

**LEGAL PRACTICE SKILLS PROGRAM  
SUFFOLK UNIVERSITY LAW SCHOOL**

TO: LPS Students  
FROM: LPS Faculty  
DATE: August 2011  
RE: Madison Memorandum

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This packet contains the materials that you will need to complete your first LPS writing assignment.

Prior to your first LPS class during the week of August 22nd, read the attached memorandum and the attached copies of the Landreth, Davis, Keith, and Garcia cases. You should also prepare a case brief for each of these cases. (The case briefs will not be collected or graded but will be used for class discussion). Use only the attached copies of the cases.<sup>1</sup> *Additional research is prohibited and will be considered a violation of the LPS course rules.*

Your first LPS writing assignment, a closed research office memorandum, is due on Friday, September 16, 2011 for all day students (LPS Sections 1-25) and on Friday, September 23, 2011 for all evening students (LPS Sections 26-37). For your memorandum, you will be required to identify the significant facts of the plaintiff's case, apply the relevant law to those facts, and predict the likely outcome of the case. Your memorandum may not be longer than four pages, double-spaced. For authority, use only the provided copies of the Landreth, Davis, Keith, and Garcia cases. Citations within the memorandum must be in conformity with The Bluebook.

Limit your memorandum to the issue of whether Patrick Madison's experience can satisfy the sensory and contemporaneous element of the foreseeability test for the tort of negligent infliction of emotional distress. We will analyze the closely related element (discussed in the Garcia case) together in class; but do not address the closely related element in your memorandum.

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<sup>1</sup> The cases have been redacted for this assignment.

## MEMORANDUM

TO: LPS Students

FROM: LPS Faculty

DATE: August 2011

RE: Madison Memorandum

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Your firm has been retained by Patrick Madison to discuss the possibility of filing a lawsuit against Lizak Bus Company for negligent infliction of emotional distress (“NIED”), arising out of a bus accident in which Steven Williams was seriously injured. Cheryl Robbins is an employee of Lizak Bus Company and was the driver of the bus involved in the accident. The following is a summary of the facts relevant to Madison’s claim.

In 2001, Steven Williams’ parents got divorced. Since then, Steven’s mother has had legal and physical custody of Steven. Steven is now thirteen years old. In 2006, Steven’s mother married Madison. Steven now lives with his mother and Madison in Austin, Texas. Steven has continued, however, to see his biological father every weekend, and they have a good relationship. Steven and Madison, while civil to one another, are not close and never have been.

On June 20, 2011, Steven was scheduled to go on an overnight camping trip in a state park outside of Austin. That morning, Madison drove Steven to the bus station. It was raining heavily. They arrived at 9:00 A.M. Madison helped Steven load his things onto the yellow school bus that was to take him and the other campers to the campsite. Robbins greeted Steven as he boarded the bus. At 9:30 A.M., the bus, which was filled to capacity, departed. A few minutes later, Madison began his trip home. A block from the bus station, Madison stopped for gas. He filled his tank and then entered the gas station’s convenience store, where he bought an iced coffee and gum. About five minutes after arriving at the gas station, Madison resumed his trip home. As he turned onto Route 473 North, he remembered that the campsite was off the same highway, about sixty miles north of his home.

The rain continued in heavy sheets, limiting visibility. Just a few minutes after entering the highway, Madison saw brake lights in front of him, and he quickly hit his brakes to slow down and stop. He could make out a long line of traffic in front of him. Cars were not moving, and he heard sirens in the distance. Several police cars, a fire truck, and ambulances flew by him in the breakdown lane. He could not see the cause of the traffic jam, but he assumed it was an accident. He sat in his car, inching along for ten minutes, before he could finally make out police cars, ambulances, and the fire truck on the right side of the road. He could see people run-

ning up and down an embankment to a ditch out of sight. A single state trooper was directing traffic into the left-hand lane. Madison suddenly felt a rush of anxiety, wondering if the accident might involve Steven's bus. He rolled down the window as he passed the trooper and yelled, "What happened down there?!" The trooper replied, "A school bus went off . . ." Before the trooper could finish, Madison jerked the steering wheel to the right, drove past a line of emergency vehicles, and slammed on the brakes. He jumped out of the car and went to the edge of the embankment. About sixty feet below, he saw a school bus on its side. It was dented and twisted from rolling down the embankment and hitting rocks and trees in its path. Firefighters, police, and EMTs were racing around carrying equipment to the bus and injured people out of it.

Madison ran down the hill and immediately began to look for Steven. There were injured passengers everywhere. Some were being attended to, but there were only about a dozen rescue personnel on site. Steven was not one of the passengers who had been removed from the bus, so Madison entered the wreckage. The inside of the bus was completely askew. There were unhinged seats piled on top of each other, and rubble was everywhere. He began helping workers pull seats, rubble, and equipment out of the bus to get to the rest of the passengers. They found three more people and removed them for medical care. They then reached a point where the side of the bus had collapsed in on itself, blocking further passage. Madison could hear cries for help from the trapped passengers. He and the other workers spent fifteen minutes using jacks and crowbars to raise the steel shell. When they got inside they found ten children, but Steven was not among them. While Madison was still helping with the injured passengers inside the bus, he heard a firefighter call out from the woods, "I found three boys over here!" Madison rushed from the bus and ran to the woods. There lay Steven, bleeding and barely conscious. He had been thrown from the bus, and a tree that had been uprooted by the bus had pinned his legs. Madison held his hand and consoled him as the rescue workers spent five minutes removing the tree and as medical workers continued to attend to him for several more minutes. Madison then rode in the ambulance with him to the hospital.

