

# Liability of Health Care Providers for the Emotional Injuries of “Bystanders”

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## Introduction

Theories of recovery for so-called “bystander claims” have evolved over more than one hundred years.<sup>1</sup> Today in New York, bystanders can recover damages from health care providers and other private parties for their emotional distress caused by witnessing the death or injury of a family member.

Part I of this article explores the evolution of American jurisprudence on bystander claims, with particular focus on New York. It explains the “zone of danger” rule and the elements required for recovery under the rule in New York. Part II reviews how New York courts have applied the zone of danger rule and explains how a direct duty of care running from the health care provider to the plaintiff circumvents the rule through the application of traditional tort principles. Part III looks specifically at the development and current status of theories of recovery for emotional distress in traditional negligence and medical malpractice cases, in cases involving loss or disappearance of a patient, and in obstetrical cases, including miscarriage, stillbirth, and *in utero* injuries.

## Part I

### A. Early New York Jurisprudence on Emotional Distress Claims for Acts Directed Toward Third Persons

At the end of the 19th century, New York courts established two rules on recovery for emotional distress: (1) damages for emotional distress were disallowed unless accompanied by a physical injury;<sup>2</sup> and (2) there was no recovery for emotional distress resulting from the witnessing of a death or injury of a third party, unless plaintiff also suffered personal injuries.<sup>3</sup>

The first rule remained good law in New York until 1961, when it was overruled in *Battalla v. State of New York*.<sup>4</sup> In overruling the 1896 doctrine, the New York Court of Appeals noted that the rule “has been thoroughly repudiated by the English courts which initiated it, rejected by a majority of American jurisdictions, abandoned by many which originally adopted it, and diluted, through numerous exceptions, in the minority which retained it.”<sup>5</sup> The *Battalla* court allowed an infant plaintiff to recover for “severe emotional and neurological disturbances with residual physical manifestations” that resulted from the negligence of a state ski resort employee who failed to properly strap the child into a chair lift.<sup>6</sup> Put differently by a later court, “one may have a cause of action for injuries sustained although precipitated by a negligently induced mental trauma without physical impact.”<sup>7</sup>

The second rule, which barred recovery for emotional distress resulting from the witnessing of a death or injury to a third party, without accompanying injury to plaintiff,<sup>8</sup> remained good law in New York until the mid-1980s, but California was first to reject it in 1968.

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In *Dillon v. Legg*, a closely divided California Supreme Court overruled its own recent precedent to permit a mother to recover damages for the emotional distress she suffered from seeing her child struck by a car and fatally injured in a crosswalk.<sup>9</sup> The decision turned on the foreseeability of the emotional harm, which the court described as the “chief element” in determining whether the defendant owed a duty to the plaintiff.<sup>10</sup> If a duty is owed, the plaintiff could recover for emotional injuries alone.

The *Dillon* court enunciated three factors to be considered in deciding whether emotional harm from a defendant’s negligence is foreseeable, and thus gave rise to a duty owed to a plaintiff:

- (1) Whether plaintiff was located immediately near the scene of the accident;
- (2) Whether plaintiff’s shock resulted from a direct emotional impact resulting from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence; and
- (3) Whether plaintiff and victim were closely related, as contrasted with the absence of any relationship or the presence of only a distant relationship.”<sup>11</sup>

Three dissenting California justices, including Chief Justice Traynor, warned that the majority was “embarking upon a first excursion into the fantastic realm of infinite liability,”<sup>12</sup> but the majority opined that a case-by-case analysis using the three guidelines “will not expose the courts to false claims or a flood of litigation.”<sup>13</sup>

The year following *Dillon*, the New York Court of Appeals heard *Tobin v. Grossman*.<sup>14</sup> In *Tobin*, a mother sought damages for emotional injuries occasioned by shock and fear for her young child, who was struck by an automo-

bile and seriously injured. The accident occurred when the mother left the child unattended outside, and was herself inside a neighbor's home. She did not see the accident, but she heard brakes screeching, ran immediately to the accident scene and saw her injured child lying on the ground.<sup>15</sup> Faced with the *Dillon* issue—whether “duty in tort should be extended to third persons, who do not sustain any physical impact in the accident or fear for their own safety”<sup>16</sup>—the New York Court of Appeals described the dilemma as a “profound question,” because to allow recovery would create a new duty and an “an entirely new cause of action.”<sup>17</sup>

New York criticized California's “foreseeability” approach, because it lacked any rational way to limit the scope of bystander claims.<sup>18</sup> “Relatives, other than the mother, such as fathers or grandparents, or even other caretakers, equally sensitive and as easily harmed, may be just as foreseeably affected [,] [h]ence, foreseeability would, in short order, extend...ultimately to affected bystanders.”<sup>19</sup> The *Dillon* court's three guidelines, it said, were of little help in “holding strict rein on liability”<sup>20</sup> and it was particularly critical of the first two *Dillon* factors. “Any rule based solely on eye witnessing the accident could stand only until the first case comes along in which the parent is in the immediate vicinity but did not see the accident.”<sup>21</sup> It further described the *Dillon* guidelines as “inconsequential[,] for the shock more likely results from the relationship with the injured party than what is seen of the accident.”<sup>22</sup>

Ultimately, the *Tobin* court denied recovery of damages for emotional distress without accompanying physical injury “regardless of the relationship and whether the [sic] one was an eyewitness to the incident which resulted in the direct injuries,” and it refused to recognize this new, proposed cause of action.<sup>23</sup>

In 1975, the Court of Appeals distinguished *Tobin* in a case against a state hospital, in which the hospital erroneously notified plaintiff that her mother, a patient in the facility, had died.<sup>24</sup> The Court of Claims had denied punitive damages, but had awarded plaintiff damages for the funeral expenses she incurred and for emotional distress.<sup>25</sup> The Appellate Division modified the award, limiting it to plaintiff's monetary loss for funeral expenses.<sup>26</sup> The Court of Appeals held that the hospital had a direct duty to advise the proper next of kin of patient deaths, and thus owed a direct duty to plaintiff, upon whom its negligence was inflicted and for which she could recover.<sup>27</sup>

## **B. A New Era: The New York “Zone of Danger” Rule**

After *Tobin*, New York courts “hesitated for a long time before recognizing a very circumscribed right of recovery for bystanders based on the negligent infliction of emotional distress.”<sup>28</sup> But recognition did finally occur in 1984, when a sharply divided Court of Appeals adopted the “zone of danger” rule in *Bovsun v. Sanperi*, and for

the first time allowed a bystander to recover for purely emotional injury.<sup>29</sup>

