's emotional disturbance at the peril or harm of a third person . . . the defendant is subject to liability if **[***35]** the third person *is a member of the plaintiff's immediate family*" (Restatement [Second] of Torts § 436, Comment *f* [emphasis added]).

In the Third Restatement, the use of the term "immediate family" has been rejected (*see* Restatement [Third] of Torts: Liability for Physical and Emotional Harm § 48). The Third Restatement states that "[a]n actor who negligently causes sudden serious bodily injury to a third person is subject to liability for serious emotional harm caused thereby to a person who . . . perceives **[**114]** the event contemporaneously, and . . . *is a close family member* of the person suffering the bodily injury" (Restatement [Third] of Torts: Liability for Physical and Emotional Harm § 48 [emphasis added]).

In its commentary on this section, the Third Restatement recognizes that "[s]ometimes people live functionally in a nuclear family without formal legal family ties" (Restatement [Third] of Torts: Liability for Physical and Emotional Harm § 48, Comment *f*). "When defining what constitutes a close family relationship, courts should take into account changing practices and social norms and employ a functional approach to determine what constitutes a family" (*id.*). The commentary specifically indicates that a grandparent may qualify as a close family member (*see id.*).

As the plaintiffs correctly argue, the Supreme Court of **[*1032]** Oregon **[***36]** has recently adopted the test set forth in the Third Restatement (*see Philibert v Kluser*, 360 Or 698, 711-712, 385 P3d 1038, 1046 [2016]). Many other jurisdictions have similarly rejected the strict formalistic approach adopted by the Court of Appeals in favor of a functional test that inquires into the nature of the relationship between the bystander and the injured third party (*see e.g. Ramsey v Beavers*, 931 SW2d 527, 531-532 [Tenn Sup Ct 1996]; *Paugh v Hanks*, 6 Ohio St 3d 72, 79, 6 Ohio B. 114, 451 NE2d 759, 766 [1983]).

For example, the Supreme Court of New Hampshire has stated: "[W]e decline to adopt a bright line rule when a flexible approach, designed to account for factual nuances is available" (*Graves v Estabrook*, 149 NH 202, 209, 818 A2d 1255, 1261 [2003] [internal quotation marks omitted]). The Supreme Court of Washington has similarly stated: "We decline to draw an absolute boundary around the class of persons whose peril may stimulate the mental distress" (*Hunsley v Giard*, 87 Wash 2d 424, 436, 553 P2d 1096, 1103 [1976]). The Supreme Court of New Jersey has explicitly rejected the New York requirement of "a strict blood relationship" in favor of a test that "focus[es] on the nature and integrity of the relationship" (*Dunphy v Gregor*, 136 NJ 99, 114-115, 642 A2d 372, 379 [1994]).

The Court of Appeals' policy argument that the "immediate family" requirement is easy to apply also fails to hold up to scrutiny. This case well illustrates this point. Even where the immediate family requirement is easily applied to eliminate a portion of emotional damages attributable **[***37]** to bystander recovery, such a finding does not preclude the plaintiff from seeking damages for emotional injuries attributable to other causes. Under these circumstances, the strict application of the immediate family requirement is simply a prelude to a metaphysical parsing of emotional trauma. Thus, while the Court of Appeals has decried the ability of courts "to assess an enormous range and array of emotional ties" (*Trombetta v Conkling*, 82 NY2d at 554), it nevertheless requires them to parse out the array of concurrent causes that may contribute to an individual's emotional trauma. In any event, courts are well equipped to inquire into the nature of interpersonal relationships, as is evident from other legal contexts (*see e.g. Millington v Southeastern El. Co.*, 22 NY2d 498, 502, 239 NE2d 897, 293 NYS2d 305 [1968] ["(t)he concept of consortium includes not only loss of support or services, it also embraces such elements as love, companionship, affection, society, sexual relations, solace and more"]).

Finally, allowing plaintiffs to recover damages for all of the emotional injuries sustained as a result of a defendant's **[*1033]** negligent conduct, where such conduct breached a duty of care owed directly to those plaintiffs, would not lead to unlimited liability. The idea that "[e]very injury has **[**115]** ramifying consequences, **[***38]** like the ripplings of the waters, without end" (*Trombetta v Conkling*, 82 NY2d at 554 [internal quotation marks

omitted]), even if true, does not mean that liability would also extend ad infinitum. While every injury may have infinite *consequences*, it does not follow that every injury leads to an infinite number of additional *injuries*.

Furthermore, the limits of liability are already circumscribed by the requirement that a plaintiff must be in the zone of danger when the injury to the third party occurs. Many state courts, and the Third Restatement, do not require that a plaintiff be in the zone of danger at all (*see e.g. Paugh v Hanks*, 6 Ohio St 3d at 79, 451 NE2d at 766; Restatement [Third] of Torts: Liability for Physical and Emotional Harm § 48). The requirement of a close family relationship is thought sufficient to limit liability to manageable bounds. Other state courts which apply the zone-of-danger requirement rely on that limitation alone and do not also inquire into the relationship between the plaintiff and the injured third party (*see e.g. Asaro v Cardinal Glennon Mem. Hosp.*, 799 SW2d 595, 599-600 [Mo Sup Ct 1990]).

In New York, of course, these limiting factors have been piled on top of each other **[****9]** and are applied together to protect the New York court system from the flood of litigation that has been predicted. Notwithstanding such dire predictions, the courts in these other **[***39]** jurisdictions, to my knowledge, have not ceased to function. In any event, "[i]t is the business of law to remedy wrongs that deserve it, even at the expense of a flood of litigation, and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds" (Prosser & Keeton, Torts § 12 at 56 [internal quotation marks omitted]).

In sum, even the most ardent supporters of the current state of the law in this area must acknowledge that it "lacks that coherence which precedent should possess" (*Battalla v State of New York*, 10 NY2d at 239; *see generally* Harold F. McNiece, *Psychic Injury and Tort Liability in New York*, 24 St John's L Rev 1, 33). And while I acknowledge the importance of such precedent, it must be cast away when it "has failed to withstand the cold light of logic and experience" (*Broadnax v Gonzalez*, 2 NY3d at 156). That is the case here.

4. Conclusion

If it is still true in this state that "one may seek redress for **[*1034]** every substantial wrong" (*Battalla v State of New York*, 10 NY2d at 240), and that "[f]reedom from mental disturbance is . . . a protected interest" (*Ferrara v Galluchio*, 5 NY2d 16, 21, 152 NE2d 249, 176 NYS2d 996 [1958]), the order must be affirmed insofar as appealed from.

In light of the foregoing, I conclude that the Supreme Court did not improvidently exercise its discretion in granting that branch of the plaintiffs' motion which was for **[***40]** leave to amend the amended complaint to add the proposed fourth cause of action. Accordingly, I vote to affirm the order insofar as appealed from, and must respectfully dissent.

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Greene v Esplanade Venture Partnership

Court of Appeals of New York

February 18, 2021, Decided

No. 6

Reporter
144 N.Y.S.3d 654*; 36 N.Y.3d 513**; 168 N.E.3d 827***; 2021 N.Y. LEXIS 104 ****.

Judges: Opinion by Judge Fahey. Chief Judge DiFiore and Judges Stein and Feinman concur. Judge Rivera concurs in result in an opinion in which Judge Wilson concurs. Judge Garcia concurs in result in a separate concurring opinion.

Opinion by: FAHEY

Opinion

FAHEY, J.

This case begins with the heart-breaking death of a child. Our responsibility is to determine whether plaintiff-grandparent Susan Frierson, who was in close proximity to the decedent-grandchild at the time of the death-producing accident, may pursue a claim for bystander recovery under a "zone of danger" theory.

We have applied the settled "zone of danger" rule to "allow[] one who is . . . threatened with bodily harm in consequence of the defendant's negligence to recover for emotional distress" flowing only from the "viewing [of] the death or serious physical injury of a member of [that person's] *immediate family*" (*Bovsun v Sanperi*, 61 NY2d 219, 228, 461 N.E.2d 843, 473 N.Y.S.2d 357 [1984] [emphasis added]). Unsettled at this juncture, however, are "the outer limits" of the phrase "immediate family" **[*2]** (*id.* at 233 n 13). Once again, we are not asked to fix permanent boundaries of the "immediate family." Instead, our task simply is to determine whether a grandchild may come within the limits of her grandparent's "immediate family," as that phrase is used in zone of danger jurisprudence.

We conclude that the grandchild comes within those limits. Consistent with our historically circumspect approach expanding liability for emotional damages within our zone of danger jurisprudence, our increasing legal recognition of the special status of grandparents, shifting societal norms, and common sense, we conclude that plaintiff's grandchild is "immediate family" for the purpose of applying the zone of danger rule.

I.

A.

On May 17, 2015, plaintiff Susan Frierson and her two-year-old granddaughter, decedent Greta Devere Greene, were in front of a building when they were suddenly struck by debris that fell from the facade of that edifice. Emergency measures taken to save Greta's life failed, and she died the next day.

Susan and Greta's mother, plaintiff Stacy Greene, subsequently commenced this action seeking damages for injuries sustained in that accident. The complaint was quickly superseded by an amended pleading **[*3]** in which plaintiffs alleged, among other things, that defendant Esplanade Venture Partnership owned the building, and that the remaining defendants were negligent with respect to the inspection of the facade of that structure. The amended complaint also alleged that the facade was in a dangerous condition, and that as a result, a piece of the facade broke, fell, struck Greta, and caused her to die.

Based on those allegations, plaintiffs asserted two causes of action; the first sounding in negligence, and the second in wrongful death. Nowhere in that amended pleading, however, did plaintiffs assert a cause of action for negligent infliction of emotional distress on behalf of Susan under the "zone of danger" doctrine.

B.

