Alive and Well:
Bystander Recovery for Negligent Infliction of Emotional Distress in Medical Negligence Cases

By

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I. Introduction

In Corso v. Merrill, the New Hampshire Supreme Court held that a bystander who witnesses harm caused by the negligent act of another may recover, under a claim of negligent infliction of emotional distress, if she can establish: (1) causal negligence of the defendant; (2) foreseeability; and (3) serious mental and emotional harm accompanied by objective physical symptoms.[2] In assessing the second prong of this inquiry – whether the bystander's harm was sufficiently "foreseeable" to the defendant to warrant a negligent infliction claim – the Court implemented a three-factor test: "(1) [w]hether the plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it[;] (2) [w]hether the shock resulted from a direct emotional impact upon the plaintiff *from the sensory and contemporaneous observance of the accident*, as contrasted with learning of the accident from others after its occurrence[;] [and] (3) [w]hether the plaintiff and victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship."[3]

The apparent qualification that the plaintiff bystander "contemporaneous[ly] observ[e] . . . the accident" resulted, for some time, in the unintended and unfortunate consequence of precluding family members of medical malpractice victims from recovering under a theory of negligent infliction of emotional distress. Quite plainly, unlike a routine negligence or "accident" case, it is virtually impossible for a loved one of a medical malpractice victim to contemporaneously observe (much less immediately comprehend) the underlying act of negligence, which almost always occurs in the privacy of an operating or examination room. The emotional distress, instead, is triggered later, when the event *caused* by the negligent

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[2] Corso v. Merrill, 119 N.H. 647 (1979); St. Onge v. MacDonald, 154 N.H. 768, 770 (2007).

[3] Corso, 119 N.H. at 653-54; Dillon v. Legg, 68 Cal.2d 728, 740-41 (Cal. 1968) (emphasis added).

medical treatment actually manifests. A rigid application of Corso's "contemporaneous observance" language in the medical negligence context would thus foreclose a remedy to an entire class of plaintiffs. Such incongruous treatment, as the Supreme Court has since recognized, may run afoul of the New Hampshire Constitution.[4]

The question, then – and one with which the courts have long grappled – is how to reconcile Corso's language with the rather unique factual predicate of a medical malpractice case. Although there is currently a divide among New Hampshire state courts on the issue, the prevailing answer appears to be that the term "accident," which must be contemporaneously observed under Corso, is not the act of malpractice in the medical negligence context, but rather the event *caused* by the act of malpractice. This approach avoids a potentially unconstitutional application of Corso, and practically achieves what common sense tells us must be the just result: the mental anguish and emotional distress of loved ones is no less acute, nor less deserving of compensation, when the injury is caused by the less readily observable negligence of a medical provider. This article summarizes the law on the issue, and concludes that the majority (and most recent) position of the New Hampshire trial courts, which adopts the broader definition of "accident" and therefore permits bystander recovery in medical negligence cases, is indeed correct.

II. Corso v. Merrill and Foreseeability

In Corso v. Merrill, the Court confronted a scenario of traditional "accident" negligence. A mother heard a vehicle striking her daughter less than fifty feet away, and thereafter observed her child prostrate on the ground, injured. The victim's father, also perceiving the commotion, witnessed the consequences of the driver's negligent act in the immediate aftermath. The trial court dismissed the parents' respective claims for negligent infliction of emotional distress, and the plaintiffs filed an interlocutory appeal.[5]

Prior to Corso, bystander emotional distress was compensable in New Hampshire only if the plaintiff feared for her own safety as a result of being in the "physical zone of danger" created by a defendant's negligence.[6] The "zone of danger" doctrine, however, was deemed insufficiently protective of plaintiffs' rights in Corso, consequently prompting the adoption, in its place, of traditional principles of negligence liability for bystander negligent infliction claims. The Court delineated three elements which must be demonstrated by a bystander plaintiff in order to establish such a claim:

(1) Causal negligence of the defendant;

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[4] Carson v. Maurer, 120 N.H. 925 (1980).

[5] Corso v. Merrill, 119 N.H. 647 (1979).

[6] Id. at 650-651.

(2) Foreseeability; and

(3) Serious mental and emotional harm accompanied by objective physical symptoms.[7]

As the Court opined, its historical reluctance to abandon the "zone of danger" rule and allow bystander recovery for emotional distress was rooted in the risk of exposing a defendant to liability which extended far beyond his culpability.[8] Balancing that interest, against the importance of rectifying a plaintiff's serious emotional injury directly caused by a defendant's negligence, could only be achieved, the Court explained, by grounding the analysis in a carefully crafted framework of foreseeability.[9] That framework, as set forth in Corso, comprises three factors:

(1) Whether the plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it;

(2) Whether the shock resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence; and

(3) Whether the plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.[10]

These factors, as subsequently interpreted by the Supreme Court, are "not [intended to be] a rigid framework, but are flexible and allow the courts, on a case-by-case basis, to decide what an ordinary person under the circumstances should reasonably have foreseen."[11] In short, for a claim of negligent infliction of emotional distress to be actionable, a bystander plaintiff must establish that her objectively perceivable distress was directly caused by, and foreseeable to, the defendant in light of the facts and circumstances of her particular case.

