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isfy the requirement of a fair trial without sacrificing the interest of society in upholding valid convictions.

Vincent Toomey

Torts—Recovery allowed for psychic injury resulting from observation of serious injury to family member if plaintiff in zone of danger

Over 50 years ago, Chief Judge Benjamin Cardozo defined the limits of tortfeasor liability in New York by stating that the "risk reasonably to be perceived defines the duty to be obeyed."¹⁷³ This rule has been used to justify recoveries by plaintiffs who have suffered psychic injury as a result of being in physical peril themselves,¹⁷⁴ yet New York Courts have been reluctant to extend pro-

defendant's decision to plead, but that information was not subject to mandatory disclosure under *Brady and Agurs*. 44 N.Y.2d at 79-80, 375 N.E.2d at 43, 404 N.Y.S.2d at 87; see also *People v. Ausserau*, 77 App. Div. 2d 152, 156, 432 N.Y.S.2d 940, 943 (4th Dep't 1980) ("If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial") (quoting *Agurs*, 427 U.S. at 112-13).

¹⁷³ *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928). In *Palsgraf*, a woman standing on a railroad platform was injured by a set of scales that was knocked over by the force of an explosion many feet away. *Id.* at 341, 162 N.E. at 99. The explosion occurred when a package of explosives was knocked from a passenger's arms as he jumped aboard a moving train. *Id.* at 340-41, 162 N.E. at 99. Chief Justice Cardozo reasoned that, since the plaintiff was in no foreseeable physical peril herself, there was no duty owed to her. *Id.* at 342, 162 N.E. at 101.

Dean Prosser has described *Palsgraf* as "something of a bombshell" in forsaking proximate cause and redefining the issue of foreseeability in terms of duty. W. PROSSER & W. KEETON, *HANDBOOK ON THE LAW OF TORTS* § 43, at 284 (5th ed. 1983). Indeed, the case has been written on extensively. See, e.g., Goodhart, *The Unforeseeable Consequences of a Negligent Act*, 39 *YALE L.J.* 449, 449 (1930); James, *Scope of Duty in Negligence Cases*, 47 *NEV. U.L. REV.* 778, (1953); Prosser, *Palsgraf Revisited*, 52 *MICH. L. REV.* 1, (1953). The New York courts often return to the *Palsgraf* doctrine in discussing tort liability. See, e.g., *Robinson v. Reed-Prentice*, 49 N.Y.2d 471, 483, 403 N.E.2d 440, 445, 426 N.Y.S.2d 717, 723 (1980) (Fuchsberg, J., dissenting) (law of negligence phrased by Cardozo is "right on target"); *Havas v. Victory Paper Stock Co.*, 49 N.Y.2d 381, 385-86, 402 N.E.2d 1136, 1138, 426 N.Y.S.2d 233, 236 (1980) (answers to traditional negligence problems still found in principle formulated by Cardozo); *Pulka v. Edelman*, 40 N.Y.2d 781, 785, 358 N.E.2d 1019, 1022, 390 N.Y.S.2d 393, 396 (1976) (principle expressed in *Palsgraf* determines scope of duty).

¹⁷⁴ See, e.g., *Battalla v. State*, 10 N.Y.2d 237, 239-40, 176 N.E.2d 729, 730, 219 N.Y.S.2d 34, 35-36 (1961). Prior to *Battalla* New York required that there be some physical impact preceding recovery for psychic harm. See *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 109-10, 45 N.E. 354, 354-55 (1896). In *Battalla*, the infant plaintiff was placed in defendant's chair lift by an employee of the defendant who failed to secure the strap intended to protect the occupant. 10 N.Y.2d at 239, 176 N.E.2d at 729, 219 N.Y.S.2d at 35. As a result of the employee's negligence, the infant became hysterical and suffered physical and mental injuries. *Id.* The *Battalla* Court, overruling *Mitchell*, held that a cause of action will lie for negligently caused "severe emotional and neurological disturbances with residual physical

tection to those who suffer emotional trauma¹⁷⁵ as a proximate result of witnessing the injury or death of another.¹⁷⁶ Recently,

manifestations." *Id.* at 239, 176 N.E.2d at 729, 219 N.Y.S.2d at 35.