Plaintiffs sought to cure that deficiency through a motion for leave to amend the amended complaint, and that application lies at the core of this appeal. In that motion, plaintiffs sought permission to "assert an additional cause of action on behalf of Susan under the 'zone of danger' doctrine." That cause of action, plaintiffs contended, was appropriate in view of the "unique and special" nature of "the relationship between a grandparent and a grandchild."

To the extent **[*4]** the grandparent-grandchild relationship between Susan and Greta is not alone enough to bring Greta into Susan's "immediate family," plaintiffs maintained that the nature of the relationship warrants that classification. Susan, plaintiffs alleged, participated in Greta's birthing process, helped to care for Greta during the first few weeks of Greta's life, and subsequently developed a "powerful" "emotional

bond" with Greta. By the time Greta was one year old, plaintiffs further alleged, Greta began to have overnight visits with Susan. It was during one of those visits that Susan was struck by debris that fell from the subject building, and Greta was struck and killed.

C.

The motion to amend the amended complaint was granted. Relying on the combination of our reasoning in *Bovsun* (61 NY2d at 232), this State's "specific recognition of the custody rights of grandparents with respect to their grandchildren," and the progression of zone of danger jurisprudence in other jurisdictions, Supreme Court concluded that Susan "should be considered an 'immediate family member' and afforded a right to recover for her emotional injuries caused by this tragic accident" (2017 NY Slip Op 32335[U], at *4).

A divided Appellate Division reversed that **[*5]** order insofar as appealed from and denied the "branch of plaintiffs' motion which was for leave to amend the amended complaint to add a cause of action sounding in negligent infliction of emotional distress" (172 AD3d 1013, 1014, 101 N.Y.S.3d 99 [2d Dept 2019]). The majority ruled that leave to amend should have been denied (*see id.* at 1015) based on its interpretation of *Bovsun* (61 NY2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357) and *Trombetta* (82 NY2d 549, 626 N.E.2d 653, 605 N.Y.S.2d 678). *Bovsun* saw us hold "that a plaintiff may recover damages for emotional distress 'occasioned by [the plaintiff's] witnessing injury or death caused by the defendant's conduct to a member of the plaintiff's *immediate family*' (emphasis added)" (172 AD3d at 1015, quoting *Bovsun*, 61 NY2d at 224). That case, the Appellate Division believed, thus "stands for the proposition that spouses and their children are immediate family members" (172 AD3d at 1015, citing *Bovsun*, 61 NY2d at 233-234).

Bovsun was not an exercise in line-drawing. Although it identified certain relationships that come within the class of "immediate family members," *Bovsun* did not establish exhaustive boundaries with respect to the universe of "immediate family members." For that reason, the Appellate Division analogized this case—involving a grandmother and a granddaughter—to *Trombetta* (82 NY2d 549, 626 N.E.2d 653, 605 N.Y.S.2d 678). There, we concluded that the plaintiff-niece of a woman who was killed in the plaintiff's presence and with whom **[*6]** the plaintiff had a significant emotional bond was not entitled to "bring suit as a bystander for the negligent infliction of emotional injuries under the . . . 'zone of danger' rule" (*id.* at 550) because the decedent-aunt was not part of the plaintiff-niece's immediate family (*see id.* at 553; *see also* 172 AD3d at 1015-1016, citing *Jun Chi Guan v Tuscan Dairy Farms*, 24 AD3d 725, 725, 806 N.Y.S.2d 713 [2d Dept 2005], *lv dismissed* 7 NY3d 784, 853 N.E.2d 1114, 820 N.Y.S.2d 546 [2006]).

The dissenters at the Appellate Division would have affirmed Supreme Court's order. Though mindful of "the importance of precedent in our common-law system," the dissenters noted that the "'living nature'" of the common law sometimes requires a "'respon[se] to the surging reality of changed conditions'" (172 AD3d at 1016, quoting *Gallagher v St. Raymond's R. C. Church*, 21 NY2d 554, 558, 236 N.E.2d 632, 289 N.Y.S.2d 401 [1968]) and maintained that the law should recognize that Greta was part of Susan's "immediate family" for the purpose of permitting a zone of danger claim (*see* 172 AD3d at 1028). The dissenters also rejected what they characterized as the majority's "use of consanguinity as a crude proxy for emotional harm" given the likelihood that "arbitrary and unjust results that will inevitably follow when, for instance, a child is denied recovery because [the child] does not live within a traditional family structure" (*id.* at 1030). "To be sure," the dissenters continued, "line drawing is often an inevitable element **[*7]** of the common-law process, but [it] . . . does not justify . . . clinging to a [boundary] that," as sketched by the Appellate Division, excludes Greta from the class of persons constituting Susan's immediate family (*id.* at 1031).

The Appellate Division subsequently granted leave to appeal to this Court and certified for our review the question whether its order was properly made. We now reverse and answer that question in the negative.

II.

The past is always prologue. Our review of the merits begins with the underpinnings of our modern bystander zone of danger law.

A.

In the nineteenth century, *Mitchell v Rochester Ry. Co.* (151 NY 107, 45 N.E. 354, 3 N.Y. Ann. Cas. 283 [1896]) saw us conclude that "no recovery can be had for injuries sustained by fright occasioned by the negligence of another where there is no immediate personal injury" (*id.* at 110). That now-outdated rule fittingly arose from antiquated circumstances; there the plaintiff was rendered unconscious and suffered a miscarriage during a "near miss" with the defendant's horse car (*see id.* at 108). Even assuming that the defendant was negligent in the management of its horses, however, we concluded that the plaintiff could not "recover for injuries occasioned by fright, as there was no immediate personal injury" (*id.* at 109). Central to that determination **[*8]** was the concern that recovery for emotional distress "would be contrary to public policy because that type of injury could be feigned without detection and it would result in a flood of litigation where damages must rest on speculation" (*Battalla v State of New York*, 10 NY2d 237, 240, 176 N.E.2d 729, 219 N.Y.S.2d 34 [1961] [discussing

Mitchell]).

By the 1930s, *Mitchell* had "been much discussed and frequently criticised by legal scholars" (*Comstock v Wilson*, 257 NY 231, 234, 177 N.E. 431 [1931]). In a point that carries weight today, we acknowledged that *Mitchell* had been shaped by views of policy rooted in the outlook of the times in which that case had been decided. We also noted that there are times in which "[p]ractical considerations must . . . determine the bounds of correlative rights and duties" (*Comstock*, 257 NY at 235). At that juncture, we believed that those practical concerns continued to require that a plaintiff be physically impacted in order to recover. Still, in *Comstock* we recognized that damages for "a mental disturbance" might be recoverable where the "fright" or "nervous shock" is produced by a concurrent physical impact (*see id.* at 237-239).

B.

As time marched on, the law continued to drift away from *Mitchell*. By the early 1960s, we acknowledged that the core of the *Mitchell* conclusion—namely, that recovery for injury resulting from "mere **[*9]** fright" is not permitted—had been "demolished many times" (*Battalla*, 10 NY2d at 240). We also reconsidered the public policy underlying *Mitchell* (*see Battalla*, 10 NY2d at 240). The review was circumspect, to be sure; we balanced the possibility that "fraud, extra litigation and a measure of speculation are, of course, possibilities" in the event of a claim for fright against our awareness of the folly of denying "a logical legal right and remedy in *all* cases because in *some* a fictitious injury may be urged as a real one" (*id.* at 241). Against the backdrop of those competing considerations, and while mindful of factors including "just[ice]," "experience[,] and logic" (*id.* at 239), we concluded that a plaintiff "subjected to the fear of physical injury as a direct result of the tortious conduct" (*Howard v Lecher*, 42 NY2d 109, 111, 366 N.E.2d 64, 397 N.Y.S.2d 363 [1977]) may state a claim that he or she was "negligently caused to suffer 'severe emotional and neurological disturbances with residual physical manifestations'" when the defendant owed the plaintiff a direct duty, such as the one owed to the plaintiff by the ski-lift operator at issue in that case (*Battalla*, 10 NY2d at 238-239). By the late 1960s, we crystallized that point. There was "no longer any question" that, in some circumstances, "one may have a cause of action for . . . negligently **[*10]** induced mental trauma without physical impact" (*Tobin v Grossman*, 24 NY2d 609, 613, 249 N.E.2d 419, 301 N.Y.S.2d 554 [1969]).

C.

By the time *Tobin* was decided, we came to consider the issue whether a cause of action for negligent infliction for emotional distress might lie in favor of a bystander who did not suffer physical injury and who was owed no "direct duty" (*see id.*). Although we acknowledged developments in the law—including landmark developments in other areas in the tort field—we declined to recognize a cause of action for harm sustained by a "third person" parent as a result of injuries negligently inflicted directly upon her child when the parent was not in the zone of danger (*see id.* at 615-619; *see also id.* at 614, citing *MacPherson v Buick Motor Co.*, 217 NY 382, 111 N.E. 1050 [1916]). Stating the practical difficulties and the goal for the law to "limit the legal consequences of wrongs to a controllable degree," we observed that "[t]he risk of indirect harm from the loss or injury of loved ones is pervasive and inevitably realized at one time or another" (*Tobin*, 24 NY2d at 619).

In words that have failed the test of time, however, we also said that "[o]nly a very small part of that risk is brought about by the culpable acts of others" and that "[t]his is the risk of living and bearing children" (*id.*). That logic, and a concern with "[t]he problem of **[*11]** unlimited liability" (*id.* at 616), led us to conclude that it was "enough that the law establishes liability in favor of those directly or intentionally harmed" (*see id.* at 619).

