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### The Appellate Division, Fourth Department, Declines to Expand the Scope of the "Immediate Family" Requirement for Bystander Recovery under the Negligent Infliction of Emotional Distress Doctrine

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## DEVELOPMENTS IN THE LAW

*The Appellate Division, Fourth Department, declines to expand the scope of the "immediate family" requirement for bystander recovery under the negligent infliction of emotional distress doctrine*

In New York, one who negligently causes physical harm to another may also be liable for the emotional distress<sup>1</sup> suffered by those "immediate family" members of the victim who both witnessed the harm and were within the "zone of danger."<sup>2</sup> Unfortu-

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<sup>1</sup> See BLACK'S LAW DICTIONARY 985-86 (6th ed. 1990). Emotional distress "includes both the mental sensation of pain as well as the accompanying feelings of distress, fright, and anxiety." *Id.*

Initially, courts were reluctant to impose liability upon individuals who inflicted emotional distress on others. See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §12, at 54-55 (5th ed. 1984). See also *Leong v. Takasaki*, 520 P.2d 758, 761 (Haw. 1974) (stating traditional tort law would bar recovery for mental distress in absence of physical injury); *Paugh v. Hanks*, 451 N.E.2d 759, 763 (Ohio 1983) (stating courts have traditionally been reluctant to award compensation for mental suffering); *Burroughs v. Jordan*, 456 S.W.2d 652, 653-59 (Tenn. 1970) (denying recovery for mental distress suffered by plaintiff upon hearing her family was in car accident); *McMahon v. Bergeson*, 101 N.W.2d 63, 71 (Wis. 1960) (denying defendant recovery for emotional distress triggered by pre-existing susceptibility). Judicial apprehension was based primarily upon the concern that many defendants would be unduly burdened with unlimited liability, and that the floodgates of litigation would be opened to an overwhelming number of plaintiffs, many of whom would assert fictitious claims. See *Knaub v. Gotwalt*, 220 A.2d 646, 647 (Pa. 1966) (requiring physical injury for recovery of damages for emotional distress), *overruled by*, *Niederman v. Brodsky*, 261 A.2d 84, 89 (Pa. 1970); *Waube v. Warrington*, 258 N.W. 497, 501 (Wis. 1935) (concluding that allowing recovery for emotional distress by one not in physical danger would lead to fraudulent claims).

This rule was later altered in *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968), the first American case to allow bystander recovery for psychological distress resulting from the observance of another's physical harm. Julie A. Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?*, 67 WASH. L. REV. 1, 12 (1992). The New York Court of Appeals in *Bovsun v. Sanperi*, 61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 (1984), followed this rationale and allowed physically unharmed members of the victim's "immediate family" to recover because they were in the "zone of danger." *Bovsun*, 61 N.Y.2d at 233-34, 461 N.E.2d at 850, 473 N.Y.S.2d at 364.

<sup>2</sup> *Bovsun*, 61 N.Y.2d at 228, 461 N.E.2d at 847, 473 N.Y.S.2d at 361. The "zone of danger" requirement is fulfilled when the plaintiff's own safety is threatened by the defendant's negligence. *Id.* This breach of the defendant's duty to avoid placing the plaintiff at risk entitles the plaintiff to recover for *all* damages, including not only fear for his own condition, but the anguish associated with witnessing an immediate family member's suffering as well. *Id.*

nately, the term "immediate family" has never been expressly defined by any New York court.<sup>3</sup> Thus, most New York courts have been cautious in granting relief, limiting recovery for negligent infliction of emotional distress only to members of the victim's nuclear family.<sup>4</sup> Recently, in *Trombetta v. Conkling*,<sup>5</sup> the Appellate Division, Fourth Department, reaffirmed the restrictive interpretation of the "immediate family" prerequisite by refusing to expand its scope to include a "significant attachment" between an aunt and her niece.<sup>6</sup>