The Court of Appeals has reaffirmed *Battalla* by holding that an individual can recover for psychic injuries resulting from another's negligence even in the absence of physical impact as long as the party seeking recovery was subjected to the fear of physical injury. See *Howard v. Lecher*, 42 N.Y.2d 109, 111, 366 N.E.2d 64, 65, 397 N.Y.S.2d 363, 364-65 (1977). It has also been held that occupants of a residence could recover against the state for the mental disturbance or fright that resulted from a "no-knock" search warrant negligently obtained by the state police even though it was unaccompanied by physical impact. *Herman v. State of New York*, 78 Misc. 2d 1025, 1031-32, 357 N.Y.S.2d 811, 817 (Ct. Cl. 1974); see also *Blair v. Union Free School Dist. No. 6*, 67 Misc. 2d 248, 248-49, 324 N.Y.S.2d 222, 223 (Dist. Ct. Suffolk County 1971) (law is unequivocal that action can lie for mental and physical injuries negligently induced).

¹⁷⁵ RESTATEMENT (SECOND) OF TORTS § 46 comments j, k (1965). The type of mental distress considered by the Restatement is the type that is so severe that no reasonable man could observe such an incident without succumbing to stress-related bodily harm. *Id.* Moreover, this emotional disturbance must be serious and verifiable. *Id.* It is left to the courts to separate serious mental disorders from trifling and frivolous ones, Note, *Torts—Expanding the Concept of Recovery for Mental and Emotional Injury*, 76 W. VA. L. REV. 176, 186 (1974), yet it is clear that what is required is something more than mere grief or mental anguish, Comment, *The Development of Recovery for Negligently Inflicted Mental Distress Arising From Peril or Injury to Another: An Analysis of the American and Australian Approaches*, 26 EMORY L.J. 647, 647 n.4 (1977). Indeed, a wide range of disturbances ranging from ulcers to death often result from severe mental shock. Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 222-26 (1944). For a discussion of sudden stress induced disease, see Selzer, *Psychological Stress and Legal Concepts of Disease Causation*, 56 CORNELL L. REV. 951 (1971).

¹⁷⁶ Comment, *An Expanding Legal Duty: The Recovery of Damages for Mental Anguish by Those Observing Tortious Activity*, 19 AM. BUS. L.J. 214, 215 n.3. (1981). The reason underlying the denial of recovery for mental distress is that no duty has been found running from the negligent defendant to the bystander who suffers psychic injury. See *Kennedy v. McKesson Co.*, 58 N.Y.2d 500, 506, 448 N.E.2d 1332, 1335, 462 N.Y.S.2d 421, 424 (1983). In the leading New York case, *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969), a mother outside the zone of danger was denied recovery for mental and resulting physical injuries caused by the shock of witnessing an automobile accident in which her 2-year old child was seriously injured. *Id.* at 611, 249 N.E.2d at 419-20, 301 N.Y.S.2d at 555. The *Tobin* Court held recovery would be barred whether or not the bystander was an eyewitness and regardless of the relationship between the victim and the bystander. *Id.* This is consistent with other New York cases denying recovery to wives for harm sustained solely as a result of the negligently sustained injuries of their husbands. See, e.g., *Bessette v. St. Peter's Hosp.*, 51 App. Div. 2d 286, 287, 381 N.Y.S.2d 339, 340 (3d Dep't 1976) (wife witnessed husband's suffering and eventual amputation of limb resulting from medical malpractice); *Smith v. Incorporated Village of Plandome*, 28 Misc. 2d 793, 794, 213 N.Y.S.2d 119, 120 (Sup. Ct. Nassau County 1961) (wife arrived at scene of fire and told of husband's injury). Recovery has also been denied to parents for psychic harm caused as a result of injury to their children. See, e.g., *Quijije v. Lutheran Medical Center*, 92 App. Div. 2d 935, 935, 460 N.Y.S.2d 600, 600-01 (2d Dep't 1983) (mother barred from recovering for emotional harm caused solely from observing baby suffer and die); *Aquilio v. Nelson*, 78 App. Div. 2d 195, 199, 434 N.Y.S.2d 520, 523 (4th Dep't 1980) (mother's injury caused by death of child too remote to be compensable); *Berg v. Baum*, 224 N.Y.S.2d 974, 975 (Sup.