Fifteen years later, we revisited the question and our policy consideration in *Tobin* to recognize a cause of action for bystander liability in part. *Bovsun* (61 NY2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357) recognized that a plaintiff negligently "expose[d] . . . to an unreasonable risk of bodily injury or death . . . may recover . . . damages for injuries suffered in consequence of the observation of the serious injury or death of a member of his or her immediate family—assuming, of course, that it is established that the defendant's conduct was a substantial factor in bringing about such injury or death" (*id.* at 230-231). "Traditionally," we observed, "courts ha[d] been reluctant to recognize any [such] liability for . . . mental distress which may result from the observation of a third person's peril or harm" (*id.*). However, by then, the "zone-of-danger rule, which" renders compensable emotional harm caused by the negligent infliction of injuries upon another person in certain cases, had "become the majority rule in this country" (*id.* at 228-229) [1] .

Consequently, we incorporated the zone of danger **[*12]** rule into our jurisprudence (*see id.* at 230-231; *see also id.* at 224). That rule "allows one who is . . . threatened with bodily harm in consequence of the defendant's negligence to recover for emotional distress" flowing only from the "viewing [of] the

[1] We further observed that, "[i]n disposing of the appeal in *Tobin* we were not, however, required to confront the precise issue presented . . . inasmuch as the plaintiff in *Tobin* had not been within the zone of danger of bodily harm" (*id.* at 228).

death or serious physical injury of a member of his or her immediate family" (*id.* at 228).

D.

At the time *Bovsun* (61 NY2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357) was decided, other courts had taken a more expansive view of liability for emotional distress resulting from viewing the death or serious physical injury of a relative. In *Dillon v Legg* (68 Cal 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 [1968]), for example, the Supreme Court of California held "that damages may be recovered for the emotional trauma caused when the plaintiff witnesses the injury or death of a close relative even though the plaintiff is not . . . within the zone of danger of physical injury, provided that the emotional injury is reasonably foreseeable" (*Bovsun*, 61 NY2d at 227 [discussing *Dillon*]). *Bovsun*'s approach, of course, was more circumscribed. As in *Tobin* (24 NY2d at 618), the *Bovsun* Court expressly rejected adoption of the rule in *Dillon*, explaining that for those in the zone of danger,

"[r]ecognition of this right to recover for emotional distress attributable to observation of injuries suffered by a member of the immediate family involves a broadening **[*13]** of the duty concept but—unlike the *Dillon* approach—not the creation of a duty to a plaintiff to whom the defendant is not already recognized as owing a duty to avoid bodily harm" (*id.* at 229).

We emphasized that "the zone-of-danger rule provides a circumscribed alternative to the apparently sweeping liability recognized in *Dillon* . . . and does so within the framework of traditional and accepted negligence principles by using an objective test of whether the plaintiff was unreasonably threatened with bodily harm by the conduct of the defendant" (*id.* at 230).

Bovsun is also remarkable for what it did not say. While *Bovsun* recognized a zone of danger rule with an objectively defined class of bystanders as "immediate family," the Court did not list or enumerate "immediate family members." In fact, consistent with the caution with which we have historically approached this issue, we expressly declined to define the "outer limits" with respect to "the immediate family" element of the zone of danger rule (*see id.* at 233 n 13). "Inasmuch as all [of the] plaintiffs [at issue in *Bovsun*] were married or related in the first degree of consanguinity to the injured or deceased person," we left for another case the decision as to "where **[*14]** lie the outer limits of 'the immediate family'" (*id.*).

III.

Our evolving zone of danger field jurisprudence is not the only development in the law relevant to our analysis.

In the 1990s we concluded that an unmarried, same-sex partner could adopt the partner's biological child (*see Matter of Jacob*, 86 NY2d 651, 655-656, 660 N.E.2d 397, 636 N.Y.S.2d 716 [1995], citing Domestic Relations Law § 110 and 18 NYCRR 421.16 [h] [2]). Same sex marriage was codified in 2011 (*see* Domestic Relations Law § 10-a [1] [added by L 2011, ch 95 § 3) and affirmed in 2012 (*see New Yorkers for Constitutional Freedoms v New York State Senate*, 98 AD3d 285, 287, 948 N.Y.S.2d 787 [4th Dept 2012], *lv denied* 19 NY3d 814, 979 N.E.2d 813, 955 N.Y.S.2d 552 [2012]).

More recently we acknowledged that the definition of parent—which previously excluded a partner without a biological or adoptive relation to the subject child—had "become unworkable when applied to increasingly varied familial relationships" (*Matter of Brooke S.B. v Elizabeth A.C.C.*, 28 NY3d 1, 14, 39 N.Y.S.3d 89, 61 N.E.3d 488 [2016]). This analysis emphasized the point that roles and perspectives change, and that what once was accepted as a basic social premise has to be carefully examined in a way that reflects the realities of our lives.

Even more important in the context of this case is the legislative recognition of the changing nature of society's understanding of family and the special relationship between grandparents and grandchildren. In the 1960s the legislature established a vehicle for grandparents to obtain visitation rights with minor grandchildren **[*15]** (*see* Domestic Relations Law § 72; L 1966 ch 631 § 1). Although section 72 originally addressed only grandparent visitation, the statute was amended in 2003 "to provide guidance regarding the ability of grandparents to obtain **[**2]** standing in custody proceedings involving their grandchildren" (L 2003, ch 657, § 1). Following the amendment, section 72 now provides "that grandparents may demonstrate standing to seek custody based on extraordinary circumstances where the child has lived with the grandparents for a prolonged period of time, even if the child had contact with, and spent time with, a parent while the child lived with the grandparents" (*Matter of Suarez v Williams*, 26 NY3d 440, 444, 23 N.Y.S.3d 617, 44 N.E.3d 915 [2015]).

The 2003 amendment was enacted based on an express legislative finding illustrative of the policy choice here. Namely, the legislature acknowledged that "grandparents play a special role in the lives of their grandchildren and are increasingly functioning as care givers in their grandchildren['s] lives. In recognition of this critical role that many grandparents play in the lives of their grandchildren, the legislature finds it necessary to provide guidance regarding the ability of grandparents to obtain standing in custody proceedings involving their grandchildren" (L 2003, ch 657, § 1).

Thus, this **[*16]** Court recognized the "special status" of

grandparents and that the unique path embodied in section 72 to establish extraordinary circumstances was enacted "in recognition of the important role of grandparents and the increasing number of grandparents raising their grandchildren" (*Suarez*, 26 NY3d at 446). As we have recognized in other contexts (*see e.g. Brooke S.B.*, 28 NY3d at 14), concepts of the creation and composition of family units have evolved beyond traditional legal notions of blood relation or consanguinity. What once was accepted as a basic social premise must be carefully examined in a way that reflects the realities of both our changing legal landscape and our lives.

IV.

It is here that the evolution of New York law with respect to bystander claims and the shifting understanding of varied familial relationships intersect [2] . As noted, this case presents the question whether Susan, as the grandmother of Greta, may assert a viable cause of action for negligent infliction of emotional distress under the "zone of danger" theory based upon the emotional harm stemming from witnessing at close proximity the incident in which Greta was killed. There is no dispute that Susan was within the zone of danger at the time of that incident, meaning **[*17]** that the question whether she may assert that cause of action for negligent infliction of emotional distress turns on whether Greta was part of Susan's "immediate family" (*see Bovsun*, 61 NY2d at 228).

We have not established an outer boundary for "the immediate family" element of the zone of danger rule (*see id.* at 233 n 13). Here, we simply conclude that a grandchild is within our understanding of what is meant by "immediate family." That is, given the recognition by this Court and the legislature that the relationship of grandparent and grandchild enjoys a "special status" among familiar relationships (*Suarez*, 26 NY3d at 448; *see* L 2003, ch 657 § 1), inclusion of grandparents in the common-law term "immediate family" under these circumstancehere was no reason to deny that application.[s is more than warranted.

This circumspect approach is consistent with our post-*Bovsun* decision in *Trombetta v Conkling* (82 NY2d 549, 626 N.E.2d 653, 605 N.Y.S.2d 678 [1993]). There, we concluded that the decedent-aunt was not "immediate family" of the plaintiff-niece for the purpose of the zone of danger rule (*see id.* at 550). That determination was borne not of an investigation into the nature of the bond between the decedent and the plaintiff, but of our historical precision and prudence in this area (*see id.* at 553). We adhered to our articulated **[*18]** policy of "limiting the availability of recovery for the negligent infliction of emotional distress to a strictly and objectively defined class of bystanders" (*id.*). Critically, we also recognized that *Bovsun* did not "define the boundaries of 'the immediate family'" (*id.* at 553) and we did not do so in *Trombetta* either. Likewise, it is unnecessary to do so here, and that issue remains open.

This case calls upon us to blend the prudence we have shown in the course of many decades, including in *Bovsun* (61 NY2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357) and that yielded *Trombetta* (82 NY2d 549, 626 N.E.2d 653, 605 N.Y.S.2d 678) with recognition of reshaped societal norms and **[**3]** everyday common sense. We simply clarify that a discrete, limited class of persons that enjoys a special status under modern New York family law comes within the "narrow avenue to bystander recovery" (*Trombetta*, 82 NY2d at 552), and conclude that a grandchild is the "immediate family" of a grandparent for the purpose of applying the zone of danger rule.

V.

The motion for leave to serve and file a second amended complaint should have been granted. "Permission to amend pleadings should be 'freely given' (CPLR 3025 [b])" (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959, 459 N.E.2d 164, 471 N.Y.S.2d 55 [1983]), and the decision whether "to allow . . . the amendment is committed to the court's discretion" (*id.*). Here, inasmuch as the proposed amendment is not "patently **[*19]** devoid of merit" (172 AD3d at 1015), there was no reason to deny that application. [3]

Accordingly, the order of the Appellate Division should be reversed, with costs, plaintiffs' motion to serve and file a second amended complaint granted in its entirety, and the certified question answered in the negative.