In *Bovsun*, mother, father and child were motoring in their station wagon on the Southern State Parkway in Long Island when they experienced mechanical problems and pulled off to the side of the road. Father got out of the car, went to the rear of the vehicle and opened the tailgate. A vehicle struck him from behind and he was pinned between the two cars. Mother and child did not see the accident, but they felt the impact and both saw that father was seriously injured.<sup>30</sup>

The Court of Appeals recognized the “zone of danger” rule as the majority rule in the United States, “which allows one who is himself or herself threatened with bodily harm in consequence of the defendant's negligence to recover for emotional distress resulting from viewing the death or serious physical injury of a member of his or her immediate family.”<sup>31</sup> Explicitly rejecting the earlier *Battalla* arguments—that the rule invites fraudulent claims or that emotional injuries are incapable of sufficient proof<sup>32</sup>—the Court said that in this case, the plaintiffs were within the “zone of danger” because they too were subject to an unreasonable risk of physical injury.<sup>33</sup> It 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.<sup>34</sup>

The *Bovsun* majority said it was not creating a new cause of action, but merely recognizing a plaintiff's right to recover from a defendant from whom a duty of care is owed.<sup>35</sup> Adoption of the zone of danger rule relieved the apprehension of unlimited liability to bystanders who might feign emotional injury, and the Court laid out three separate elements that must be met for liability to attach:

1. Defendant's conduct is negligent;
2. Defendant's negligent conduct created an unreasonable risk of bodily harm to plaintiff and the conduct is a substantial factor in bringing about injuries in consequence of fright from his or her contemporaneous observation of physical injury or death inflicted by the defendant's conduct in plaintiff's presence; and
3. The Defendant's negligent conduct was inflicted upon a member of plaintiff's immediate family.<sup>36</sup>

## Part II

### A. The *Bovsun* Elements as Applied by Later Courts

#### 1. Defendant's Negligence and a Direct Duty of Care

The first element, that a defendant's conduct must be negligent, is determined under traditional tort principles.<sup>37</sup> Accordingly, in cases where the duty of care is owed directly to the person seeking recovery for emotional injuries, the courts will permit such recovery under traditional tort law principles.

For example, in *Moreta v. NYC Health & Hosp. Corp.*, an infant plaintiff who contracted tuberculosis sued defendants for discontinuing his mother's tuberculosis medication while she was pregnant. Experts testified that failure to treat active tuberculosis exposes an infant to a 50% chance of contracting the disease in its first year of life. The court said it was foreseeable that the infant would contract tuberculosis soon after its birth, therefore defendants owed a duty of care to the plaintiff *in utero*.<sup>38</sup>

In *Perry-Rogers v. Obasaju*, the defendant mistakenly implanted the plaintiffs' embryo into another patient's uterus.<sup>39</sup> The court reasoned that the plaintiff parents were not seeking damages for the emotional injuries related to birthing, but rather from "their being deprived of the opportunity of experiencing pregnancy, prenatal bonding and the birth of their child, and by their separation from the child for more than four months after his birth," and held that the defendant owed a duty of care directly to the plaintiffs.<sup>40</sup>

The duty of care was also found to run from health care provider to the patient mother in *Garcia v. Lawrence Hospital*, where the mother fell asleep on top of her baby and smothered it to death. The plaintiff mother was medically sedated when hospital staff brought her newborn baby to breastfeed and they left her unattended with the infant. Although she was found to have no cause of action under the *Bovsun* zone of danger rubric, the court concluded that the hospital owed and breached its duty of care, and the direct result of that breach was emotional harm.<sup>41</sup>

The Fourth Department also explored the issue of duty of care and to whom it is owed in *Shaw v. QC Medi New York, Inc.*<sup>42</sup> In *Shaw*, the plaintiffs' daughter, born with severe and profound physical impairments, was ventilator dependent and required 24-hour nursing care. Her trachea tube became dislodged when one of the defendant's nurses was attending to her care, causing an oxygen deprivation. The plaintiff mother witnessed the incident and saw her child sweating profusely, turn very blue in color, and slip into near unconsciousness, although the child recovered and sustained no permanent injury.

The plaintiff parents brought an action for negligent infliction of emotional distress, arguing that the mother

was in the zone of danger when the incident occurred, therefore no allegation or proof of breach of an independent duty by the defendant owed to the plaintiff was required.<sup>43</sup> The plaintiffs also asserted that their prior written notice to the defendants expressing concerns about the child's care gave rise to an independent duty of care. They also argued that the stress experienced by the plaintiff mother, a diabetic, "is literally killing her."<sup>44</sup>

The defendants, citing *Zea v. Kolb*, argued that speculative injuries satisfied no element of the zone of danger rubric, and exacerbation of the plaintiff's diabetic condition was not a bodily harm suffered within the zone of danger nor was it the same harm suffered by her daughter.

The court commenced its analysis by noting:

The issue of what duty is owed to third parties in a medical malpractice setting is a troubling one. Courts have been reluctant to hold a medical provider liable to the patient's family for emotional distress as a result of malpractice in treating the patient [citations omitted]...

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The Court of Appeals has taken a very restrictive view toward third-party liability in medical malpractice cases.<sup>45</sup>

Ultimately, the court dismissed the claim for emotional distress on grounds that the mother was not within the zone of danger, and it refused to extend the *Bovsun* liability on policy grounds.

To permit liability under these circumstances would create untold numbers of claims by third parties. Familial concerns are present in most instances involving relationships between health care providers and patients.... Were we to permit such liability as is sought by plaintiffs herein, medical providers would necessarily be concerned with matters unrelated to their treatment of patients.<sup>46</sup>

Courts have also declined to extend a health care provider's duty of care to a husband or father because it could "expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs."<sup>47</sup> Consequently, a husband's or father's claim for emotional distress is subject to the same "zone of danger" proofs as would be required of any other bystander. Frequently, fathers and husbands are able to satisfy more of the requirements than ordinary bystanders, including being immediate family, contemporaneously observing the death or serious injury, and suffering a serious and verifiable emotional injury from this observation. But unless he can also demonstrate that

he was exposed to an unreasonable risk of bodily injury or death, his claim will be dismissed, as the following three cases illustrate.

