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RECENT DEVELOPMENTS TO RECOVER NON-PECUNIARY DAMAGES DUE TO NEGLIGENTLY INFLICTED INJURY TO CHILD

I. THE EFFECTS OF CHILDHOOD INJURY ON PARENTS

A. CASE IN POINT: NIGHTINGALE V. DERRICK

Fifteen-month-old Courtney Nightingale was a beautiful, blond haired, blue-eyed baby who had already begun walking and talking. Her development had been totally normal in all respects, and her devoted parents, George and Nell Nightingale, loved her dearly.

On January 17, 1978, Courtney became ill with a run of the mill stomach and intestinal virus (virus gastroenteritis). She should have recuperated from the virus none the worse for wear, but her pediatricians neither diagnosed nor treated her illness properly. Because of their negligence, Courtney dehydrated over a nine day period, and the oxygen supply to her brain was slowly diminished. Result: Courtney sustained severe, catastrophic, life long brain damage, and her broken—hearted parents' lives will never be the same.

In March of 1984, a West Palm Beach jury awarded Courtney and her parents \$10.5 million against the pediatricians that treated her. The jury found Courtney's damages to be \$8.5 million, and awarded her parents \$2 million for their past and future medical expenses, loss of services, and related expenses.

Courtney's parents also requested damages for their mental pain and suffering, and for the wrongful interference with Courtney's society, comfort and companionship. Their claims were based on the fact that they helplessly witnessed the effects of Courtney's debilitating illness and the malpractice that ensued, as well as for the emotional trauma they now experience every day due to Courtney's permanently brain damaged condition. The defendants, however, filed a pre-trial motion to strike the non-pecuniary allegations, which the court granted, thereby denying the jury an opportunity to compensate the Nightingales for their emotional trauma and loss of a normal parent-child relationship. (Following the verdict, the court granted a post-trial

defense motion for a new trial, and in the alternative, remitted the total judgment to \$2.35 million: \$2 million for Courtney and \$350,000 for her parents. The case was appealed and one of the issues to be resolved was the trial court's striking of the parents' non-pecuniary claims; however, prior to oral arguments, settlement was reached and the issue was not addressed.)

B. RESEARCH REVEALS SIGNIFICANCE OF PROBLEM

A severe injury to a child often leads to a devastating spiral of emotional reactions for the child's parents and siblings. Parents feel despair, depression, anger, guilt and anxiety. Carlson and Erumback, Psychological Processes Associated with Premature Death in Duchenne Muscular Dystrophy, 52 PSYCH. REPTS.165 (1983). The injury can also affect the psychological and physiological health and well being of the child's siblings. Family stability can be eroded. Winkler, Chronic Stresses of Families of Mentally Retarded children, 30 FAMILY RELATIONS 281 (1981)

Studies have indicated that a chronic childhood injury or illness brings on a period of family mourning. The parents must mourn the child they once had, before they can deal with the child they now have. For example, see Davidson and Dosser, A Support System for Families with Developmentally Disabled Infants, 32 FAMILY RELATIONS 295 (1982). According to the Winkler study, parents of retarded or disabled children are often ashamed of their child's condition or disability. They often perceive the situation as their own personal failure even though they bear no responsibility for the child's injury. "They face hostile stares, judgmental comments, murmurs of pity and intrusive requests for personal information." Chronic management problems, such as lifting the child out of a wheelchair, become monumental when parents must cope with them over a long period of years.

In short, catastrophic injury to a child virtually guarantees that parents will experience deep and lasting effects upon their lifestyle, resulting in periodic or recurrent sadness,

emotional disorganization, stress, recurrent period of alarm, denial, shame, and self—pity. Prof. Winkler had labeled the syndrome as “chronic sorrow”. Aside from the psychological and emotional effects that catastrophic childhood injury brings to a parent, one need only to consider the devastating and permanent interruption that such an injury has on the parent-child relationship to comprehend that parents of such children suffer irreparable harm as a result of serious childhood injuries. The question is, will our courts recognize such harm and compensate parents who suffer these losses?

C. PURPOSE

The common law traditionally limited parental damage recovery to pecuniary losses when a minor child was negligently injured by a third party tortfeasor. In recent years, however, the law has begun to recognize non—pecuniary causes of actions for parents of such injured children.

