

## Journal of Civil Rights and Economic Development

---

Volume 3  
Issue 1 *Volume 3, 1987, Issue 1*

Article 5

---

September 1987

### Martinez v. Long Island Jewish Hillside Medical Center, Emotional Distress Compensation Without a Physical Manifestation of the Harm: Has New York Gone Too Far?

Edward M. Pinter

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

---

#### Recommended Citation

Pinter, Edward M. (1987) "Martinez v. Long Island Jewish Hillside Medical Center, Emotional Distress Compensation Without a Physical Manifestation of the Harm: Has New York Gone Too Far?," *Journal of Civil Rights and Economic Development*. Vol. 3 : Iss. 1 , Article 5.

Available at: <https://scholarship.law.stjohns.edu/jcred/vol3/iss1/5>

This Comment is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# **MARTINEZ V. LONG ISLAND JEWISH HILLSIDE MEDICAL CENTER, EMOTIONAL DISTRESS COMPENSATION WITHOUT A PHYSICAL MANIFESTATION OF THE HARM: HAS NEW YORK GONE TOO FAR?**

In a majority of states, recovery for the negligent infliction of emotional distress is granted only in a limited number of cases.<sup>1</sup> In

<sup>1</sup> See, e.g., *Keck v. Jackson*, 122 Ariz. 114, 593 P.2d 668 (1979). The court held that damages for shock or mental anguish resulting from witnessing an injury to a third person, caused through another's negligence, were recoverable. *Id.* at 116, 593 P.2d at 669. The recovery, however, was limited in that the mental distress must have been manifested as a physical injury and that such distress resulted from witnessing an injury to a close, personal relative of the claimant. *Id.* at 117, 593 P.2d at 669-70. See also *Towns v. Anderson*, 195 Colo. 517, 520, 579 P.2d 1163, 1165 (1978) (where emotional distress manifested in a form of physical injury, recovery allowed even absent a showing of bodily harm or immediate impact); *Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131, 134, 447 N.E.2d 109, 112-13 (1983) (negligence of defendant, causing accident resulting in serious emotional harm needed no contemporaneous physical injury, but rather, permanent medical and psychological attention found sufficient for recovery); *Espinosa v. Beverly Hosp.*, 114 Cal. App. 2d 232, 235, 249 P.2d 843, 845 (1952) (negligent act causing mental suffering and loss of sleep with no physical injuries not compensable); *Butler v. Pardue*, 415 So. 2d 249, 252 (La. Ct. App. 1982) ("fright, fear or mental anguish while an ordeal is in progress is legally compensable"); *Sears, Roebuck & Co. v. Devers*, 405 So. 2d 898, 901-02 (Miss. 1981) (where no physical injury, sickness or medically identifiable mental injury suffered, damages for unnecessary embarrassment through another's negligence, not recoverable); *Seidenbach's, Inc. v. Williams*, 361 P.2d 185, 187 (Okla. 1961) (damages for mental anguish unaccompanied by or unconnected to physical injuries cannot be recovered on account of negligent breach of contract); *Logan v. St. Luke's Gen. Hosp.*, 65 Wash. 2d 914, 915, 400 P.2d 296, 296 (1965) (where "no malice or intent to do harm is alleged, there must be either an immediate physical invasion . . . or a direct possibility of such invasion in order that recovery may be had for mental anguish . . .").

As stated in *RESTATEMENT (SECOND) OF TORTS* § 436A, at 461 (1965), the general rule regarding liability for negligent infliction of emotional distress alone is "if the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance." *Id.*

## Emotional Distress Compensation

most of these situations,<sup>2</sup> the plaintiff is required to show either an accompanying physical injury<sup>3</sup> or a physical manifestation of the emotional injury.<sup>4</sup> There are currently three exceptions in New York<sup>5</sup> for which this showing is not required. These involve the

<sup>2</sup> See *infra* note 5.

<sup>3</sup> See *Bullard v. Central Vt. Ry.*, 565 F.2d 193 (1st Cir. 1977). The court awarded emotional distress damages to a railway company employee who suffered a foot injury as a result of defendant's negligently caused accident. *Id.* at 197-98. See also *Ferrara v. Galuchio*, 5 N.Y.2d 16, 18, 21, 152 N.E.2d 249, 250, 252, 176 N.Y.S.2d 996, 997, 999 (1958) (where plaintiff suffered burn on shoulder through doctor's negligent X-ray treatments, neurosis and mental distress about possibility of cancer allowed as part of recovery); *Holmquist v. Volkswagen of America, Inc.*, 261 N.W.2d 516, 526 (Iowa Ct. App. 1977) (where plaintiff sustained severe physical injuries as a result of car accident, court considered mental pain and suffering in computing damages); *Hayes v. New York Cent. R.R.*, 311 F.2d 198, 201 (2d Cir. 1962) (in determining damages for plaintiff's frost bitten foot injuries, court permitted damages for anxiety of threat of amputation); RESTATEMENT (SECOND) OF TORTS § 436 comment c (1965).

<sup>4</sup> See *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961). In *Battalla*, plaintiff was awarded a recovery for emotional distress without a physical injury when the suffering included "severe emotional and neurological disturbances with residual physical manifestations." *Id.* at 239, 176 N.E.2d at 729, 219 N.Y.S.2d at 35. See also *Towns v. Anderson*, 195 Colo. 517, 520, 579 P.2d 1163, 1165 (1978) (where boy's witnessing of house on fire with sister inside caused emotional distress and later manifested itself in forms of physical injuries, court permitted recovery); *First Nat'l Bank v. Langley*, 314 So. 2d 324, 334 (1975) (no physical impact required to recover for "genuine physical consequences of fright, shock, or other mental distress resulting from a negligent act"). Cf. *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969). In *Tobin*, the court denied recovery although there were physical manifestations of emotional distress because the plaintiff was not within the zone-of-danger. *Id.* at 613, 249 N.E.2d at 421, 301 N.Y.S.2d at 557; Comment, *Negligent Infliction of Prenatal Death: New York's Unrecompensed Injury After Tebbutt v. Virotek*, 19 CONN. L. REV. 365, 371 (1987); Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1240-41 (1971).