In *Reed v. Cioffi, Seftel & Soni, P.C.*, the plaintiff claimed emotional distress from observing his wife's death and the stillbirth of his daughter, both of which resulted from the defendants' alleged obstetrical malpractice. His claim was dismissed because there was no showing that the defendants' negligence exposed him to unreasonable risk of physical injury such that he was within the zone of danger.<sup>48</sup>

In *Schram v. Herkimer Memorial Hospital*, a mother was left alone in the delivery room with her husband.<sup>49</sup> When she began to deliver her baby, no medical personnel were present and her husband assisted. The baby was born with the umbilical cord wrapped around his neck, suffered oxygen deprivation and died the next day. The husband's claim for the emotional distress he suffered from witnessing his child struggle to breathe failed, because he was not within the zone of danger and exposed to any risk of physical injury, nor did he allege that he suffered physical injuries.<sup>50</sup>

Similarly, in *Saguid v. Kingston Hospital*, the key element, being within the zone of danger and at risk of personal injuries, was also missing. In *Saguid*, as a result of an obstetrician's alleged malpractice, a baby died two days after birth.<sup>51</sup> In dismissing the father's claims for emotional distress the court said "he was merely a bystander and was not personally at risk of any physical injury; plainly, he cannot be said to have been in the 'zone of danger.'"<sup>52</sup>

## **2. Plaintiff Must Be Within the "Zone of Danger"; Contemporaneously Observe the Physical Injury or Death Caused by Defendant's Negligence; and the Negligence Is a Substantial Factor in Causing Plaintiff's Emotional Distress**

The second element is effectively comprised of three separate parts (i) presence in the zone of danger; (ii) contemporaneous observation; and (iii) causation of plaintiff's injuries. The New York courts have dealt with all three.

### **i. Presence in the Zone of Danger**

Plaintiffs must themselves be threatened with bodily harm as a result of a defendant's negligence. Put differently, a plaintiff must have been within the zone of danger. The boundaries of that zone and the identity of the persons within it are not always clear.

#### **a. The Boundaries of the Zone of Danger**

In a traditional automobile accident case, *Zea v. Kolb*,<sup>53</sup> the plaintiff mother was ten to fifteen feet away from the defendant's vehicle when it struck her daughter, but she was never in any danger of bodily harm and was therefore clearly outside the zone of danger. Her claim

for the emotional injuries she suffered from observing the accident was denied, because allowing such recovery "would unreasonably expand bystander liability."<sup>54</sup>

Expansion of liability is carefully guarded in New York, as illustrated in *Landon v. N.Y. Hosp.*, where the defendants failed to timely diagnose bacterial meningitis in an infant, resulting in its parents' prolonged exposure to the disease.<sup>55</sup> Although the Supreme Court concluded the parents were in the zone of danger and that they were the foreseeable victims of this communicable disease, the Appellate Division said the duty of diagnosis ran from the defendants to the infant, and refused to widen its scope to allow recovery for the parents' psychic injuries. The Court of Appeals affirmed.<sup>56</sup>

Yet in *Lancellotti v. Howard*, a plaintiff who had been misdiagnosed as pregnant and who was treated for pregnancy for seven months could not recover for emotional injuries resulting from the misdiagnosis on grounds that her psychic harm was "unaccompanied by any form of physical trauma."<sup>57</sup>

Similarly, the court took a narrow approach to defining the zone of danger in *Arroyo v. New York City Health & Hosp. Corp.*, a case where two siblings were admitted to the same hospital for treatment of lead poisoning, placed in adjacent beds, and administered the same intravenous solution.<sup>58</sup> Tragically, the younger child went into cardiac arrest and died, allegedly due to the defendant's failure to properly control the flow of the intravenous solution. The other child contemporaneously witnessed the death of his sibling, feared for his own safety, and sought to recover damages for emotional injuries. Yet the court found that the two siblings were treated with two different intravenous systems, and refused to "characterize the threat of bodily injury to the older sibling and the breach of defendant's duty of care as to him as identical to that posed to and suffered by the younger sibling."<sup>59</sup> Otherwise stated, the child that survived the negligence was not within the zone of danger.

### **b. Persons Identifiable Within the Zone of Danger**

Claims for medical malpractice have been dismissed where, at the time the tort was committed, the parties were not identifiable beings within the zone of danger. For example, in *Weed v. Meyers*, the plaintiffs, individually and as parents of their two infant children, commenced medical malpractice actions against the father's ophthalmologist alleging failure to warn of the risk that plaintiffs' children could develop retinoblastoma, a hereditary form of eye cancer.<sup>60</sup> Three decades after the ophthalmologist began treating Mr. Weed, the plaintiffs had two children, both of whom were diagnosed with retinoblastoma. The court found that the causes of action on behalf of the children could not be maintained since the children were not identifiable beings within the zone of danger when the alleged medical malpractice occurred.<sup>61</sup>

The issue of whether a non-patient was an identifiable being when the tort was committed often arises when a psychiatric patient harms a third person. In *Pingtella v. Jones*, the question before the court was whether a psychiatrist treating a woman for major depression with psychotic features owed a duty of care to his patient's child. While under the psychiatrist's treatment, the patient stabbed her nine-year-old son, believing he was the devil.<sup>62</sup> Quoting a 1981 Court of Appeals decision, the Appellate Division noted that at the time a tort is committed, the defendant has an independent duty to all identifiable beings within the zone of danger.<sup>63</sup> Here, it reasoned, the patient sought treatment for severe depression, not to prevent injury to her son. Accordingly, when the alleged malpractice occurred, the child was not an identifiable being within the zone of danger and the psychiatrist owed no duty to him that was independent of the duty he owed to his patient, the child's mother.<sup>64</sup>

An opposite conclusion was reached in *Lizardi v. Westchester County Health Care Corp.*, where the father sought to recover damages for the wrongful death of his seven-month-old son who was strangled to death by his mother.<sup>65</sup> In the months before this tragedy, the mother allegedly had repeatedly informed her doctors that she had thoughts of hurting and killing her baby. The court issued an unpublished opinion denying one defendant's pre-answer motion to dismiss, on grounds that the child was an "identifiable being within the zone of danger" in view of the mother's expressed intentions to harm the child.<sup>66</sup> Thus, the defendants may have owed the child a duty of care independent of the duty they owed to the mother.