The purpose of this topic is to address the avenues of compensation available to parents such as George and Nell Nightingale, who have sustained non—pecuniary losses due to their child’s injury. In particular, we will discuss the two common forms of parental recovery: mental pain and suffering and the loss of society, comfort and companionship, also referred to as consortium. We will also note the development and current state of the law in various jurisdictions as well as focus on emerging trends.

II. PARENTAL RIGHTS TO RECOVER FOR LOSS OF SOCIETY, COMFORT AND COMPANIONSHIP DUE TO NEGLIGENT INJURY OF CHILD

A. BACKGROUND

1. Definition

“Society and companionship” is a term of art that encompasses the intangible qualities of the parent—child relationship. Love, Tortious Interference With the Parent—Child Relationship: Loss of an Injured Person’s Society and Companionship, 51 IND. L.J. 590 (1976) . The loss of a child’s society, comfort and companionship, sometimes referred to as consortium, embraces a broad range of mutual benefits that a parent enjoys from a child’s continued and unencumbered existence, including love, affection, care, attention, companionship, comfort, and protection. Consolidated Machines v. Protein Products Corporation, 428 F. Supp. 209 (D.C. Fla.).

2. Common Law View Denying Recovery for Loss of Injured Child’s Society and Companionship

A parent’s claim for loss of his injured child has traditionally been limited to past and future lost wages and income up to the age of minority, as well as whatever medical expenses were incurred. Prior to 1975, parental losses of affection and companionship as to an injured living child were not recognized by the common law. For example, see: Brennan v. Biber, 225 A.2d 742 (n)J. 1966); Smith v. Richardson, 171 So.2d 96 (Ala. 1965); Butler v. Chrestman, 264 So.2d 812 (Miss. 1972); White v. New York, 322 N.Y. 2nd 920 (N.Y. App. Div. 2nd 1971); Quinn v. Pittsburgh, 90 A. 353 (Pa. 1914); McGarr v. National and Providence Worsted Mills, 53 A. 320 (R.I. 1902); and Baxter v. Superior Court of Los Angeles County, 19 Cal. 3d 461, 138 Cal. Rptr. 315 (Cal. 1977).

3. Policy Consideration

As stated above, the common law permitted parents to recover only for loss of their minor child’s “services”. The underlying policy supporting this rule was that a child was considered an economic asset. For centuries, child labor was a critical part of the family

economy. Given that relationship, it was reasonable to award damages to a parent whose child's wage earning potential was diminished or eliminated.

In our contemporary society, however, children are more a financial burden and less an economic asset. Children are no longer brought into the world to farm, work in a factory, or perform chores to help support the family; rather, because of child labor laws and compulsive education, children now take far more from a family's collective pocket than they put in. Today, parents carefully plan the size of their families and are cognizant of the high costs of raising children. They simply no longer bear children for utility purposes. Instead, today's parents birth and raise children to experience the very special love that the parent—child relationship brings. If that special relationship is wrongfully interfered with, it seems reasonable that the parties affected be fairly compensated.

4. Statutes Permitting Parental Recovery for Loss of Injured Child's Society and Companionship

Excepting to the common law rule, three states have enacted statutes permitting parents to recover for their loss of an injured child's society and companionship. Iowa and Washington have statutes which expressly allow recovery. IOWA, CODE ANN. RULE CIVIL PRO. 9 (Supp. 1974); WASH. REV. CODE ANN. Sec. 4.24.010 (Supp. 1975). Idaho's statute, which permits parents to maintain an action for the injury of a minor child and authorizes the recovery of "such damages... as under all the circumstances of the case may be just" has been construed to allow recovery for the loss of the child's society and companionship. IDAHO CODE ANN. Sec. 5—3102—311 (Supp. 1975); See Hayward v. Yost, 242 P. 2d 971 (1952), for interpretation of Idaho's statute. Also, Utah has a statute comparable to Idaho's but has not yet determined whether to construe it to allow recovery for loss of society and companionship. UTAH CODE ANN. Sec. 78—1162—7 (1953).