<sup>5</sup> See *Johnson v. State*, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975). The court sustained recovery for plaintiff's mental distress as a result of receiving a notice falsely informing her that her mother had died, when in fact, she was still alive. *Id.* at 379-80, 334 N.E.2d at 591, 372 N.Y.S.2d at 638-39. The exceptional recovery was based on the fact that the defendant hospital breached a duty owed directly to the daughter, and on the seriousness of a message announcing death. *Id.* at 383, 334 N.E.2d at 593, 372 N.Y.S.2d at 642-43. Cf. *Johnson v. Jamaica Hosp.*, 62 N.Y.2d 523, 530, 467 N.E.2d 502, 505, 478 N.Y.S.2d 838, 841 (1984). The court denied the parents of an infant, under the care of a hospital nursery, damages for the hospital's negligence, causing them grief and worry upon their child's disappearance and later return. *Id.* The *Jamaica Hospital* case limited *Johnson* to its specific facts, thereby creating an exception to the rule in cases involving the negligent transmission of information regarding death. *Id.* See also *Lando v. State*, 39 N.Y.2d 808, 808, 351 N.E.2d 426, 426, 385 N.Y.S.2d 759, 759 (1976) (court permitted recovery for failure to recover plaintiff's daughter's body for 11 days, resulting in emotional injury to plaintiff); *Darcy v. Presbyterian Hosp.*, 202 N.Y. 259, 262, 95 N.E. 695, 696 (1911) (recovery for emotional distress resulting from negligent mishandling of a corpse based on the plaintiff's quasi-property right in the body was allowed). Cf. *Bovsun v. Sanperi*, 61 N.Y.2d 219, 228-29, 461 N.E.2d 843, 847, 473 N.Y.S.2d 357, 361 (1984)

negligent transmission of a message announcing death, the negligent mishandling of corpses, and the zone-of-danger rule. Recently, in *Martinez v. Long Island Jewish Hillside Medical Center*,<sup>6</sup> a case which did not involve any of the previously noted exceptions, the New York Court of Appeals allowed recovery for the negligent infliction of emotional distress without a showing of any physical harm.<sup>7</sup>

In *Martinez*, a mother was awarded recovery for emotional distress suffered as a result of submitting to an unnecessary abortion.<sup>8</sup> The facts of *Martinez*, while quite unique, share some similarities with two widely litigated areas of law: wrongful life cases<sup>9</sup>

(court allowed recovery to plaintiffs who were in the zone-of-danger, that is, one who was himself in the same physical danger as person suffering the physical injury or death through defendant's negligence and yet only received emotional injury from viewing such death or serious injury of another member of his immediate family).

<sup>6</sup> *Martinez v. Long Island Jewish Hillside Medical Center*, 70 N.Y.2d 697, 512 N.E.2d 538, 518 N.Y.S.2d 955 (1987).

<sup>7</sup> *Id.* at 699, 512 N.E.2d at 538, 518 N.Y.S.2d at 956.

<sup>8</sup> *Id.*

<sup>9</sup> See *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). A "wrongful life" cause of action involves the birth of a wanted, but abnormal child who would not have been born but for the doctor's negligence in failing to inform the parents of specific risks and problems of treatment. *Id.* at 406, 386 N.E.2d at 808-09, 413 N.Y.S.2d at 896-97. The parents sought, in addition to other damages, recovery for emotional and mental harm suffered as a result of the birth of their retarded child. *Id.* at 406, 386 N.E.2d at 809, 413 N.Y.S.2d at 897. The New York Court of Appeals held that the plaintiffs could not recover for emotional injury as part of their monetary damages, for this sort of injury was too speculative. *Id.* at 415, 386 N.E.2d at 813, 413 N.Y.S.2d at 902. See also *Moores v. Lucas*, 405 So. 2d 1022, 1024-25 (Fla. Dist. Ct. App. 1981) (no claim allowed for suffering and mental anguish arising from pregnancy and birth of child with Larsen's Syndrome due to medical expert's negligence); *Howard v. Lecher*, 42 N.Y.2d 109, 113, 366 N.E.2d 64, 66, 397 N.Y.S.2d 363, 365 (1977) (parents of child born with Tay-Sachs disease denied recovery for emotional distress suffered as a result of doctor's negligence); *Jacobs v. Theimer*, 519 S.W.2d 846, 850 (Tex. 1975) (child's parents not entitled to damages for their emotional suffering due to negligence of doctor in failing to diagnose mother's German measles). But see *Karlsons v. Guerinot*, 57 App. Div. 2d 73, 394 N.Y.S.2d 933 (4th Dep't 1977). The parents of a mongoloid child, as a result of a doctor's negligence in diagnosis, were permitted to recover for mental anguish incident to the birth. *Id.* at 81, 394 N.Y.S.2d at 940. See generally W. KEETON, PROSSER AND KEETON ON TORTS § 55, at 370 (5th ed. 1984) (a distinction between wrongful birth claims brought by parents for their damages and wrongful life claims brought on behalf of the child is addressed); Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409, 1429 (1977) (author submitted parents in wrongful life situations should be allowed recovery for emotional suffering). "[T]he parents do not sue because the child is unloved or a burden; they sue because they must live with the excruciating pain of seeing a child whom they dearly love face life under harsh disabilities." *Id.* at 1429; Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L.J. 1488, 1502-03 (1978) (author noted the difficulty of measuring the parents' emotional distress injuries in wrong-

## Emotional Distress Compensation

and cases involving the infliction of harm to a fetus.<sup>10</sup> Both types of cases have repeatedly surfaced in New York.

This Comment will examine these areas and address the role of requiring some physical indication of harm.<sup>11</sup> It will then argue that although the decision in *Martinez* was the correct one, the court should not have overlooked the physical manifestation requirement.<sup>12</sup> This Comment will then examine the state of the law in California, which has abandoned the requirement since 1980,<sup>13</sup> and analyze the problems which have resulted. Finally, some alter-

ful life cases, yet treated differently in other areas of tort law).

<sup>10</sup> See *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951). The court held that the child was entitled to damages for the negligent infliction of harm while in utero, but his mother was not entitled to a recovery for the ensuing emotional distress. *Id.* at 351-57, 102 N.E.2d at 692-95. See also *Vaccaro v. Squibb Corp.*, 52 N.Y.2d 809, 418 N.E.2d 386, 436 N.Y.S.2d 871 (1980). In *Vaccaro*, the court held that the defendant (a drug manufacturer) owed no duty to a mother who suffered from emotional distress as a result of her child being born with severe deformities due to the defendant's product. *Id.* at 810, 418 N.E.2d at 386, 436 N.Y.S.2d at 871. The mother did not allege physical injuries, and therefore, the court held that she was not entitled to recover for emotional and psychic harm. *Id.* at 810-11, 418 N.E.2d at 386, 436 N.Y.S.2d at 871. See also *Tebbutt v. Virostek*, 65 N.Y.2d 931, 483 N.E.2d 1142, 493 N.Y.S.2d 1010 (1985). Plaintiff-mother alleged emotional distress as a result of a negligent amniocentesis causing her to deliver a stillborn child. *Id.* at 932, 483 N.E.2d at 1143, 493 N.Y.S.2d at 1011. Recovery for emotional distress was denied on the theory that the mother failed to learn of the injury to her child until well after it was inflicted. *Id.* See generally Note, *Recovery for Tortious Death of the Unborn*, 33 S.C.L. REV. 797, 811 (1982) (measuring damages in death resulting from prenatal injuries is extremely troublesome).