however, in *Bovsun v. Sanperi*,¹⁷⁷ the Court of Appeals held that an action lies for emotional injury caused by the contemporaneous observation of the serious physical injury or death of an immediate family member, provided the plaintiff was himself subject to an unreasonable risk of bodily harm.¹⁷⁸ In *Bovsun*, the plaintiffs, a mother and daughter, were sitting in a station wagon that Jack Bovsun, the husband and father, had stopped on the side of a parkway because of mechanical difficulties.¹⁷⁹ Mr. Bovsun was at the rear of the station wagon when he and his vehicle were struck by a car negligently driven by the defendant.¹⁸⁰ Although his wife and daughter were only slightly injured and were not situated so as to witness the impact, they were both instantly aware of Mr. Bovsun's more serious injuries.¹⁸¹ In *Kugel v. Mid-Westchester Industrial Park, Inc.*,¹⁸² the companion case to *Bovsun*, a car in which the plaintiffs and their two children were riding was hit by a recklessly driven vehicle.¹⁸³ All the occupants of the car were injured,

Ct. Rockland County 1962) (parents of infant have no cause of action based on fright induced while witnessing accident). Similarly, siblings have been barred from recovery. *See Shaner v. Greece Cent. School Dist. No. 1*, 51 App. Div. 2d 662, 663, 378 N.Y.S.2d 185, 187 (4th Dep't 1976) (barring sister who discovered body of brother but did not witness suicide).

The reluctance to extend legal protection to plaintiff bystanders stems from a traditional judicial hesitancy to protect psychic injuries. McNiece, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S L. REV. 1, 9 (1949); Comment, *Negligent Infliction of Emotional Distress: Liability to the Bystander*, 11 GONZAGA L. REV. 203, 203 (1975); see also Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936). Early New York cases denied recovery in actions based solely on psychic injury. *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 107, 45 N.E. 354, 354 (1896) (fright alone cannot support an action for damages). An analysis of New York case law reveals three distinct lines of cases: those that allowed recovery for emotional harm when a duty already owed directly to the plaintiff had been breached; those that denied liability for injuries caused by shock and fear as a result of witnessing injury to another; and those that denied recovery when a duty to the plaintiff had been violated and there was physical injury to a third party that resulted in the plaintiff suffering an emotional injury. *See Kennedy v. McKesson Co.*, 58 N.Y.2d 500, 504-06, 448 N.E.2d 1332, 1334-35, 462 N.Y.S.2d 421, 423-24 (1983).

¹⁷⁷ 61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 (1984).

¹⁷⁸ *Id.* at 233, 461 N.E.2d at 850, 473 N.Y.S.2d at 364.

¹⁷⁹ *Id.* at 224, 461 N.E.2d at 844, 473 N.Y.S.2d at 358.

¹⁸⁰ *Id.* At the time of impact, Mrs. Selma Bovsun was seated in the front passenger seat and the Bovsun's daughter, Mara Beth, was in the rear seat. *Id.*

¹⁸¹ *Id.* at 224-25, 461 N.E.2d at 844, 473 N.Y.S.2d at 358. Mrs. Bovsun and her daughter were thrown about the interior of the wagon. *Id.* at 224, 461 N.E.2d at 844, 473 N.Y.S.2d at 358.

¹⁸² 61 N.Y.S.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 (1984).

¹⁸³ *Id.* at 225-26, 461 N.E.2d at 845, 473 N.Y.S.2d at 359. Plaintiff Lawrence Kugel was driving the vehicle. *Id.* at 225, 461 N.E.2d at 845, 473 N.Y.S.2d at 359. His wife, Lydia, was seated in the front passenger seat with their 1-year old daughter, Stephanie, on her lap. *Id.*

and one died soon after the accident as a result of her injuries.¹⁸⁴

In separate actions, suit was brought against the negligent drivers seeking compensation for, *inter alia*, the emotional trauma caused by witnessing injuries to immediate family members.¹⁸⁵ The trial courts in both actions dismissed the emotional distress claims, ruling that no legally recognized cause of action had been alleged.¹⁸⁶ Both cases were separately appealed and affirmed by the Appellate Division, Second Department.¹⁸⁷

On appeal, the Court of Appeals consolidated the actions and reversed,¹⁸⁸ holding that if the defendants' negligent conduct had exposed the plaintiffs to an unreasonable risk of physical injury, recovery for injuries suffered as a result of the contemporaneous observation of serious harm to an immediate family member was a proper element of damages.¹⁸⁹ Writing for the majority,¹⁹⁰ Judge