## ii. Contemporaneous Observation

Contemporary awareness, as opposed to actual visual, contemporaneous observation, can satisfy this element as illustrated in *Khan v. Hip Hospital, Inc.*<sup>67</sup> In this medical malpractice action, although the mother was awake, conscious and subject to a reasonable fear of injury during a prolonged delivery, she was under general anesthesia when her stillborn child was delivered.<sup>68</sup> The lack of contemporaneous observation was not fatal to her claim, because when she regained consciousness, her first words were, "'Can I see my baby?'" and thereafter she was taken 'in a wheelchair to see fetus in [the] morgue.'<sup>69</sup> The court found that these circumstances constituted a contemporaneous observation and allowed recovery for emotional injuries.<sup>70</sup>

## iii. Defendant's Negligence Was the Proximate Cause of Emotional Injuries

The *Bovsun* court clearly said that physical injury to plaintiff was not a precondition for recovery, so long as all required elements are satisfied.<sup>71</sup> However, the emotional injury cannot be "any trifling distress"; it must be serious, verifiable, and tied, as a matter of proximate cause, to the observation of the serious injury or death

of an immediate family member.<sup>72</sup> Medical treatment or psychological counseling is not essential to establish a serious and verifiable emotional injury, although it may be relevant to damages.<sup>73</sup>

## 3. Defendant's Negligent Conduct Was Inflicted Upon a Member of Plaintiff's Immediate Family

The *Bovsun* plaintiffs were married or related in the first degree of consanguinity to the injured or deceased person; therefore, the Court of Appeals did not need to decide "where lie the outer limits of immediate family."<sup>74</sup> Courts in later cases have struggled to precisely define to whom the term "immediate family member" applies.

The first such case came out of a lower court in the year following *Bovsun*, with a decision that a stillborn fetus was immediate family.<sup>75</sup> "Immediate family" remained limited to relatives in the first degree of consanguinity, and the Court of Appeals did not have occasion to revisit this issue until 1994 in *Trombetta v. Conkling*, where plaintiff petitioned to have an aunt, who raised the plaintiff from age eleven when her mother died and with whom she had a close relationship, declared "immediate family."<sup>76</sup> The plaintiff urged the Appellate Division to adopt Nebraska and Hawaii law, which allow plaintiffs to prove the nature of their relationships with the deceased or injured person.<sup>77</sup> The court declined to do so, stating, "[i]n our view, conditioning defendants' liability upon plaintiff's being able to prove that he or she shared a 'strong bond' with the deceased or injured person would unreasonably extend the limits of defendants' duty... and would give rise to difficult proof problems and the danger of fictitious claims."<sup>78</sup>

The Court of Appeals said it did not wish *Bovsun's* "narrow avenue to bystander recovery" to "become a broad concourse, impeding reasonable or practicable limitations."<sup>79</sup> On policy grounds, it declined to "expand the cause of action for emotional injuries to all bystanders who may be able to demonstrate a blood relationship coupled with significant emotional attachment or the equivalent of an intimate, immediate familial bond,"<sup>80</sup> and held that recovery of damages by bystanders for emotional distress should be limited only to immediate family. The court denied the plaintiff's claim despite her presence in the zone of danger.<sup>81</sup>

In 2006 in *Shipley v. Williams*, a Staten Island Supreme Court combed New York statutes for definitions of "immediate family," and found that the penal law, public health law, social services law and regulations governing the landlord-tenant relationship swept numerous individuals into the category, including ex-spouses and in-laws.<sup>82</sup> Every definition, however, included the terms "siblings" or "brothers and sisters." The court held that "a brother and sister who lived together in the same household at the time of the accident" are "immediate family."<sup>83</sup> The case was not appealed and no other reported New York

decisions have dealt with the issue of whether siblings constitute immediate family under *Bovsun*.

Generally, “immediate family” has been strictly construed, and even where the injuries to another person were particularly gruesome and fatal, a bystander cannot recover for emotional distress even if he or she witnessed the decapitation of a stranger in an elevator accident<sup>84</sup> or, as a patient in the mental health unit of a hospital, overheard the murder of another patient.<sup>85</sup>

Bystanders have also been denied recovery when the injured person was a friend, a co-worker, a grandson, and a girlfriend, because these persons were not immediate family members.<sup>86</sup> “Immediate family” also excludes the family dog and means “an immediate family member who is a person.”<sup>87</sup>

### Part III

#### A. Emotional Distress Claims Against Health Care Providers After *Bovsun* in Traditional Medical Malpractice Actions

Under the zone of danger rule, claims for negligent infliction of emotional distress in medical malpractice actions are rarely successful, because one of the *Bovsun* elements is typically missing: defendant’s negligent conduct does not generally expose a non-patient bystander to an unreasonable risk of bodily injury or death.<sup>88</sup> Moreover, since *Bovsun* did not depart from traditional tort principles, courts have been unable to extend liability for the emotional distress of third parties in medical malpractices, where the health care provider owes no duty to the third party.

This key *Bovsun* element was missing in *Colombini v. Westchester County Healthcare Corp.*, a case involving a fatal accident that occurred at a magnetic resonance imaging (“MRI”) facility, when a heavy metal oxygen tank was drawn into the magnet of the MRI machine and struck a six-year-old boy in the head as he lay inside the machine. When this occurred, the boy’s father was outside the room, but he rushed in to help extricate his son from the MRI machine. His subsequent claim for emotional distress was dismissed because there was no proof he feared for his own safety, only that he was, in his own words, “nervous” for his son’s safety.<sup>89</sup>

#### B. Emotional Distress Claims Against Medical Providers for the Disappearance or Loss of a Patient

Plaintiffs have also unsuccessfully attempted to expand *Bovsun* to recover for emotional injuries caused by the disappearance of a family member from a hospital or nursing home. In *Johnson v. Jamaica Hospital*, the court denied the parents’ claim for emotional injuries they suffered when their newborn daughter was abducted from the hospital and not recovered until nearly five months

later.<sup>90</sup> Despite the grief and mental torment the parents suffered, the Court of Appeals denied recovery on the simple ground that they were not within the zone of danger, and again expressed its policy concerns on inappropriate extension of liability under *Bovsun*.

[T]o permit recovery by the infant’s parents for emotional distress would be to invite open-ended liability for indirect emotional injury suffered by families in every instance where the very young, or very elderly, or incapacitated persons experience negligent care or treatment.<sup>91</sup>

Even when a patient disappears and is never found, plaintiffs cannot recover for emotional distress, which occurred in *Oresky v. Scharf*.<sup>92</sup> The plaintiffs’ mother, who suffered from Alzheimer’s disease, disappeared from her nursing home and was never located. Simply put, plaintiffs did not meet the *Bovsun* standards for recovery because they were not within the zone of danger and their emotional injuries did not result from contemporaneous observation of serious physical injury or death to their mother caused by the defendants’ negligence.<sup>93</sup>

#### C. Theories of Recovery for Emotional Distress in Obstetrical Cases

There existed two avenues of recovery for emotional distress suffered in childbirth cases. The first arose under *Tebbutt v. Virostek*, decided by the Third Department in 1984 and affirmed by the Court of Appeals in 1985. Under *Tebbutt* and its progeny, recovery for emotional injuries was not allowed for injury or death to the fetus or child, unless mother suffered an independent physical injury.<sup>94</sup>