<sup>11</sup> See *supra* notes 4 and 5 and accompanying text.

<sup>12</sup> See RESTATEMENT (SECOND) OF TORTS § 436A comment b (1965). As justification for the requirement of some physical injury with a claim for emotional distress, comment b provides three reasons:

One is that emotional disturbance which is not so severe and serious as to have physical consequences is normally in the realm of the trivial . . . . It is likely to be so temporary . . . and so relatively harmless and unimportant, that the task of compensating for it would unduly burden the courts and the defendants . . . . [S]econd is that in the absence of the guarantee of genuineness provided by the resulting bodily harm, such emotional disturbance may be too easily feigned . . . . [T]o allow recovery for it might open too wide a door for false claimants who have suffered no real harm at all. The third is that where the defendant has been merely negligent, without any element of intent to do harm, his fault is not so great that he should be required to make good a purely mental disturbance.

*Id.* See also Dworkin, *Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box?*, 53 FORDHAM L. REV. 527, 530-31 (1984); Note, *The Negligent Infliction of Mental Distress: The Scope of Duty and Foreseeability of Injury*, 57 N.D.L. REV. 577, 580-81 (1981).

<sup>13</sup> See *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). See generally Note, *Negligent Infliction of Emotional Distress As An Independent Cause of Action in California: Do Defendants Face Unlimited Liability?*, 22 SANTA CLARA L. REV. 181, 183 (1982) ("[u]ntil *Molien*, . . . California courts refused to allow a plaintiff to state a cause of action purely for negligent infliction of emotional distress without physical injury").

natives are proposed which would have enabled the court to hold for the plaintiff without abandoning important policy considerations.

## I. NEW YORK LAW PRIOR TO *Martinez*

### A. *Wrongful Life Cases*

In *Howard v. Lecher*,<sup>14</sup> the plaintiffs sued a doctor after their daughter was born with Tay-Sachs disease. They claimed that the defendant was negligent in failing to properly counsel them.<sup>15</sup> They also averred that if they had known of the existence of the disease, they would have terminated the pregnancy.<sup>16</sup>

In holding for the defendant, the New York Court of Appeals pointed to its repeated practice of denying recovery for emotional injuries suffered as a result of physical injuries sustained by another.<sup>17</sup> The injury complained of did not directly arise from the defendant's breach of duty, but rather, it arose from watching the child suffer.<sup>18</sup>

The court also denied recovery for emotional suffering in *Becker v. Schwartz*.<sup>19</sup> In *Becker*, the plaintiff was a 37-year old mother who was in the defendant's care from the tenth week of pregnancy until birth.<sup>20</sup> The defendant failed to inform the plaintiff of the increased risk of Down's Syndrome in children of older parents.<sup>21</sup>

<sup>14</sup> 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977).

<sup>15</sup> *Id.* at 110, 366 N.E.2d at 65, 397 N.Y.S.2d at 364. The plaintiff-parents claimed that the defendant, being aware of the fact that they were Eastern European Jews, should have known of the high risk that the child could suffer from Tay-Sachs disease. *Id.*

<sup>16</sup> *Id.* The plaintiffs did not claim that the defendant was responsible for the child's affliction with Tay-Sachs or the inevitable death. *Id.* They alleged that the doctor should be liable for the emotional suffering which was caused by the "birth, degeneration, and death of the child." *Id.* at 111, 366 N.E.2d at 65, 397 N.Y.S.2d at 364.

<sup>17</sup> *Id.* at 112, 366 N.E.2d at 66, 397 N.Y.S.2d at 365. The court stated that, "No cause of action exists, irrespective of the relationship between the parties or whether one was a witness . . . 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." *Id.*

<sup>18</sup> *Id.* at 112-13, 366 N.E.2d at 66, 397 N.Y.S.2d at 365.

<sup>19</sup> 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

<sup>20</sup> *Id.* at 405, 386 N.E.2d at 808, 413 N.Y.S.2d at 896.

<sup>21</sup> *Id.* at 406, 386 N.E.2d at 808, 413 N.Y.S.2d at 897. The plaintiff also contended that neither she nor her husband were ever advised of the availability of an amniocentesis test to determine whether the fetus would be affected with Down's Syndrome. *Id.* Had they known of the test they alleged they would have had it performed and could have prevented the birth of their child. *Id.* at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 891.

## Emotional Distress Compensation

As a result, no tests were given and the pregnancy went to full term. The plaintiff's daughter suffered from the disease and required institutionalization.<sup>23</sup> The court stated that the claim for emotional distress was too speculative<sup>23</sup> and therefore denied relief. These mental injuries, according to the court, would be mitigated by "the experience of love associated with the birth of every child."<sup>24</sup>

Typically, wrongful life actions are also brought on the child's behalf.<sup>25</sup> Here the courts have held that the infant suffered "no legally cognizable injury."<sup>26</sup> Virtually all courts have consistently denied recovery for a wrongful life claim brought on the child's behalf.<sup>27</sup>

<sup>23</sup> *Id.*

<sup>23</sup> *Id.* at 414, 386 N.E.2d at 814, 413 N.Y.S.2d at 902.

<sup>24</sup> *Id.*

<sup>25</sup> See *Becker v. Schwartz*, 46 N.Y.2d 401, 406, 386 N.E.2d 807, 809, 413 N.Y.S.2d 895, 897 (1978). See also *Stills v. Gratton*, 55 Cal. App. 3d 698, 699, 127 Cal. Rptr. 652, 653 (1976) (child brought wrongful life action after defendant had negligently performed an abortion on his mother); *Gleitman v. Cosgrove*, 49 N.J. 22, 24, 227 A.2d 689, 690 (1967) (child with birth defect sued doctor for failure to properly diagnose effects on birth of mother's disease); *Williams v. State*, 18 N.Y.2d 481, 482, 223 N.E.2d 343, 343, 276 N.Y.S.2d 885, 886 (1966) (child sued state where mother was a mental patient and as a result of state's negligence, child was born out of wedlock); *Slawek v. Stroh*, 62 Wis. 2d 295, 300, 215 N.W.2d 9, 13 (1974) (illegitimate child sued father for mental pain and anguish resulting from her wrongful birth); *Rogers*, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C.L. Rev. 713, 715 (1982) (discussion of merits of both wrongful life and wrongful birth claims).