Their 4-year old daughter, also a plaintiff, also was seated in the car. *Id.*

¹⁸⁴ *Id.* at 226, 461 N.E.2d at 845, 473 N.Y.S.2d at 359. Lydia Kugel broke her clavicle in the collision, Lawrence Kugel broke his finger, and Karen, their 4-year old daughter, suffered abdominal injuries. *Id.* The 1-year old daughter sustained several severe injuries that caused her death several hours later. *Id.*

¹⁸⁵ *Id.* at 224, 461 N.E.2d at 844, 473 N.Y.S.2d at 358. In both cases, lower courts disposed of the actions on procedural grounds and therefore detailed factual records were not developed. *Id.* at 225 n.1, 461 N.E.2d at 844 n.1, 473 N.Y.S.2d at 358 n.1.

¹⁸⁶ *Id.* at 225-27, 461 N.E.2d at 845-46, 473 N.Y.S.2d at 359-60.

¹⁸⁷ See *Bovsun v. Sanperi*, 94 App. Div. 2d 711, 711, 462 N.Y.S.2d 611, 611 (2d Dep't 1983); *Kugel v. Mid-Westchester Indus. Park*, 90 App. Div. 2d 496, 496, 454 N.Y.S.2d 750, 751 (2d Dep't 1982).

¹⁸⁸ *Bovsun*, 61 N.Y.2d at 234, 461 N.E.2d at 850, 473 N.Y.S.2d at 364.

¹⁸⁹ *Id.* at 230-31, 461 N.E.2d at 848, 473 N.Y.S.2d at 362. The Court noted that the zone of danger approach is the majority rule. *Id.* at 228-29, 461 N.E.2d at 847, 473 N.Y.S.2d at 361 (citing Note, *Negligent Infliction of Mental Distress: Reaction to Dillon v. Legg in California and Other States*, 25 HASTINGS L.J. 1248, 1252 (1974); Note, *Duty, Foreseeability, and the Negligent Infliction of Mental Distress*, 33 ME. L. REV. 303, 305 (1981)); see also Comment, *Portee v. Jaffee: Dillon Comes to New Jersey*, 33 RUTGERS L. REV. 1171, 1172 (1981); Comment, *Dillon v. Legg: Extension of Tort Liability in the Field of Mental Distress*, 4 U.S.F.L. REV. 116, 120 (1969). The zone of danger approach has also been adopted by the American Law Institute as the preferred rule. See RESTATEMENT (SECOND) OF TORTS § 313(2) comment d (1965). Nevertheless, the draftsmen recommended the zone of danger approach reluctantly. See *Dziokonski v. Babineau*, 375 Mass. 555, 563, 380 N.E.2d 1295, 1300 (1978). See generally *Hopper v. United States*, 244 F. Supp. 314, 317-18 (D. Colo. 1965) (under Federal Tort Claims Act plaintiff can recover for shock with resulting injuries if within zone of danger); *Maryland v. Thomas*, 173 F. Supp. 568, 573 (D. Md. 1959) (husband could recover for fear for safety of his family in same automobile accident); *Keck v. Jackson*, 122 Ariz. 114, 115, 593 P.2d 668, 669-70 (1979) (son can recover for trauma of seeing mother injured in accident in which son also involved).

A number of cases have denied recovery when the plaintiff was not in the zone of danger. See, e.g., *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678, 684 (N.D. 1972) (recovery for shock from witnessing family member allowed if plaintiff located in zone of danger); *Guilmette v. Alexander*, 128 Vt. 116, 120, 259 A.2d 12, 15 (1969) (mother not in zone of

Jones noted that denying recovery to a foreseeable bystander merely because unlimited liability might result was no longer valid.¹⁹¹ Instead, the Court adopted a zone of danger rule reasoning that the risk of unlimited liability was effectively circumscribed through the use of this objective test.¹⁹² The Court rejected any contention that the zone of danger rule was susceptible to fraud and observed that, in any event, fear of fraud or of a proliferation of claims was not a valid basis on which to deny all claims.¹⁹³ The Court concluded that its decision was consistent with prior case law¹⁹⁴ and, therefore, did not create a new cause of action.¹⁹⁵

danger may not recover for shock caused from viewing daughter injured); *Waube v. Warrington*, 216 Wis. 603, 613, 258 N.W. 497, 501 (1935) (mother died from shock after seeing daughter run over—no recovery unless in zone of danger).

¹⁹⁰ The majority opinion, written by Judge Jones, was joined by Chief Judge Cooke and Judges Jasen and Meyer.