Steven suffered a severe concussion, two broken legs, and broken ribs. He stayed in the hospital for two weeks. Since the incident, Madison has suffered from recurring nightmares, periodic anxiety attacks, and depression. Two weeks ago, he began seeing a psychiatrist who prescribed him anti-anxiety medication.

The senior partner needs to evaluate whether Madison has a cause of action under Texas law for NIED based on the mental injury he suffered as a bystander to Steven's injury. Although a final determination has not yet been made, presume for the purposes of this memo that Robbins was negligent in operating the bus. Accordingly, please write a memorandum to the senior partner analyzing whether Madison's experience can satisfy the second element of the tort's foreseeability test, *i.e.*, whether the shock Madison suffered "resulted from a direct emotional impact . . . from a sensory and contemporaneous perception of the accident." Another associate is analyzing the remaining elements of the foreseeability test.

570 S.W.2d 486



Court of Appeals of Texas,  
Texarkana.

J. LANDRETH and Paula Landreth, d/b/a Happy Acres  
Nursery, and Happy Acres Nursery, Appellants,

v.

James REED and Elizabeth Reed, Individually and as  
next friend of Melissa Reed, a minor, Appellees.

**No. 8563.**

Aug. 22, 1978.

Action was instituted in connection with drowning death of plaintiffs' 14-month-old infant in swimming pool of day nursery operated by defendants. The 5th District Court, Bowie County, Bun L. Hutchinson, J., entered judgment on verdict for plaintiffs, and defendants appealed. The Court of Civil Appeals, Cornelius, C. J., held that recovery of damages by minor plaintiff as a result of having suffered such a physical injury was not improper given, inter alia, shock resulting from direct emotional impact upon plaintiff from sensory and contemporaneous perception of accident.

Affirmed

West Headnotes

**[1] Damages 115** **57.27**

**115** Damages

**115III** Grounds and Subjects of Compensatory Damages

**115III(A)** Direct or Remote, Contingent, or Prospective Consequences or Losses

**115III(A)2** Mental Suffering and Emotional Distress

**115k57.26** Injury or Threat to Another; Bystanders

**115k57.27** k. In General. **Most Cited Cases**

(Formerly 115k51)

In determining foreseeability in resolving issue whether to allow recovery of damages by one who witnesses negligent injury of another, court should resolve whether plaintiff was located near scene of accident, whether shock resulted from a direct emotional impact upon plaintiff

from a sensory and contemporaneous perception of accident, as distinguished from learning of accident from others after its occurrence, and whether plaintiff and victim were closely related.

**[2] Damages 115** **57.60**

**115** Damages

**115III** Grounds and Subjects of Compensatory Damages

**115III(A)** Direct or Remote, Contingent, or Prospective Consequences or Losses

**115III(A)2** Mental Suffering and Emotional Distress

**115k57.60** k. Recovery for Resulting Physical Injury. **Most Cited Cases**

(Formerly 115k56.20)

Allowing minor plaintiff to recover damages for physical injury sustained by her as a result of shock and trauma in witnessing efforts to revive her infant sister after she was removed from swimming pool of day nursery operated by defendant was not inappropriate where plaintiff was located near scene of accident, shock resulted from a direct emotional impact upon plaintiff from a sensory and contemporaneous perception of accident, and close family relationship between plaintiff and her younger sister was obvious.

**\*487** Howard Waldrop, Atchley, Russell, Waldrop & Hlavinka, Texarkana, for appellants.

Harry B. Friedman, Harkness, Friedman, Kusin & Hooper, Texarkana, for appellees.

CORNELIUS, Chief Justice.

While attending a day nursery operated by Mrs. Paula Landreth, fourteen month old Kecia Reed fell into the swimming pool and drowned. Her parents, Mr. and Mrs. James Reed, individually and as next friend of Kecia's infant sister, Melissa, filed suit against Mr. and Mrs. Landreth for damages. Based upon jury findings of negligence, proximate cause and damages, the district court entered judgment against Mr. and Mrs. Landreth awarding Mr. and Mrs. Reed \$25,000.00 for their loss, together with \$2,940.00 for funeral and medical expenses, the estate of Kecia \$65,000.00 for the conscious pain and suf-

fering she experienced, and Melissa the sum of \$25,000.00 for injuries she received as a result of witnessing the death of her sister.