<sup>26</sup> See *Becker*, 46 N.Y.2d at 401, 386 N.E.2d at 807, 413 N.Y.S.2d at 895. The court stated: "[T]here is no precedent for recognition . . . of the fundamental right of a child to be born as a whole functional human being." *Id.* at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900 (quoting from *Park v. Chessin*, 60 App. Div. 2d 80, 88, 400 N.Y.S.2d 110, 114 (2d Dep't. 1977)). See also *Gleitman*, 49 N.J. at 22, 227 A.2d at 689. In *Gleitman*, the plaintiff contracted German measles at an early stage of her pregnancy. *Id.* at 22, 227 A.2d at 689. The defendant assured her that there would be no adverse affects upon the child. *Id.* at 23, 227 A.2d at 690. After the child was born with birth defects, the plaintiff claimed that she might have secured an abortion had she been informed of the risk to the child from the disease. *Id.* at 26, 227 A.2d at 691. The action was based on a claim on behalf of the child that he never should have been born. *Id.* at 28, 227 A.2d at 692. In denying the claim, the court noted that "the infant plaintiff would have us measure the difference between his life with defects against the utter void of non-existence, but it is impossible to make such a determination." *Id.*

<sup>27</sup> See W. KEETON, PROSSER AND KEETON ON TORTS § 55, at 371 (5th ed. 1984). See also Note, *Wrongful Life and a Fundamental Right to be Born Healthy*, 27 BUFFALO L. REV. 537, 539-40 (1978) (proven pecuniary damages are allowed to parents in wrongful life claims); Note, *A Child May Recover Special Damages But Not General Damages in a Claim for Wrongful Life*: *Turpin v. Satini*, 10 PEPPERDINE L. REV. 296, 298 (1982) (wrongful life cases are almost universally rejected).

There is, however, one way by which defendants can be held liable. Recovery was allowed in *Becker* for pecuniary loss suffered by the parents.<sup>28</sup> Generally, these include either the costs involved in institutionalization or any other additional costs arising from the disease.<sup>29</sup> These damages serve, not to make the plaintiff whole, but to reimburse him or her for losses which are less speculative.<sup>30</sup>

### B. *Infliction of Physical Harm to the Fetus*

In *Vaccaro v. Squibb Corp.*,<sup>31</sup> the plaintiff-mother took a drug, manufactured by the defendant, during her pregnancy.<sup>32</sup> As a result, her child was born severely deformed. The court of appeals refused to recognize a cause of action for her emotional distress.<sup>33</sup> The court observed that the mother alleged no physical injuries and therefore was unable to collect for emotional distress.<sup>34</sup> In

<sup>28</sup> See *Becker*, 46 N.Y.2d at 413, 386 N.E.2d at 813, 413 N.Y.S.2d at 901.

<sup>29</sup> See *Robak v. United States*, 658 F.2d 471, 473 (7th Cir. 1981) (parents sued for future care and maintenance associated with a child inflicted with rubella syndrome); *Schroeder v. Perkel*, 87 N.J. 53, 57, 432 A.2d 834, 835 (1981) (parents sued for the additional expenses they would incur in caring for their children who suffered from cystic fibrosis); *Becker*, 46 N.Y.2d at 406, 386 N.E.2d at 809, 413 N.Y.S.2d at 897 (1978) (plaintiffs sued for the extraordinary care and treatment associated with Down's Syndrome).

<sup>30</sup> See *Schroeder*, 87 N.J. 53, 432 A.2d 834 (1981). On the matter of pecuniary damages, the Supreme Court of New Jersey concluded that the defendant should have foreseen that the child could suffer from certain diseases and that if afflicted, would sustain certain medical expenses. *Id.* at 65, 432 A.2d at 841. In *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978), the court opined that "to permit the plaintiff to recover for pecuniary loss while precluding recovery for alleged emotional injuries . . . does not run counter to this court's previous decisions." *Id.* at 414, 386 N.E.2d at 813, 413 N.Y.S.2d at 902. The defendant in *Becker* breached a duty which allowed the plaintiff to recover damages for "the proven harmful consequences proximately caused by the breach." *Id.* at 415, 386 N.E.2d at 814, 413 N.Y.S.2d at 902. See also Note, *supra* note 9, at 1506, 1514-15 (discussion of what physicians should reasonably foresee, with regard to genetic counseling of patients). If a physician is held to have been able to foresee a particular defect, he should have foreseen the medical expenses associated with the defect as well. *Id.* at 1515.

<sup>31</sup> 52 N.Y.2d 809, 418 N.E.2d 386, 436 N.Y.S.2d 871 (1980).

<sup>32</sup> *Id.* at 811, 418 N.E.2d at 386, 436 N.Y.S.2d at 871 (Fuchsberg, J., dissenting). The plaintiff took the drug Delalutin, which was manufactured and marketed by the defendant. *Id.* The purpose of the drug was to prevent a miscarriage. *Id.* The plaintiff's doctor, also a defendant in the action, prescribed the drug for the plaintiff. *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* It should be noted that whether the plaintiff could recover for physical injuries sustained as a result of the defendant's negligence was not addressed in the court's opinion. *Id.* Rather, only "the legal question [of] whether in the circumstances [the plaintiff-mother] is entitled to recover for emotional and psychic harm" was considered. *Id.*



## Emotional Distress Compensation

this line of cases, the mother is often viewed as a third party bystander.<sup>35</sup>

The *Vaccaro* holding was based on the rule set forth in *Battalla v. State*.<sup>36</sup> In *Battalla*, an employee at a ski slope placed the plaintiff on a chairlift without properly securing him.<sup>37</sup> The child, although not physically hurt, was seriously frightened.<sup>38</sup> He demonstrated "severe emotional and neurological disturbances with residual physical manifestations."<sup>39</sup> The court of appeals held that the plaintiff fulfilled the requirement of physical harm necessary for an emotional suffering cause of action.<sup>40</sup>

This requirement was altered when New York adopted the zone-of-danger rule in *Bovsun v. Sanperi*.<sup>41</sup> In *Bovsun*, the plaintiff was awarded damages for emotional distress which occurred as a result of witnessing injury to her husband in an automobile accident in which she was also involved.<sup>42</sup> The court noted that be-

<sup>35</sup> See *Tebbutt v. Virotek*, 65 N.Y.2d 931, 932, 483 N.E.2d 1142, 1143, 493 N.Y.S.2d 1010, 1011 (1985); *Vaccaro*, 52 N.Y.2d at 810, 418 N.E.2d at 386, 436 N.Y.S.2d at 871. See generally Comment, *supra* note 4, at 385, 389 (case-by-case discussion of how New York's courts have handled the problem).

<sup>36</sup> 10 N.Y.2d 237, 239, 176 N.E.2d 729, 729, 219 N.Y.S.2d 34, 35 (1961).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> See *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961). In its decision the court overruled *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 354 (1896). The *Mitchell* court found that there could be no recovery for injuries, physical or mental, incurred by fright negligently induced. *Id.* at 109, 45 N.E. at 354. The court concluded that a wrongdoer should be responsible for the natural and proximate consequences of his misconduct. *Id.* at 110, 45 N.E. at 355. The *Battalla* court stated that the only substantial policy argument of *Mitchell* is that the damages or injuries are somewhat speculative and difficult to prove. *Battalla*, 10 N.Y.2d at 242, 176 N.E.2d at 731, 219 N.Y.S.2d at 38. However, it concluded that in the difficult cases, the court must look to the quality and genuineness of the proof. *Id.* By showing that he suffered from physical manifestations of emotional distress, the plaintiff in *Battalla* assured the court that his claim was genuine. *Id.* at 239, 240, 242, 176 N.E.2d at 729, 730, 219 N.Y.S.2d at 35, 36, 38.