¹⁹¹ 61 N.Y.2d at 231, 461 N.E.2d at 849, 473 N.Y.S.2d at 363 (citing *Battalla v. State*, 10 N.Y.2d 237, 240, 176 N.E.2d 729, 730, 219 N.Y.S.2d 34, 36 (1961)).

¹⁹² *Id.* at 230, 461 N.E.2d at 848, 473 N.Y.S.2d at 362.

¹⁹³ *Id.* at 231, 461 N.E.2d at 849, 473 N.Y.S.2d at 363. Even before emotional distress had been recognized as a legitimate cause of action, virtually all jurisdictions had rejected the denial of entire classes of cases based solely on the threat of fraud. *See, e.g.*, *Immer v. Risko*, 56 N.J. 482, 493, 267 A.2d 481, 487 (1970) (interspousal tort immunity); *Rozell v. Rozell*, 281 N.Y. 106, 109, 22 N.E.2d 254, 255 (1939) (siblings). It has been asserted that the possibility of fraudulent claims, standing alone, cannot justify the denial of recovery. *See Dziokonski v. Babineau*, 375 Mass. 555, 561, 380 N.E.2d 1295, 1299 (1978). According to Dean Prosser, “[i]t is the business of the law to remedy wrongs that deserve it, even at the expense of a ‘flood of litigation,’ and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the court too much work to do.” Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 877 (1939). The New York Court of Appeals has previously rejected the fear of a “proliferation of claims” as a ground for denying a cause of action. *Tobin v. Grossman*, 24 N.Y.2d 609, 615, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558 (1969) (dictum).

¹⁹⁴ 61 N.Y.2d at 232, 461 N.E.2d at 849, 473 N.Y.S.2d at 363. The Court gave four examples of cases consistent with the *Bovsun* decision in which recovery was denied because the plaintiff was outside the zone of danger. *Id.* In *Lafferty v. Manhasset Medical Center Hosp.*, 54 N.Y.2d 277, 429 N.E.2d 789, 445 N.Y.S.2d 111 (1981), a woman was denied recovery for the emotional distress resulting from the negligent administration of a blood transfusion to her mother-in-law. *Id.* at 279-80, 429 N.E.2d at 790-91, 445 N.Y.S.2d at 112-13.

The case of *Vaccaro v. Squibb Corp.*, 52 N.Y.2d 809, 418 N.E.2d 386, 436 N.Y.S.2d 871 (1980), involved a plaintiff mother who claimed emotional and psychic harm as a result of the birth of her child who was allegedly deformed because of a drug administered to her by the defendant hospital. *Id.* at 811, 418 N.E.2d at 386, 436 N.Y.S.2d at 871 (Fuchsberg, J., dissenting). The Appellate Division, First Department, held that the mother was owed a duty because she was the doctor's patient and had herself ingested the drug, 71 App. Div. 2d 270, 277, 422 N.Y.S.2d 679, 683 (1st Dep't 1979), while the father was owed no duty because he was not in any physical danger, *id.* at 278, 422 N.Y.S.2d at 684. The Court of Appeals reversed, holding that even the mother was owed no duty. 52 N.Y.2d at 810-11, 418 N.E.2d at 386, 436 N.Y.S.2d at 871.

In *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978), the

In a dissenting opinion,¹⁹⁶ Judge Kaye asserted that the majority's holding was a departure from precedent and had, in fact, imposed a new duty upon tortfeasors.¹⁹⁷ Judge Kaye suggested that since crucial determinations in such cases are within the province of the jury, courts will almost never be able to dismiss such actions before trial.¹⁹⁸ This new duty, Judge Kaye argued, was based on an artificial rule that would eventually lead to far reaching liability.¹⁹⁹ The dissent maintained that public policy demanded the denial of bystander claims.²⁰⁰

It is suggested that, although the abandonment of the absolute bar to bystander recovery is a step in the right direction, the Court should have extended protection to all foreseeable bystanders whether or not they are within the zone of danger. It is further suggested that maintaining that a negligent defendant owes no

plaintiff was denied damages for emotional and physical injuries suffered as a result of giving birth to a baby suffering from Down's Syndrome. *Id.* at 406, 386 N.E.2d at 809, 413 N.Y.S.2d at 897. The Court contended that, had the defendant's doctor warned the mother of the existence of the abnormality (detectable by an amniocentesis test), the pregnancy would have been terminated, *id.* at 408, 386 N.E.2d at 810, 413 N.Y.S.2d at 898, yet held that denial of recovery was necessitated because to allow recovery would lead to "artificial and arbitrary boundaries." *Id.* at 413-14, 386 N.E.2d at 813, 413 N.Y.S.2d at 902; *see also* Howard v. Lecher, 42 N.Y.2d 109, 113, 366 N.E.2d 64, 66, 397 N.Y.S.2d 363, 365-66 (1977) (parents of a child born suffering from Tay-Sachs disease denied recovery for emotional injuries caused by watching their child suffer).