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[2] We note that New York appears to be an outlier in terms of limiting bystander recovery to those with a familial relationship, but not permitting grandparents to recover (*see Philibert v Kluser*, 360 Ore. 698, 385 P3d 1038 [Or. 2016]; *Smith v Toney*, 862 NE2d 656 [Ind. 2007]; *Dickerson v Lafferty*, 750 So 2d 432 [La Ct App 2000] [same] *Fernandez v Walgreen Hastings Co.*, 1998-NMSC-039, 126 N.M. 263, 968 P.2d 774 [1998]; *Bowen v Lumbermens Mut. Cas. Co.*, 183 Wis. 2d 627, 517 NW2d 432 [Wis 1994]; *Hayes v Illinois Power Co.*, 225 Ill. App. 3d 819, 587 NE2d 559, 167 Ill. Dec. 290 [Ill. App. 1992]; *Thing v La Chusa*, 48 Cal. 3d 644, 257 Cal. Rptr. 865, 771 P.2d 814 [1989]; *Genzer v City of Mission*, 666 SW2d 116 [Tex App 1983] *Barnhill v Davis*, 300 NW2d 104 [Iowa 1981]; *Leong v Takasaki*, 55 Haw. 398, 520 P2d 758 [Haw. 1974]; Wyo Stat. Ann. §§ 1-38-102; 2-4-101). As plaintiffs argue, our case law in this regard is in tension with New York's public policy recognizing the special status of grandparents.

[3] To the extent defendants contend that the motion should have been denied for the independent reason that plaintiffs failed to comply with the submission requirements of CPLR 3025 (b), that contention should be rejected.

Order reversed, with costs, plaintiffs' motion to serve and file a second amended complaint granted in its entirety and certified question answered in the negative. Opinion by Judge Fahey. Chief Judge DiFiore and Judges Stein and Feinman concur. Judge Rivera concurs in result in an opinion in which Judge Wilson concurs. Judge Garcia concurs in result in a separate concurring opinion.

Decided February 18, 2021

Concur by: RIVERA; GARCIA

Concur

RIVERA, J. (concurring):

"[W]hile legislative bodies have the power to change old rules of law, nevertheless, when they fail to act, it is the duty of the court to bring the law into accordance with present day standards of wisdom and justice rather than 'with some outworn and antiquated rule of the past.' No reason appears why there should not be the same approach when traditional common-law rules of negligence result in injustice" (*Woods v Lancet*, 303 NY 349, 355, 102 N.E.2d 691 [1951], quoting *Funk v United States*, 290 U.S. 371, 382, 54 S. Ct. 212, 78 L. Ed. 369 [1933]).

The Court has missed the moment. In *Bovsun v Sanperi* (61 NY2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 [1984]), **[*20]** the Court adopted the zone-of-danger rule that limits recovery for infliction of emotional distress to certain family members put within harm's way by defendants' conduct. On this appeal, we could have discarded that rule, which the Court knew then to be arbitrary and which served merely as a legally sanctioned excuse for "holding strict rein on liability" (*id.* at 230, quoting *Tobin v Grossman*, 24 NY2d 609, 618, 249 N.E.2d 419, 301 N.Y.S.2d 554 [1969]). We could have explained that basing a right of recovery on whether a plaintiff was physically near to the injured or killed person leads to absurd results.

On this appeal, we could have discarded the Court's additional limitation that a person within the zone of danger must be the third party's "immediate family" member, defined strictly by marriage and degrees of consanguinity (*see Bovsun*, 61 NY2d at 233 n 13; *Trombetta v Conkling*, 82 NY2d 549, 553, 626 N.E.2d 653, 605 N.Y.S.2d 678 [1993]). We would be justified in rejecting this outdated, patriarchal, and parochial definition, because families are formed not solely by matrimony and blood but also with bonds of friendship and love.

Lastly, we could have acknowledged that our rule was formed around the Court's assumption that a less stringent rule would lead to "unduly burdensome liability" (*Tobin*, 24 NY2d at 615), and then recognized that—as the experiences of other jurisdictions have proven—this **[*21]** concern is overstated. Regardless, such liability is merely "a kind of dollars-and-cents argument" (*id.* at 617) that neglects the dual purposes of tort law, which is to make wrongfully injured parties whole and provide a sufficient economic disincentive for injurious negligent conduct. We should have taken this opportunity to "reject[] as a ground for denying a cause of action that there will be a proliferation of claims" (*id.* at 615). "It suffices that if a cognizable wrong has been committed that there must be a remedy, whatever the burden of the courts" (*id.*). Having freed ourselves from the constraints of a retrograde and deeply flawed jurisprudence, the Court could have adopted a rule premised on the fundamentals of tort law—foreseeability, causation, and discernable harm—rather than a rule overwhelmingly concerned with assumed "unduly burdensome liability" (*id.*). Yes, the majority holding is a long overdue, though modest, expansion of the class of plaintiffs that are eligible to recover for emotional injuries sustained from watching loved ones suffer injury or death. And so I concur in the result. But the majority adheres to a legal framework that is arbitrary to the point of being contrary to public **[*22]** policy and blatantly unjust. The majority's small step is inadequate and solidifies an indefensible jurisprudence for the unforeseen future.

I write separately to explain why our rule should be that a person may recover for the emotional distress caused by perceiving the serious injury or death of any person with whom they shared a strong personal and loving bond. Alternatively, a person may recover if they contemporaneously observed the serious injury or death of another, regardless of their relationship, if they were at risk of immediate and serious physical harm from the defendant's conduct. This rule would eliminate the requirement that the plaintiff be related to the victim by marriage or consanguinity. The rule would also allow "strangers" to recover if the defendant violated a duty owed to them by putting them at risk of immediate and serious physical harm.

I.

The majority has described with a broad brush the development of our common law that led to this Court's adoption of a standard that permits recovery for infliction of emotional distress caused by observing a defendant's harm to an immediate family member (majority op at 6-11). There are some additional observations and conclusions **[*23]** within these seminal cases worth noting, which illustrate why we should adopt a new rule as I have articulated.

In *Battalla v State of New York* (10 NY2d 237, 242, 176 N.E.2d 729, 219 N.Y.S.2d 34 [1961]), the Court first recognized a claim for damages based on mental distress without physical

injury. *Battalla* involved an infant that was placed in a chairlift by an employee of a ski resort and not properly secured (*id.* at 239). The infant "became frightened and hysterical" while riding on the chairlift and suffered severe emotional disturbance with residual physical manifestations as a result (*id.* 238-239). In finding that the plaintiff had stated a legally cognizable claim, the Court noted the well-understood principle, "fundamental to our common-law system[,] that one may seek redress for every substantial wrong" (*id.* at 240).

Battalla overruled *Mitchell v Rochester Railway Co.* (151 NY 107, 110, 45 N.E. 354, 3 N.Y. Ann. Cas. 283 [1896]), which prohibited recovery for emotional disturbance without physical injury. The Court explained that "a rigorous application of" the rule articulated in *Mitchell* "would be unjust, as well as opposed to experience and logic" (*Battalla*, 10 NY2d at 239).

Unlike the majority here, the Court in *Battalla* extolled our role in developing the common law. That role is not contingent upon legislative enactments, for as the Court explained, "'[w]e act in the finest common-law tradition when **[*24]** we adopt and alter decisional law to produce common-sense justice. . . . Legislative action there could, of course, be, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule'" (*id.*, quoting *Woods v Lancet*, 303 NY 349, 355, 102 N.E.2d 691 [1951]).

Fidelity to the development of common law as the duty of an independent judiciary was well established long before its reaffirmation in *Battalla* and *Woods*. Aligning the common law with an evolving sense of justice is essential to the judicial exercise of this authority. Almost a century ago the United States Supreme Court explained that

"as it was the characteristic principle of the common law to draw its inspiration from every foundation of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms. . . .

To concede this capacity for growth and change in the common law by drawing 'its inspiration from every fountain of justice,' and at the same time to say that the courts of this country are forever bound to perpetuate such of its **[*25]** rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time, is to deny to the common law in the place of its adoption a 'flexibility and capacity for growth and adaptation' which was 'the peculiar boast and excellence' of the system in the place of its origin. . . . It has been said so often as to have become axiomatic that the common law is not immutable, but flexible, and, by its own principles, adapts itself to varying conditions" (*Funk*, 290 U.S. at 383).

In the same vein, the *Battalla* Court rejected the traditional arguments against expanding liability to include emotional injuries (10 NY2d at 240). Specifically, it questioned the Court's preoccupation in *Mitchell* with the possibility that emotional injury "could be feigned without detection" and the risk that expanding liability would lead to "a flood of litigation where damages must rest on speculation" (*id.*). The Court reasoned that, "[a]lthough fraud, extra litigation and a measure of speculation are, of course, possibilities, it is no reason for a court to eschew a measure of its jurisdiction" (*id.* at 240-241). In addition, the Court noted that "fraudulent accidents **[*26]** and injuries are just as easily feigned in the slight-impact cases and other exceptions wherein New York permits recovery, as in no-impact cases which it has heretofore shunned" (*id.* at 241). Thus, the Court rejected the view that it was too difficult to discern the genuine from the fraudulent claim for nonphysical harm. That was the right choice because, as the Court observed, an "argument from mere expediency cannot commend itself to a Court of Justice, resulting in the denial of a logical legal right and remedy in *all* cases because in *some* a fictitious injury may be urged as a real one" (*id.*, quoting *Green v Shoemaker & Co.*, 111 Md 69, 81, 73 A 688, 692 [1909] [internal quotation marks omitted] [emphasis in the original]). A few years later, California adopted a "bystander" recovery rule in *Dillon v Legg* (68 Cal 2d 728, 747, 69 Cal. Rptr. 72, 441 P2d 912, 924-925 [1968]). In that case, California permitted a mother to recover for her emotional harm caused by observing the defendant's car hit her son. The court applied a foreseeability test, concluding that the emotional harm to the plaintiff was foreseeable even if the mother was not at risk of physical harm because the mother and victim shared a strong emotional bond and she was in close proximity to the events (*id.* at 741). The court rejected arguments that emotional harm was easily feigned, **[*27]** that its holding would encourage false claims, and that the defendant owed a duty of care solely to those in danger of physical harm (*id.* at 746-747). [4]

The court noted legal commentators' observations that emotional injury should be treated as any other negligently inflicted injury (*id.* at 746, citing 2 Harper & James, The Law of Torts 1039 [1956] and Archibald H. Throchmorton, *Damages for Fright*, 34 Harv L Rev 260, 277 [1921]). For example, one commentator argued that,

[4] California has refined its rule and now limits recovery "to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim" absent exceptional circumstances (*Thing v La Chusa*, 48 Cal 3d 644, 668, 257 Cal. Rptr. 865, 771 P.2d 814 n 10 [1989]).