[1] Melissa's recovery is challenged on the ground that, as she neither received a physical impact as a result of the negligent act, nor was she in the zone of danger created by that act, the allowance of recovery for injuries resulting from her shock would be to extend the liability for one's negligent act beyond reasonable and permissible limits. The problem of whether to allow recovery of damages by one who witnesses the negligent injury of another person has confronted and perplexed the courts for decades. Yet, in our own jurisdiction, there is a surprising paucity of cases which have directly considered it. Nationwide, the courts have expressed several views. Some deny any recovery for emotional trauma in such cases. Others permit a recovery only if the claimant sustained a physical impact. Still others have ruled that physical impact is not necessary if the plaintiff was in the zone of danger. Finally, some have held that artificial distinctions such as those noted above should be disregarded and each case should be determined upon the traditional concepts of negligence and proximate cause based upon reasonable foreseeability. See [Annot., 29 A.L.R.3d 1337 \(1970\)](#); [Dillon v. Legg, 68 Cal.2d 728, 69 Cal.Rptr. 72, 441 P.2d 912 \(1968\)](#). Although the exact question has not been definitely answered by a decision of our own courts, it appears that Texas will follow the modern rule, and will disregard the artificial distinctions in favor of a decision based upon those traditional concepts. See [Kaufman v. Miller, 414 S.W.2d 164 \(Tex.1967\)](#); [Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 \(1890\)](#); [Dave Snelling Lincoln-Mercury v. Simon, 508 S.W.2d 923 \(Tex.Civ.App. Houston-1st Dist. 1974, no writ\)](#); Comments, *Negligent Infliction Of Emotional Harm To Bystanders-Should Recovery Be Denied?*, 7 St. Mary's Law Journal 560 (1975).

[2] In [Dillon v. Legg, supra](#), the seminal case setting forth the modern rule (and replacing the "zone of danger" rule), the Supreme Court of California expanded tort liability for emotional distress to include safely located bystanders, but it also acknowledged the necessity for limiting this otherwise potentially infinite \*488 liability which follows every negligent act. ([Dillon v. Legg, supra, at 739, 69 Cal.Rptr. 72, 441 P.2d 912](#); [Justus v. Atchison \(1977\) 19 Cal.3d 564, 582, 139 Cal.Rptr. 97, 565 P.2d 122.](#)) "It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one person were to be compelled to pay for the lacerated feel-

ings of every other person disturbed by reason of it." (Prosser and Keeton on Torts (5th ed. 1984) p. 366.) What the [Dillon](#) court tried to do was recognize the severe and sudden shock that undoubtedly accompanies the perception of the infliction of traumatic physical injuries upon a loved one, without granting a right of recovery to every possible third party who might justifiably be upset over the injuries. It is generally agreed that in determining foreseeability in this type of case, several elements will be relevant: (1) whether the plaintiff was located near the scene of the accident; (2) whether the shock resulted from a direct emotional impact upon the plaintiff from a sensory and contemporaneous perception of the accident, as distinguished from learning of the accident from others after its occurrence; and (3) whether the plaintiff and the victim were closely related. See [Dave Snelling Lincoln-Mercury v. Simon, supra](#); [Dillon v. Legg, supra](#).

Without question, the first relevant element was established in this case. Melissa was present every day, including the day of the drowning, with Kecia at the day nursery. The nursery occupied a relatively small area and the pool was located immediately adjacent to the playground areas as well as the buildings. Concerning the second element, the evidence is uncertain as to whether Melissa saw Kecia in the pool, but it is clear that she was present in the room when Kecia was brought from the pool and was there for at least some time while "mouth to mouth" and "arm lift" procedures were used in an effort to resuscitate her. The jury could have inferred from \*489 other evidence that only a few minutes elapsed between Kecia's entry into the pool and her discovery and the resulting resuscitative efforts. In the modern view, actual observance of the accident is not required if there is otherwise an experiential perception of it, as distinguished from a learning of it from others after its occurrence. Compare, [Krouse v. Graham, 19 Cal.3d 59, 137 Cal.Rptr. 863, 562 P.2d 1002 \(1977\)](#); [Archibald v. Braverman, 275 Cal.App.2d 253, 79 Cal.Rptr. 723 \(1969\)](#). In the special circumstances of this case, we conclude that there was such a perception on the part of Melissa. In seeing Kecia brought from the pool in an emergency situation fraught with life or death drama, together with the traumatic shock of witnessing the desperate but unsuccessful attempts to save Kecia's life, Melissa was brought so close to the reality of the accident as to render her experience an integral part of it. Such an experience is far different from the case where one seeks damages for his grief or agony at merely seeing the dead body of a loved one, or upon learning of the death from others after its occur-

rence. We also find that the third element was established here. Although most of the cases dealing with this type of injury involve shock to parents, at least two cases have recognized the right of a sister to recover, assuming that the other elements of foreseeability are present. Dillon v. Legg, *supra*; Hopper v. United States, 244 F.Supp. 314 (D.C.Colo.1965). In light of the foregoing, we conclude that the jury's award of damages to Melissa, based upon the concepts of proximate cause and foreseeability, is supported by the evidence.

Affirmed

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693 S.W.2d 31



Court of Appeals of Texas.  
Austin.

CITY OF AUSTIN, Appellant,

v.