In *Trombetta*, Justice Doerr, writing for the court, granted the defendant's motion to dismiss an emotional distress claim<sup>7</sup> which was based on the mental anguish suffered by the plaintiff in witnessing her aunt's accidental death.<sup>8</sup> The facts of this case tested the outer limits of the vaguely sketched "immediate family" rule,

By requiring the bystander's actual fear of physical danger, the authenticity of the emotional distress claim is guaranteed. *Paugh*, 451 N.E.2d at 763. This rule has become the majority rule in this country. *Davies*, *supra* note 1, at 13; *see also* *Resavage v. Davies*, 86 A.2d 879, 883 (Md. 1952) (holding there is no liability to spectator in safe place); *Stadler v. Cross*, 295 N.W.2d 552, 555 (Minn. 1980) (declining to extend liability to persons outside zone of danger); *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678, 684 (N.D. 1972) (denying recovery for emotional distress to mother whose baby dropped when mother was outside zone of danger).

<sup>3</sup> *Trombetta v. Conkling*, 154 Misc. 2d 844, 846 586 N.Y.S.2d 461, 462 (Sup. Ct. Oneida County 1992) ("This Court has found no case in New York State which specifically defines the term "immediate family."), *rev'd*, 187 A.D.2d 213, 593 N.Y.S.2d 670 (4th Dep't 1993).

<sup>4</sup> *See* *Capolupo v. Trustees of Columbia Univ.*, (Sup. Ct. N.Y. County 1992) (denying emotional distress recovery to man after his failed rescue attempt to save fiancée who had fallen into ditch of steam and hot water), *aff'd*, 597 N.Y.S.2d 363 (1st Dep't 1993); *see also* *Delosovic v. City of New York*, 143 Misc. 2d 801, 809, 541 N.Y.S.2d 685, 691 (Sup. Ct. N.Y. County 1989) (awarding damages for emotional distress to mother who had witnessed the death of her two children), *aff'd*, 174 A.D.2d 407, 572 N.Y.S.2d 857 (1st Dep't 1991); *Bovsun*, 61 N.Y.2d at 233-34, 461 N.E.2d at 850, 473 N.Y.S.2d at 364 (allowing recovery for wife and daughter who were present while husband/father was hit by car); *Collesides v. Westinghouse Elec.*, 125 Misc. 2d 413, 415, 479 N.Y.S.2d 475, 476 (Sup. Ct. Albany County 1984) (compensating mother who watched daughter lose finger in escalator accident).

<sup>5</sup> 187 A.D.2d 213, 593 N.Y.S.2d 670 (4th Dep't 1993).

<sup>6</sup> *Id.* at 215, 593 N.Y.S.2d at 671.

<sup>7</sup> *Id.* at 216, 593 N.Y.S.2d at 671.

<sup>8</sup> *Id.* at 214, 593 N.Y.S.2d at 670. While the plaintiff and her aunt were crossing the street together, the plaintiff attempted in vain to pull her aunt from the path of defendant's tractor-trailer which eventually struck and killed the aunt upon impact. *Id.* The plaintiff alleged that, as a result of the accident, she suffered from severe depression, was unable to forget the accident, and could not even look at her aunt's photograph or speak her name. *Trombetta v. Conkling*, 154 Misc. 2d 844, 845, 586 N.Y.S.2d 461, 461 (Sup. Ct. Oneida County 1992), *rev'd*, 187 A.D.2d 213, 593 N.Y.S.2d 670 (4th Dep't 1993). In addition, the plaintiff suffered from a series of phobias, and had been treated by several psychologists and psychiatrists. *Id.* at 845, 586 N.Y.S.2d at 461-62.

which had never before been challenged by an aunt-niece relationship.<sup>9</sup> However, the court asserted that a bright-line rule was needed in order to constrain the number of persons eligible to recover for such mental distress<sup>10</sup> and therefore strictly construed the term "immediate family," equating it with present nuclear family.<sup>11</sup>