"Nervous shock resulting from fright is just one species of physical injury, and the rules of law, governing the right of recovery therefor, and the measure of recovery, are, or should be, the same as in all other cases of physical injury. The refusal to apply these general rules to actions for this particular kind of physical injury is nothing short of a denial of justice" (Throchmorton, 34 Harv L Rev at 277).

William L. Prosser described *Dillon* as a movement away from the zone-of-danger limitation, which he regarded as "no great triumph of logic," given the inconsistencies that it created within tort law (Prosser and Keeton, Torts § 54 at 366 [5th ed 1984]). Indeed, "[i]t is the business of the courts to make precedent where a wrong calls for redress, even if lawsuits must be multiplied" (*id.* at 360). **[*28]** And, "where the concern is to avoid imposing excessive punishment upon a negligent defendant, it must be asked whether fairness will permit leaving the burden of loss instead upon the innocent victim" (*id.* at 361; *see also Leong v Takasaki*, 55 Haw 398, 404, 520 P2d 758, 763 [1974] [describing limitations like the zone-of-danger requirement as "artificial devices" that "may actually foreclose relief to a genuine claim" that were unnecessary under the rule developed in *Dillon*]; *Dunphy v Gregor*, 136 NJ 99, 112, 642 A2d 372, 378 [1994] [noting that the need to put a limit on liability "does not outweigh the need to recognize claims that are legitimate and just"]).

New York did not follow *Dillon's* lead, although many other jurisdictions did.

[5] Less than a year after California's pathbreaking holding, our Court decided *Tobin*, which refused to allow recovery for emotional and mental damages incurred as a result of a defendant's injury to another (24 NY2d at 619). Like *Dillon, Tobin* involved a mother who sought recovery for her emotional and mental injuries caused by perceiving defendant's negligent harm to her child. Unlike in *Dillon*, the mother was not an eyewitness to the events; she heard the screech of automobile brakes and then discovered moments later that her infant child had been struck by a car and seriously injured (**[*29]** *id.* at 611). [6] In rejecting the mother's claim for recovery, the Court acknowledged that "the common law is not circumscribed by syllogisms, however constructed out of precedents" (*id.* at 614).

However, the Court in *Tobin* erred in framing the issue as whether to create a new cause of action, which according to the Court required a "radical change in policy" that it was unwilling to make (*id.* at 615). Yet, all that was necessary was for the Court to employ the same logic of *Battalla* to *extend* the cause of action recognized therein to an individual who asserts emotional and mental injuries, leaving it to traditional principles of tort law to address that person's entitlement to recovery. As Judge Keating explained in dissent, the holding was unsupported by reason given that the majority "ha[d] shown that every element necessary to build a case for tortious liability in negligence is here present" (*id.* at 619 [Keating, J., dissenting]). Specifically, "[t]here is an important interest worthy of protection, there is proximate cause, there is injury, and there is foreseeability" (*id.*).

As both the *Tobin* majority and dissent recognized, withholding recovery from the mother was patently arbitrary (*id.* at 618, 620). In rejecting **[*30]** recovery nonetheless, the *Tobin* majority reviewed "several [policy] factors most often considered" in the development of the law governing recovery for emotional injury. These factors "overlap in various degrees" (*id.* at 615).

The Court had previously rejected the threat of a proliferation of claims and an increase in fraudulent litigation as outcome-determinative factors, and so handily rejected these as bases for deciding whether plaintiff should recover in *Tobin* (*id.* at 615-616). The Court concluded, however, that the remaining "factors"—foreseeability, the "inconsistency of the zone of danger rule, unlimited liability, unduly burdensome liability, and the difficulty of circumscribing the area of liability"—all weighed against plaintiff (*id.* at 615).

The Court noted that section 313 of the Second Restatement and several states had adopted the zone-of-danger rule, although it acknowledged that *Dillon* viewed that rule as a "rather arbitrary limiting rule which has the unpalatable consequence that a mother who also fears for herself may recover while, if she does not or has no such similar opportunity, she may not recover" (*id.* at 616, citing *Dillon*, 68 Cal 2d at 747, 441 P2d at 924-925). While **[**4]** unlimited and unduly burdensome liability were constants under any theory of recovery, **[*31]** the "most difficult factor" to resolve, according to the Court, was the "reasonable circumscription, within tolerable limits required by public policy, of a rule creating liability" (*id.* at 617).

As the Court recognized, a parent need not witness the events

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[5] *See e.g. Sacco v High Country Indep. Press, Inc.*, 271 Mont 209, 228-229, 896 P2d 411, 423 (1995); *Paugh v Hanks*, 6 Ohio St 3d 72, 80, 6 Ohio B. 114, 451 NE2d 759, 767 (1983); *Sinn v Burd*, 486 Pa 146, 172-173, 404 A2d 672, 686 (1979); *Leong*, 55 Haw at 404-410, 520 P2d at 763-766.

[6] This distinction was an odd one to note. The Court in *Battalla* had rejected the requirement that the plaintiff actually be impacted so it should not have mattered in *Tobin* whether the plaintiff was in a position to be impacted (10 NY2d at 239).

that caused harm to their child for the parent "to sustain grievous psychological trauma" (*id.*). "The sight of gore and exposed bones is not necessary to provide special impact on a parent" (*id.*). And apart from the irrationality of conditioning recovery on whether the parent was an eyewitness to the harm, there is "the logical difficulty of excluding the grandparents, the relatives, or others *in loco parentis*, and even the conscientious and sensitive caretaker, from a right to recovery, if in fact the accident had the grave consequences claimed, rais[ing] subtle and elusive hazards in devising a sound rule in this field" (*id.*).

The *Tobin* dissent argued that arbitrariness alone warranted discarding the limitation on recovery. The majority justified its holding as necessary to limit defendants' liability (*id.* at 618). But the Court rejected the limitations adopted in *Dillon* because, according to the Court, "none of these standards are of much help if **[*32]** they are to serve the purpose of holding strict rein on liability and if the test is to be a reasonably objective one" (*id.*).

It was not until *Bovsun* that the Court finally held that third parties could recover "damages for injuries suffered in consequence of the observation of the serious injury or death" of another in certain circumstances (61 NY2d at 231). The *Bovsun* Court correctly viewed the issue as an expansion of the plaintiff's right to recover and not the creation of a new duty of the defendant (*id.* at 229). Nor did the Court create a new cause of action:

"There may be an enlargement of the scope of recoverable damages; there is no recognition of a new cause of action or of a cause of action in favor of a party not previously recognized as entitled thereto. In conformity with traditional tort principles, the touchstone of liability in these cases is the breach by the defendant of a duty of due care owed the plaintiff" (*id.* at 233).

Nevertheless, in its quest to limit liability, the Court adopted two requirements intended to circumscribe the class of plaintiffs who could assert this right of recovery (*id.* at 230-231). Under the first, a plaintiff may recover if they are within the zone of danger created by the defendant's **[*33]** conduct (*id.* at 223-224). This requirement does not require direct infliction of physical harm to the plaintiff, as the Court long ago rejected what had come to be known as the physical impact test (*see Tobin*, 24 NY2d at 613 [citation omitted]). As the analysis goes, a defendant who has placed a plaintiff in the zone of danger created by the defendant's conduct has violated a duty of reasonable care owed to the plaintiff, who may recover for emotional harm, even if the plaintiff is not physically impacted or injured (*Bovsun*, 61 NY2d at 229). Notwithstanding the rule's detractors, the Court viewed it "as comporting with the requirements set out in *Tobin* of a 'reasonably objective' standard which will 'serve the purpose of holding strict rein on liability'" (*id.* at 230, quoting *Tobin*, 24 NY2d at 618).

The second requirement limits recovery only to persons who are members of the third-party victim's "immediate family" (*id.* at 230-231). Because the plaintiffs in *Bovsun* and its companion case "were married or related within the first degree of consanguinity to the injured or deceased person," the Court had no occasion to opine at the time on "the outer limits of 'the immediate family'" (*id.* at 233 n 13).

It would not be long before the Court defined the boundary of "immediate family" in *Trombetta*. In that **[*34]** case, the Court denied a niece recovery as a bystander to her aunt's death, though the niece "shared a long and strong emotional bond" with her aunt who had cared for her and acted as her mother since she was a child (82 NY2d at 554). The Court held that the definition of "immediate family" was "confine[d] . . . to only the immediate family as surveyed in *Bovsun*" and "defined and limited by *Bovsun*" (*id.* at 553, 554). "Immediate family," limited to spouses, parents, and children, was "a strictly and objectively defined class" that was "discrete [and] readily determinable" (*id.* at 553-554).