Kenneth Richard DAVIS, III, b/n/f Kenneth Richard Davis, Sr., et al., Appellees.

No. 14246.

June 5, 1985.

Rehearing Denied June 26, 1985.

Father disclaimed interest in action for wrongful death of his son and brought action against city hospital for his own mental distress and physical injuries sustained as bystander to finding of his son's body at base of airshaft. The 53rd Judicial District Court, Travis County, Harley Clark, J., entered judgment for father, and city appealed. The Court of Appeals, Gammage, J., held that: (1) father, who was intensely involved in search for and subsequent discovery of his son, who did not learn of incident from others but found his son's body at bottom of airshaft, experienced sufficient perception of the incident to satisfy requirements of the "bystander doctrine"; (2) trial court did not err in concluding that injury to father was reasonably foreseeable by city.

Affirmed.

West Headnotes

**[1] Damages 115 ↪ 57.14**

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.13 Negligent Infliction of Emotional Distress

115k57.14 k. In General. Most Cited Cases

(Formerly 115k49.10)

Successful plaintiff, in action to recover for negligently inflicting emotional distress, must prove that his injuries

were reasonably foreseeable by defendant.

**[2] Damages 115 ↪ 57.27**

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.26 Injury or Threat to Another; Bystanders

115k57.27 k. In General. Most Cited Cases

(Formerly 115k51)

Two elements of cause of action for right of bystander to shocking event to recover for injury proximately caused by injury negligently inflicted upon another are that plaintiff must have been in close proximity to scene of incident, and that plaintiff's injuries must have been proximately caused by sensory and contemporaneous perception of incident.

**[3] Damages 115 ↪ 57.29**

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.26 Injury or Threat to Another; Bystanders

115k57.29 k. Other Particular Cases. Most Cited Cases

(Formerly 115k51)

Father, who was intensely involved in search for and subsequent discovery of his son, who did not learn of incident from others but found his son's body at bottom of airshaft, was brought so close to reality of accident as to render his experience an integral part of it, experiencing sufficient perception of incident to satisfy requirements of the "bystander doctrine," for purposes of his recovery for mental distress and physical injuries sustained as bystander.

\*32 Paul C. Isham, City Atty., Mahon B. Garry, Jr., Asst. City Atty., Austin, for appellant.

Tommy Jacks, Doggett & Jacks, Austin, for appellees.

Before POWERS, KLINGEMAN <sup>FN\*</sup> and GAMMAGE, JJ.

<sup>FN\*</sup> Klingeman, Justice (Retired), Fourth Court of Appeals, sitting by assignment. See Art. 1812, as amended.

GAMMAGE, Justice.

This case arises from the circumstances surrounding the death of Kenneth Richard Davis' son, Kenny, while admitted to Brackenridge Hospital, an operation of the City of Austin, hereinafter the "City." The City appeals from the judgment of the trial court in favor of Davis. We will affirm the judgment.

Trial to the bench was had upon stipulated facts.

Kenny Davis suffered severe neurological damage resulting from head injuries sustained in a motor vehicle accident. Davis visited his son every day during his six-week hospitalization. At the time of his death Kenny was ambulatory, but was confused and disoriented. He was in danger of injuring himself and others because of his poor judgment and perception. For this reason, he was always either medicated or physically restrained. On the day of Kenny's death, the hospital staff failed to do either. When Davis arrived at the hospital for his daily visit, Kenny was not in his room and the ward staff was unable to locate him, although they were then searching the hospital and surrounding grounds. Davis joined the search, which continued for three hours and included not only the hospital and grounds, but also surrounding parks and recreational areas. In his second search of the hospital basement, Davis, accompanied by a hospital security officer, found his son's body at the base of a ten-story air shaft. In wandering around the hospital, Kenny had discovered and entered the air shaft, climbed to the top and fallen to his death. It is herein stipulated that Davis has suffered physical injuries caused by emotional distress inflicted by these circumstances.

Kenny's other statutory beneficiaries settled a wrongful death action with the City, for approximately \$93,000.

Davis disclaimed any interest in the wrongful death action and prevailed in the trial court in his own suit for mental distress and physical injuries sustained as a bystander to the incident, with stipulated damages of \$50,000. In this Court, the City attacks the trial court's judgment on Davis' separate cause of action. \*33

## BYSTANDER INJURY

[1][2] The courts of this State have long recognized the right to recover for negligently inflicted emotional distress. Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890). It is also well settled that a successful plaintiff, in an action of this kind, must prove that his injuries were reasonably foreseeable by the defendant. Kaufman v. Miller, 414 S.W.2d 164 (Tex.1967). We have more recently recognized the right of a "bystander" to a shocking event to recover for injury proximately caused by injury negligently inflicted upon another. See Landreth v. Reed, 570 S.W.2d 486 (Tex.Civ.App.1978, writ dismissed). The bystander doctrine, as articulated in Landreth, generally requires proof of three elements, two of which are pertinent here:

- (1) The plaintiff must have been in close proximity to the scene of the incident.
- (2) The plaintiff's injuries must have been proximately caused by a sensory and contemporaneous perception of the incident.