¹⁹⁶ 61 N.Y.2d at 233, 461 N.E.2d at 850, 473 N.Y.S.2d at 364. The Court declared this decision constituted merely an enlargement of the scope of damages already available under an existing cause of action. *Id.*

¹⁹⁷ Judge Kaye dissented in an opinion in which Judges Wachtler and Simons concurred. Judge Wachtler also wrote a separate dissenting memorandum.

¹⁹⁸ 61 N.Y.2d at 234, 461 N.E.2d at 850, 473 N.Y.S.2d at 364 (Kaye, J., dissenting). Judge Kaye believed that the majority had sidestepped the issue by suggesting that it was neither creating a new duty nor overruling prior decisions simply because a different set of facts were presented. *Id.* at 234-35, 461 N.E.2d at 851, 473 N.Y.S.2d at 365 (Kaye, J., dissenting). The real issue, Judge Kaye maintained, was whether recovery for all emotional trauma resulting from injuries to others should have a legal remedy. *Id.* at 235, 461 N.E.2d at 851, 473 N.Y.S.2d at 365 (Kaye, J., dissenting).

¹⁹⁹ *Id.* at 241, 461 N.E.2d at 854, 473 N.Y.S.2d at 368 (Kaye, J., dissenting). Taking no solace in the majority's view that the dearth of appellate opinions was a significant indication of the limited number of recoveries expected, *id.* at 229 n.7, 461 N.E.2d at 847 n.7, 473 N.Y.S.2d at 361 n.7, Judge Kaye noted that there is a large amount of litigation that stops short of appellate review and added that it was the practice of insurance carriers to pass the added costs of litigation on to consumers. *Id.* at 241, 461 N.E.2d at 855, 473 N.Y.S.2d at 369 (Kaye, J., dissenting). It should be noted that these are the same concerns that were articulated in Tobin v. Grossman approximately 15 years earlier. *See* Tobin v. Grossman, 24 N.Y.2d 609, 617, 249 N.E.2d 419, 423, 301 N.Y.S.2d 554, 559-60 (1969).

²⁰⁰ 61 N.Y.2d at 234, 461 N.E.2d at 850, 473 N.Y.S.2d at 364 (Kaye, J., dissenting).

²⁰⁰ *Id.* at 237, 461 N.E.2d at 852, 473 N.Y.S.2d at 366 (Kaye, J., dissenting).

duty to a bystander outside some objective zone of danger is no more than an arbitrary and artificial cut-off of liability²⁰¹ based on the unwarranted fear that an avalanche of claims²⁰² and unlimited liability will result.²⁰³ It is submitted that, as a matter of public

²⁰¹ Various commentators have denounced the artificiality of the zone of danger rule. See, e.g., J. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS 50-54 (1967); W. PROSSER & W. KEETON, *supra* note 173, § 55 at 334 (rule is illogical); Brody, *Negligently Inflicted Psychic Injuries: A Return to Reason*, 7 VILL. L. REV. 232, 238-39 (1961) (mechanical and irrelevant rule).

Judge Kaye noted that the zone of danger rule has also been criticized in other jurisdictions. 61 N.Y.2d at 242, 461 N.E.2d at 856, 473 N.Y.S.2d at 370 (Kaye, J., dissenting) (citing *Barnhill v. Davis*, 300 N.W.2d 104, 107 (Iowa 1981); *Dziokonski v. Babineau*, 375 Mass. 555, 564, 380 N.E.2d 1295, 1300 (1978); *Portee v. Jaffee*, 84 N.J. 88, 96, 417 A.2d 521, 525 (1980)).

