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AN ARBITRARY STANDARD FOR RECOVERY IN NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIMS

Sinn v. Burd

404 A.2d 672 (Pa. 1979)

While it is fundamental to the American common law system that one may seek redress for every substantial wrong,¹ even the law must recognize that not every human loss arising out of another's conduct constitutes a legal injury for which compensation shall be available.² The Supreme Court of Pennsylvania³ in *Sinn v. Burd*⁴ was faced with the difficult task of deciding if a mother who suffered mental distress as a result of witnessing her young daughter being struck and killed by a negligently driven automobile had suffered a compensable injury. The court in *Sinn* held that although the plaintiff herself was not within any zone of personal physical danger and had no reason to fear for her own safety, she had pleaded sufficient facts upon which to be granted relief.⁵ Thus, under Pennsylvania law, a mother's mental distress suffered as a result of viewing her young daughter's accidental death is a compensable injury.⁶

This comment will first explain how the *Sinn* decision attempts to set a logical standard for recovery in a negligent infliction of emotional distress claim. It will next discuss why the *Sinn* court's decision unfortunately has resulted in an arbitrary standard for recovery. Also, this comment will address the issue of whether the *Sinn* court's holding has circumvented the legislative intent of the Pennsylvania wrongful death statute. Finally, it will examine whether the *Sinn* court fully considered the public policy issue of unduly burdensome liability on insured motorists. Before this analysis can be undertaken, an understanding of the divergent views of negligent infliction of emotional distress claims is helpful.

1. *Niederman v. Brodsky*, 436 Pa. 401, 403, 261 A.2d 84, 85 (1970).

2. *See* W. PROSSER, *THE LAW OF TORTS* § 1 at 2-4 (4th ed. 1971) [hereinafter referred to as PROSSER].

3. Justice Nix delivered the opinion of the court, in which Justice Larsen and Justice Manderino joined. Chief Justice Eagen filed a concurring opinion. Justice Roberts filed a dissenting opinion in which Justice O'Brien joined.

4. 404 A.2d 672 (Pa. 1979).

5. *Id.* at 686.

6. *Id.*

THE THREE TESTS FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

The tort of negligent infliction of emotional distress has been a source of confusion and much litigation in courts throughout the United States.⁷ This confusion is exemplified by the various tests that courts have applied in determining whether or not such a cause of action for negligent infliction of emotional distress can be maintained. The courts have developed three separate tests for making this determination: the "impact rule," the "zone of danger" test, and the "pure negligence" test.⁸

Under the "impact rule," a cause of action for negligent infliction of emotional distress cannot be maintained in the absence of contemporaneous physical impact.⁹ Typically, courts have interpreted this rule to mean that damages could be recovered only if a physical injury caused the emotional distress.¹⁰ Most courts have recognized the inherent harshness of the "impact rule;" thus, it is currently in use in only a minority of jurisdictions.¹¹

As an alternative to the "impact rule," the majority of courts have adopted the "zone of danger" test.¹² This test required that the tortfeasor create an unreasonable risk of bodily harm to a person before that person can recover.¹³ Although the "zone of danger" test does not require actual physical impact, it does require that the plaintiff be within the area of potential physical harm. Moreover, a plaintiff within the zone of danger must demonstrate that the emotional distress caused a physical injury.¹⁴

7. See *Southern Express Co. v. Byers*, 240 U.S. 612 (1916) (denying recovery in the absence of physical harm resulting from the negligently inflicted emotional distress); *Leong v. Takasaki*, 55 Haw. 398, 520 P.2d 758 (1974) (allowing recovery absent the showing of any physical injury); *Benza v. Shulman Air Freight*, 46 Ill. App. 3d 521, 361 N.E.2d 91 (1977) (where the plaintiff was denied recovery when the defendant's negligent driving caused the plaintiff severe emotional distress); see also Annot., 64 A.L.R.2d 100 (1959).

8. See Comment, 1977 Wis. L. Rev. 1089.

9. See, e.g., *Kaiserman v. Bright*, 61 Ill. App. 3d 67, 71, 377 N.E.2d 261, 264 (1978); *Kentucky Traction & Terminal Co. v. Roman's Guardian*, 23 S.W.2d 272, 275 (Ky. 1929).

10. See, e.g., *Braun v. Craven*, 175 Ill. 401, 51 N.E. 657 (1898); *Keyes v. Minneapolis & St. L. Ry. Co.*, 36 Minn. 290, 30 N.W. 888 (1886); *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 45 N.E. 354 (1896). See text accompanying note 23 *infra* for rationale of the "impact rule."

11. See Note, *Negligent Infliction of Mental Distress*, 25 HASTINGS L.J. 1248, 1251 (1974).

12. *Id.*

13. RESTATEMENT (SECOND) OF TORTS § 313 (1965). See also *Cosgrove v. Beymer*, 244 F. Supp. 824 (D. Del. 1965); *Bowman v. Williams*, 164 Md. 397, 165 A. 182 (1933). See text accompanying notes 29-31 *infra* for rationale of the "zone of danger" test.