In so doing, the Appellate Division reversed an expansive decision by the Oneida County Supreme Court<sup>12</sup> which had concluded that the actual strength of the relationship between the parties should govern the court's decision, not the mere label given that relationship.<sup>13</sup> In that case, Justice Shaheen, writing for the Supreme Court, explained that this aunt-niece relationship did in fact fall within the "immediate family" framework<sup>14</sup> since the aunt was a mother figure to her niece.<sup>15</sup>

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<sup>9</sup> 187 A.D.2d at 215, 593 N.Y.S.2d at 671. This is a case of first impression, for the cases concerning emotional distress recovery by bystanders who have not sustained physical injury have primarily dealt with nuclear family members, and have never before addressed an aunt-niece relationship. *Id.* As a result, there is no New York case law defining the term "immediate family." *Trombetta*, 154 Misc. 2d at 846, 586 N.Y.S. at 462; *see also* *Bovsun v. Sanperi*, 61 N.Y.2d 219, 234 n.13, 461 N.E.2d 843, 850 n.13, 473 N.Y.S. 357, 364 n.13 (1984) ("[W]e need not now decide where lie the outer limits of 'the immediate family.'").

<sup>10</sup> *Trombetta*, 187 A.D.2d at 215, 593 N.Y.S.2d at 671 ("[B]right line limits need to be drawn in the area of bystander recovery . . ."). Due to its trepidation that defendants' duties might become "unreasonably extend[ed]," that evidentiary issues could become "difficult", and that fictitious claims might be asserted, the court refused to extend recovery to those persons with whom plaintiff has a strong emotional bond. *Id.*

<sup>11</sup> *See id.* (declining to adopt other states' rule that permits plaintiffs to prove strength of relationship with deceased or injured person).

<sup>12</sup> *Trombetta*, 154 Misc. 2d at 847, 586 N.Y.S.2d at 463.

<sup>13</sup> *Id.* at 847, 586 N.Y.S.2d at 463. "On the particular facts above, which reveal a significant attachment between the plaintiff and the deceased more in the nature of a mother/child relationship rather than an aunt/niece relationship, the plaintiff should be considered 'immediate family' to her aunt . . ." *Id.* This court interpreted the failure of the New York Court of Appeals to clearly define "immediate family" as not having "foreclosed the possibility that aunts, uncles or other family members may be considered 'immediate family.'" *Id.* at 846, 586 N.Y.S.2d at 462. Noting the limited definition of "immediate family" provided in *Bovsun*, the *Trombetta* court based its decision on a popular treatise as well as case law from Hawaii and Nebraska. *Id.* at 846-47, 586 N.Y.S.2d at 462. The court then examined the broad approach taken by courts in other jurisdictions in order to ascertain whether there existed a "significant attachment" or "intimate familial relationship" that would warrant the award of damages for emotional distress. *Id.* at 847, 586 N.Y.S.2d at 462.

<sup>14</sup> *Id.* at 847, 586 N.Y.S.2d at 463. The plaintiff's mother had died when the plaintiff was a child; thus, her aunt became like a mother to her. *Id.* at 845, 586 N.Y.S.2d at 461. The plaintiff and her aunt had always lived near each other, and at the time of the accident, were next-door neighbors. *Id.* The two were in daily contact with each other; they ate breakfast together, spoke by phone two to three times each day, shopped together, and spent time with each other every evening. *Id.* at 845, 586 N.Y.S.2d at 463.