The rule prescribed in Landreth is not inflexible, and is tempered with the caveat that each case must be evaluated on its own merits. Id. at 490; Kaufman, supra.

The City argues that Davis was not present at the time his son fell to his death, so he therefore did not experience a sensory and contemporaneous perception of the incident. The City further argues that there is no proximate cause, because it could not reasonably foresee Davis' injuries. We disagree.

The requirement of a sensory and contemporaneous perception of the incident giving rise to the injuries has been liberally construed. In Landreth it was held that actual observance of the incident was unnecessary, if there was some perception of the incident other than learning of it from others after it had happened. This court recognizes

that it is the observation of the consequence of the negligent act, and not just the act itself that is likely to cause trauma so severe as to result in mental injury to a bystander. The realization of the consequences can be produced from the moans and cries of the victim at the accident as well as from the actual observation of the victim. General Motors Corp. v. Grizzle, 642 S.W.2d 837, 844 (Tex.App. 1982).

Two courts have allowed recovery where the plaintiffs had been rendered unconscious at the precise moment of the incidents, and could not, therefore, have observed the incidents. Dawson v. Garcia, 666 S.W.2d 254 (Tex.App.1984, no writ); Apache Ready Mix Co., Inc. v. Creed, 653 S.W.2d 79 (Tex.App.1983, no writ). Both courts, after reviewing the facts in each of the individual cases, determined that actual observance was unnecessary, in view of the high degree of involvement each plaintiff had with the incident giving rise to the injuries.

[3] The City's argument essentially rests on the premise that Davis should be denied recovery because he was not at the foot of the airshaft at the moment his son \*34 fell. We decline to so hold. The premise ignores the remainder of relevant circumstances surrounding the death of Davis' son. It is clear from the stipulated facts that Davis was intensely involved in the search and subsequent discovery of his son. He did not learn of the incident from others, but found his son's body at the bottom of the airshaft. In light of these circumstances and the above cited authorities, we hold that Davis "was brought so close to the reality of the accident as to render [his] experience an integral part of it," and Davis experienced sufficient perception of the incident to satisfy the requirements of the "bystander doctrine." Grizzle, 642 S.W.2d at 843.

Under these facts, a jury could have found that a reasonable person in the City's position, in the exercise of ordinary care, would have foreseen as a reasonable result of the City's negligence that Kenny would injure himself at a time when Davis was present or in close proximity and that Davis would thereby suffer injury.

The judgment of the trial court is affirmed.

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970 S.W.2d 540



Court of Appeals of Texas,  
Houston.

UNITED SERVICES AUTOMOBILE ASSOCIATION,  
Petitioner,

v.

Dianna KEITH, Respondent.

No. 97-0871.

June 5, 1998.

Insured brought suit to recover uninsured/underinsured (UM/UIM) benefits from her automobile insurer for injuries suffered as bystander to accident in which her daughter was fatally injured. The District Court, Comal County, [Jack Robison, J.](#), granted summary judgment for insured, and insurer appealed. The Court of Appeals held that insured was not entitled to recover as bystander to daughter's fatal accident absent proof that insured was present when the injury occurred and had a sensory and contemporaneous perception of the accident.

Judgment reversed.

West Headnotes

**[1] Damages 115** **57.27**

[115](#) Damages

[115III](#) Grounds and Subjects of Compensatory Damages

[115III\(A\)](#) Direct or Remote, Contingent, or Prospective Consequences or Losses

[115III\(A\)2](#) Mental Suffering and Emotional Distress

[115k57.26](#) Injury or Threat to Another; Bystanders

[115k57.27](#) k. In General. [Most Cited Cases](#)

(Formerly 115k51)

Bystander to an accident may recover for bystander's mental anguish if bystander was located near the scene of the accident, as contrasted with one who was a distance away from it, bystander suffered shock as a result of a direct emotional impact upon bystander from a sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its

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

**[2] Damages 115** **57.27**

[115](#) Damages

[115III](#) Grounds and Subjects of Compensatory Damages

[115III\(A\)](#) Direct or Remote, Contingent, or Prospective Consequences or Losses

[115III\(A\)2](#) Mental Suffering and Emotional Distress

[115k57.26](#) Injury or Threat to Another; Bystanders

[115k57.27](#) k. In General. [Most Cited Cases](#)

(Formerly 115k51)

Elements that must be proven before bystander to an accident may recover for mental anguish are flexible and should be applied on a case-by-case basis.

**[3] Damages 115** **208(6)**

[115](#) Damages

[115X](#) Proceedings for Assessment

[115k208](#) Questions for Jury

[115k208\(6\)](#) k. Mental Suffering and Emotional Distress. [Most Cited Cases](#)

Whether plaintiff is entitled to recover as a bystander to an accident is a question of law when the material facts are undisputed.