In *Tebbutt*, the plaintiff mother alleged that a negligently performed amniocentesis caused the stillbirth of her baby, and inasmuch as the fetus was *in utero* when the injury occurred, she was within the zone of danger. The Third Department rejected her *Bovsun* claim, because she did not contemporaneously observe the injury to the fetus and became aware of it only several weeks later.<sup>95</sup> Moreover, it said, “even assuming the death of the fetus *in utero* was caused by defendants’ wrongful acts, absent independent physical injuries, the plaintiff wife may not recover for emotional and psychic harm as a result of the stillborn birth.”<sup>96</sup> The Court of Appeals affirmed on the same ground, noting too that plaintiff failed to establish the existence of a duty owed to her by the health care provider.<sup>97</sup>

After *Tebbutt*, recovery for emotional distress was denied in obstetrical medical malpractice cases absent a showing that mother sustained an independent physical injury: (i) that was distinct from injuries of the fetus,<sup>98</sup> (ii) that extended beyond injury normally attendant to childbirth,<sup>99</sup> and (iii) that was an injury unassociated with routine medical procedures used during labor, prolonged labor, and delivery.<sup>100</sup>

The second theory, the zone of danger rule controlled by *Bovsun*, has rarely been found to be applicable “in actions arising out of fetal injuries unaccompanied by independent physical injury to the mother.”<sup>101</sup> Generally, the insurmountable hurdle is the same one that obstructs bystanders in typical medical malpractice cases—the plaintiff mothers cannot demonstrate their presence within the zone of danger, which is a prerequisite to recovery for emotional injuries.

However, in *Khan v. Hip Hosp.*, *supra*, the alleged medical malpractice was so egregious that the plaintiff was able to defeat a summary judgment motion disputing her presence in the zone of danger because she was “subject to an unreasonable risk of bodily injury by negligent conduct...”<sup>102</sup> Indeed the court said plaintiff “was not merely a ‘bystander’ but was as much a victim of the defendants’ alleged malpractice as the stillborn fetus.”<sup>103</sup>

Contrast *Khan* with *Miller v. Chalom*, where the mother claimed she was in the zone of danger because her doctor accidentally severed a portion of the baby’s finger while performing an episiotomy.<sup>104</sup> The episiotomy, a medical procedure used routinely during labor and delivery, was not found by the court to expose the mother to an unreasonable risk of physical injury, and therefore, she could not recover damages for emotional distress under the zone of danger rule. As the court stated, “[e]ven if the ‘zone of danger’ rule was applicable, there is simply no evidence that [the mother] was exposed to an unreasonable risk of bodily harm during labor and delivery, despite the obvious injury to the child.”<sup>105</sup>

The court permitted recovery of damages for emotional injuries in *Prado v. Catholic Med. Ctr. of Brooklyn & Queens*, a case where a mother delivered a stillborn child. However, recovery was for the mother’s legitimate fear for her own physical injury—the rupture of a previously successful recto-cystocele repair—not for her emotional injuries associated with delivery of a stillborn child, and not because pain associated with a difficult childbirth was an independent injury or placed her in the zone of danger.<sup>106</sup>

## 1. The Landmark Decision of *Broadnax v. Gonzalez*

For 20 years after *Tebbutt*, plaintiffs’ attempts to extend *Bovsun* to emotional damages arising from fetal injury were explicitly rejected by New York courts,<sup>107</sup> but two decades after *Tebbutt*, the Court of Appeals was no longer able to defend *Tebbutt*’s logic or reasoning,<sup>108</sup> because it could not withstand the “cold light of logic and experience” and did not fit comfortably in New York jurisprudence.<sup>109</sup>

The problem, said the Court of Appeals, was that *Tebbutt* rendered a “peculiar result” by exposing medical caregivers to malpractice liability for *in utero* injuries when the fetus survived, but it immunized them against any liability when their malpractice caused a miscar-

riage or stillbirth.<sup>110</sup> The fetus was consigned to a state of “juridical limbo” because the deceased fetus could not bring suit, and since that was true, “it must follow in the eyes of the law that any injury here was done to the mother.”<sup>111</sup>

Thus, in the seminal case of *Broadnax v. Gonzalez* decided in 1994, the Court of Appeals expressly overruled *Tebbutt*, and held that “even in the absence of an independent injury, medical malpractice resulting in miscarriage or stillbirth could be construed as a violation of a duty of care to the expectant mother, entitling her to damages for emotional distress.”<sup>112</sup> This decision fundamentally changed the law in New York in situations where there was a miscarriage or stillbirth.

Two months after the *Broadnax* decision, the Second Department considered *Sheppard-Mobley v. King*.<sup>113</sup> An obstetrician and a fertility specialist recommended the plaintiff mother abort her pregnancy due to her condition of uterine fibroid tumors, which would make it unlikely that she could carry a child to full term.<sup>114</sup> Relying on that advice, she underwent a chemical abortion but was allegedly given too small a dose, resulting in a failed abortion. The plaintiff was faced with the choice of undergoing a late term abortion, or giving birth to a child with birth defects. She chose the latter. The issue before the court was whether she could recover for emotional distress when her child is born alive, absent an independent physical injury to herself.

The Appellate Division could “discern no reasonable basis to limit the *Broadnax* holding to cases of stillbirth and miscarriage.”<sup>115</sup> It reasoned that regardless of whether the fetus was stillborn or born in an impaired state, the duty owed to the mother remained the same.

The Court of Appeals disagreed, stating that the Appellate Division’s decision was an improper extension of *Broadnax*. The *Broadnax* decision, it said, was narrow and intended to remedy the injustice created by the lack of remedy when the fetus is not born alive.<sup>116</sup> It held that there can be no recovery for emotional distress where the alleged medical malpractice causes *in utero* injury to a fetus subsequently born alive because, in these circumstances, a remedy exists—a child born alive can bring a medical malpractice action for its injuries caused by malpractice during pregnancy.<sup>117</sup>

Thus the Court clarified that under its precedents, a plaintiff seeking to recover for emotional distress in a case where the fetus is born alive must continue to show independent physical injury. In the case of a stillbirth or miscarriage, the requirement of independent physical injury was removed by *Broadnax*, to remedy the injustice that occurs when an infant stillborn has no cause of action and the law provides for no other remedy.<sup>118</sup>