<sup>41</sup> 61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 (1984).

<sup>42</sup> *Id.* at 224, 461 N.E.2d at 844, 473 N.Y.S.2d at 358. The facts of *Bovsun* are somewhat unique. *Id.* The station wagon in which the Bovsun family was riding had stopped at the side of the highway. *Id.* Mr. Bovsun got out of the car, went around to the rear and leaned inside the open tailgate window. *Id.* Mrs. Bovsun was seated in the front passenger seat, and their daughter remained in the rear seat. *Id.* At this point, their car was struck in the rear by the defendant's automobile. *Id.* Mr. Bovsun was seriously injured as a result of being pinned between the two vehicles. *Id.* The mother and daughter were jolted in the car but escaped without serious injuries. *Id.* While neither the mother nor the daughter actually saw the defendant's vehicle strike Mr. Bovsun, both were instantly aware of the impact and the fact that he must have been hit. *Id.* Each thereafter immediately observed

cause the plaintiff was within the zone-of-danger<sup>43</sup> the defendant breached a duty which he owed directly to her.<sup>44</sup>

Included in plaintiff's damages was the emotional distress caused by witnessing "the suffering of an immediate family member who is also injured by the defendant's conduct."<sup>45</sup> The court did not require that the plaintiff show any physical injuries from the accident.<sup>46</sup> It is unclear as to whether or not physical manifestations were required.<sup>47</sup>

In 1985, the court of appeals had a chance to apply the *Bovsun* rule to a case involving physical harm to an unborn child. In *Tebbutt v. Virostek*,<sup>48</sup> the plaintiff's child was stillborn as a result of a negligently performed amniocentesis.<sup>49</sup> The mother claimed that she was within the zone-of-danger and should be afforded a recovery for her emotional suffering.<sup>50</sup> In denying recovery, the court held that the observation of serious injury or death to a family member must be contemporaneous with the conduct causing the injury or death.<sup>51</sup> The court held that the plaintiff did not dis-

him pinned between the vehicles. *Id.* at 225, 461 N.E.2d at 844, 473 N.Y.S.2d at 358.

<sup>43</sup> *Id.* at 230, 461 N.E.2d at 848, 473 N.Y.S.2d at 362. The court held:

[W]here 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 in bringing about such injury or death.

*Id.* at 230-31, 461 N.E.2d at 848, 473 N.Y.S.2d at 362.

<sup>44</sup> *Id.* at 233, 461 N.E.2d at 850, 473 N.Y.S.2d at 364.

<sup>45</sup> *See id.* at 229, 461 N.E.2d at 847, 473 N.Y.S.2d at 361. The court recognized the right of a plaintiff, to whom the defendant owed but breached a duty of care, to recover as an element of his damages, that part of his injury attributable to emotional distress caused by the contemporaneous observation of injury to an immediate family member, caused by the same conduct of the defendant. *Id.* at 231, 461 N.E.2d at 438, 473 N.Y.S.2d at 363. The court also stated that the emotional distress must be serious. *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* The court noted that the emotional distress must be verifiable. *Id.* The court referred to the RESTATEMENT (SECOND) OF TORTS § 436(3) comment g (1965) (external factors are necessary to corroborate plaintiff's testimony).

<sup>48</sup> 65 N.Y.2d 931, 483 N.E.2d 1142, 493 N.Y.S.2d 1010 (1985).

<sup>49</sup> *Id.* at 932, 483 N.E.2d at 1143, 493 N.Y.S.2d at 1011.

<sup>50</sup> *Id.*

<sup>51</sup> *See id.* The plaintiff tried to recover damages for her "pain, severe disappointment, anxiety, despondency, bitterness and suffering" resulting from the stillbirth of her child. *Id.* The court stated that the plaintiff alleged no physical injury distinct from that suffered by the fetus. *Id.* As a result, her only avenue of recovery could have been under a zone-of-danger theory. *Id.* The court, relying on *Bovsun*, denied her claim because her observation

## Emotional Distress Compensation

cover the injury to her child until well after it was inflicted.<sup>53</sup>

In cases involving the infliction of physical harm by the defendant directly upon the fetus, the courts have allowed a recovery by the infant for the injuries suffered.<sup>53</sup> This recovery is limited only to cases where the infant survives.<sup>54</sup> By providing for some recovery, the courts have created a means by which to hold defendants liable for their negligent conduct.<sup>55</sup>

### II. THE *Martinez* DECISION

In *Martinez v. Long Island Jewish Hillside Medical Center*,<sup>56</sup> the court of appeals awarded a mother recovery for emotional distress suffered as a result of submitting to an unnecessary abortion.<sup>57</sup> Mrs. Martinez was taking small doses of a steroid on a daily basis when she discovered that she was pregnant.<sup>58</sup> She was referred to the defendant for genetic counseling regarding the possible dan-

was not contemporaneous with the defendant's conduct. *Id.* The court implicitly viewed the plaintiff-mother as a third party bystander and applied the principles attendant thereunder. *Id.*

<sup>53</sup> *Id.* On this point, the court ruled that the case was governed by *Vaccaro v. Squibb Corp.*, 52 N.Y.2d 809, 418 N.E.2d 386, 436 N.Y.S.2d 871 (1980). Both cases involved emotional injuries caused by harm done to the child *in utero*, which the mother did not learn of until after birth. *Id.* That event occurred some time after the harm was inflicted. *Id.*

<sup>54</sup> See *Grodin v. Grodin*, 102 Mich. App. 396, 398, 301 N.W.2d 869, 870 (Mich. Ct. App. 1980); *Woods v. Lancet*, 303 N.Y. 349, 357, 102 N.E.2d 691, 695 (1951); *Hughson v. St. Francis Hosp.*, 92 App. Div. 2d 131, 135, 459 N.Y.S.2d 814, 817 (2d Dep't 1983). See also RESTATEMENT (SECOND) OF TORTS § 869 (1965). The Restatement provides, "(1) [O]ne who tortiously causes harm to an unborn child is subject to liability to the child for the harm if the child is born alive." *Id.* The reporter's note states that all American jurisdictions permit recovery in the above situation. *Id.* reporter's note (1) (1982).