14. RESTATEMENT (SECOND) OF TORTS § 436A (1965) states: "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance."

Some courts have gone beyond the "zone of danger" test and permitted recovery for negligent infliction of emotional distress using a "pure negligence" test.¹⁵ This test merely requires that, to recover for negligent infliction of emotional distress, the plaintiff foreseeably suffer emotional distress as a result of the defendant's negligence.¹⁶ Furthermore, most courts adopting the "pure negligence" test have retained the requirement that the plaintiff demonstrate a physical manifestation of the emotional distress to recover.¹⁷ Only two courts have held that a showing of emotional distress alone is sufficient to recover damages.¹⁸

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IN PENNSYLVANIA

As recently as 1966, the Pennsylvania Supreme Court affirmed its adherence to the "impact rule" in *Knaub v. Gotwalt*.¹⁹ In *Knaub*, parents had witnessed the death of their son when he was struck by a negligently driven automobile. The deceased's sister was within three feet of the boy when he was killed.²⁰ The entire family sued to recover for the extreme mental shock and anguish they had suffered.²¹ The court held that the plaintiffs' complaint was defective as it failed to allege that there had been physical impact upon the plaintiffs by the negligently driven automobile.²² The court reasoned that to allow the plaintiffs to recover for negligent infliction of emotional distress without physical impact would cause a flood of similar litigation. Furthermore, the court stated that medical science would be unable to distinguish a

15. See *Dillon v. Legg*, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968); *Leong v. Takasaki*, 55 Haw. 398, 520 P.2d 758 (1974); *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975).

16. *Dillon v. Legg*, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968).

17. See, e.g., *Dillon v. Legg*, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968); *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975).

18. *Leong v. Takasaki*, 55 Haw. 398, 520 P.2d 758 (1974). The plaintiff, a ten year old boy, suffered severe emotional distress while observing his stepgrandmother being struck and killed by a negligently driven automobile. The plaintiff did not manifest any physical injury as a result of the emotional distress. The court rejected the physical injury requirement stating that it was "another of the artificial devices to guarantee the genuineness of a claim which may actually foreclose relief to a genuine claim." *Id.* at 403, 520 P.2d at 762-63. *Sinn v. Burd*, 404 A.2d 672 (Pa. 1979), also rejected the physical injury requirement.

19. 422 Pa. 267, 220 A.2d 646 (1966). See *Besley v. Andrews*, 393 Pa. 161, 142 A.2d 263 (1958); *Geffert v. Rosenthal*, 384 Pa. 123, 119 A.2d 250 (1956); *Potere v. City of Philadelphia*, 380 Pa. 581, 112 A.2d 100 (1955); *Hess v. Philadelphia Transp. Co.*, 358 Pa. 144, 56 A.2d 89 (1948); *Koplin v. Louis K. Liggett Co.*, 322 Pa. 333, 185 A. 744 (1936); *Howarth v. Adams Express Co.*, 269 Pa. 280, 112 A. 536 (1921); *Morris v. Lackawanna & Wyo. Valley R.R.*, 228 Pa. 198, 77 A. 445 (1910); *Huston v. Borough of Freemansburg*, 212 Pa. 548, 61 A. 1022 (1905); *Ewing v. Pittsburgh, C. & St. L. Ry.*, 147 Pa. 40, 23 A. 340 (1892); *Fox v. Borkey*, 126 Pa. 164, 17 A. 604 (1889).

20. 422 Pa. at 270, 220 A.2d at 646.

21. *Id.*

22. *Id.* at 270-71, 220 A.2d at 647-48.

genuine claim from a fraudulent claim.²³

In 1970, in *Niederman v. Brodsky*,²⁴ the Supreme Court of Pennsylvania abandoned the "impact rule" and adopted the "zone of danger" test.²⁵ In *Niederman*, the plaintiff suffered an acute heart attack when a negligently driven automobile narrowly missed striking him when it skidded onto the sidewalk and struck his son.²⁶ When the plaintiff sued, the trial court, relying on *Knaub*,²⁷ dismissed the case as the plaintiff had not been the victim of any physical impact.²⁸ On appeal, the Supreme Court of Pennsylvania reversed the lower court and held that if the plaintiff was in personal danger of physical impact and actually feared such impact, then he could recover for negligent infliction of emotional distress.²⁹ The court went on to reject the notion that medical science was unable to distinguish genuine claims from fraudulent claims without a physical impact.³⁰ However, the court retained the requirement that a plaintiff demonstrate a physical manifestation of the emotional distress to assure that no frauds would go undetected. Thus, in *Niederman*, Pennsylvania abandoned the "impact rule" and adopted the "zone of danger" test. Nine years later, the Supreme Court of Pennsylvania again faced a claim of negligent infliction of emotional distress in *Sinn v. Burd*.³¹

SINN V. BURD

Facts of the Case

On June 12, 1975, Mrs. Sinn's daughters, Lisa and Deborah, were standing by Mrs. Sinn's mailbox when an automobile operated by the defendant struck Lisa and hurled her through the air.³² The resultant injuries caused Lisa's death. Deborah was not struck by the vehicle although it narrowly missed her. Mrs. Sinn³³ witnessed the accident from a position near the front door of her home. The plaintiff filed a four count trespass complaint against the defendant on June 3, 1976.

