61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357

Jack E. Bovsun et al., Appellants,
v.
Gary T. Sanperi et al., Respondents.
Lawrence E. Kugel, Individually and as Administrator of the Estate of Stephanie Kugel, an Infant, Deceased, et al., Appellants,
v.
Mid- Westchester Industrial Park, Inc., et al., Respondents.

Court of Appeals of New York
Argued December 13, 1983;
decided February 23, 1984

CITE TITLE AS: Bovsun v Sanperi

SUMMARY

Appeal, in the first above-entitled action, by permission of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of said court, entered May 9, 1983, which unanimously affirmed a judgment of the Supreme Court (Aaron F. Goldstein, J.), entered in Queens County prior to a trial limited to the issue of damages only, defendants having conceded their negligence and plaintiffs' freedom from contributory negligence, (1) precluding plaintiffs from *voir dire* on the issue of psychic injuries sustained by plaintiffs Selma Bovsun and Mara Beth Bovsun, (2) granting defendants' motion to dismiss the first, second, third, fourth and fifth causes of action predicated upon claims for damages for psychic injuries, and (3) severing the sixth cause of action of plaintiff Jack E. Bovsun for property damage.

Appeal, in the second above-entitled action, by permission of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of said court, entered October 12, 1982, which unanimously affirmed an order of the Supreme Court (Matthew F. Coppola, J.), entered in Westchester County, granting defendants' motions for partial summary judgment dismissing the fourth, fifth and sixth causes of action to recover damages for emotional trauma. The following question was certified by the Appellate Division: "Was the order of this court dated October 12, 1982 properly made?"

These two appeals present the same question of law -- whether, in addition to or apart from damages to which a plaintiff may be entitled in consequence of the negligence of the defendant, he or she may recover for emotional distress occasioned by witnessing the serious injury or death of a member of plaintiff's immediate family caused by defendant's conduct. The courts below answered this question in the negative in both cases.

The Court of Appeals reversed in both cases, denied defendants' motion to dismiss and reinstated the dismissed causes of action in the first above-entitled action, and denied defendants' motions for summary judgment but did not answer the question certified as unnecessary in the second above-entitled action, holding, in an opinion by Judge Jones, that 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 in bringing about injuries to the plaintiff in consequence of shock or fright resulting 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 for such injuries.

Bovsun v Sanperi, 94 AD2d 711, reversed.

Kugel v Mid-Westchester Ind. Park, 90 AD2d 496, reversed.

HEADNOTES

Damages
Mental Anguish
Recovery by Persons within Zone of Danger

([1]) A plaintiff may recover damages for injuries suffered in consequence of shock or fright resulting from the contemporaneous observation of the serious physical injury or death of a member of his or her immediate family, where the defendant's conduct negligently exposed the plaintiff to an unreasonable risk of bodily injury or death and the same conduct by defendant was a substantial factor bringing about the injury or death of plaintiff's immediate family member. Accordingly, in each of two cases, plaintiffs' allegations, if substantiated by the evidence, are sufficient to entitle plaintiffs to recover damages for their asserted serious emotional distress suffered where, in one case, defendants' car, which was allegedly being driven in a reckless manner and at an excessive speed, struck the automobile in which

plaintiff mother and father were riding with their two infant daughters, one of whom died as a result of injuries sustained in the collision witnessed by plaintiffs, and, in the other case, defendants' car struck the rear of the disabled station wagon in which plaintiff wife and daughter were seated, seriously injuring their husband and father as he leaned into the open tailgate window; although plaintiffs in the latter case did not actually see their husband and father being injured, they asserted their instantaneous awareness that he had been injured, as well as their observation of him immediately after he was struck by defendants' automobile.

POINTS OF COUNSEL

Edgar T. Schleider for appellants in the first above-entitled action.