<sup>55</sup> See RESTATEMENT (SECOND) OF TORTS § 869 reporter's note (2) (1977). Section 869 states: "If the child is not born alive, there is no liability unless the applicable wrongful death statute so provides." *Id.* The courts are split as to whether or not wrongful death applies to a stillborn fetus. See, e.g., *Justus v. Atchinson*, 19 Cal. 3d 564, 567, 565 P.2d 122, 124, 139 Cal. Rptr. 97, 99 (1977) (recovery denied as wrongful death did not apply); *Endresz v. Friedberg*, 24 N.Y.2d 478, 482, 248 N.E.2d 901, 902, 301 N.Y.S.2d 65, 67 (1969) (New York's wrongful death statute was not intended to apply); *In re Logan's Estate*, 3 N.Y.2d 800, 800, 144 N.E.2d 644, 644, 166 N.Y.S.2d 3, 3 (1957). But see *Todd v. Sandidge Contr. Co.*, 341 F.2d 75, 75 (4th Cir. 1964) (wrongful death action can be had for stillbirth of eight month old fetus); *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 34 Wis. 2d 14, 16, 148 N.W.2d 107, 109 (1967) (unproven medical fact that fetus does not have separate juridical existence).

<sup>56</sup> See *supra* notes 53 and 54 and accompanying text.

<sup>57</sup> 70 N.Y.2d 697, 512 N.E.2d 538, 518 N.Y.S.2d 955 (1987).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 698, 512 N.E.2d at 538, 518 N.Y.S.2d at 955.

gers to her unborn child.<sup>60</sup> The defendant negligently advised her that her baby would be born with the congenital birth defect of microcephaly (small brain) or anencephaly (no brain).<sup>60</sup> The defendant advised her based on the belief that her dosage was 500mg.<sup>61</sup> However, the actual dosage was .5 mg., an amount that was not likely to harm the fetus.<sup>62</sup> Based on the defendant's advice, Mrs. Martinez submitted to an abortion, believing that the extraordinary circumstances justified such an act.<sup>63</sup>

Upon discovering the defendant's error, Mrs. Martinez suffered mental anguish and depression from her awareness that she needlessly committed an act "in violation of her deep-seated convictions."<sup>64</sup> There was no indication that she suffered from any physical injuries nor was there evidence of any physical manifestation of the emotional distress.<sup>65</sup> The court declared that the defendant breached a duty it owed to the plaintiff, which resulted directly in the emotional suffering.<sup>66</sup> As a result, a seemingly new cause of action in New York was established.<sup>67</sup>

Prior to *Martinez*, New York law provided that for a recovery in emotional distress absent some physical injury, the plaintiff's case must fall within one of New York's exceptions.<sup>68</sup> If the plaintiff is

<sup>60</sup> *Id.*

<sup>60</sup> *Id.* at 698-99, 512 N.E.2d at 538, 518 N.Y.S.2d at 955.

<sup>61</sup> See Brief for Respondent at 12, *Martinez v. Long Island Jewish Hillside Medical Center*, 70 N.Y.2d 697, 512 N.E.2d 538, 518 N.Y.S.2d 955 (1987).

<sup>62</sup> *Id.* at 19. The probability of a healthy baby was 95-98% at worst. *Id.*

<sup>63</sup> *Martinez*, 70 N.Y.2d at 699, 512 N.E.2d at 538, 518 N.Y.S.2d at 955. Mrs. Martinez testified that to her, abortion was a sin, except under the extraordinary circumstances of her situation. *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* 70 N.Y.2d 697, 699, 512 N.E.2d at 538, 518 N.Y.S.2d at 955.

<sup>66</sup> *Id.* at 699, 512 N.E.2d at 538, 518 N.Y.S.2d at 956.

<sup>67</sup> *Id.*

<sup>68</sup> See *Ferrara v. Galluchio*, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958). In *Ferrara*, the plaintiff was suffering from shoulder ailments and received a series of X-ray treatments by the defendant. *Id.* at 18, 152 N.E.2d at 250, 176 N.Y.S.2d at 997. As a result of these treatments, blisters formed on the plaintiff's shoulder and she was diagnosed as having chronic radiodermatitis. *Id.* This condition was caused by the X-ray therapy. *Id.* The court awarded the plaintiff a recovery for her emotional distress (cancerophobia) incurred as a result of the defendant's treatments. *Id.* The court stated: "Not only fright and shock, but other kinds of mental injury are marked by definite physical symptoms, which are capable of clear medical proof." *Id.* at 21, 152 N.E.2d at 252, 176 N.Y.S.2d at 999. See also *Vaccaro v. Squibb Corp.*, 52 N.Y.2d 809, 810, 418 N.E.2d 386, 386, 436 N.Y.S.2d 871, 871 (1980) (recovery denied because plaintiff made no claim of contemporaneous physical harm to herself); *Battalla v. State*, 10 N.Y.2d 237, 242, 176 N.E.2d 729, 731, 219

## Emotional Distress Compensation

within the zone-of-danger, then according to *Bovsun*, no showing of physical injury is necessary.<sup>69</sup> Traditionally, to be within the zone-of-danger,<sup>70</sup> the plaintiff must be at risk of the same type of injury that the third party actually suffers.<sup>71</sup> While it is true that Mrs. Martinez was at the risk of some physical harm that may be associated with abortion, it is submitted that it was not the same type of harm that her baby faced, specifically, inevitable death. Furthermore, her observation of the injury was not contemporaneous with the defendant's act.<sup>72</sup> Therefore, a zone-of-danger analysis would not justify the *Martinez* holding.

Two other exceptions to the physical harm rule were set forth in *Johnson v. New York*.<sup>73</sup> The court of appeals stated that in cases

N.Y.S.2d 34, 38 (1961) (suffering included "severe emotional and neurological disturbances with residual physical manifestations"). See generally Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944) (persons suffering substantial physical injury from psychic stimuli should be compensated). See also *supra* notes 5, 30-32, 35 and 54-58 and accompanying text.

<sup>69</sup> See *Bovsun v. Sanperi*, 61 N.Y.2d 219, 231, 461 N.E.2d 843, 849, 473 N.Y.S.2d 357, 363 (1984); Comment, *Negligent Infliction of Emotional Distress: Formulating the Psycho-Legal Inquiry*, 18 SUFFOLK U.L. REV. 401, 405 (1984); Comment, *The Increasingly Disparate Standards of Recovery for Negligently Inflicted Emotional Injuries*, 52 U. CIN. L. REV. 1017, 1020-21 (1983) (emotional well-being of individual is as important as physical welfare). One author has noted:

Generally, the zone-of-danger rule widens the scope of liability for infliction of emotional distress beyond situations of mere physical impact to situations where the plaintiff has been physically threatened by the defendant's negligent conduct. As long as the plaintiff can show that the defendant's conduct posed a physical threat, recovery for emotional harm will generally be granted under the zone-of-danger rule whether the emotional harm is caused directly by the physical threat or results from witnessing injury to another person similarly threatened.

Comment, *supra* note 4, at 368 n.20.