23. *Id.* at 271, 220 A.2d at 647.

24. 436 Pa. 401, 261 A.2d 84 (1970).

25. *Id.* at 413, 261 A.2d at 90.

26. *Id.* at 402-03, 261 A.2d at 84.

27. See text accompanying notes 20-23 *supra*.

28. 436 Pa. at 403, 261 A.2d at 85.

29. *Id.* at 413, 261 A.2d at 90.

30. *Id.* at 404-05, 261 A.2d at 87.

31. 404 A.2d 672 (Pa. 1979).

32. The trial court dismissed the amended complaint for failure to state a cause of action. *Id.* at 673. On review, therefore, the well pleaded allegations of fact are to be taken as true. *Byers v. Ward*, 368 Pa. 416, 84 A.2d 307 (1951).

33. Hereinafter referred to as the plaintiff.

The first and second counts were brought under the Wrongful Death and Survival Act.³⁴ The third count was brought on behalf of Deborah for the psychological damages she sustained as a result of watching her sister's death. The fourth count was brought by the plaintiff for damages she sustained from the emotional stress of witnessing her daughter's death.

The defendant filed preliminary objections in the nature of a demurrer³⁵ to the third and fourth counts of the complaint. The demurrer asserted that the complaint failed to aver that Deborah and the plaintiff were in personal danger of physical impact.

The Allegheny County Court of Common Pleas' Civil Division,³⁶ sitting en banc, overruled the demurrer as to the third count but sustained it as to the fourth count.³⁷ The trial court ruled that since Deborah was within the zone of danger, she could proceed with her action. However, the trial court held that since the mother was outside the zone of danger her cause of action must be dismissed.³⁸ The plaintiff appealed to the Superior Court which affirmed the trial court's decision without issuing an opinion.³⁹ When the plaintiff appealed to the Supreme Court of Pennsylvania, that court reversed the trial court's holding and stated that the plaintiff had pleaded facts upon which relief could be granted.

Reasoning of the Court

The court in *Sinn* recognized five policy arguments relevant to bystander recovery for negligent infliction of emotional distress. They are: medical science's potential difficulty in proving causation between the claimed damages and the alleged fright; the fear of fraudulent or exaggerated claims; the concern that to allow such recovery will precipitate a veritable flood of litigation; the problem of unlimited and unduly burdensome liability; and the difficulty of reasonably circumscribing the area of liability.⁴⁰

The *Sinn* court first addressed the issue of whether medical science

34. PA. STAT. ANN. tit. 42, § 8301 (Purdon 1978).

35. The demurrer was filed pursuant to 231 Pa. Code § 1017(b)(4) (1979). A demurrer is a response that the complaint failed to aver facts sufficient to constitute a valid cause of action, thus relieving the defendant from any obligation to file an answer. *See Purry v. First Nat'l Bank*, 270 Pa. 556, 113 A. 847 (1921).

36. Hereinafter referred to as the trial court.

37. *See* 404 A.2d at 675.

38. *Id.*

39. *Sinn v. Burd*, 253 Pa. Super. 627, 384 A.2d 1003 (1978).

40. 404 A.2d at 678.

is able to supply a causal link between the psychic damage suffered by the bystander and the shock or fright attendant to having witnessed the accident.⁴¹ The court noted that Pennsylvania courts had long assumed that medical science was unable to establish that the alleged psychic injuries were both real and, in fact, had resulted from seeing a gruesome accident.⁴² Recognition of advancements in modern science led the *Sinn* court to conclude that psychic injuries are capable of being proven despite the absence of a physical manifestation of such an injury.⁴³ Therefore, the court abolished the rule that there be a physical manifestation of the emotional distress before recovery is allowed in negligent infliction of emotional distress claims.

The court also rejected the notion that bystander recovery will open the door to fictitious injuries and fraudulent claims. Relying on *Niederman*,⁴⁴ the court stated that modern science has advanced to the point where factual, legal, and medical charlatans are likely to be unmasked at trial.⁴⁵ Moreover, the court felt that public policy requires that the legal and medical professions work together to prevent fraudulent claims.⁴⁶ Thus, fear of fraudulent claims was held to be an insufficient reason to deny bystander recovery for negligent infliction of emotional distress.

Next, the court addressed the issue of whether the fear of a flood of litigation is a sufficient reason to deny bystander recovery for negligent infliction of emotional distress. The court agreed with the late Dean Prosser when he stated:

It is the business of the law to remedy wrongs that deserve it, even at the expense of a flood of litigation; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the courts too much work to do.⁴⁷

Thus, the court was willing to increase its workload rather than let what it felt was a substantial wrong go without a legal remedy.

The *Sinn* court also dealt with the concern that bystander recovery would present a problem of unlimited or unduly burdensome liability. The court agreed that this decision was an extension of liability, but

41. *Id.*

42. *Id.* See, e.g., *Huston v. Borough of Freemansburg*, 212 Pa. 548, 61 A. 1022 (1905) (describing a cause of action for mental disturbance as being intangible, untrustworthy, illusory, and speculative).

43. 404 A.2d at 679.

44. See text accompanying notes 24-30 *supra*.

45. 404 A.2d at 680.