<sup>15</sup> *Id.* at 847, 586 N.Y.S.2d at 463; *see also supra* note 14 (describing strong relationship

It is submitted that the Appellate Division unnecessarily restricted recovery to "immediate family" members by ignoring the relationship between the plaintiff and the victim in blind adherence to the traditional rule.<sup>16</sup> It is further asserted that the Supreme Court was correct in concluding that the strength of the emotional relationship between the victim and the plaintiff should be the salient inquiry in determining whether a plaintiff should recover.<sup>17</sup>

Generally, public policy considerations factor into questions

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between aunt and niece). Based on the extent of their relationship, the court found that there was a "significant attachment" between the aunt and niece, much like a parental relationship, and thus considered the plaintiff to be an "immediate family" member to her deceased aunt. *Trombetta*, 154 Misc. 2d at 847, 586 N.Y.S.2d at 463. The plaintiff's mother died when the plaintiff was a child; thus, her aunt became like a mother to her. *Id.* at 845, 586 N.Y.S.2d at 461. The plaintiff and her aunt always lived near each other, and at the time of the accident, were next-door neighbors. *Id.* The two were in daily contact with each other; they ate breakfast together, spoke by phone two to three times each day, shopped together, and spent time with each other every evening. *Id.*

<sup>16</sup> See Timothy M. Cavanaugh, Comment, *A New Tort in California: Negligent Infliction of Emotional Distress (For Married Couples Only)*, 41 HASTINGS L.J. 447, 448 (1990) (criticizing California's approach in denying recovery to deserving plaintiffs). Some courts which allow only certain relatives to recover recognize that they may be preventing recovery by those with strong emotional attachments who suffer a compensable level of harm. *Id.* at 466-67. The court, in *Paugh v. Hanks*, 451 N.E.2d 759, 766-67 (Ohio 1983), observed that a "strict blood relationship" was unnecessary for recovery. "Certainly a plaintiff who is affianced with the victim could very well be described as a close relation." *Id.* at 767; see also David J. Leibson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. FAM. L. 163, 199 (1976-77) (suggesting that plaintiff/fiance should be allowed to recover for emotional distress upon proving sufficiently close relationship with victim).

<sup>17</sup> See Harvey Teff, *Liability for Negligently Inflicted Nervous Shock*, 99 LAW Q. REV. 100, 104 (1983). The immediate family requirement was created as an assurance that the plaintiff's emotional harm was both foreseeable and serious in fact. See *id.*

A number of states presently follow an approach whereby the strength of the emotional bond between the plaintiff and victim is a significant factor in determining the plaintiff's eligibility for recovery. See *Paugh*, 451 N.E.2d at 766; *James v. Lieb*, 375 N.W.2d 109, 114 (Neb. 1985); see also *Leong v. Takasaki*, 520 P.2d 758, 766 (Haw. 1974) (allowing child to sue for mental distress caused by witnessing death of stepgrandmother). But see *Barnhill v. Davis*, 300 N.W.2d 104, 108 (Iowa 1981) (restricting recovery to victim's spouse and those related in second degree of consanguinity); *Gates v. Richardson*, 719 P.2d 193, 200-01 (Wyo. 1986) (limiting recovery to bystanders who would be eligible to recover under state's wrongful death statute).

The Ohio courts do not require a strict blood relationship and have determined that the closer the family relationship, the more foreseeable the plaintiff's emotional distress will be. *Paugh*, 451 N.E.2d at 766-67. Rather than require a "certain degree of consanguinity," the Nebraska courts examine the "marital or intimate familial relationship between the plaintiff and the victim." *James*, 375 N.W.2d at 115. In Hawaii, each relationship is evaluated on a case-by-case basis, and recovery may be awarded even to those who are not blood relatives, but can prove that they have suffered severe emotional harm. *Leong*, 520 P.2d at 766.

concerning limitation of liability.<sup>18</sup> The policy underlying all tort actions requires the tortfeasor to compensate those harmed.<sup>19</sup> This policy, however, must be balanced against the countervailing policy of establishing a definitively foreseeable range of liability.<sup>20</sup> In the tort of negligent infliction of emotional distress, this balance is struck by compensating the bystander's harm only when there is a deep emotional bond between the bystander and the victim.<sup>21</sup> It is submitted that in denying recovery to those deserving plaintiffs who are emotionally close to the victim but not within that vic-