The Court noted that, regardless of the quality of the plaintiff's bond with her aunt, and "[a]lthough plaintiff suffered a personal tragic loss," those facts could not "justify the significant extension of defendants' obligation to be answerable in damages for [plaintiff's] emotional trauma" (*id.* at 553). "On firm policy grounds," bystander recovery **[**5]** was foreclosed to individuals "who may be able to demonstrate a blood relationship coupled with significant emotional attachment or the equivalent of an intimate, immediate familial bond" but were not "immediate family" as defined by *Bovsun* (*id.*).

The Court's limiting of the meaning of "immediate family" **[*35]** to the relationships "surveyed" in and "defined and limited" by *Bovsun*, and its further admonition that the definition did not include others "who may be able to demonstrate" the "equivalent of an intimate, immediate familial bond[,]" was intended to close the door on further expansion of the plaintiff class. Thus, and contrary to the majority view, I agree with Judge Garcia that *Trombetta* is properly understood as holding that only spouses, parents, and children can recover for their emotional injuries caused by observing defendant's third-party harm (*compare* Garcia, J., concurring op at 2, *with* majority op at 14). However, the *Bovsun*/*Trombetta* approach, and the majority's inclusion of grandparents and grandchildren within the definition of "immediate family," removes any rational ground for

excluding other close bonds that are functional equivalents. [7]

As this discussion illuminates, the zone of danger and "immediate family" limitations suffer from analytic and practical deficiencies. I now turn to approaches broader than New York's to assist in designing a truly "objectively reasonable test."

II.

Many jurisdictions have acknowledged the lack of sound policies justifying harsh **[*36]** limitations on a plaintiff's recovery for emotional distress and have adopted more flexible or permissive rules. Oregon has adopted bystander recovery exactly as it is articulated in the Third Restatement of Torts, which allows recovery by close family members who perceive accidents even if they are not within the zone of danger (*Philibert v Kluser*, 360 Ore 698, 711, 385 P3d 1038, 1046 [2016]). And several other states have adopted tests with only slight differences from the Third Restatement rule (*see e.g. La Chusa*, 48 Cal 3d at 647 [allowing bystanders "closely related" to direct victims to recover for "emotional distress beyond that which would be anticipated in a disinterested witness"]; *Jones v City of Houston*, 294 SW3d 917, 920 [Tex App 2009] [allowing bystanders who have "suffered shock as a result of a direct emotional impact" and are "closely related" to the direct victim to recover]; *Cameron v Pepin*, 610 A2d 279, 284-285 [Me 1992] [requiring that the plaintiff be "closely related to the victim"]; *Satchfield v R.R. Morrison & Son*, 872 So 2d 661, 664 [Miss 2004] [same]; *Portee*, 84 NJ at 101, 417 A2d at 528 [requiring "a marital or intimate, familial relationship between plaintiff and the injured person"]; *Clifton v McCammack*, 43 NE3d 213, 218 [Ind 2015] [requiring the plaintiff to have witnessed the death or injury of "a loved one with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling caused by the defendant's negligent or otherwise tortious conduct"]; *Graves v Estabrook*, 149 N.H. 202, 818 A.2d 1255, 1261-1262 [2003] **[*37]** [requiring that the plaintiff and physically injured victim share a "relationship that is stable, enduring, substantial, and mutually supportive" and "cemented by strong emotional bonds and provid(ing) a deep and pervasive emotional security"]).

Some states that require strict familial relationships between bystander plaintiffs and injured third parties are still less restrictive than New York (*see e.g. Barnhill v Davis*, 300 NW2d 104 [Iowa 1981] [requiring that the "bystander and the victim were husband and wife or related within the second degree of consanguinity or affinity"]; La Civ Code Ann art 2315.6 [A] [allowing spouses, children, siblings, grandparents, and grandchildren to recover as bystanders]; *Grotts v Zahner*, 115 Nev 339, 989 P2d 415 [Nev 1999] [employing a tri-partite scheme in which nuclear family members have a sufficient relationship to assert a bystander claim, non-family members may not, and relationships between non-nuclear family members are submitted to the jury to decide if the relationship is sufficiently close to permit recovery]).

Other states use *Dillon*'s foreseeability test, which is more permissive of recovery than the Third Restatement's test. "The touchstone" of that test "is not a rigid requirement of sensory and contemporaneous observance of the accident" or strict relational **[*38]** criteria, "but rather" whether there is a "reasonable foreseeability that the plaintiff-witness would suffer emotional harm" (*Tommy's Elbow Room, Inc. v Kavorkian*, 727 P2d 1038, 1043 **[**6]** [Alaska 1986]; *accord Leong*, 55 Haw at 408; *Sinn v Burd*, 486 Pa 146, 172-173, 404 A2d 672, 686 [1979]; *Wages v First Nat. Ins. Co. of Am.*, 2003 MT 309, ¶ 25, 318 Mont 232, 239, 79 P3d 1095, 1100 [2003]; *Paugh v Hanks*, 6 Ohio St 3d 72, 78, 6 Ohio B. 114, 451 NE2d 759, 765 [1983]; *James v Lieb*, 221 Neb 47, 55, 375 NW2d 109, 115 [1985] [adopting the foreseeability rule but adding that plaintiffs must show a "marital or intimate familial relationship"]; *Heldreth v Marrs*, 188 W Va 481, 493, 425 SE2d 157, 169 [1992] [adopting a foreseeability test but limiting recovery to "close relatives"]; *Hegel v McMahon*, 136 Wash 2d 122, 136, 960 P2d 424, 431 [1998] [adopting a foreseeability test but requiring "objective symptoms of distress that are susceptible to medical diagnosis and proved through qualified evidence"]).

While there are other holdouts throughout the country that have adopted rules that are as similarly harsh as New York's, or deny bystander recovery altogether,

"as is plain from approaches such as those employed by the New York courts, especially in *Trombetta v Conkling*, the concentration on difficulties in 'reasonably circumscribing the area of liability' represents a policy perception betokening greater concern with the burdens of imposing liability than with compensating loss, even where clearly attributable to the fault of another. Separating out the underlying philosophical orientations, that concern seems more apparent than real, especially when, to date, there is no sense **[*39]** of explosive expansion of tort liability either in those jurisdictions that have recognized the bystander's claim or in those that have established a generally available tort for the negligent infliction

[7] *Bovsun* included the additional requirement that an emotional injury be "serious and verifiable" (61 NY2d at 231, citing the Restatement [Second] of Torts § 436, subd [3], Comment *g* [1965]). This requirement also acts as a check on unlimited liability and a flood of litigation, further undermining the necessity of the other two limitations.

of emotional distress" (Howard H. Kestin, *The Bystander's Cause of Action for Emotional Injury: Reflections on the Relational Eligibility Standard*, 26 Seton Hall L Rev 512, 542 [1996]).

New York's failure to reconsider and reject these unsupported policy justifications has rendered us an outlier. The Court has used those policies to shield its strict limitations and kept us from joining jurisdictions like California, Texas, and New Jersey in devising a rule better suited to address negligently inflicted harm. As jurisdictions adopt a more permissive rule without experiencing a flood of litigation, the more the policy foundation upon which New York's rule is built erodes. [8]

III.

The Second Restatement provided that if an actor's conduct is negligent and creates "an unreasonable risk of causing bodily harm to another," and where that harm "results from . . . shock or fright at harm or peril to a member of" the plaintiff's "immediate family occurring in" the plaintiff's "presence," the plaintiff **[*40]** could recover (Restatement [Second] of Torts § 436 [1965]).

The comments to this section noted that the rule applied "even though the plaintiff's shock or fright is not due to any fear for" the plaintiff's safety, "but to fear for the safety of" the plaintiff's "wife or child" (*id.* at Comment *f*). In a caveat to the rule, the Restatement's commentators noted that, due to an absence of sufficient decisions, they "expresse[d] no opinion as to whether the rule" would allow for recovery for "shock or fright at harm or peril to a third person who is not a member" of a plaintiff's "immediate family, or where the harm or peril does not occur in" the plaintiff's "presence" (*id.* at Caveat; Comment on Caveat *h*).

Similarly, section 46 of the Second Restatement provided that, where a person injures or kills a third person, the actor is subject to liability if they "intentionally or recklessly cause[] severe emotional distress (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or (b) to any other person who is present at the time, if such distress results in bodily injury" (Restatement [Second] of Torts § 46 [1965]). Thus, under section 46, the Second **[*41]** Restatement recognizes two classes of "bystander" plaintiffs: the immediate family member *and* any person whose distress results in bodily harm.

As with the commentators' caveat to section 436, Comment *l* to section 46 of the Second Restatement explains that the language "leave[s] open the possibility of situations in which presence at the time may not be required." Further, although the cases decided up to the point of the Second Restatement's publishing involved a plaintiff who was at least a close associate with the person harmed, the analysis could extend to strangers: "there appears to be no essential reason why a stranger who is asked for a match on the street should not recover when the [person] who asks for it is shot down before [their] eyes, at least where the stranger's emotional distress results in bodily harm" (Restatement [Second] of Torts § 46 at Comment *l* [1965]).

The Third Restatement, Liability for Physical and Emotional Harm, first published in 2012 and updated in 2020, reflects the further evolution of the rules governing "bystander recovery" in the ways left open by the Second Restatement. Under the Third Restatement, "[a]n actor who negligently causes sudden serious bodily injury to a third **[*42]** person is subject to liability for serious emotional harm" caused to "a person who: (a) perceives the event contemporaneously, and (b) is a close family member of the person suffering the bodily injury" (Restatement [Third] of Torts: Phys & Emot Harm § 48 [Oct 2020 update]).