**[4] Damages 115** **57.29**

[115](#) Damages

[115III](#) Grounds and Subjects of Compensatory Damages

[115III\(A\)](#) Direct or Remote, Contingent, or Prospective Consequences or Losses

[115III\(A\)2](#) Mental Suffering and Emotional Distress

[115k57.26](#) Injury or Threat to Another; Bystanders

[115k57.29](#) k. Other Particular Cases. [Most Cited Cases](#)

(Formerly 115k51)

Mother was not entitled to recover as bystander to car

accident in which her daughter was fatally injured, even though mother rushed to accident scene after learning about it from eyewitness, car was still smoking and rescue operations were underway upon mother's arrival, and mother heard daughter inside wreckage making "scary noises and crying out," where mother was not at scene when accident occurred, and emotional impact on mother did not result from a sensory and contemporaneous observance of the accident.

## **[5] Damages 115** **57.27**

### 115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.26 Injury or Threat to Another; Bystanders

115k57.27 k. In General. Most Cited Cases

(Formerly 115k51)

Although bystander to an accident is not required to have been within a "zone of danger" before bystander may recover, bystander must have been present when the injury occurred and have had a sensory and contemporaneous perception of the accident causing it.

\***541** James V. Sylvester, Austin, for petitioner.

Linda L. Daniels, San Antonio, for respondent.

PER CURIAM.

The trial court described this case as one in which it "explore[d] the outer boundaries of the bystander cause of action in Texas." Because the court exceeded those boundaries when it held that a cause of action may exist under the facts presented here, we reverse and render judgment for United States Automobile Association (USAA).

The facts are not in dispute. Dianna Keith's daughter, Lyndsay Keith, was a passenger in a car that swerved out of control and hit a tree. The owner of the vehicle was uninsured or underinsured. The accident occurred approximately one block from the Keith residence where Dianna Keith was asleep at the time of the crash. Shortly after the

accident, Adam Hahn, a friend of Lyndsay's who had been following the car in which she was a passenger, drove to the Keith residence and awoke Dianna Keith. From the summary judgment evidence, it appears that Hahn was in shock and was only able to tell her that "Lyndsay was in an accident." Hahn rushed Dianna Keith to the accident scene, where the wrecked car was still smoking and a tail-light was blinking. Keith could not see her daughter, but she could hear her inside the wreckage making "scary noises and crying out."

After Lyndsay was removed from the car, Dianna Keith accompanied her daughter in the ambulance to a location where a helicopter took Lyndsay to the hospital. Keith later arrived at the hospital and waited while her daughter was in the operating room. She was informed around 3:20 a.m. that Lyndsay had died.

Dianna Keith was insured by USAA. She presented claims under her uninsured/underinsured motorist policy as the representative of Lyndsay's estate, as a beneficiary under the Texas Wrongful Death Statute, and for her own injuries as a bystander. USAA settled the estate's claims for \$20,000 but denied Dianna Keith's bystander recovery claim. Keith filed suit on a bystander theory of recovery and elected not to pursue her wrongful death claim. Both parties moved for summary judgment. The trial court granted summary judgment for Dianna Keith.

**[1]** Texas has adopted the bystander elements that the California Supreme Court identified in Dillon v. Legg, 68 Cal.2d 728, 69 Cal.Rptr. 72, 441 P.2d 912, 920 (1968). See Freeman v. City of Pasadena, 744 S.W.2d 923, 923-24 (Tex.1988); see also Edinburg Hosp. Auth. v. Trevino, 941 S.W.2d 76, 80 (Tex.1997); Boyles v. Kerr, 855 S.W.2d 593, 597-98 (Tex.1993); Reagan v. Vaughn, 804 S.W.2d 463, 467 (Tex.1990). To recover as a bystander, courts determine duty case-by-case after considering three elements:

\***542** (1) The plaintiff was located near the scene of the accident, as contrasted with one who was a distance away from it;

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

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

See [Freeman, 744 S.W.2d at 923-24.](#)

The lower court correctly recognized that the existence of a bystander cause of action depends on whether the plaintiff can prove these three elements. However, the court erroneously concluded that Mrs. Keith had a sensory and contemporaneous perception of the accident.

[2][3] The bystander elements are flexible and should be applied on a case-by-case basis. [Freeman, 744 S.W.2d at 924.](#) But, when the material facts are undisputed, as they are here, whether the plaintiff is entitled to recover as a bystander is a question of law. [Id. at 923.](#)

[4][5] The facts of this case are similar to those in [Freeman, Id. at 923-24](#) (ruling that plaintiff who was told that his stepsons were in an automobile accident by a third party did not have a sensory and contemporaneous perception of the accident). Like [Freeman](#), the undisputed facts in this case show that Dianna Keith was not at the scene when the accident occurred. She did not see or hear the crash. The emotional impact that she undoubtedly suffered did not result from a sensory and contemporaneous observance of the accident. In this regard, Dianna Keith is in the same position as any other close relative who sees and experiences the immediate aftermath of a serious injury to a loved one. For example, we have not recognized bystander recovery simply because a relative arrived on the scene in time to see an injured loved one placed in an ambulance. See [Freeman, 744 S.W.2d at 923.](#) The requirement that a parent bystander's mental anguish resulted from a direct emotional impact upon said parent bystander from the sensory and contemporaneous observance of the accident necessarily excludes circumstances in which the parent saw nothing, heard nothing, did not know what happened to the child, and learned from a third party their child was injured. The fact that Dianna Keith arrived on the scene while rescue operations were underway and witnessed her daughter's pain and suffering at the site of the accident rather than at the hospital or some other location does not affect the analysis. Although the "zone of danger" test has been replaced, Texas law still requires a sensory and contemporaneous perception

of the accident. See [id. at 923.](#)

Accordingly, without hearing oral argument, the Court reverses the judgment of the District Court, and renders judgment that Keith take nothing on her bystander claim. [TEX.R.APP. P. 59.1.](#)

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859 S.W.2d 78



Court of Appeals of Texas,  
San Antonio.