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<sup>18</sup> See, e.g., *DeAngelis v. Lutheran Medical Ctr.*, 58 N.Y.2d 1053, 1055, 449 N.E.2d 406, 407, 462 N.Y.S.2d 626, 627 (1983) (emphasizing how policy considerations determine limits of liability in tort actions); *Thing v. La Chusa*, 771 P.2d 814, 827 (Cal. 1989) ("policy considerations justify restrictions on recovery for emotional distress"); *Pulka v. Edelman*, 40 N.Y.2d 781, 786, 358 N.E.2d 1019, 1023, 390 N.Y.S.2d 393, 397 (1976) (using public policy to decline to extend liability of garage owners to passing pedestrian struck by exiting patron).

<sup>19</sup> See, e.g., *Gates*, 719 P.2d at 198 ("general policy in favor of imposing the loss on the negligent tortfeasor rather than the innocent victim"); Linda M. Paul, Note, *Masaki v. General Motors Corp.: Negligent Infliction of Emotional Distress and Loss of Filial Consortium*, 12 U. HAW. L. REV. 215, 235 (1990) (noting that victims should not have to pay for negligent acts of wrongdoers); Carolyn J. Smilie, Note, *Mesa v. Burke: Mental Anguish Damages for Witnessing Injury to a Close Relation*, 48 LA. L. REV. 1005, 1012 (1988) (emphasizing tort goals of compensating true injury while denying recovery to simply strategic claims); William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 877 (1939) (asserting that wrongs are to be remedied even if "flood of litigation" may ensue).

<sup>20</sup> See *Elden v. Sheldon*, 758 P.2d 582, 588 (Cal. 1988) (en banc) (recognizing "need to draw a bright line" of liability due to difficulty in distinguishing between close emotional relationships and those bound by blood or marriage). Because of the difficulty in proving mental distress, arbitrary line-drawing is the only effective way to limit liability. See *Tobin v. Grossman*, 24 N.Y.2d 609, 618, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 354 (3d ed. 1964)). This arbitrary method of limiting liability is designed to prevent a multiplicity of actions and damages. *Elden*, 758 P.2d at 588 (citing *Borer v. American Airlines, Inc.*, 563 P.2d 858, 863 (Cal. 1977) (en banc)); see also *Thing*, 771 P.2d at 828 (concluding that such concerns justify family recovery to close blood or marital relations); *Tobin*, 24 N.Y.2d at 618, 249 N.E.2d at 424, 301 N.Y.S.2d at 561 (noting "the purpose of holding strict rein on liability"). But see *Amaya v. Home Ice, Fuel and Supply Co.*, 379 P.2d 513, 524 (Cal. 1963) (predicting that problems may arise when one emotionally harmed, but not qualifying under narrow definition of close relation is emotionally closer to victim than those falling within protected category).

<sup>21</sup> *Portee v. Jaffee*, 417 A.2d 521, 526-27 (N.J. 1980); Leibson, *supra* note 16, at 196. The medical community is in agreement that the most important factor in experiencing emotional distress is the strong emotional tie between the victim and the bystander, so that the loss of the victim leaves a great void in the life of the plaintiff. *Id.*; see also Teff, *supra* note 17, at 104 (noting that "normally only when the relationship between plaintiff and victim is *in fact* exceptionally close that medical experience indicates a degree of reaction that would be compensable"). The greater the actual emotional attachment between the victim and the plaintiff, the more likely and therefore reasonably foreseeable it is that the plaintiff will suffer mental anguish. Leibson, *supra* note 16, at 196.

tim's "immediate family," the New York courts will tip the scale in favor of the policy of limiting liability. It is suggested that the New York courts allow recovery to plaintiffs who can show "significant attachment" to the victim, but who are not members of the traditional "immediate family."