The bystander recovery rule articulated in the Third Restatement differs from the rule developed in *Bovsun* and *Trombetta*. It mandates that the plaintiff perceived the harm to the third party as it occurred. The comments to the Third Restatement explain that the contemporaneous-perception requirement "is not limited to sight" and give the example of a blind person hearing a close family member suffer harm as an instance where recovery would be permitted (*id.* at Comment *e*).

In addition, the Third Restatement requires only that the plaintiff and injured or killed third party are "close family member[s]" as opposed to "immediate family." The Third Restatement commentators urged courts to adopt flexible definitions for "close family." As the Third Restatement commentators explained, "[s]ometimes people live functionally in a nuclear family without formal legal family ties" (*id.* at Comment *f*). Thus, "[w]hen defining what constitutes **[*43]** a close family relationship, courts should take into account changing practices and social norms and employ a functional approach to determine what constitutes a family" (*id.*).

That view is supported by studies of human relations and modern family structures. For example, the percentage of

[8] Courts are on shaky justificatory ground to begin with when they shape substantive law to avoid an increase in their workloads (*see* Marin K. Levy, *Judging the Flood of Litigation*, 80 U Chi L Rev 1007, 1057 [2013]). "[T]he concern with court-centered floodgates arguments is precisely about volume—that the . . . courts will have additional cases to decide (which is, of course, precisely their official obligation)" (*id.* at 1065).

children living with unmarried, cohabitating parents more than doubled between 1997, the first year that census data on cohabitation was available, and 2017; and in 2018 approximately one-third of children were living with an unmarried parent (Gretchen Livingston, Pew Research Center *About one-third of U.S. children are living with an unmarried parent* [last accessed February 5, 2021], https://www.pewresearch.org/fact-tank/2018/04/27/about-one-third-of-u-s-children-are-living-with-an-unmarried-parent/; see also Rebecca L. Melton, Note, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of "Family"*, 29 J Fam L 497, 499 [1991] [surveying statistical data indicating that American families take many varied forms, including group living and unmarried cohabitation]; Mary Patricia Treuthart, *Adopting A More Realistic Definition of "Family"*, 26 Gonz L Rev. 91, 91-92 [1991] [noting that most families are not organized around a **[*44]** married man and woman occupying traditional gender roles]; Michael J Rosenfled, *Young Adulthood as a Factor in Social Change in the United States*, 32 Population & Dev R 27, 40-47 [2006] [describing a trend away from traditional family structures dominant before and during the industrial revolution towards alternative family structures, including unmarried cohabitation, and attributing the shift to a less oppressive culture]; Benjamin Currentz, *Living with an Unmarried Partner Now Common for Young Adults*, United States Census Bureau [last accessed February 5, 2021] https://www.census.gov/library/stories/2018/11/cohabitaiton-is-up-marriage-is-down-for-young-adults.html#:~:text=How%20Times%20Have%20Changed,to%20the%20Current%20Population%20Survey [In 1968, only "0.2 percent of 25-to 34-year-olds lived with an unmarried partner[;]" in 2018, 14.8% did]).

Moreover, since this Court's decision in *Tobin*, multigenerational households have almost doubled in number; one in five Americans—20% of the United States population—live in these arrangements (D'Vera Cohn and Jeffrey S. Passel, *A record 64 million Americans live in multigenerational households*, Pew Research Center [last accessed February **[*45]** 5, 2021], https://www.pewresearch.org/fact-tank/2018/04/05/a-record-64-million-americans-live-in-multigenerational-households/; *see also* Frank F. Furstenberg, *Fifty Years of Family Change: From Consensus to **[**7]** Complexity*, 654 Annals Am Acad Pol Soc Sci 12, 13-15 [2014] [describing the increasing complexity in types of familial structures throughout the world]).

Unsurprisingly, the revolution in awareness of the diversity of family arrangements has worked its way into many areas of our jurisprudence. As a constitutional matter, for zoning purposes, unrelated individuals living together may be the "functional and factual equivalent" of a family (*see e.g. Baer v Town of Brookhaven*, 73 NY2d 942, 943, 537 N.E.2d 619, 540 N.Y.S.2d 234 [1989] [finding that five unrelated elderly women who lived together in a home were a family]; *McMinn v Town of Oyster Bay*, 66 NY2d 544, 551, 488 N.E.2d 1240, 498 N.Y.S.2d 128 [1985] [holding unconstitutional a town zoning ordinance that defined "family" to exclude households consisting of more than two unrelated or unmarried persons younger than 62]; *Group House of Port Washington, Inc. v Bd. of Zoning & Appeals of Town of N. Hempstead*, 45 NY2d 266, 272, 380 N.E.2d 207, 408 N.Y.S.2d 377 [1978] [holding that a group home in which two surrogate parents cared for seven foster children was a family]; *City of White Plains v Ferraioli*, 34 NY2d 300, 303, 313 N.E.2d 756, 357 N.Y.S.2d 449 [1974] [finding that, for purposes of a city's zoning regulations, a group home consisting of a married couple, their two biological children, and 10 foster children constituted a single family]).

Other cases similarly demonstrate **[*46]** that when tasked with recognizing the bonds that comprise family, the Court has adopted an approach that does not depend solely upon the rigid familial markers of birth or marriage. For example, in *Braschi v Stahl Associates Company* (74 NY2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 [1989]), Judge Vito J. Titone, writing for the Court, explained the proper test for interpreting the word "family" in New York's rent-control code. The Court rejected the Appellate Division's holding that the rent-control code limited tenant succession rights to "family members within traditional, legally recognized familial relationships" (*id.* at 207). Instead, in order to serve the broad remedial aims of the rent-control law,

"the term family, as used in 9 NYCRR 2204.6(d), should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life" (*id.* at 211).

To aid in recognizing the "reality of family life," the Court described a non-exhaustive list of factors for courts and juries to consider, including the "longevity of the relationship, the level of emotional **[*47]** and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services" (*id.* at 212-213). *Braschi*, acknowledged that the lower courts had already ably applied those factors in a variety of cases to determine whether "the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties" demonstrate that two people were family (*id.* at 213).

Scores of cases decided before and after *Braschi* prove that New York courts are well-equipped to apply a functional mode

of analysis in order to identify strong and caring bonds, when the important remedial purposes of New York law so require (*e.g. 2-4 Realty Assocs. v Pittman*, 137 Misc 2d 898, 899, 523 N.Y.S.2d 7 [Civ Ct 1987], *affd* 144 Misc 2d 311, 547 N.Y.S.2d 515 [App Term 1989] [two men developed a father-son relationship after supporting each other through 25 "long years of life, poor health, and eventual death"]; *Zimmerman v Burton*, 107 Misc 2d 401, 401, 434 N.Y.S.2d 127 [Civ Ct 1980] [recognizing the tenant succession rights of unmarried partners and noting that "(t)he law must keep abreast of changing moral standards"]; *Fleishman Realty Corp. v Garrison*, 27 Misc 3d 1202[A], 907 N.Y.S.2d 437, 2010 NY Slip Op 50527[U] [Civ Ct 2010] [finding that over a decade a tenant formed "loving, committed, long-term relationships" with his boyfriend and boyfriend's mother]).

IV.

Thus, we come to the foundational error of ***[*48]*** *Tobin* that continues to taint this Court's analysis. The specter of unlimited liability is a weak justification for our tort rule, especially when it is unproven and when its application leads to irrational results. As the *Tobin* dissent observed,

"Not one piece of evidence is offered to prove that the 'dollar-and-cents' problem [of unlimited liability] will have the dire effects claimed. More important, the manner in which the argument about infinite liability is explicitly rejected one day only to be revived the next is indicative of what may be **[**8]** described as a rather erratic method of decision. One can easily recognize the ad hoc nature of the argument by comparing passages in our opinions where we have chosen to do what modern concepts of justice demand[] with those cases where we have hesitated to follow through on the basic currents in the law of torts for the past generation. The statements in these opinions cannot be reconciled. . . . [T]here has been an expanding recognition that the argument concerning unlimited liability is of no merit, yet the aberrations persist. One would imagine that we were here involved with a catastrophic loss. There have already been decisions imposing **[*49]** liability of far greater dimension than can ever arise if we should embark upon a search for 'essential justice' in the bystander class of cases" (24 NY2d at 620).

The dissent is not alone.

"Too many respectable commentators have dismissed the 'flood of litigation' argument for it to detain us. The problem of imposing 'unlimited and unduly burdensome liability' is no greater as the jurisprudence relating to this cause of action develops than it has classically been in the past as causes of action have been articulated and have matured. As we gain familiarity with the various elements of any cause of action, our concerns about the burdens of coping with them are usually allayed. Typically, it is not a new development expanding a cause of action that itself creates problems of understanding and administration but, rather, the sense of unfamiliarity with its requirements. By now, with respect to typical factual issues concerning the existence and extent of emotional injury, this is no longer a real problem" (Howard H. Kestin, *The Bystander's Cause of Action for Emotional Injury: Reflections on the Relational Eligibility Standard*, 26 Seton Hall L Rev 512, 542 [1996]).

Moreover, as others have observed, "rigid doctrinal limitations on liability **[*50]** to bystanders produce arbitrary, incongruous and indefensible results. Plaintiffs in substantially the same position have been treated differently" (*Bowen v Lumbermens Mut. Cas. Co.*, 183 Wis 2d 627, 651-652, 517 N.W.2d 432, 442 [1994]). Consider the following examples.

A parent stands on a street corner with their child waiting for a car service, when the defendant negligently loses control of their car and fatally strikes the child. The parent suffers emotional trauma from losing their child and has nightmares of the accident in which the parent relives the moment when they saw the car hit the child.

As a person within the zone of danger created by the defendant's conduct and a person who was the "immediate family" member of the decedent, as defined in *Trombetta*, the parent may recover for the physical and emotional injuries suffered as a direct cause of the defendant striking them as well as the emotional trauma caused by observing the defendant strike and kill their child.