Ruben GARCIA, Appellant,  
v.  
SAN ANTONIO HOUSING AUTHORITY, Appellee.


No. 04-91-00708-CV.

June 23, 1993.

Uncle sued to recover for mental anguish which resulted from having witnessed nephew's injury. The 285th District Court, Bexar County, Charles Gonzalez, J., entered take nothing judgment, and uncle appealed. The Court of Appeals, Peeples, J., held that uncle could recover if he proved that he resided in same household as nephew.

Reversed and remanded.

West Headnotes

**[1] Damages 115**  **57.29**

**115** Damages

**115III** Grounds and Subjects of Compensatory Damages

**115III(A)** Direct or Remote, Contingent, or Prospective Consequences or Losses

**115III(A)2** Mental Suffering and Emotional Distress


**115k57.26** Injury or Threat to Another; Bystanders

**115k57.29** k. Other Particular Cases.

**Most Cited Cases**

(Formerly 115k51)

Uncle who witnessed injury of nephew with whom uncle lived could recover for his own mental anguish as bystander; although neither uncle-nephew relationship, nor close personal relationship, without more, was sufficient to sustain recovery as bystander, relative residing in injured person's household could recover.

**[2] Damages 115**  **57.27**

**115** Damages

**115III** Grounds and Subjects of Compensatory Damages

**115III(A)** Direct or Remote, Contingent, or Prospective Consequences or Losses

**115III(A)2** Mental Suffering and Emotional Distress

**115k57.26** Injury or Threat to Another; Bystanders

**115k57.27** k. In General. **Most Cited**

**Cases**

(Formerly 115k51)

Requirement that bystander seeking to recover for mental anguish resulting from having witnessed injury to another must be "closely related" to injured person means that some sort of familial relationship must exist between bystander and person injured.

\***79** **Warren Weir**, Weir & Alvarado, P.C., San Antonio, TX, for appellant.

**John Milano, Jr.**, Thornton, Summers, Biechlin, Dunham & Brown, Inc., **Tim Daniels**, Daniels & Daniels, San Antonio, for appellee.

Before BUTTS, PEEPLES and BIERY, JJ.

ON APPELLANT'S MOTION FOR REHEARING

PEEPLES, Justice.

[1] In this case we must decide whether Ruben Garcia, an uncle who witnessed his nephew's injury, may recover for his own mental anguish as a bystander. We hold that neither a close personal relationship nor the uncle-nephew relationship without more is sufficient for recovery as a bystander. But we conclude that a relative residing in the injured person's household may recover as a bystander, and we therefore reverse the take-nothing summary judgment.

Ruben brought suit against the San Antonio Housing Authority and six other defendants to recover for mental anguish he suffered when he rescued his ne-

phep Adrian from a fire in the apartment where Adrian and his family lived. Adrian's suit by next friend for his own injuries is not part of this appeal. The trial court rendered a take-nothing summary judgment against Ruben on the ground that an uncle has no standing to seek mental anguish damages as a bystander for injuries suffered by a nephew.<sup>FNI</sup> Ruben argues that he should be able to recover because he has a close personal relationship with his nephew and is a father figure who lived with the family and who eyewitnessed his nephew's injury and suffering.

FNI. We refer to uncles and nephews because that is the relationship involved in this case, but our discussion and holding apply generally to bystander suits by uncles and aunts when their nephews or nieces were injured, and vice versa.

Bystander recovery for mental anguish first gained impetus with the decision in Dillon v. Legg, 68 Cal.2d 728, 69 Cal.Rptr. 72, 441 P.2d 912 (1968). There the court allowed a mother to recover for mental anguish she suffered upon witnessing the death of her child. The Dillon court contemplated that courts would determine duty case-by-case after considering three elements:

(1) Whether plaintiff was located near the scene of the accident as contrasted \*80 with one who was a distance away from it. (2) 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. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship

The Texas courts adopted Dillon in 1978, calling it the "modern rule." See Landreth v. Reed, 570 S.W.2d 486, 489 (Tex.App.-Texarkana 1978, no writ). The supreme court has accepted the Dillon elements while denying recovery to a stepparent who "did not sensorily and contemporaneously perceive the accident or otherwise experience the shock of unwittingly coming upon the accident scene." Freeman v. City of Pasadena, 744 S.W.2d 923, 924 (Tex.1988). The court later denied recovery for mental anguish to a child who was not at or near the scene where the parent was injured and who did not suffer "direct emotional

impact ... from the sensory and contemporaneous observance of the incident, as contrasted with learning of the accident from others" afterward. Reagan v. Vaughn, 804 S.W.2d 463, 467 (Tex.1990). Freeman and Reagan show that even the parent-child relationship will not support a mental-anguish recovery if the plaintiff was not a bystander within Dillon.