The arbitrariness of the zone of danger rule can best be illustrated by the facts of the leading case rejecting the rule. See *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). In *Dillon*, the court was asked whether a mother several feet outside the zone of danger and a daughter within it could recover for psychic injury caused by observing the injury of another family member. *Id.* at 730, 441 P.2d at 914, 69 Cal. Rptr. at 74. To allow the sister to recover while at the same time denying the mother's claim, the court stated, exposed the "hopeless artificiality" of the zone of danger rule. *Id.* at 732, 441 P.2d at 915, 69 Cal. Rptr. at 75. The California Supreme Court also suggested that it was logically indefensible to rely upon the zone of danger rule while rejecting the impact rule. *Accord* 68 Cal. 2d at 733, 441 P.2d at 915, 69 Cal. Rptr. at 57. See *Rodriguez v. State*, 52 Haw. 156, 166, 472 P.2d 509, 518-21 (1970) (psychic zone of danger is necessarily larger than the zone of physical danger); see, e.g., *Toms v. McConnell*, 45 Mich. App. 647, 653, 207 N.W.2d 140, 144 (1973). By recognizing an emotional impact zone, the Court can break through the duty barrier created by *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928). See Comment, *supra* note 176, at 215.

²⁰² See W. PROSSER & W. KEETON, *supra* note 173, § 172, at 23. Courts often fear a flood of litigation when they are on the verge of extending existing legal theory. *Id.* This has been particularly true in the field of recovery for emotional trauma. See, e.g., *Tobin v. Grossman*, 24 N.Y.2d 609, 615, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558 (1969). Indeed, the New York Court of Appeals expressed such a fear when considering whether to allow claims for nervous shock without physical injury. See *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 110, 45 N.E. 354, 354 (1896); *Simons, Psychic Injury and the Bystander: The Transcontinental Dispute Between California and New York*, 51 ST. JOHN'S L. REV. 1, 12-13 (1976). It is submitted that the fear of overwhelming litigation in the *Bovsun* setting is as unreal as it was when used in defense of the privity doctrine in products liability: "Unless we confine the operation of such contracts as to the parties who entered them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." *Winterbottom v. Wright*, 10 M. & W. 109, 114, 152 Eng. Rep. 402, 405 (1842).

²⁰³ See *Kennedy v. McKesson Co.*, 58 N.Y.2d 500, 512, 448 N.E.2d 1332, 1338, 462 N.Y.S.2d 411, 427 (1983) (Jasen, J., dissenting). The fear of unlimited liability has been raised against every innovation in tort litigation, see *id.*; see also *Stone, Louisiana Tort Doctrine: Emotional Distress Occasioned by Another's Peril*, 48 TUL. L. REV. 782, 791 (1974) (courts fear opening Pandora's box), and has been the main factor in causing a majority of jurisdictions to reject claims of bystanders outside the zone of danger, see Comment, *Grimsby v. Samson: Bystander Recovery in Washington*, 12 WILLAMETTE L.J. 196, 201-02 (1975). The New York Court of Appeals, in *Tobin*, stated that the most difficult factor in allowing recovery to bystander witnesses is keeping liability within tolerable bounds. See *Tobin v. Grossman*, 24 N.Y.2d 609, 617, 249 N.E.2d 419, 423, 301 N.Y.S.2d 554,

policy, recovery should not be denied when there has been an injury.²⁰⁴

The basic objective of tort law is to afford compensation for injuries sustained.²⁰⁵ It is therefore suggested that a foreseeability approach is preferable to the zone of danger rule. Many jurisdictions have already adopted such an approach²⁰⁶ and determine the foreseeability of injury with reference to three factors: first, whether the plaintiff was located near the scene of the accident; second, whether the shock resulted from a direct emotional impact upon the plaintiff from a contemporaneous perception of the accident or from learning of the accident from others; and, third, whether the victim and the plaintiff were closely related.²⁰⁷ The

560 (1969).

²⁰⁴ In discussing public policy and how it relates to tortfeasor liability it has been noted that public policy finds expression through the "talisman of duty." W. PROSSER & W. KEETON, *supra* note 173, § 53, at 326-27. "The question of duty . . . is best expressed as 'whether the plaintiff's interests are entitled to legal protection against the defendant's conduct.'" *Pulka v. Edelman*, 40 N.Y.2d 781, 782, 358 N.E.2d 1019, 1021, 390 N.Y.S.2d 393, 395 (1976) (quoting W. PROSSER & W. KEETON, *supra* note 173, § 53, at 325). When phrased this way, it is clear that by denying the existence of a duty the Court is really denying its protection to genuine human interests that can therefore be infringed with impunity. See J. FLEMING, *supra* note 201, at 46.