Yet *Broadnax* and *Sheppard-Mobley* left unresolved the issue of whether a woman could recover for emotional

distress where her baby was pronounced dead within minutes of delivery and was neither conscious nor viable and its estate had no claim for conscious pain and suffering. That question arose before a Bronx Supreme Court three years later in *Mendez v. Bhattacharya*.<sup>119</sup> The court reasoned that “[s]uch a situation clearly comports with the rationale of *Broadnax* and *Sheppard-Mobley* that the plaintiff mother’s cause of action ‘fills the gap,’ and permits a cause of action where otherwise none would be available, to redress wrongdoing resulting from physical injury inflicted in the womb at labor and delivery,” and held that plaintiff mother had a viable cause of action for emotional distress.<sup>120</sup>

## Conclusion

New York courts recognize that in limited circumstances, bystanders have a right to recover for emotional injuries under the zone of danger rule. The rule requires that bystanders must be identifiable beings present in the zone of danger created by the defendant’s negligence at the time the negligence occurred. While in the zone, they must have contemporaneously observed the physical injury or death of an immediate family member proximately caused by the defendant’s negligence. In medical malpractice cases against health care providers, such bystanders are typically unable to recover because the professional malpractice generally does not expose a non-patient bystander to an unreasonable risk of bodily injury or death and, as a consequence, they are not within the zone of danger.

In obstetrical cases, where the fetus is stillborn or miscarried and thus has no viable cause of action of its own for medical malpractice, the courts will construe the malpractice as a violation of the duty of care to the mother, and she will be entitled to damages for emotional distress without a showing of independent physical injury to herself.

Attempts to further broaden bystander claims for emotional distress in medical malpractice cases have been unsuccessful, for courts are still concerned about opening the door to potentially unlimited liability—the same concern the courts expressed before they adopted the zone of danger rule almost three decades ago.

## Endnotes

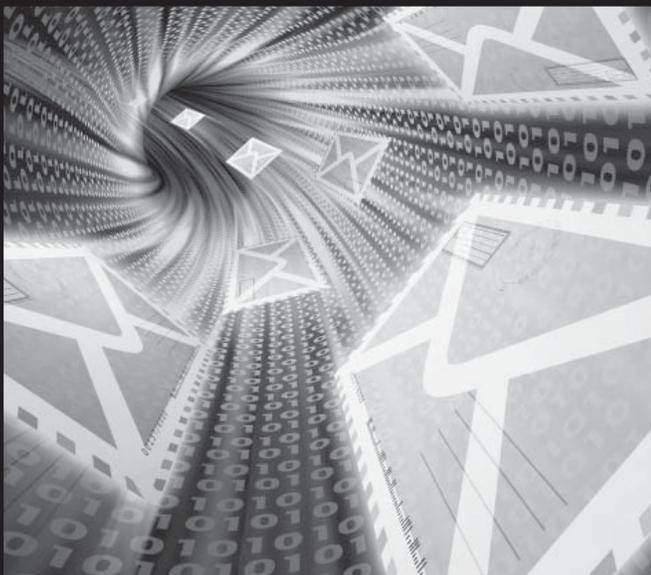
1. *Hutchinson v. Stern*, 101 N.Y.S. 145 (App. Div. 1906); *appeal dismissed* 189 N.Y. 577 (1908).
2. *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107 (1896) (a negligently driven team of horses came so close to plaintiff that her head was between theirs when they came to a stop, but her subsequent miscarriage was not proximately caused from the negligence.)
3. *Hutchinson v. Stern*, 115 A.D. 791 (4th Dep’t 1906).
4. *Battalla v. State of New York*, 10 N.Y.2d 237, 239 (1961).
5. *Id.*
6. *Id.*
7. *Tobin v. Grossman*, 24 N.Y.2d 609, 613 (1968).
8. *Hutchinson v. Stern*, 115 A.D. 791 (4th Dep’t 1906).
9. *Dillon v. Legg*, 68 Cal.2d 728 (Cal. 1968).
10. *Id.* at 68 Cal.2d 740-41.
11. *Id.*
12. *Id.* at 68 Cal.2d 749.
13. *Id.* at 68 Cal.2d 741; 747.
14. *Tobin v. Grossman*, 24 N.Y.2d 609, 611 (1969).
15. *Id.* at 24 N.Y. 612. In contrast, the *Dillon* mother actually saw her child be struck and killed by an automobile.
16. *Id.* at 613.
17. *Id.* at 614.
18. *Id.* at 618.
19. *Id.* at 615.
20. *Tobin*, 24 N.Y.2d at 615.
21. *Id.* at 617.
22. *Id.* at 618.
23. *Tobin*, 24 N.Y.2d at 611-12.
24. *Johnson v. State of New York*, 37 N.Y.2d 378 (1975).
25. *Id.* 37 N.Y.2d 379.
26. *Id.*
27. *Id.*, 37 N.Y.2d 382-83. See also *Rainnie v. Cmty. Mem’l Hosp.*, 87 A.D.2d 707 (3d Dep’t 1982) (“to recover for emotional harm[,] the plaintiff must be owed a duty and be the person directly injured by the breach of that duty.”)
28. *Trombetta v. Conkling*, 82 N.Y.2d 549, 551-552 (1993).
29. *Bovsun v. Sanperi*, 61 N.Y.2d 219 (1984).
30. *Id.*, 61 N.Y.2d at 224-25.
31. *Id.*, 61 N.Y.2d at 228-29.
32. *Battella, supra*.
33. *Bovsun*, 61 N.Y.2d at 229.
34. *Id.*, 61 N.Y. 2d at 230-31.
35. *Id.*, 61 N.Y.2d at 233. (“There may be an enlargement of the scope of recoverable damages; there is no recognition of a new cause of action or of a cause of action in favor of a party not previously recognized as entitled thereto.”)
36. *Id.*, 61 N.Y.2d at 223-24.
37. *Id.*, 61 N.Y.2d at 233.
38. *Moreta v. NYC Health & Hosp. Corp.*, 238 A.D.2d 149 (1st Dep’t 1997).
39. *Perry-Rogers v. Obasaju*, 282 A.D.2d 231, 1st Dep’t 2001).
40. *Id.*
41. *Garcia v. Lawrence Hosp.*, 5 A.D.3d (1st Dep’t 2004).
42. *Shaw v. QC Medi New York, Inc.*, 10 A.D.3d 120 (4th Dep’t 2004). Ms. Richards represented the defendants before the Fourth Department in this case.
43. *Id.* at 122.
44. *Id.* at 121.
45. *Id.* at 124.
46. *Id.* at 125.
47. *Shea v. Catholic Health Systems, Inc.*, 5 Misc.3d 1021(A) at \*2 (Sup. Ct. Erie Co. 2004) (no duty of care owed to father who was not in the zone of danger when the alleged medical malpractice occurred during a Caesarian section).

