New Hampshire Supreme Court Clarifies Law on Bystander Emotional Distress Claims

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I. Introduction

In the *Estate of Lisa Chartier v. Apple Therapy of Londonderry, LLC*,[2] the New Hampshire Supreme Court recently clarified the law with respect to bystander emotional distress claims. In the 4-1 decision, the Court held that the "accident" that must be contemporaneously perceived as required in *Corso v. Merrill*[3] is "a sudden, unexpected, and shocking event involving serious physical injury to a third party," settling an issue that has been litigated in New Hampshire trial courts for over 30 years. This article will discuss the background giving rise to this issue and it will summarize the *Chartier* decision.

II. Background

In *Corso*, the New Hampshire Supreme Court held that a bystander who witnesses harm caused by the negligent conduct of another may recover, under a claim of negligent infliction of emotional distress ("NIED"), if he or she can prove: (1) causal negligence of the defendant; (2) foreseeability; and (3) serious mental and emotional harm accompanied by objective, physical symptoms.[4] To determine "whether…the manner in which the [bystanders] became aware of the injury was reasonably foreseeable to cause them harm…," the Court adopted 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 other 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."[5]

The requirement that the NIED plaintiff contemporaneously observe the "accident" led to extensive litigation in the trial courts over what the term "accident" meant in the context of a medical negligence case, resulting in a distinctive split among New Hampshire trial court judges. Some judges found that the bystander must be aware when he or she perceives his or loved one being injured that a defendant has breached a duty of care or committed a negligent act.[6] Other judges found that the bystander's awareness of a breach of duty is irrelevant as long as the bystander perceived a loved one being injured in a shocking event and can prove that the shocking event was caused by a defendant's negligence.[7] The former group of justices believed that the "accident" meant the defendant's negligent conduct, while the latter believed

that the "accident' was the shocking event during which the victim is being injured.[8]

This issue finally came to a head in the *Estate of Lisa Chartier v. Apple Therapy of Londonderry, LLC* and the Supreme Court accepted the plaintiff's appeal under Superior Court Rule 46(c).

III. The Chartier Opinion

The Supreme Court recognized that resolution of the appeal turned on the meaning of the term "accident." The Court agreed with the plaintiff's position, finding that the "accident" in the bystander emotional distress context is the shocking event during which the victim is being injured, not the defendant's negligent conduct as the defendants contended. In rejecting the defendants' argument, the Court noted that in *Corso*:

> We did not consider the plaintiffs' contemporaneous perception of the defendant's negligence. Indeed, nothing in *Corso* suggests that the plaintiffs ever perceived the defendant's negligent operation of her automobile, and our discussion of the defendant's negligence was limited to a brief acknowledgment that she was driving negligently.[9]

Instead, the focus in *Corso* was "the event resulting from the defendant's negligence."[10] Indeed, the Court in *Corso* centered its analysis on the "plaintiff's contemporaneous perception of the accident and proximity to the 'accident scene' rather than the defendant's negligent conduct."[11] The Court also noted that it applied this same framework in its subsequent decisions in bystander emotional distress cases.[12] Thus, the Court concluded, "the term 'accident' in the context of bystander recovery for emotional harm refers to a sudden unexpected, and shocking event involving serious physical injury."[13] Although he dissented from the majority opinion, Justice Bassett acknowledged that a bystander plaintiff "need not be aware, at the time the plaintiff perceives the defendant's conduct, that the conduct is negligent — only that the defendant's act has caused harm to the plaintiff's loved one…"[14]

IV. Conclusion

The New Hampshire Supreme Court's decision in *Chartier* represents a significant victory for plaintiffs, especially in the medical negligence context, where the underlying act of negligence – whether that be a failure to diagnose; a misdiagnosis; operative mistake; or some other treatment error – is rarely, if ever, contemporaneously discernible. But it is entirely consistent with the Court's practice of maintaining defined limits on the bystander cause of action since the class of plaintiffs that may bring such claims remains circumscribed

by the numerous elements required to assert such claims. To bring a claim for NIED, the bystander must establish that they suffered serious emotional harm accompanied by objective physical symptoms as a result of the "sensory and contemporaneous perception" of "a sudden, unexpected, and shocking event involving serious physical injury" to a spouse or immediate family member that was caused by the negligence of the defendant. This new decision simply applies a common sense approach to ensure fundamental fairness.

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[1] Jared Green wrote the Brief for the Plaintiff and presented the oral argument before the Supreme Court advocating for the specific rule of law the Court ultimately adopted.
[2] No. 2021-0166, 2023 LEXIS 10 (2023).
[3] 119 N.H. 647 (1979).
[4] *Id.*
[5] *Id.* at 657 (emphasis added).
[6] 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.).
[7] See, e.g., *Berk v. Losasso*, Hillsborough North Super. Ct. No. 216-2017-CV-207 (July 18, 2018) (Nicolosi, J.) (finding that the "accident" was the aortic dissection suffered by the plaintiff, which was allegedly caused by the defendants failure to diagnose); *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.'").
[8] Interpreting "accident" to mean negligent conduct, however, meant that family members of medical negligence victims were precluded from recovering under a theory of NIED. Unlike a routine accident, it is essentially impossible for close relatives of a medical malpractice victims to contemporaneously observe or immediately comprehend the underlying negligence, which almost always occurs in the privacy of an operating or examination room.
[9] *Estate of Lisa Chartier v. Apple Therapy of Londonderry, LLC*, No. 2021-0166, 2023 LEXIS 10 (2023).

[10] *Id.* at *6-7.
[11] *Id.*
[12] *Id.* The court observed that it had applied this same analysis in subsequent emotional distress cases, citing *Wilder v. Keene*, 131 N.H. 599, 604 (1989) ("The plaintiffs were not sufficiently close to the accident scene to experience a sensory perception of the event") and *Nutter v. Frisbie Memorial Hospital*, 124 N.H. 791, 795 (1984) ("[T]he parent had to be close enough to experience the accident at first hand...").
[13] *Id.*
[14] *Id.* at 11.