46. *Id.*

47. *Id.* at 681, citing Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 877 (1939).

held that it was not unduly burdensome. The court reasoned that the more complex and interwoven societal relations become, the greater the responsibility one must accept for his or her conduct.⁴⁸ Furthermore, the conduct in the instant case, the negligent operation of a vehicle, has traditionally been held to be actionable by plaintiffs who have sustained provable damages.⁴⁹

Another concern of the court in allowing recovery was the effect on constantly advancing insurance costs.⁵⁰ The *Sinn* court agreed with the dissent in the leading New York case, *Tobin v. Grossman*,⁵¹ where the majority denied bystander recovery for negligent infliction of emotional distress. The *Tobin* dissent pointed out that there was no evidence that allowing bystander recovery would have dire effects on insurance costs.⁵²

The court in *Sinn* agreed that some limits on liability were necessary. To this end, the court held that a defendant will not be liable for the mental distress that may be experienced by the most timid or sensitive members of society.⁵³ Thus, the court directed the trial courts to focus upon the situation producing the emotional distress and to require that the occurrence be of such a nature that it would be likely to produce severe emotional distress in a person of average sensitivities.⁵⁴ The *Sinn* court concluded that with this limitation, concerns over unlimited and unduly burdensome liability were not sufficient to deny bystander recovery.

The *Sinn* court was then faced with the difficult task of reasonably circumscribing the area of liability. The court expressed confidence that the application of the traditional tort concept of foreseeability would reasonably limit the tortfeasor's liability.⁵⁵ The court, in defining what is reasonably foreseeable, looked to three factors expressed in *Dillon v. Legg*⁵⁶ which was the first case to allow bystander recovery

48. 404 A.2d at 681.

49. *Id.* at 683.

50. *Id.* at 684.

51. 24 N.Y.2d 609, 301 N.Y.S.2d 554, 249 N.E.2d 419 (1969). In *Tobin*, the plaintiff heard the screech of automobile brakes and immediately went to the scene of the accident. There she saw her two year old child seriously injured and lying helplessly on the ground. She brought suit for the severe emotional distress she suffered. The court dismissed her complaint holding that the plaintiff had not pleaded facts upon which relief could be granted. The court reasoned that if it allowed recovery here, the court would be creating a new tort which would result in unduly burdensome liability.

52. 24 N.Y.2d at 619, 301 N.Y.S.2d at 562, 249 N.E.2d at 425 (Keating, J., dissenting).

53. 404 A.2d at 683.

54. *Id.*

55. *Id.* at 684.

56. 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968).

for negligent infliction of emotional distress.⁵⁷

In *Dillon*, a mother brought an action to recover damages for the mental distress she suffered when she witnessed the accident in which her infant daughter was struck and killed by a negligently driven automobile.⁵⁸ While the *Dillon* court allowed the mother to recover, it limited the scope of liability by setting out three factors as general determinants of liability. These factors were:

Whether the plaintiff was located near the scene of the accident as contrasted with one who was a distance away.

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

Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.⁵⁹

The court in *Sinn*, in adopting these three factors, agreed that they would reasonably circumscribe the area of liability.⁶⁰ Mrs. Sinn met all three elements of this test because she was located near the accident, witnessed it happen, and was the victim's mother. Thus, the Pennsylvania high court held that her mental distress was foreseeable as a matter of law.⁶¹ Since all five policy objections to bystander recovery for negligent infliction of emotional distress were overcome and the plaintiff's mental distress was foreseeable, the *Sinn* court held that Mrs. Sinn had pleaded facts upon which relief could be granted.

In his concurrence, Chief Justice Eagen agreed that recovery would be appropriate if:

[T]he plaintiff is closely related to the injured party, such as a mother, father, husband or wife; the plaintiff is near the scene of and views the accident; the plaintiff suffers serious mental distress as a result of viewing the accident . . . and there is a severe physical manifestation of this mental distress.⁶²

Thus, the concurring justice differed from the majority in that he would retain the requirement that a plaintiff manifest a severe physical injury as a result of the mental distress. Mrs. Sinn pleaded that she suffered from nervous shock,⁶³ which is generally considered a physical injury.⁶⁴

57. *Id.* at 730-31, 69 Cal. Rptr. at 74, 441 P.2d at 914.

58. *Id.* at 731, 69 Cal. Rptr. at 74, 441 P.2d at 914.

59. *Id.* at 740-41, 69 Cal. Rptr. at 80, 441 P.2d at 920.

60. 404 A.2d at 684-5.

61. *Id.* at 686.

62. *Id.* at 687 (Eagen, C.J., concurring).

63. The fourth count of the complaint averred that: "As a result of watching the aforementioned accident, the Plaintiff suffered a shock to her nerves and nervous system, and sustained

Therefore, Chief Justice Eagen held that justice mandated that Mrs. Sinn be given the opportunity of proving the aforementioned requirements.⁶⁵

The dissenting opinion⁶⁶ rejected the majority's holding that a physical injury resulting from emotional distress is not essential to recovery for negligent infliction of emotional distress.⁶⁷ The dissent reasoned that without a physical injury any award of damages would be too speculative.⁶⁸ Moreover, to allow recovery for mental distress alone would undercut the social policy of demanding strong emotional fortitude from all persons.⁶⁹ Thus, the dissent would retain the physical injury requirement in negligent infliction of emotional distress cases.