I. Plaintiffs may recover damages for emotional pain and psychological injury due to their reaction to ***221** horrible injuries to a third person caused by the negligence of defendants. The sole limiting condition is that the "*Palsgraf* " principle be satisfied: that plaintiffs be within the zone of danger of personal injury caused by the same negligence of defendants which caused the horrible injuries to said third person. (Battalla v State of New York, 10 NY2d 237; Ferrara v Galluchio, 5 NY2d 16; Johnson v State of New York, 37 NY2d 378; Tobin v Grossman, 24 NY2d 609; Shanahan v Orenstein, 52 AD2d 164; Kennedy v McKesson Co., 58 NY2d 500; Garrett v Holiday Inns, 58 NY2d 253.) II. The seemingly adverse cases are distinguishable on their facts, and the results therein completely consistent with appellants' position here. (Shanahan v Orenstein, 52 AD2d 164; Lafferty v Manhasset Med. Center Hosp., 54 NY2d 277; Vaccaro v Squibb Corp., 52 NY2d 809; Kennedy v McKesson Co., 58 NY2d 500.)

Michael Wolpinsky and *Bernard Pizzitola* for respondents in the first above-entitled action.

The trial court, as unanimously affirmed by the court below, correctly barred the Bovsuns' "psychic injury" claims, as coming within the preclusion against a cause of action for injuries resulting indirectly through reaction to injury negligently caused to another. Moreover, the Bovsuns' endeavor to avoid this preclusion under their "*Palsgraf*-orbit of danger " argument is misplaced; and this argument has, heretofore, been consistently rejected by this Court of Appeals. (Kennedy v McKesson Co., 88 AD2d 785, 58 NY2d 500; Lafferty v Manhasset Med. Center Hosp., 54 NY2d 277; Vaccaro v Squibb Corp., 52 NY2d 809; Howard v Lecher, 42 NY2d 109; Tobin v Grossman, 24 NY2d 609; Aquilio v Nelson, 78 AD2d 195; Park v Chessin, 46 NY2d 401; Cullen v Naples, 31 NY2d 818.)

Donald H. Zuckerman for appellants in the second above-entitled action.

I. As plaintiffs-appellants were participants in the automobile accident in which their infant daughter was killed and as their psychic injuries were a direct, rather than a consequential, result of the breach of duty owed them by defendants, those injuries are compensable. (Tobin v Grossman, 24 NY2d 609; Kennedy v McKesson Co., 58 NY2d 500; Matter of Wolfe v Sibley, Lindsay & Curr Co., 36 NY2d 505; ***222** Johnson v State of New York, 37 NY2d 378; Shanahan v Orenstein, 52 AD2d 164, 40 NY2d 985.) II. Recognizing a cause of action by parents who sustain psychic injuries upon witnessing their child fatally injured in the same automobile accident in which they are themselves physically injured will not violate policy considerations -- such as reasonably circumscribing liability. (Tobin v Grossman, 24 NY2d 609; Lafferty v Manhasset Med. Center Hosp., 54 NY2d 277; Kennedy v McKesson Co., 58 NY2d 500; Amader v Johns-Manville Corp., 514 F Supp 1031.)

Lawrence T. D'Aloise, Jr., for Mid-Westchester Industrial Park, Inc., respondent in the second above-entitled action.

I. Damages for emotional distress are not recoverable in a wrongful death action because such damages are not pecuniary injuries as defined by EPTL 5-4.3. (Liff v Schildkrout, 49 NY2d 622; Gilbert v Stanton Brewery, 295 NY 270; White v City of New York, 37 AD2d 603.) II. The State of New York does not recognize a cause of action for emotional distress incurred solely as a result of witnessing injuries negligently inflicted upon another. (Tobin v Grossman, 24 NY2d 609; Howard v Lecher, 42 NY2d 109; Becker v Schwartz, 60 AD2d 587, 46 NY2d 401; Vaccaro v Squibb Corp., 52 NY2d 809; Lafferty v Manhasset Med. Center Hosp., 54 NY2d 277; Kennedy v McKesson Co., 58 NY2d 500; Johnson v State of New York, 37 NY2d 378; Battalla v State of New York, 10 NY2d 237.) III. Public policy precludes recovery for emotional distress in the case at bar. (Pulka v Edelman, 40 NY2d 781; Lafferty v Manhasset Med. Center Hosp., 54 NY2d 277.)

Emanuel Thebner for Barbara B. Rooney, respondent in the second above-entitled action.

I. There is no cause of action for emotional distress on behalf of a parent for loss of a child for injuries allegedly negligently inflicted on such child. (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; Albala v City of New York, 54 NY2d 269; Lafferty v Manhasset Med.