²⁰⁵ W. PROSSER & W. KEETON, *supra* note 173, § 1, at 5-6; see also *Sinn v. Burd*, 486 Pa. 146, 155, 404 A.2d 672, 677 (1979).

²⁰⁶ See *Dillon v. Legg*, 68 Cal. 2d 728, 739, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 740 (1968) (first jurisdiction adopting foreseeability approach). In rejecting the zone of danger rule, the *Dillon* Court reasoned that the defendant's duty should be determined according to the foreseeability of the risk to the plaintiff. *Id.* at 738, 441 P.2d at 919-21, 925, 69 Cal. Rptr. at 79-81. Contrary to the concerns expressed by the *Bovsun* court, *Dillon* has not led to a deluge of false claims, a flood of litigation, or unlimited liability. See *Lafferty v. Manhasset Medical Center Hosp.*, 103 Misc. 2d 98, 103, 425 N.Y.S.2d 244, 247 (Sup. Ct. Nassau County 1980), *rev'd*, 79 App. Div. 2d 996, 435 N.Y.S.2d 307 (2d Dep't), *aff'd*, 54 N.Y.2d 277, 429 N.E.2d 789, 445 N.Y.S.2d 111 (1981); Simons, *supra* note 202, at 39. From 1968 to 1981, eight other jurisdictions adopted the *Dillon* approach, Comment, *supra* note 189, at 1176, and today, a total of fourteen jurisdictions have done so, *Bovsun*, 61 N.Y.2d at 227 n.4, 461 N.E.2d at 846 n.4, 473 N.Y.S.2d at 360 n.4. Commentators have noted that *Dillon* represents the modern trend. See, e.g., Comment, *Torts—Mental Distress—Liability for Negligently Inflicted Mental Distress Extended to Apply to Mother Who Witnesses Death of Her Child*, 43 N.Y.U. L. Rev. 1252, 1254 (1968) [hereinafter cited as *Torts—Mental Distress*]. Indeed, in England, far from adopting the restrictive approach followed by *Bovsun*, courts employ an analysis that is even broader than that used in *Dillon*. See, e.g., *Boardman v. Sanderson* [1964] 1 W.L.R. 1317, 1321; see also Simons, *supra* note 202, at 17-22.

²⁰⁷ *Dillon v. Legg*, 68 Cal. 2d 728, 740-41, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968). The *Dillon* court believed that the three factor test it enunciated could be used to determine the foreseeability of the injury to the plaintiff. *Id.* The three elements were first suggested by Dean Prosser. W. PROSSER & W. KEETON, *supra* note 173, § 55, at 335. Since then they have been adopted by many jurisdictions. See, e.g., *D'Amicol v. Alvarez Shipping Co.*, 31 Conn. Sup. 164, 167, 326 A.2d 129, 131 (1973); *Culbert v. Sampson's Supermarkets*, 444

jurisdictions that have adopted a foreseeability approach have considered and rejected the arguments advanced by the *Bovsun* Court.²⁰⁸ By applying these guidelines on a case-by-case basis, courts can free themselves of the mechanical rules imposed by a strict physical zone of danger rule and determine what the ordinary prudent person under the circumstances should reasonably have foreseen.²⁰⁹

In *Bovsun*, New York has moved closer to an equitable process of ascertaining liability. It is submitted, however, that implementing a traditional foreseeability analysis in this area will better serve the courts than will the creation of another set of artificial exceptions.

Christopher Nenninger

A.2d 433, 435 (Me. 1982); *Landreth v. Reed*, 570 S.W.2d 486, 489 (Tex. Civ. App. 1978).

²⁰⁸ See, e.g., *Rodrigues v. State*, 52 Haw. 156, 172, 472 P.2d 509, 519-20 (1970); *Culbert v. Sampson's Supermarkets*, 444 A.2d 433, 436-37 (Me. 1982); *Sinn v. Burd*, 486 Pa. 146, 160, 404 A.2d 672, 679-80 (1979).

²⁰⁹ See *Dillon v. Legg*, 68 Cal. 2d 728, 741, 441 P.2d 912, 921, 69 Cal. Rptr. 72, 81 (1968); *Torts—Mental Distress*, *supra* note 34, at 1253.