<sup>70</sup> See *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928). In *Palsgraf*, the plaintiff was injured as she stood on a train platform. *Id.* at 340, 162 N.E. at 99. Her injuries were caused by an explosion of fireworks after a passenger had dropped them while trying to board a train. *Id.* A conductor shoved the passenger to help him get on the train. *Id.* The package fell, causing the fireworks to explode. *Id.* at 341, 162 N.E. at 99. As a result a scale was knocked over and injured the plaintiff who was 30 feet away. *Id.* The court held that the defendant owed no duty to the plaintiff because she was outside the zone-of-danger. *Id.*

<sup>71</sup> See *Bovsun*, 61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357. In *Bovsun*, the mother and daughter were at risk from the same type of harm as the injured father, that is, being hit by the defendant's car. *Id.* See also Comment, *supra* note 4, at 368 (zone-of-danger rule widens scope of liability to situations without impact if plaintiff shows he was physically threatened by defendant's negligent conduct).

<sup>72</sup> *Martinez v. Long Island Jewish Hillside Medical Center*, 70 N.Y.2d 697, 699, 512 N.E.2d 538, 538, 518 N.Y.S.2d 955, 955 (1987).

<sup>73</sup> 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975). In *Johnson*, the plaintiff sued a hospital for negligently misinforming her that her mother was dead. *Id.* at 379, 334

involving the negligent transmission of a message announcing death, and in those involving the negligent mishandling of corpses, no showing of a physical manifestation of distress was necessary for a recovery.<sup>74</sup> In *Johnson*, the court awarded recovery based on the fact that the injury was inflicted by the defendant directly on the plaintiff, by its negligent transmission of a false message announcing her mother's death.<sup>75</sup>

In *Martinez*, the court stated that where there is a duty owed by the defendant to the plaintiff, a breach of that duty which results directly in emotional harm is actionable.<sup>76</sup> While this appears to be correct on its face, there are a number of policy considerations which the court apparently overlooked in arriving at the decision.

In *Battalla v. State*,<sup>77</sup> the court differentiated between allowing recovery for emotional distress in the absence of physical injuries, and allowing recovery when there is no physical manifestation of the distress.<sup>78</sup> In *Battalla*, the plaintiff demonstrated a physical

N.E.2d at 590, 372 N.Y.S.2d at 639. The plaintiff did not find out that the person for whom she had made funeral arrangements was not her mother until shortly before the wake. *Id.* The court allowed her a recovery for both pecuniary losses and emotional distress. *Id.*

<sup>74</sup> *Id.* at 382, 334 N.E.2d at 592, 372 N.Y.S.2d at 641-42.

<sup>75</sup> *Id.* at 383, 334 N.E.2d at 593, 372 N.Y.S.2d at 642. After noting the two exceptions to the rule requiring a physical manifestation of emotional distress, the court stated: "The false message and the events flowing from its receipt were the proximate cause of claimant's emotional harm. Hence, claimant is entitled to recover for that harm, especially if supported by objective manifestations of that harm." *Id.* Cf. *Johnson v. Jamaica Hosp.*, 62 N.Y.2d 523, 467 N.E.2d 502, 478 N.Y.S.2d 838 (1984). In *Johnson v. Jamaica Hospital*, the plaintiffs brought a claim against a hospital for emotional distress resulting from the abduction of their child from the hospital nursery. *Id.* at 525, 467 N.E.2d at 503, 478 N.Y.S.2d at 839. The court denied a recovery for the emotional distress. *Id.* The plaintiff's alleged that *Johnson v. State* would allow this action without a showing of physical manifestation. *Id.* at 529, 467 N.E.2d at 505, 478 N.Y.S.2d at 841. However, the court limited the *Johnson* holding to its specific facts, and held that it stood only for a recovery when a message announcing death was negligently relayed. *Id.*

<sup>76</sup> *Martinez*, 70 N.Y.2d at 699, 512 N.E.2d at 538-39, 518 N.Y.S.2d at 955-56.

<sup>77</sup> 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

<sup>78</sup> *Id.* In *Battalla*, the court noted that it was possible to have severe emotional distress when the plaintiff was not actually impacted. *Id.* at 239, 176 N.E.2d at 729, 219 N.Y.S.2d at 35. The requirement of a physical injury was deemed to be an artificial barrier to recovery. *Id.* at 241, 176 N.E.2d at 730, 219 N.Y.S.2d at 37. The court also stated that the requirement would encourage plaintiffs to perjure themselves. *Id.* at 242, 176 N.E.2d at 731, 219 N.Y.S.2d at 38. The court held that as long as the plaintiff showed some physical manifestation of the emotional injury, recovery was possible. *Id.* This, the court felt, was sufficient to guarantee the genuineness of the claim. *Id.* at 239, 176 N.E.2d at 730, 219 N.Y.S.2d 36.

## Emotional Distress Compensation

manifestation of the distress.<sup>79</sup> This provided the court with a guarantee that the claim was genuine.<sup>80</sup> The *Martinez* case neither spoke of any showing of physical injuries nor placed the plaintiff into one of the exceptions to the rule.<sup>81</sup> The holding can be read to suggest that New York no longer requires a showing of physical manifestations of emotional distress for recovery based on negligent conduct. It is submitted that abandoning this rule will open the floodgates to a wide variety of lawsuits without any requirement that the plaintiff show the claim to be genuine.

### III. VIEWING A SYSTEM WHERE NO PHYSICAL SYMPTOMS ARE REQUIRED

In *Molien v. Kaiser Foundation Hospitals*,<sup>82</sup> California allowed the plaintiff to recover for the negligent infliction of emotional distress without any showing of physical harm whatsoever.<sup>83</sup> The plaintiff brought an action alleging emotional distress as a result of the defendant's negligence in incorrectly diagnosing and treating his wife for syphilis.<sup>84</sup> In granting a recovery, California's highest court did away with the physical manifestation requirement.<sup>85</sup> However, it limited recovery to cases of "serious" emo-

<sup>79</sup> *Id.* at 239, 176 N.E.2d at 730, 219 N.Y.S.2d at 35.