48. *Reed v. Cioffi, Seftel & Soni, P.C.*, 155 A.D.2d 796, appeal dismissed, 76 N.Y.2d 845 (1990), reargument denied, 76 N.Y.2d 890 (1990). See also, *Kamiecki v. Yost*, 166 Misc.2d 408 (Sup. Ct. Erie Co. 1995) (denying father's claim for emotional distress arising from witnessing a stillbirth because he was not in the zone of danger and did not suffer any independent physical injury).
49. *Schram v. Herkimer Memorial Hospital*, 115 A.D.2d 882 (3d Dep't 1985).
50. *Id.*
51. *Saguid v. Kingston Hospital*, 213 A.D.2d 770 (3d Dep't 1995), appeal dismissed, 87 N.Y.2d 861 (1995), leave to appeal dismissed, 88 N.Y.2d 868 (1996).
52. *Saguid v. Kingston Hospital*, 213 A.D.2d 770, 772 (3d Dep't 1995).
53. *Zea v. Kolb*, 204 A.D.2d 1019 (4th Dep't 1994), leave to appeal dismissed by, 84 N.Y.2d 864 (1994).
54. *Id.*, 204 A.D.2d at 1020.
55. *Landon v. N.Y. Hosp.*, 65 N.Y.2d 639 (1985).
56. *Id.*
57. *Lancellotti v. Howard*, 155 A.D.2d 588 (2d Dep't 1989).
58. *Arroyo v. New York City Health and Hospitals Corp.*, 163 A.D.2d 9 (1st Dep't 1990).
59. *Arroyo*, 163 A.D.2d at 9. See also, *Osborn v. Andrus Pavilion of St. John's Riverside Hospital*, 100 A.D.2d 840 (2d Dep't 1984) (dismissing the complaint because the plaintiffs did not sustain any bodily injury, and significantly, they failed to assert that they were subjected to an unreasonable risk of bodily injury).
60. *Weed v. Meyers*, 251 A.D.2d 1062 (4th Dep't 1998); see also, *Hughson v. St. Francis Hospital of Port Jervis*, 92 A.D.2d 131 (2d Dep't 1983)
61. The court further found that the ophthalmologist did not owe a duty to the children independent of the duty owed to their father.
62. *Pingtella v. Jones*, 305 A.D.2d 38 (4th Dep't 2003), leave to appeal dismissed, 100 N.Y.2d 640 (2003), reargument denied, 1 N.Y.3d 594 (2004).
63. *Pingtella*, 305 A.D.2d at 42, quoting, *Abala v. City of New York*, 54 N.Y.2d 269, 272 (1981) (finding hypothetical generations were outside the immediate zone of danger).
64. *Pingtella*, 305 A.D.2d at 42.
65. *Lizardi v. Westchester County Health Care Corp.*, 21 Misc. 3d 1133(A) (Sup. Ct. Westchester Co. 2008). The mother was tried for murder but was found not guilty by reason of insanity.
66. *Id.*
67. *Khan v. Kip Hospital, Inc.*, 127 Misc.2d 1063 (Sup. Ct., Queens Co. 1985).
68. *Khan, supra*.
69. *Id.*, 127 Misc.2d at 1071.
70. *Id.*, 127 Misc.2d at 1072.
71. *Bovsun v. Sanperi*, 61 N.Y.2d 219, 228-229 (1984).
72. *Bovsun*, 61 N.Y.2d at 231.
73. *Garcia v. Lawrence Hospital*, 5 A.D.3d 227, 228 (1st Dep't 2004).
74. *Bovsun*, 61 N.Y.2d at 234 n.13.
75. *Khan v. Kip Hosp.* 127 Misc.2d 1063, 1070 (Sup. Ct., Queens Co. 1985).
76. *Trombetta v. Conkling*, 82 N.Y.2d 549 (1993).
77. *Trombetta v. Conklin*, 187 A.D.2d 213, 215 (4th Dep't 1993).
78. *Id.*, 187 A.D.2d at 215.
79. *Trombetta*, 82 N.Y.2d at 552-53.
80. *Id.* 82 N.Y.2d at 553.
81. *Id.*, 82 N.Y.2d at 554.
82. *Shipley v. Williams*, 14 Misc.3d 682 (Sup. Ct., Richmond Co. 2006).
83. *Id.*, 14 Misc.3d at 688-89.
84. *Pizarro v. 421 Port Assoc., et al.*, 292 A.D.2d 259 (1st Dep't 2002).
85. *Molitero v. Cmty. Gen. Hosp. of Sullivan Cty.*, 282 A.D.2d 441 (2d Dep't 2001).
86. *Jorgensen v. B.F. Yennay Construction Co.*, 255 A.D.2d 1008 (4th Dep't 1998) (co-workers); *Casale v. Unipunch, Inc.*, 177 A.D.2d 1029 (4th Dep't 1991) (friend and co-worker); *Jun Chi Guan v. Tuscan Dairy Farms*, 24 A.D.3d 725 (2d Dep't 2005) (grandson), appeal dismissed, 7 N.Y.3d 784 (1996); *Santana v. Salmeron*, 79 A.D.3d 1122 (2d Dep't 2010) (girlfriend).
87. *Johnson v. Douglas*, 187 Misc.2d 509, 510-11 (Sup. Ct., Nassau Co. 2001), *aff'd*, 289 A.D.2d 202 (2d Dep't 2001).
88. Ordinarily, in the absence of a special relationship between the plaintiff and the patient's health care provider, the zone of danger rule is not extended to the patient's family members.
89. *Colombini v. Westchester Cty. Healthcare Corp.*, 24 A.D.3d 712 (2d Dep't 2005).
90. *Johnson v. Jamaica Hospital*, 62 N.Y.2d 523 (1984).
91. *Johnson*, 62 N.Y.2d at 528. The dissent wrote that "*Bovsun's* adoption of the zone of danger concept need not, and should not, be read as barring recovery by parents who suffer serious and verifiable emotional injury as the result of the negligent infringement by a hospital of the parents' right to custody of their child, even though the parents are not within the zone of danger when the infringement occurs." *Id.* at 532-33.
92. *Oresky v. Scharf*, 126 A.D.2d 614 (2d Dep't 1987, appeal dismissed, 69 N.Y.2d 868 (1987), appeal denied, 69 N.Y.2d 610 (1987).
93. *Oresky*, 126 A.D.2d at 617.
94. *Tebbutt v. Virostek*, 102 A.D.2d 231 (3d Dep't 1984), *aff'd*, 65 N.Y.2d 931, 932 (1985), overruled, *Broadnax v. Gonzalez*, 2 N.Y.3d 148 (2004).
95. *Tebbutt, supra*.
96. *Tebbutt*, 102 A.D.2d at 233 (quoting *Friedman v. Meyer*, 90 A.D.2d 511 (2d Dep't 1982, appeal dismissed 59 N.Y.2d 763 (1983)).
97. *Tebbutt*, 65 N.Y.2d at 932.
98. *Scott v. Capital Area Cmty. Health Plan*, 191 A.D.2d 772 (3d Dep't 1993), *lv. denied* 594 N.Y.S.2d 370 (1993) (mother's pain and suffering, described as "sequelae of fetal heart distress" and her emotional distress from delivering a stillborn child following nurse practitioner's failure to diagnose fetal cardiac and pulmonary distress were the direct result of fetal impairment and did not constitute an independent injury distinct for which mother could recover damages for emotional distress).
99. *Saguid v. Kingston Hospital*, 213 A.D.2d 770, 771 (3d Dep't 1995), appeal dismissed, 87 N.Y.2d 861 (1995), leave to appeal dismissed, 88 N.Y.2d 868 (1996) (mother's pain and suffering during a difficult delivery and emergency Cesarean section was not greater than that "naturally attendant to childbirth" and did not constitute an independent physical injury enabling recovery for emotional distress caused by the death of the newborn infant); *Parsons v. Chenango Memorial Hospital*, 210 A.D.2d 847 (3d Dep't 1994), leave to appeal dismissed, 620 N.Y.S.2d 604 (1995); (mother's pain and suffering from prolonged labor to deliver a stillborn child were not permanent and are not independent physical injuries enabling recovery for emotional distress); *Kakoullis v. Janssen*, 188 A.D.2d 769 (3d Dep't 1992) (mother's pain and suffering associated with childbirth was not a permanent, independent physical injury enabling recovery for emotional distress associated with the impaired condition of the infant); *Hayes v. Record*, 158 A.D.2d 874 (3d Dep't 1990) (mother's anxiety attacks do not constitute independent physical injury enabling recovery for emotional distress associated with the death of her six-day-old infant); *Bauch v. Verrilli*, 146 A.D.2d 835 (3d Dep't 1989) (an episiotomy is not an independent physical injury unless it is also alleged to have caused infant's death); *Keselman v. Kingsboro Medical Group*, 156 A.D.2d 334