New York should expand upon the concepts advanced in *Trombetta* and adopt a test similar to the disposition of the California Supreme Court in *Thing v. La Chusa*,<sup>22</sup> in which the court created a basic family requirement necessary for recovery<sup>23</sup> while providing an opportunity for extended recovery in "exceptional circumstances."<sup>24</sup> In adopting this method, the New York Court of Appeals could retain the basic "immediate family" standard as an important guideline,<sup>25</sup> while providing an exception that would permit recovery by plaintiffs who meet the higher burden of proving their "significant attachment" to the victims.<sup>26</sup> Accordingly,

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<sup>22</sup> 771 P.2d 814 (Cal. 1989). The *Thing* court narrowed the broad foreseeability approach previously used by the California courts under which plaintiffs were not required to prove any particular factors as prerequisites for recovery. *Id.* at 830. In contrast, the new approach set out three firm requirements for bystander recovery: a close relationship to the victim, presence at the scene of the injury in conjunction with an awareness of the harm being caused the victim, and resulting severe emotional distress. *Id.* at 829-30. This new approach was adopted in order to clarify the scope of recovery for this tort and to prevent limitless liability. *Id.* at 825-26.

<sup>23</sup> *Id.* at 829. Under the California approach, a bystander may recover for the negligent infliction of emotional distress if he has a close relationship with the injury victim. *Id.*; see *supra* note 22. In a footnote, the *Thing* court indicated that such close relationships are basically limited to household relatives, parents, siblings, children, and grandparents. *Thing*, 771 P.2d at 829 n.10.

<sup>24</sup> *Thing*, 771 P.2d at 829. In clarifying the scope of the relationship requirement, the *Thing* court stated that "[a]bsent exceptional circumstances" bystander recovery would be limited to nuclear family members. *Id.* However, the court did not clarify what would constitute an "exceptional circumstance." See *id.*

<sup>25</sup> See *James v. Lieb*, 375 N.W.2d 109, 115 (Neb. 1985) (requiring "marital or intimate familial relationship"); *Portee v. Jaffee*, 417 A.2d 521, 527 (N.J. 1980) ("[M]arital or intimate familial relationship is therefore an essential element of a cause of action for negligent infliction of emotional distress.") (footnote omitted); *Ramirez v. Armstrong*, 673 P.2d 822, 825 (N.M. 1983) ("The tort of negligent infliction of emotional distress is a tort against the integrity of the family unit."); *D'Ambra v. United States*, 338 A.2d 524, 531 (R.I. 1975) ("Personal relationship may link people together more tightly, if less tangibly, than any mere physical and chronological proximity."); see also *Gates v. Richardson*, 719 P.2d 193, 198 (Wyo. 1986) (as relationship between victim and witness becomes more attenuated, mental harm becomes less plausible).

<sup>26</sup> See *James*, 375 N.W.2d at 115, *Trombetta v. Conkling*, 154 Misc. 2d 844, 846, 586 N.Y.S.2d 461, 462 (Sup. Ct. Oneida County 1992), *rev'd*, 187 A.D.2d 213, 593 N.Y.S.2d 670 (4th Dep't 1993); *Leibson*, *supra*, note 16, at 198-99. Although the great majority of emotional distress suits will involve nuclear family members, such a rule seeks to compensate all those who actually have a bond with the victim equal to that of an "immediately family"

those plaintiffs who have a bond with the victim sufficient to trigger a compensable level of emotional distress, but who are not part of the "immediate family," would not be summarily precluded from recovery.

A bystander's mental distress is directly correlative to the strength of the bond between that bystander and the victim. Therefore, recovery should logically be based on exactly that, the strength of the bond. A rule which blindly restricts recovery to "immediate family" members ignores many strong relationships and therefore violates this syllogism. In order to equitably measure and compensate the mental anguish suffered by bystanders, the New York Court of Appeals should adopt a test which provides for a case-by-case determination of those relationships that are not within the "immediate family," but still involve a "significant attachment." This approach will help ensure that *all* those with truly special relationships are adequately compensated.

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