The dissent's further attack on the majority's holding was that it was based on arbitrary distinctions. It was pointed out that a mother may surely suffer severe emotional distress upon learning of her child's accidental death even though the mother may not have learned of it until the accident had long since occurred.⁷⁰ However, this mother could not recover for negligent infliction of emotional distress. Therefore, the dissent concluded that any mother whether present or not at her child's death may suffer severe emotional distress. To allow recovery to the witnessing mother while not to the absent mother was clearly an arbitrary distinction.

Another concern expressed by the dissent was that any application of the rules espoused by the majority will result in arbitrary recovery. The dissent demonstrated this arbitrariness with a worthy example:

Three siblings get off a bus. Two attempt to cross the street. The third begins to walk away . . . and goes down the block. A moment later he hears screeching car brakes, screams, and one of his siblings yelling, "My God, Jim is dead." Does the brother have a foreseeable injury? Is there any way to judge whether his emotional distress "resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the accident," or from "learning of the accident from others after its occurrence?" How

grievous mental pain and suffering resulting in severe depression and an acute nervous condition." *Id.* at 674.

64. *See, e.g.*, *Vanoni v. Western Airlines*, 247 Cal. App. 2d 793, 56 Cal. Rptr. 115 (1967). While the majority acknowledged that Mrs. Sinn had pleaded physical injury, the court held that a physical injury was not essential to recovery.

65. 404 A.2d at 687 (Eagen, C.J., concurring).

66. The dissent was written by Justice Roberts and joined by Justice O'Brien.

67. 404 A.2d at 688 (Roberts, O'Brien, J.J., dissenting).

68. *Id.*

69. *Id.*

70. *Id.* at 691.

many steps down the street distinguish immediate observation from indirect learning?⁷¹

The dissent asserted that any answer to the above questions would lead to arbitrary recovery. The dissent further asserted that it would be impossible to distinguish immediate observation from indirect learning. Additionally, the dissent reasoned that the emotional distress experienced by one three blocks from the accident is likely to be as equally traumatic as one two or four blocks away from the accident. Moreover, the dissent contended the majority, by using its test, may allow recovery to the closest plaintiff while denying recovery to the other plaintiffs even though the mental distress may have been equally severe. Thus, the dissent accused the majority of developing a clearly arbitrary standard for recovery in negligent infliction of emotional distress cases which is incapable of uniform application.

As an alternative to the majority's holding in *Sinn*, the dissent believed that the "zone of danger" test⁷² should be retained. Thus, there would be no recovery for negligent infliction of emotional distress unless the tortfeasor had breached a duty directly owed to the plaintiff, causing the plaintiff to fear for his own physical safety.⁷³ The dissent reasoned that, by limiting recovery to the class of plaintiffs within the zone of danger, the arbitrary distinctions set forth in the majority's opinion would be eliminated.

Finally, the dissent asserted that the majority had circumvented the legislative intent of Pennsylvania's wrongful death statute.⁷⁴ This legislation provides for specific recovery to a mother emotionally injured by a tortfeasor's negligent killing of her child.⁷⁵ Moreover, it created a new⁷⁶ and independent right for the mother to recover for the wrong that was done to her.⁷⁷ The dissent contended that in the present case the majority allowed the mother to collect for injury to the feelings (solatium) which is proscribed by the statute. The dissent further asserted that grief caused by the loss of a child must be an integral part of the plaintiff's mental distress and that injury, by statute, must

71. *Id.* at 692.

72. See text accompanying notes 12-14 *supra*.

73. 404 A.2d at 688 (Roberts, O'Brien, J.J., dissenting).

74. PA. STAT. ANN. tit. 42, § 8301 (Purdon 1978).

75. The measure of damages for the wrongful death of a minor consists of funeral expenses, plus the total earnings which would have been earned by the child up to the age of twenty-one, minus the cost of maintaining the child during this period, with the resulting amount reduced to its present worth. See, e.g., *Swartz v. Smokowitz*, 400 Pa. 109, 161 A.2d 330 (1960).

76. This cause of action was unknown to Pennsylvania's common law and was created by legislation. See *Howard v. Bell Tel. Co.*, 306 Pa. 518, 160 A. 613 (1932).

77. See, e.g., *Pennsylvania R.R. v. Zebe*, 33 Pa. 318, 328 (1858).

go uncompensated. Therefore, the dissent stated that, by allowing recovery, the *Sinn* court had undermined the legislative determination that compensation for damages suffered by the class of individuals to which the plaintiff belonged must be obtained through the wrongful death statute.

ANALYSIS OF *SINN V. BURD*

The depth and inconsolable nature of a parent's loss at the death of a child must be among the most traumatic in human experience. Where that death is caused by another's irresponsible act, it is understandable that parents should turn to the law to seek redress for the harm done to them. Yet, as Dean Prosser noted, even the law is not capable of righting every wrong, nor compensating every injury.⁷⁸ Moreover, fundamental jurisprudential wisdom demands that recovery not be based on arbitrary rules and distinctions. Unfortunately, the Supreme Court of Pennsylvania in *Sinn* has allowed recovery based on arbitrary rules and distinctions.