<sup>80</sup> *Id.*

<sup>81</sup> See *Martinez v. Long Island Jewish Hillside Medical Center*, 70 N.Y.2d 697, 699, 512 N.E.2d 538, 538, 518 N.Y.S.2d 955, 956 (1987). In granting recovery, the court merely stated that "where there is a breach of duty owed by the defendant to plaintiff, the breach of that duty resulting directly in emotional harm is actionable." *Id.*

<sup>82</sup> 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

<sup>83</sup> *Id.* at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832. The court concluded that "emotional injury may be fully as severe and debilitating as physical harm, and is no less deserving of redress; the refusal to recognize a cause of action for negligently inflicted injury in the absence of some physical consequence is therefore an anachronism." *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 927, 616 P.2d at 819, 167 Cal. Rptr. at 837. The court found that the requirement of physical injury was unnecessary for two reasons. *Id.* First, the requirement is both overinclusive and underinclusive. *Id.* The court said that with the requirement, defendants would be exposed to emotional distress claims that are accompanied by trivial physical injury. *Id.* The requirement also prevents claims from arising when the emotional distress is severe but there is no physical manifestation. *Id.* The second problem with the requirement of physical injury is that it "encourages extravagant pleading and distorted testimony." *Id.* at 928, 616 P.2d at 820, 167 Cal. Rptr. at 838. The court pointed out that in most cases of severe mental disturbance, some physical consequence can be found. *Id.* at 929, 616 P.2d at 821, 167 Cal. Rptr. at 838. See generally Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1059 (1936) (physical injury requirement encourages extravagant pleadings); Note, *supra* note 12, at 603-04 (examination of to

tional distress.<sup>86</sup>

In defining serious, the court used a definition set forth by the Supreme Court of Hawaii.<sup>87</sup> Serious emotional distress existed "when a reasonable man, normally constituted, would be unable to adequately cope with the mental distress engendered by the circumstances of the case."<sup>88</sup> This definition proved problematic for two reasons. First, the reasonable man standard is to be used to define when conduct is negligent,<sup>89</sup> not when the injury sustained by the plaintiff is inappropriate for compensation. Secondly, use of the standard flies directly in the face of the long standing tort concept that the tortfeasor takes his victim as he finds him.<sup>90</sup>

Aside from the problems with the reasonable man standard, there is an even more basic problem. In all cases involving physical injury, it is incumbent upon the plaintiff to establish medical proof of the injury.<sup>91</sup> However, where the injury is of an emotional nature, California does not require that sort of evidence.<sup>92</sup> It is much easier to feign an emotional injury and yet courts seem to treat this claim more leniently. It is suggested that there is no room in New York for this illogical type of decision-making.

whom defendant owes a duty); Note, *supra* note 13, at 186-87 (discussion of policy considerations of physical manifestation requirement).

<sup>86</sup> See *Molien*, 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

<sup>87</sup> See *Rodrigues v. State*, 52 Haw. 156, 472 P.2d 509 (1970).

<sup>88</sup> *Id.* at 173, 472 P.2d at 520.

<sup>89</sup> See *W. KEETON*, *supra* note 27, §§ 32-33. The theory of negligence law presupposes a uniform standard of behavior. *Id.* The reasonable person was created as a basis against which to measure the behavior of the tortfeasor. *Id.* The conduct of a reasonable person varies with the situation in which he finds himself. *Id.* If a defendant does not act as a reasonable person would have, he can be held liable for his actions which cause harm to the plaintiff. *Id.*

<sup>90</sup> See *Owen v. Rochester-Penfield Bus Co.*, 304 N.Y. 457, 460, 108 N.E.2d 606, 608 (1952); *Poplar v. Barjois, Inc.*, 298 N.Y. 62, 67-68, 80 N.E.2d 334, 337 (1948); *McCahill v. New York Transp. Co.*, 201 N.Y. 221, 223, 94 N.E. 616, 617 (1911); S. SCHREIBER, *DAMAGES IN PERSONAL INJURY AND WRONGFUL DEATH CASES* 313, 314 (1965); Note, *supra* note 13, at 196.

<sup>91</sup> See Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237 (1971). Actual medical harm to a patient must be preliminarily established in all personal injury cases. *Id.* at 1255 n.102.

<sup>92</sup> See *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 930, 616 P.2d 813, 821, 167 Cal. Rptr. 831, 839 (1980); Note, *supra* note 13, at 205.



## Emotional Distress Compensation

### IV. RESOLVING THE PROBLEM

The *Martinez* decision cannot be supported by a zone-of-danger analysis.<sup>93</sup> However, to put the case into the *Johnson* framework, and provide that where the breach causes the distress recovery should be afforded,<sup>94</sup> would be disastrous. It is submitted that this type of reasoning will lead New York into the dilemma in which California presently finds itself.

It is suggested that to effectively grant recovery to Mrs. Martinez, the court should have limited its holding to the specific facts of the case and created a new exception to the physical injury requirement rule. Alternatively, the court should have required Mrs. Martinez to show more than just a claim of emotional distress.<sup>95</sup> In creating the exception for a *Martinez* situation, the court should have analyzed the policy reasons for the rule itself,<sup>96</sup> as *Martinez* lends itself well to them. If, in the future, the New York Court of Appeals limits *Martinez* to its facts, it will effectively create this exception.<sup>97</sup> It is submitted that to do otherwise, would be to turn the area of negligence law into an arena for the dishonest plaintiff and unduly burden our justice system.

### CONCLUSION

Although a decision might appear to be balanced on principles of fairness and equity, it is important that a court apply the law in

<sup>93</sup> See *supra* notes 72-75 and accompanying text.

<sup>94</sup> See *Martinez v. Long Island Jewish Hillside Medical Center*, 122 App. Div. 2d 122, 123, 504 N.Y.S.2d 693, 694 (2d Dep't 1986). The appellate division denied a recovery. *Id.* However, Justice Gibbons, dissenting, found that the plaintiff's claim "fits squarely within the rationale of *Johnson*." *Id.* at 123, 504 N.Y.S.2d at 694 (Gibbons, J., dissenting). He focused on the duty owed to the plaintiff by the defendant. *Id.*

<sup>95</sup> See *Krause v. Graham*, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977); *Espinosa v. Beverly Hosp.*, 114 Cal. App. 2d 232, 249 P.2d 843 (1952); *Cook v. Maier*, 33 Cal. App. 2d 581, 92 P.2d 434 (1939). See also Note, *supra* note 13, at 183 (California courts have allowed nervous disorders, loss of sleep, humiliation and nausea to constitute a physical manifestation of emotional distress).

<sup>96</sup> See *supra* notes 5 and 70 and accompanying text.

<sup>97</sup> See *Tebbutt v. Virostek*, 65 N.Y.2d 931, 483 N.E.2d 1142, 493 N.Y.S.2d 1010 (1985). The *Tebbutt* court illustrated how subsequent cases can arise to limit the language of a previous holding. *Id.* at 932, 483 N.E.2d at 1143, 493 N.Y.S.2d at 1011. The court pointed out that *Johnson v. Jamaica Hosp.* limited the holding of *Johnson v. State*, to apply only to cases involving the negligent transmission of a message announcing death. *Id.* at 933, 483 N.E.2d at 1143, 493 N.Y.S.2d at 1012. See *supra* note 75.

a consistent fashion. By quickly categorizing *Martinez* as a case involving only a duty and a breach thereof, the court failed to acknowledge the importance of protecting defendants from spurious claims. If the *Martinez* holding is not limited to its specific facts, New York will lose an effective deterrent to such spurious claims.

*Edward M. Pinter*