- (2d Dep't 1989), *appeal dismissed*, 76 N.Y.2d 845 (1990) (defendant's failure to diagnose fetus' fatal genetic anomaly foreclosing mother's ability to opt for alternative treatment sparing her from the pain and suffering of childbirth did not constitute independent physical injury enabling recovery for emotional distress); *Wittrock v. Maimonides Med. Ctr.*, 119 A.D.2d 748 (2d Dep't 1986) (pain and suffering incident to childbirth are unrelated to the stillbirth and is not actionable).
100. *Farago v. Shulman*, 65 N.Y.2d 763 (1985) (mother's blood loss and pain from negligently performed episiotomy are injuries attendant to childbirth and do not constitute independent physical injury enabling recovery for emotional distress from stillbirth); *Miller v. Chalom*, 269 A.D.2d 37 (3d Dep't 2000) (negligently performed episiotomy that severed infant's finger did not constitute an independent physical injury enabling recovery for the emotional distress caused by injuries to the child); *Sceusa v. Mastor*, 135 A.D.2d 117 (4th Dep't 1988), *appeal dismissed* 525 N.Y.S.2d 101 (1988) (Cesarean section for delivery of twins, one stillborn, did not constitute an independent physical injury enabling recovery for emotional distress from the death of one twin).
  101. *Miller v. Chalom*, 269 A.D.2d 37, 40 (3d Dep't 2000).
  102. *Khan v. Hip Hosp.*, 127 Misc.2d 1063, 1070 (Sup. Ct., Queens Co. 1985).
  103. *Id.*, 172 Misc.2d at 1068.
  104. *Miller v. Chalom*, 269 A.D.2d 37 (3d Dep't 2000).
  105. *Miller*, 269 A.D.2d at 40-41.
  106. *Prado v. Catholic Med. Ctr. of Brooklyn & Queens*, 145 A.D.2d 614 (2d Dep't 1988).
  107. *Miller v. Chalom*, 269 A.D.2d 37 (3d Dep't 2000) (negligently performed episiotomy that severed infant's finger did not place mother in zone of danger); *Parsons v. Chenango Memorial Hospital*, 210 A.D.2d 847 (3d Dep't 1994), *leave to appeal dismissed*, 620 N.Y.S.2d 604 (1995) (mother's prolonged labor is not sufficient to prove she was in the zone of danger); *Guialdo v. Allen*, 171 A.D.2d 535 (1st Dep't 1991) (premature contractions resulting in stillbirth did not place mother in zone of danger); *Sceusa v. Mastor*, 135 A.D.2d 117 (4th Dep't 1988), *appeal dismissed*, 72 N.Y.2d 909 (1988) (Cesarean section did not place mother within the zone of danger); *Burgess v. Miller*, 124 A.D.2d 692, 693 (2d Dep't 1986) (difficult labor and delivery of severely impaired infant who died shortly after delivery from alleged medical malpractice did not place mother in zone of danger).
  108. *Broadnax v. Gonzalez*, 2 N.Y.3d 148 (2004).
  109. *Id.* at 156.
  110. *Id.* at 154.
  111. *Id.* (citing dissenting Judges Kay and Jasen in *Tebbutt*).
  112. *Broadnax*, 2 N.Y.3d at 155.
  113. *Sheppard-Mobley v. King*, 10 A.D.3d 70 (2d Dep't 2004), *aff'd as modified*, 4 N.Y.3d 627 (2005).
  114. *Sheppard-Mobley*, 10 A.D.3d 70, 76 (2d Dep't 2004), *aff'd as modified*, 4 N.Y.3d 627 (2005).
  115. *Id.*
  116. *Sheppard-Mobley*, 4 N.Y.3d at 637.
  117. *Id.* at 638. Although she could not recover for emotional distress resulting from the birth of her impaired child, she could recover for the emotional distress she suffered independent from the birth because of the difficult choice she had to make—whether to have a late term abortion or give birth to a severely impaired child.
  118. *Id.*, 4 N.Y.3d 637.
  119. *Mendez v. Bhattacharya, M.D.*, 15 Misc.3d 974, 981 (Sup. Ct., Bronx Co. 2007).
  120. *Mendez*, 15 Misc.3d at 983.

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