Arbitrariness

While the dissent has given a vivid example⁷⁹ of how the majority's standard is arbitrary, an examination of other jurisdictions which allow bystander recovery for negligent infliction of emotional distress will more clearly demonstrate the arbitrary nature of the majority's holding.

California was the first state to allow bystander recovery for negligent infliction of emotional distress in *Dillon v. Legg*.⁸⁰ In a subsequent California case, *Archibald v. Braverman*,⁸¹ a mother arriving on the scene of the accident shortly after her son was negligently injured was allowed to recover. Her arrival one minute after the accident was considered to be "contemporaneous" as stated within the second factor of the test enunciated in *Dillon* and adopted by the *Sinn* court. In a more recent California case, *Powers v. Sissoev*,⁸² a mother arrived upon the scene of her child's accident about thirty minutes after it occurred. Although the mother viewed her injured daughter at the scene of the accident, she was denied recovery because her arrival was not considered "contemporaneous." Logically, the emotional distress suffered by a

78. PROSSER, *supra* note 2, § 1 at 2-4.

79. See text accompanying notes 70 and 72 *supra*.

80. See text accompanying notes 56-59 *supra*.

81. 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969).

82. 39 Cal. App. 3d 865, 114 Cal. Rptr. 868 (1974).

mother upon viewing her injured child thirty minutes after an accident is just as severe as if she had viewed the child one minute after the accident had occurred. Clearly, the *Sinn* court's requirement of "contemporaneousness" will lead to these types of arbitrary distinctions.

A plaintiff may suffer severe emotional distress upon learning from others of an accident after the accident had occurred.⁸³ In *Kelly v. Kokua Sales & Supply, Ltd.*,⁸⁴ a father died of a heart attack upon being informed by telephone of the deaths of his daughter and granddaughter in an automobile accident. However, his estate was denied recovery for negligent infliction of emotional distress as the plaintiff learned of the accident from others as contrasted with actually observing the accident.⁸⁵ Therefore, by applying the test adopted in *Sinn*, a plaintiff with obviously severe emotional distress will be arbitrarily denied recovery if he learns of the accident from others.

Another example of the arbitrariness resulting from the majority's holding can be found in the third requirement for recovery. That requirement states that the bystander must have a close relationship with the injured person.⁸⁶ In Rhode Island, a mother can recover for negligent infliction of emotional distress while a close personal friend cannot.⁸⁷ In Arizona, even one who was a close friend of the victim may recover,⁸⁸ while in Hawaii not all closely related persons can recover.⁸⁹ This variety of rules limiting recovery for negligent infliction of emotional distress is eloquent testimony that there is no uniform non-arbitrary definition of who is closely related.

83. In fact, some experts are of the opinion that the emotional distress may actually be worse when a person does not observe the circumstances in which a loved one died or was injured. This is because a person could very well imagine a scene much more gruesome and horrible than actually happened. Leibson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. FAMILY L. 163, 196 n.79 (1976-77).

84. 56 Haw. 204, 532 P.2d 673 (1975).

85. *Id.* at 208, 532 P.2d at 675-76.

86. See text accompanying note 59 *supra*.

87. *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975). The plaintiffs in *D'Ambra* sued to recover for physical and emotional injuries incurred by witnessing their four year old son being struck and killed by a United States mail truck. The court in allowing recovery attempted to limit the scope of liability. It did so by limiting recovery in future such cases to plaintiffs who are closely related to the victim.

88. *Keck v. Jackson*, 122 Ariz. 114, 593 P.2d 668 (1979). The plaintiff in *Keck* brought suit to recover for the emotional distress she suffered as a result of witnessing her mother die in an automobile accident. The court held that to recover the plaintiff must have had a close personal relationship to the victim either by consanguinity or otherwise. *Id.* at 117, 593 P.2d at 670.

89. *Leong v. Takasaki*, 55 Haw. 398, 520 P.2d 758 (1974). The plaintiff, a ten year old boy, was allowed to recover for negligent infliction of emotional distress when he witnessed his step-grandmother's accidental death. The court in *Leong* held that due to Hawaiian customs, a step-grandmother was a close enough relationship to warrant liability. The court suggested that a blood relationship may not necessarily be close enough to warrant recovery and that future plaintiffs must prove the nature of their relationship with the victim. *Id.* at 411, 520 P.2d at 766.

Even Dean Prosser, a firm supporter of recovery in negligent infliction of emotional distress cases, admitted that arbitrariness cannot be avoided. He limited recovery to include only the immediate family and only if they additionally manifested a physical injury.⁹⁰ However, Prosser's expostulation created as many questions as it answered. If a foster child or a very close cousin living in the home is the victim, is either considered immediate family? Surely Prosser's suggestions would not negate the inherent arbitrariness of allowing some to recover for negligent infliction of emotional distress while others with equally severe emotional distress must go without compensation.