Incongruously, if the parent is a block away from the child waiting on the corner, and the child is at all times within the parent's line of sight, the parent cannot recover in New York because they were not within the zone of danger, although they are an "immediate family" member. Where is **[*51]** the fairness in this outcome? Why is the defendant in this example more worthy of protection from liability than the defendant in the first example? In both scenarios the defendant killed a child on a public street in plain view of the child's parent. The plaintiff's injury and the defendant's culpability are the same in both examples. The measure of deterrence required is also identical. There is no defensible justification for denying recovery to a plaintiff simply because of where they stood relative to the accident that they apprehended. Only blind adherence to a doctrine grounded in an unproven concern for limiting liability explains the difference in outcome. [9]

[9] Further emphasizing the trend in favor of a broader rule, the parent could recover under the Third Restatement because the parent perceived the accident contemporaneously with its occurrence and the

Take the further example of a parent estranged from their minor child, who has not seen the child since the child's birth. The child lives with the other parent who has sole legal and physical custody pursuant to a court order, and who has raised and cared for the child since birth. The estranged parent seeks to reconnect and finds the child on the street as the child waits for a school bus, while the custodial parent watches from the window of their second-story apartment, directly above the bus stop. At that moment, the **[*52]** defendant's car fatally strikes the child.

Under New York's rule, the custodial parent may not recover, despite losing the child they nurtured since birth. This result, on its own, is indefensible. As with the prior example, this parent experiences injurious emotional distress over the loss of their child that is in no way lessened merely because the custodial parent was outside the zone of danger. But it further contravenes public policy by allowing the noncustodial parent to recover, in disregard of both society's and the law's recognition of the longstanding bond between the custodial parent and their child.

Or assume, as in *Trombetta*, a woman within the zone of danger created by the defendant's negligence watches a car strike and kill her aunt, who has been the woman's caretaker and a parental figure since childhood. The niece could not recover under *Trombetta*. And the majority's limited expansion of bystander recovery to grandparents and grandchildren would not expressly apply. Yet one cannot seriously argue that grandparents are intimate family members (based on presumptions of their role within a family), but the parental figure in this hypothetical should not be considered an **[*53]** intimate family member. [10]

Marriage and blood relationships have served for too long as the primary measure for a strong human bond based on affection and connectedness. By its own terms, this measure is overinclusive, as it assumes a reaction that may not be accurate given the actual nature of the relationship. It is a strange principle that seeks to circumscribe liability but allows for recovery on such an assumption. But that is not the real problem because our system already disallows recovery without actual injury and the plaintiff must still provide proof of real emotional trauma.

The real problem is that this limitation is underinclusive because it assumes that only spouses and certain relatives have the type of emotional attachment to the third-party victim that justifies recovery. That assumption cannot stand the cold light of reality. Human beings have strong, loving connections to non-relatives and non-spouses that are at least as meaningful as those between spouses and to grandparents (Restatement [Third] of Torts: Phys & Emot Harm § 48, Comment *f* [Oct 2020 update] [urging a functional as opposed to formal definition of family]; Rebecca L. Melton, Note, *Legal Rights of Unmarried **[*54]** Heterosexual and Homosexual Couples and Evolving Definitions of "Family"*, 29 J Fam L 497, 499 [1991]; Mary Patricia Treuthart, *Adopting A More Realistic Definition of "Family"*, 26 Gonz L Rev 91, 91-92 [1991]). In the past we have not hesitated to reject outdated holdings and adopt standards and rules that better reflect life and family structures (*Brooke S.B. v Elizabeth A.C.C.*, 28 NY3d 1, 26, 39 N.Y.S.3d 89, 61 N.E.3d 488 [2016] [overruling a strict definition of "parent" that excluded non-biological and non-adoptive caregivers]).

We are also now well past the point of denying rights to persons who could not marry or who decide that it best serves them and their families not to marry (*see e.g.* Public Health Law § 2805-q [prohibiting hospitals from barring domestic partners from visiting one another]; 22 NYCRR 24.4 [defining "close family member" for purposes of paid sick leave under the Medical Leave Act as an "employee's spouse; domestic partner; natural, foster or step child; natural, foster or step parent; or any relative residing with the employee or an individual for whom the employee is the primary caregiver"]; 12 NYCRR 380-4.4 [providing that proof of domestic partnership is sufficient in part to establish a non-birthing parent's right to take leave to bond with their child]). These legislative changes are no less powerful than the ones upon which the majority relies **[*55]** to expand tort liability to include grandparents, yet the majority offers no principle to distinguish legislative recognition of the familial relationship of grandparents from domestic partners.

The plaintiff in *Trombetta* is a prime example of the way many families are structured. But even without a blood relation, people form bonds, for example, based on a shared culture and a mutual experience born of shared struggle. We cannot ignore that unrelated children who grow up together consider themselves siblings in every sense, or that individuals who have grown close through shared experiences may be family in every sense of the word save **[**9]** for biology. Our rule should no longer preclude recovery by persons whose lives are intertwined but choose not to marry because their families would ostracize them for marrying someone of the same gender, or because they are of a different race or ethnicity, or from outside of their religious community, or because they simply choose not to marry. Our rule denying recovery in these

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parent is a close family member of the child (Restatement [Third] of Torts: Phys & Emot Harm § 48 [Oct. 2020 update]).

[10] Again, showing the trend towards flexibility and recovery for plaintiffs based on their actual relationships with victims, under the Third Restatement rule, the niece could recover (Restatement [Third] of Torts: Phys & Emot Harm § 48 [Oct 2020 update]).

situations cannot withstand the logic by which the Court extends bystander recovery today.

Further, the immediate family requirement should be eliminated for persons within **[*56]** the zone of danger whose emotional distress caused by observing the serious injury or death of another manifests in physical harm. In that case, the defendant owes a duty directly to the plaintiff and traditional rules of foreseeability and proof of actual injury should apply to all aspects of the claim and demands for recovery. Under those rules, it is foreseeable that a person within the zone of danger who fears for their life would suffer a particular serious emotional trauma if they survive but observe another's severe or fatal injuries. The third-party victim's harm is a constant reminder of the plaintiff's own close call. In contrast, a bystander across the street may be horrified by what they see, but they will not associate that memory with their own near-death encounter or harm.

Allowing recovery is not arbitrary in this circumstance because someone in physical proximity to the victim has a meaningfully different experience from that of someone who perceives no risk to themselves and suffers no injury (Restatement [Second] of Torts § 46 at Comment *l* [1965]). Thus, there is a logical basis for allowing a stranger who is within the zone of danger to recover while denying liability **[*57]** to any other bystander who happens to observe the injury or death of another.

As a final point, a rule that excuses a defendant—like the ones sued by plaintiff here—of the consequences of their negligence is bereft of justice. The defendants failed to remedy the building façade's structural weaknesses and thus risked harm to any pedestrians that walked beneath the building. While the majority holding allows *this* plaintiff to recover, if she had stood in a slightly different relationship or was a stranger to the deceased child, the defendants would not have to compensate her for a part of the harm caused by their inexcusable negligence. Causing defendants like these to internalize the full cost of the harm that they cause, and making those harmed by them whole, promotes the important societal goal of public safety. Second, it encourages potential defendants to acquire appropriate insurance coverage; this, too, promotes public safety, as these individuals and entities will likely undertake risk-reduction measures to avoid hefty insurance premiums. For those concerned that society (renters in the building, for instance) will pay the price for increased insurance, the costs are unlikely **[*58]** to be greater than for any other type of tort recovery that we already permit, and defendant can contain increased insurance costs by taking the legally prescribed steps to reduce the likelihood that their buildings crumble and kill passersby.

V.

The majority's expansion of the definition of "immediate family," while significant for this plaintiff and others like her, repeats the errors of the past. It has taken over a quarter century since *Trombetta* for the Court to get this far. "I can only hope it will not take as long for New York to" finally "correct this error" (*Tobin*, 24 NY2d at 618 [Keating, J., dissenting]).

GARCIA, J. (concurring):

What's past is precedent. Here, that means this Court's decision in *Trombetta v Conkling* (82 NY2d 549, 554, 626 N.E.2d 653, 605 N.Y.S.2d 678 [1993]) and by reversing the Appellate Division, we overrule, at least in part, that decision. While the majority is correct that this Court declined to set the "outer limits of immediate family" in *Bovsun v Sanperi* (61 NY2d 219, 233, 461 N.E.2d 843, 473 N.Y.S.2d 357 n 13 [1984] ["Inasmuch as all plaintiffs in these cases were married or related in the first degree of consanguinity to the injured or deceased person, we need not now decide where lie the outer limits of 'immediate family'"]), we did so in *Trombetta*. In that case we held that "sound policy and strong precedents justify our **[*59]** confinement and circumspection of the zone of danger rule to only the immediate family as surveyed in *Bovsun*" (82 NY2d at 553) That "survey" — covering only those married or related in the first degree of consanguinity — did not include the relationship at issue here.

Six of my colleagues agree that we should overrule our precedent and expand the pool of potential plaintiffs. Although, I question the wisdom of that conclusion (*see Bovsun*, 61 NY2d at 234 [Kaye, J. dissenting] [noting that "sound policy considerations supported this court's decisions consistently denying" recovery for "emotional distress from observing physical injury to another" and that the "artificial and arbitrary" limitation imposed would eventually "give way to far-reaching liability affecting the public generally"]), I see no value in dissenting. Accordingly, acknowledging the proper context of what we do today—overturning in part our decision in *Trombetta*—I concur in the narrow holding that "a grandchild is the 'immediate family' of a grandparent for the purpose of applying the zone of danger rule" (majority op at 15).