Center Hosp., 54 NY2d 277.) II. Such a cause, a departure from common-law principles, is not allowable by public policy. (De Angelis v Lutheran Med. Center, 84 AD2d 17, 58 NY2d 1053; Becker v Schwartz, 46 NY2d 401; ***223** Kennedy v McKesson Co., 58 NY2d 500; Aquilio v Nelson, 78 AD2d 195; Shanahan v Orenstein, 52 AD2d 164, 40 NY2d 985.) III. The exclusive remedy for such child's death is the statutory wrongful death action. (Liff v Schildkrout, 49 NY2d 622; Rowe v Patterson Home, 72 AD2d 578.) IV. A cause for emotional distress would place an unlimited burden on society by increased insurance costs, litigation expense and presents an uncontrollable limitation on damages. If any such cause is to be recognized, it must be created by the Legislature, not by the court. (De Angelis v Lutheran Med. Center, 84 AD2d 17, 58 NY2d 1053; Thrasher v United States Liab. Ins. Co., 19 NY2d 159; Langerman v Langerman, 303 NY 465; Matter of Steinway, 159 NY 250.)

R. Christopher Owen for Lawrence E. Kugel, as respondent on the counterclaim in the second above-entitled action.

I. The court below was correct in affirming the order of Special Term which concluded that no cause of action exists in the State of New York for emotional trauma suffered solely as the result of witnessing the negligent infliction of injuries upon a family member. (Tobin v Grossman, 24 NY2d 609; Howard v Lecher, 42 NY2d 109; Becker v Schwartz, 60 AD2d 587, 46 NY2d 401; Lafferty v Manhasset Med. Center Hosp., 54 NY2d 277; Vaccaro v Squibb Corp., 52 NY2d 809; Battalla v State of New York, 10 NY2d 237; Johnson v State of New York, 37 NY2d 378; Kennedy v McKesson Co., 58 NY2d 500.) II. The exclusive remedy for wrongful death in the State of New York is governed by EPTL 5-4.3 which provides only for recovery for pecuniary injury. (Ratka v St. Francis Hosp., 44 NY2d 604; Liff v Schildkrout, 49 NY2d 622; Rowe v Patterson Home, 72 AD2d 578.) III. Public policy is strong in limiting the liability of defendants for emotional distress caused by their negligent conduct. (Lafferty v Manhasset Med. Center Hosp., 54 NY2d 277.)

OPINION OF THE COURT

Jones, J.

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 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 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]

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 plaintiffs' own direct physical injuries and that no mention could be made during the *voir dire* of any injuries attributable to emotional

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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 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 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 no cause of action in New York for emotional trauma suffered by the 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.

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 the 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] Soon after the *Dillon* 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 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 forese- ***228** able observer of an accident. [5] In so doing, in obiter dictum we questioned the zone-of-danger analysis.

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 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] 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 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 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 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." 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.*)

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] 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]

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

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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.' * * * 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."

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 compensa- ***232** ble 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 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 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 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 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.

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 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 plain- ***234** tiffs to recover for their asserted emotional distress damages.

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.

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 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 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 compensable. In *Tobin* it was recognized that "[t]here 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 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 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 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: " [T]he law has repeatedly denied recovery for mental and emotional 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." (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, 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 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 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 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 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 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 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, "[h]ad 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 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 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 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*.

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] 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 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 danger." It is perhaps for these reasons that so many other jurisdictions have, like this court in the past, sharply criticized the "zone-of-danger" rule.[5]

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 broad-based 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.

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.
In *Bovsun v Sanperi*: Order reversed, with costs, defendants' motion to dismiss denied and the dismissed causes of action reinstated.

In *Kugel v Mid-Westchester Ind. Park*: Order reversed, with costs, and defendants' motions for summary judgment denied. Question certified not answered as unnecessary. ***244**

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Footnotes

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.

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 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 [8 th 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.)

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.

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".

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.)

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); "impos[ing] unjust limitations on recovery" (Corso v Merrill, 199 NH 647, 658); an "arbitrary formality" (Portee v Jaffee, 84 NJ 88, 96); "unduly restrictive" (Paugh v Hanks, 6 Ohio St 3d 72); "ignor[ing] 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 "deny[ing] psychological reality" (D'Ambra v United States, 114 RI 643, 657).

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