Circumvention of the Wrongful Death Statute

Furthermore, it does appear that the holding in *Sinn* will have the effect of circumventing the legislative intent of Pennsylvania's wrongful death statute.⁹¹ The legislature has realized that a parent suffers a great loss when his or her child is negligently killed. This statute has been interpreted as giving the parents their own cause of action to compensate them for the loss they have suffered.⁹² Damages are limited to funeral expenses, plus the total earnings which would have been earned by the child up to the age of twenty-one, minus the cost of maintaining the child during that period, with the amount reduced to the present value.⁹³ Nothing is recoverable for the mental suffering of the surviving parents. The legislature has adjudged those damages as being too speculative to reasonably estimate.⁹⁴ The majority in *Sinn* claims that it is not giving damages for the mental suffering of losing a child but rather for the shock of witnessing the death of a child.⁹⁵ However, even if it is assumed, *arguendo*, that medical science is able to prove emotional distress absent a physical manifestation of the distress,⁹⁶ logic

90. PROSSER, *supra* note 2, § 54 at 334.

91. PA. STAT. ANN. tit. 42, § 8301 (Purdon 1978).

92. *See, e.g.*, Pennsylvania R.R. v. Zebe, 33 Pa. 318, 329 (1858).

93. *See* note 75 *supra*. *See also* Smith v. Philadelphia Transp. Co., 173 F.2d 721 (3d Cir. 1949); Palmer v. Moren, 44 F. Supp. 704 (M.D. Pa. 1942); Schultheir v. Levin, 372 Pa. 513, 94 A.2d 740 (1953); Allen v. Silverman, 355 Pa. 471, 50 A.2d 275 (1947).

94. Pennsylvania R.R. v. Zebe, 33 Pa. 318, 328 (1858).

95. 404 A.2d at 675 n.3.

96. It cannot be assumed that medical science is accurately able to prove psychic injuries alone. As one commentator noted:

Regardless of the different theories and systems used in the training of psychiatrists, it can be proved that such training, regardless of the psychiatric system taught, is speculative and subjective in content as practiced today, and is not founded upon scientific principles. Psychiatry has been developed and is taught from combinations of argumentative and speculative theories born from personal experiences and ideas which are presented as facts without classification or validation. There are just too many contradictions and

dictates that it is impossible for medical science to separate the mental anguish caused by witnessing the death of a child and the subsequent or contemporaneous realization by the parent that the child is lost to the parent forever. Therefore, by allowing a parent to recover more damages than those permitted in the statute, the *Sinn* court has circumvented the legislative intent of the Pennsylvania wrongful death statute.

An alternative to the "pure negligence" test adopted in *Sinn* is the "zone of danger" test.⁹⁷ Simplified, the "zone of danger" test states that there is a duty to use reasonable care to avoid causing another the fear of physical injury, the breach of which will lead to the actor's being liable for all the damages he proximately caused. The zone of danger itself is not arbitrary since it is defined as the area in which a reasonable man would fear for his own physical safety.⁹⁸ Thus, when applying the "zone of danger" test, only the class of plaintiffs who are within the zone of personal physical danger could recover. The arbitrary distinctions resulting from the standards adopted in *Sinn*, such as contemporaneousness and close relationships, would be eliminated as such distinctions would be irrelevant to recovery in negligent infliction of emotional distress cases. Therefore, the "zone of danger" test is not arbitrary and should have been retained in *Sinn*.

Moreover, retention of the "zone of danger" test in *Sinn* would not have circumvented the legislative intent of Pennsylvania's wrongful death statute.⁹⁹ The fact that someone died during the accident would not preclude a plaintiff from recovery as long as he was within the "zone of danger," because the action would result from someone breaching a duty owed to the plaintiff, not a duty owed toward a third person. Thus, wrongful death statutes would never enter into negligent infliction of emotional distress claims since such claims result from a separate breach of duty. The negligent infliction of emotional distress

disagreements presently existing which seem to be irreconcilable among the leading psychiatrists and systems to justify the acceptance of psychiatry as an established science.

Therefore, since the state of psychiatric diagnosis is presently so fraught with inconsistencies, errors, chance, personality, and intellectual interferences, it has to be concluded that psychiatrists, and their psychiatric testimony, when properly weighed and tested, are many times so confusing and contradictory as to be of no constructive help in aiding a court or jury to reach a right and just decision pertaining to an individual's mental or emotional state.

McNeal, *The Value of a Psychiatrist*, 1972 LEGAL MED. ANN. 303, 307, 313.

97. See text accompanying notes 12-14 *supra*.

98. See, e.g., *Welsh v. Davis*, 307 F. Supp. 416 (D. Mont. 1969); *Cosgrove v. Beymer*, 244 F. Supp. 824 (D. Del. 1965); *Jelley v. LaFlame*, 108 N.H. 471, 238 A.2d 728 (1968). See also RESTATEMENT (SECOND) OF TORTS § 313 (1965).

99. It must be noted that if Mrs. Sinn's daughter had not died but had only been seriously injured, the circumvention of the wrongful death statute would not be an issue.

claim would not be the result of watching someone else die, but rather from fearing for one's own physical safety. Had the "zone of danger" test been retained in *Sinn*,¹⁰⁰ the court would not have circumvented the legislative intent of Pennsylvania's wrongful death statute.