Unlike the plaintiffs in Freeman and Reagan, Ruben Garcia clearly satisfies the first two Dillon elements: he was at the scene and he suffered direct emotional impact from observing the incident firsthand. But the third element requires a close relationship between the bystander and the injured person, and his relationship to his nephew is biologically distant.

Our courts have denied bystander recovery when the plaintiff had no formal or biological relationship to the injured person. In Hinojosa v. South Texas Drilling & Exploration, Inc., 727 S.W.2d 320 (Tex.App.-San Antonio 1987, no writ), plaintiff had heard his co-worker and close friend fall to his death and land near the area where plaintiff was working. We denied recovery because there was no familial relationship. In Hastie v. Rodriguez, 716 S.W.2d 675 (Tex.App.-Corpus Christi 1986, writ ref'd n.r.e.), the plaintiff was a live-in girl friend who witnessed an accident involving her male partner. Plaintiff did not establish common-law marriage, and the court denied recovery because there was no familial relationship. In Genzer v. City of Mission, 666 S.W.2d 116 (Tex.App.-Corpus Christi 1983, writ ref'd n.r.e.), the plaintiffs were the grandparents of a child who was injured and died. The court permitted recovery, noting that the grandparents had a close relationship with the child.

[2] These cases illustrate that in Texas the Dillon requirement of a plaintiff "closely related" to the victim requires a familial relationship of some sort; it is not enough to show a close non-familial relationship,\*81 or a distant familial relationship without more. That the relationship must be familial is shown by a recent California Supreme Court decision authored by Justice Mosk, a member of the Dillon majority. In Elden v. Sheldon, 46 Cal.3d 267, 250 Cal.Rptr. 254, 758 P.2d 582 (1988), the plaintiff had witnessed the tortious injury and death of the woman with whom he had cohabited, whom he termed his "de facto spouse." The court held that the plaintiff did not meet the third Dillon element—a close relationship. This element excludes "friends or distant

relatives of the injured person,” such as first cousins, and close girl friends who are akin to natural sisters. [Id.](#) 250 Cal.Rptr. at 256, 758 P.2d at 584. The court disapproved the notion that it is the emotional attachment that counts, not the biological or marital relationship. [Id.](#) 250 Cal.Rptr. at 256-61, 758 P.2d at 584-88.

The question here is whether the uncle-nephew relationship is enough to justify bystander recovery. To require mere emotional “closeness” would require constant ad hoc line-drawing; courts would have to probe case-by-case the genuineness of the relationship. Presumably when several people were injured, courts would weigh the varying relationships and decide which ones were close enough to justify bystander recovery and which ones were not. We question whether it is in society's interest for courts and litigants to delve into family relationships to this extent. See [Elden v. Sheldon](#), 250 Cal.Rptr. at 259, 758 P.2d at 587. Courts must draw a line somewhere. “We may regret that the line was drawn just where it was, but drawn somewhere it had to be.” [Palsgraf v. Long Island R.R. Co.](#), 248 N.Y. 339, 162 N.E. 99, 103-04 (1928) (Andrews, J., dissenting). Prosser and Keeton make the same point:

If [bystander] recovery is to be permitted, however, it is also clear that there must be some limitation. It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one person were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as all his friends.

W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 54, at 366 (5th ed. 1984). “A ‘bright line in this area of the law is essential.’ ” [Thing v. La Chusa](#), 48 Cal.3d 644, 257 Cal.Rptr. 865, 878, 771 P.2d 814, 827 (1989), quoting [Elden v. Sheldon](#), 250 Cal.Rptr. at 260, 758 P.2d at 588.

The California Supreme Court has defined “closely related” to mean “relatives residing in the same household, or parents, siblings, children, and grandparents of the victim.” [Thing v. La Chusa](#), 257 Cal.Rptr. at 880 n. 10, 771 P.2d at 829 n. 10. This

standard sets a reasonably bright line that limits suits to a finite number of relatives while ensuring some degree of closeness by requiring that they reside in the same household. Parents, siblings, children, and grandparents can recover as bystanders even if they did not reside with the injured person; other relatives must prove residence.

[3] We adopt this standard and remand the cause for further proceedings because there is a fact issue whether Ruben is a resident of his sister's household. In reviewing this summary judgment, we consider the evidence favorably to the nonmovant. See [Cate v. Dover Corp.](#), 790 S.W.2d 559, 562 (Tex.1990). Though the evidence that Ruben was a good uncle to his sister's children \*82 does not pertain to this standard, the record does not establish as a matter of law that Ruben is not a resident at his sister's apartment.

We hold that mere personal closeness of relationship is, as a matter of law, not sufficient for bystander recovery. But we also hold that Ruben may recover as a bystander if he proves that he was a resident in his sister's apartment. We therefore reverse the judgment and remand for further proceedings.

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