III. Corso, Bystander Recovery, and Foreseeability in Medical Malpractice Cases

The flexibility with which the courts have applied the Corso factors is important, because, as written, those factors do not seamlessly translate to the medical malpractice context. This is unsurprising – Corso, for which these factors were specifically crafted, was a straightforward "accident" case. Contemporaneous observance of an "accident" therefore made

[7] Id.; St. Onge, 154 N.H. at 770.

[8] Corso, 119 N.H. at 653.

[9] Id. at 653-54.

[10] St. Onge, 154 N.H. at 770.

[11] Id.

sense, because there was a discrete "accident" to be seen. In a medical negligence case, by contrast, there is generally no perfectly analogous "accident" to observe – yet there is an identical opportunity for a loved one to suffer severe emotional distress. This tension between the somewhat restrictive language of Corso and the seemingly indistinguishable harm suffered by loved ones in the medical malpractice context has been reflected in conflicting decisions from the New Hampshire Superior Court regarding the applicability of Corso in medical negligence cases.

The majority of trial court decisions to address the issue, including the three most recent opinions of which we are aware, have permitted bystander recovery for negligent infliction of emotional distress in medical malpractice cases[12]; the minority remainder have reached the countervailing conclusion[13]. The tension point, rather simply, is in discerning the definition of "accident." In those cases permitting claims for bystander recovery, the judges have held that the "accident" is the event *caused* by the medical negligence. Conversely, in those cases dismissing claims for bystander recovery, the judges have held that the act of medical negligence itself, such as a misdiagnosis or failure to diagnose, constitutes the "accident" which must be contemporaneously observed under Corso.

Most recently, in a series of pertinent decisions, the Honorable John C. Kissinger has adopted the former (majority) view, holding, *inter alia*, that

> [t]he "contemporaneous observance of the accident" requirement from Corso exists to ensure that the emotional harm to a plaintiff is foreseeable, not to create an arbitrary, inflexible requirement about

[12] See, e.g., Billodeau, et al v. Elliot Hospital, Hillsborough Co. Super. Ct., No. 216-2015-CV-00290 (October 13, 2016) (Kissinger, J.) ("[T]he 'accident' in this case was the pulmonary thromboembolism allegedly caused by Elliot Hospital's medical negligence, not Elliot Hospital's alleged medical negligence itself."); Sears v. Opsahl, M.D., Cheshire Co. Super. Ct., No. 213-2014-CV-00063 (August 24, 2015) (Kissinger, J.) ("In this case, the accident was [the decedent's] heart attack allegedly caused by the malpractice, not the negligent act of malpractice itself."); Roy v. Sarson, M.D., Cheshire Co. Super. Ct., No. 213-2013-CV-168 (June 15, 2015) (Kissinger, J.) ("[I]n this case, the 'accident' should be considered the worsening of [the patient's] condition that was allegedly caused by the malpractice, not the malpractice itself."); Erickson v. Beech Hill Hosp., Rockingham Co. Super. Ct., No. 98-C-638 (November 6, 1998) (Abramson, J.) ("[T]he Court concludes that the negligent misdiagnosis and/or treatment was not the 'accident,' but rather was the alleged cause of the suicide which was the 'accident' that led to [the victim's] death."); Brauel v. White, Strafford Co. Super. Ct., No. 96-C-238 (May 27, 1997) (Nadeau, J.) ("Although under Corso, a plaintiff need not be present during the misdiagnosis, a plaintiff must witness a definable, perceivable event that ultimately results in injury."); Hilber v. Horsley, Hillsborough Co. Super. Ct., No. 93-C-790 (May 2, 1995) (Murphy, J.) ("The defendants' claimed negligent acts in medicating the child's pregnant mother was not the 'accident' . . . the 'accident' was the resulting premature birth."); Aldrich v. Witkin, Belknap Co. Super. Ct., No. C-94-074 (February 15, 1995) (Smukler, J.) ("[T]he court concludes that the negligent misdiagnosis was not the 'accident' but rather was the cause of the heart attack which was the 'accident.'").

[13] See, e.g., Dashnaw v. Dartmouth-Hitchcock Clinic, Inc., Sullivan Co. Super. Ct., No. 10-CV-59 (November 18, 2011) (Tucker, J.); Harvey v. Haan, Merrimack Co. Super. Ct., No. 04-C-117 (October 28, 2004) (McGuire, J.); Marvin v. Wentworth-Douglass Hospital, Strafford Co. Super. Ct., No. 03-C-016 (March 18, 2004) (Mohl, J.); Bronson v. Hitchcock Clinic, Inc., Coos Co. Super. Ct., No. 89-C-95 (June 9, 1992) (Perkins, J.).

> what the plaintiff must observe. . . . [T]he Court sees no inherent distinction between the suffering of a spouse who witnesses the effect of malpractice without witnessing the malpractice itself, and a spouse who does witness the malpractice. [. . . .] [S]ending a spouse home with a negligently diagnosed heart condition will foreseeably cause the surviving spouse emotional distress if an injury later occurs.[14]

These decisions aptly perceive the crux of the Corso framework: foreseeability. At bottom, with or without being present for the negligent act of medical care, it is likely foreseeable that the victim's loved ones may experience significant emotional distress when they contemporaneously witness the catastrophic events later, and directly, triggered by that malpractice.