Potentially Unduly Burdensome Liability

Another strong argument against allowing bystander recovery for negligent infliction of emotional distress is that it will create unduly burdensome liability, a public policy issue that is unrelated to the traditional tort concepts of negligence—duty, breach, proximate cause, and damages.¹⁰¹ The court in *Sinn* agreed that it was extending the scope of liability. However, the *Sinn* court reasoned that this extension was not unduly burdensome nor would it have dire effects on insurance costs.¹⁰² Other courts have disagreed.

In *Waube v. Warrington*,¹⁰³ a mother died shortly after she suffered emotional shock as a result of witnessing the defendant's negligent killing of her child in an automobile accident. Her estate was denied recovery. The *Waube* court held that the allowing of recovery would result in liability wholly out of proportion to the culpability of the negligent tortfeasor and would also unduly burden the users of the highways.¹⁰⁴

In the more recent case of *Tobin v. Grossman*,¹⁰⁵ the New York Court of Appeals accepted the assertion that the possibility of fraudulent claims was not a valid reason for denying recovery in negligent infliction of emotional distress claims. The court also accepted the argument that causation could be proven by medical science. Nevertheless, the *Tobin* court denied the mother recovery since it would be creating unduly burdensome liability and the area of liability was incapable of rational circumscription.¹⁰⁶ The *Tobin* court was further concerned with the effect on insurance costs if recovery was allowed.¹⁰⁷ The *Tobin* court noted that constantly advancing insurance costs can become unduly burdensome and that the aggregate recoveries in a sin-

100. Since Mrs. Sinn was clearly outside the zone of danger, she would have been precluded from recovering if the "zone of danger" test had been retained.

101. See *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928); *Colla v. Mandella*, 1 Wis. 2d 594, 85 N.W.2d 345 (1957).

102. See text accompanying notes 48-52 *supra*.

103. 216 Wis. 603, 258 N.W. 497 (1935).

104. *Id.* at 607, 258 N.W. at 501.

105. 24 N.Y.2d 609, 301 N.Y.S.2d 554, 249 N.E.2d 419 (1969).

106. *Id.* at 618-19, 301 N.Y.S.2d at 560-62, 249 N.E.2d at 423-24.

107. *Id.* at 617, 301 N.Y.S.2d at 559-60, 249 N.E.2d at 423.

gle accident of this kind are not likely to stay within compulsory or even ordinary insurance liability coverage.¹⁰⁸

Although the *Sinn* court stated that it found no evidence that allowing recovery for negligent infliction of emotional distress would have dire effect on insurance cost and that this "dollars-and-cents" argument was unpersuasive,¹⁰⁹ there is substantial evidence suggesting that automobile insurance costs are becoming an undue burden on motorists. Automobile insurance costs have been advancing at a rapid rate.¹¹⁰ The burden of these increases can be demonstrated by the fact that at the end of 1977, nationally, there were over fifteen million automobiles which were uninsured,¹¹¹ many because the owners could not afford automobile insurance.¹¹² Moreover, the effect of extending liability in negligent infliction of emotional distress claims will further burden motorists, in the form of higher insurance premiums, as insurance companies will have a greater exposure of risk and an additional type of claim to defend.¹¹³ Thus, it is clear that the *Sinn* court treated the public policy issue of unduly burdensome liability lightly, whereas if the court had examined fully this social problem, it may have decided that society could not afford to compensate Mrs. Sinn's emotional distress.

CONCLUSION

Plaintiffs, throughout time, have argued that defendants who cause them emotional distress must be held liable. However, most courts have limited recovery to cases where the defendant has caused the plaintiff to fear for his or her own personal physical safety. The Supreme Court of Pennsylvania in *Sinn* has expanded this venerable doctrine to include plaintiffs whose physical well-being has not been placed in jeopardy. By so doing, the *Sinn* court has clearly established arbitrary rules and distinctions which are incapable of uniform and fair application. Furthermore, by allowing the plaintiff in *Sinn* to recover what must surely include solatium, the *Sinn* court has circumvented the

108. *Id.*

109. 404 A.2d at 684.

110. From 1967 through 1979, the cost of the average automobile insurance policy rose 128.7 percent while the cost of living rose only 117.4 percent. INSURANCE INFORMATION INSTITUTE, FACT SHEET (1980).

111. INSURANCE INFORMATION INSTITUTE, INSURANCE FACTS 31 (1979).

112. Interview with Ralph Weiner, former president of the Illinois Independent Insurance Brokers Association, in Chicago, Illinois (Feb. 29, 1980).

113. *Id.* Mr. Weiner notes that these types of suits are often very expensive to defend as they involve many psychiatric examinations and much expert testimony.

legislative intent of Pennsylvania's wrongful death statute. Moreover, the *Sinn* court did not forcefully address the public policy issue of unduly burdensome liability.

In view of the facts in *Sinn*, the holding is not altogether surprising. However, decisions are not made in a vacuum. Since this decision must lead in the future to arbitrary results, it frustrates a basic purpose and policy of tort law; namely, to achieve consistently just results in the resolution of private disputes. It certainly can be maintained that over the passage of time the holding in *Sinn* will lead to more injustice than would allowing recovery only to those who reasonably fear for their physical safety.

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