Nor does the majority position, as explicated by Judge Kissinger, undermine the kinds of limits on bystander recovery contemplated by the Corso court, "because the plaintiff must still witness the actual worsening of an illness or injury, as opposed to observing a person's condition after the illness or injury has occurred."[15] Thus, bystander recovery remains restricted to situations where a plaintiff bears an unusual or heightened burden of emotional distress by witnessing an injury as it occurs.

This interpretation of Corso is entirely consistent with both the common sense, and jurisprudential, understanding of the term "accident," as perhaps most helpfully demonstrated by the Supreme Court in Siciliano v. Capitol City Shows, Inc.[16] There, the Court addressed a parent's claim for negligent infliction of emotional distress after her child was injured in an accident on an amusement park ride caused by the ride's earlier negligent inspection. The negligent infliction claim ultimately failed, because the parents had not observed the accident in which the child was harmed – yet the Court suggested that such observation of the accident would have been legally sufficient. In other words, the "accident" was not the negligent inspection of the ride which resulted in the malfunction and injury, but rather the child later suffering a harmful event during that malfunction; just as the "accident" should not be the act of malpractice, but the victim later suffering a harmful event as a result of that medical negligence.

IV. Post-Corso Supreme Court Precedent Does Not Preclude Bystander Recovery

The oft-sung defense refrain, when faced with a bystander negligent infliction claim in a medical malpractice case, is to cite Nutter v. Frisbie Memorial Hospital[17], and Wilder v.

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[14] Billodeau, et al v. Elliot Hospital, Hillsborough Co. Super. Ct., No. 216-2015-CV-00290 (October 13, 2016) (Kissinger, J.).

[15] Sears v. Opsahl, M.D., Cheshire Co. Super. Ct., No. 213-2014-CV-00063 (August 24, 2015) (Kissinger, J.).

[16] 124 N.H. 719 (1984).

[17] 124 N.H. 791 (1984).

Keene[18], for the proposition that recovery is precluded because the "accident" is the actual negligent act of malpractice. A detailed examination of those cases suggests otherwise.

In Nutter, the plaintiffs took their ill, three-month-old daughter to a pediatrician, where she was erroneously diagnosed with pneumonia and sent home. Three days later, while under the care of a babysitter, the child developed severe complications and was taken to the hospital, where she perished soon thereafter. It was not until after their child passed away that the parents arrived at the hospital, where they observed the baby's lifeless body in the emergency room. The Court denied bystander recovery because the parents witnessed neither the injuries to their daughter, nor her death, until after they had occurred; the Court made no mention of whether the parents were present for the original negligent misdiagnosis which resulted in the baby's premature death. Thus, Nutter is not at odds with the majority interpretation that the "accident" is the event *caused* by the medical negligence: the Court merely held that because the parents did not learn about *any* of the traumatic events until after they occurred (i.e., did not contemporaneously perceive anything), their observation of the "accident," whatever that might be, was not sufficiently contemporaneous to support a negligent infliction claim.

In Wilder, a young boy was severely injured by a passing vehicle while riding his bicycle. His parents learned of the accident, and their son's injuries, when they arrived at the hospital one hour later, at which time they watched as their son faded and eventually died. The Court denied the parents' claims for emotional distress because they observed the injuries to their son at the hospital after they were inflicted, away from the accident scene. The parents' emotional distress was caused by seeing their son *in extremis* and watching him perish in the hospital, not from witnessing his underlying accident or injuries at the accident scene. The line drawn in Corso, according to the Wilder court, "requires a contemporaneous sensory perception of the *accident*, and not, as the plaintiffs argue, a perception of the *injury* sustained."[19] The Court, however, did nothing to define "accident," because the accident was a typical vehicle/pedestrian scenario. Nothing in Wilder suggests that the "accident" in a medical negligence case should not be the event subsequently caused by the underlying malpractice.

V. Conclusion

Watching a loved one experience a catastrophic injury is emotionally distressing, and that emotional distress is equally foreseeable regardless of whether its cause is a vehicular strike or a sudden and unexpected post-operative death caused by an errant slice of the scalpel. In either instance, families of the victims should be given a fair opportunity to perceive the harm and appropriately react to it. In the medical negligence context, the underlying act of negligence – whether that be a failure to diagnose; a misdiagnosis; or an affirmative treatment error – is rarely, if ever, contemporaneously discernible. Thus, the majority of courts to apply the Corso framework have followed the Court's advice not to apply it rigidly, adopting a more malleable

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[18] 131 N.H. 599 (1989).

[19] Id. at 603.

definition of "accident" which facilitates the framework's flexible application. The "accident," for purposes of bystander claims for negligent infliction of emotional distress in medical malpractice cases, is the event caused by the medically negligent act. When that event is contemporaneously perceived by a loved one, and results in objectively observable symptoms of emotional distress, recovery is warranted.