5. Landmark Decision: Shockley v. Prier

In 1975, the Wisconsin Supreme Court reversed itself on the issue of parental recovery of non—pecuniary damages based on injuries to a minor child, and held that the parents of an infant who had been permanently blinded and disfigured could bring an action against the defendant—physician for the loss of the injured child’s *aid, comfort, society and companionship*. Shockley v. Prier, 226 N.W. 2nd 495 (Wis. 1975)

The Shockley court observed that Wisconsin’s wrongful death statute “already recognizes the loss of society and companionship as an element of damages in the case of death,” and concluded that it seemed reasonable to recognize this same type loss where there has been injury to a minor child.” Furthermore, the court could find no reasonable justification for distinguishing between an injury to the husband—wife relationship, which allows damages for loss of society and consortium, and the parent—child relationship, which traditionally has not. The essence of the opinion lies with the emphasis the court placed on the changing role of children in the family relationship from colonial times to the present. The court stated that “society and companionship between parents and their children are closer to our present day family ideal than the right of the parents to the ‘earning capacity during minority,’ which once seemed so important when the common law was originally established.” Also, the court clearly distinguished between loss of society and loss of services by stating that “loss of services is in purely economic terms, while loss of society is a sociological concern.”

B. DEVELOPMENTS SINCE SHOCKLEY V. PRIER

1. Jurisdictions Permitting Parental Recovery for Loss of a Child’s Society. Comfort and Companionship

Since 1975, several cases have followed the lead of Shockley v. Prier. A recent Arizona Appellate decision has recognized the right of parents in that state to claim for the loss of their child’s consortium due to negligent injury. In Reben v. Ely, 705 P.2nd 1360 (Ariz.

App., 1985), the parents of a ten year old permanently brain damaged boy were awarded, in addition to \$500,000 for their pecuniary losses, \$1 million for the loss of their son's consortium. (The boy was awarded \$5 million for his past and future damages.)

Following the lead of Shockley, the Reben court specifically held that it was unable to justify the denial of an award in such circumstances, "when only the bare fact of the child's existence distinguishes this from a wrongful death case" (which would permit a loss of child's consortium claim, under Arizona law)

Also, the court squarely faced and rejected the often asserted "lack of precedent" argument, citing Shockley as clear authority. The court further acknowledged that Colorado and Florida have implied such a cause of action in Miller v. Subia, 514 P. 2nd 79 (Cob. 1973), and 'Yordan v. Savage, 279 So.2d 844 (Fla. 1973); and that three others states (Idaho, Iowa and Washington) have amended their statutes to allow statutory recovery for loss of consortium damages for injury to living children. Therefore, the defendant's contention that "many bastions of progressive thought, such as California, New York, Pennsylvania and New Jersey have denied recovery for loss of filial consortium, and that Arizona should do likewise", was rejected.

Based on a trilogy of cases, Illinois now allows parents and children to collect from third parties for their losses of consortium. In Bullard v. Barnes, 468 N.E. 2nd 1228 (Ill. 1984), an automobile accident case in which a seventeen year old boy was killed, the Illinois Supreme Court noted that the trend in wrongful death cases "has been to expand the scope of pecuniary injury to encompass non-monetary losses." In dicta, the court also indicated that a parental claim would be appropriate in child injury cases by stating that, "Parents are entitled to a presumption of pecuniary injury in the loss of a child's society."

Three months later, an Illinois appellate court went even further. In Dymek v. Nyquist, 469 N.E. 2nd 659 (Ill. App. 1984), a father sued his former wife and a

psychiatrist for causing emotional injury to his nine year old son. The court permitted the father to include a claim for the loss of his child's society and companionship as a result of the defendants' wrongful interference, citing Bullard v. Barnes as authority.

Relying on Bullard v. Barnes and Dymek v. Nyquist, the court in Dralle v. Ruder. et. al, 500 N.E. 2nd 514, (Ili. App. 1986), noted that, "In recent years Illinois courts have expanded recognition of a family member's interest and legal right to protect the family relationship." In Dralle, the parents sued physicians and the manufacturer of the prescription drug, Bendectin, which was prescribed to the mother during her pregnancy and which caused her son to be born deformed and brain damaged. The parents sought damages for the prospective diminution of their child's society and companionship, but the trial court granted the defendant's motion to strike the parent's consortium claim. The appellate court, however, reversed the order and specifically held that parents have a cause of action in Illinois for the loss of society and companionship of a non-fatally injured minor child.

In Dayton v. Jiffee Chemical Corporation, 395 F. Supp. 1981 (D.C. Ohio), the mother of an infant child who was severely disfigured by a caustic drain cleaner was awarded \$100,000 for the loss of her daughter's society.

Other cases following the Shockley v. Prier precedent include Giese v. Montgomery Ward. Inc., 331 N.W. 2nd 585 (Wis. 1983); Korth v. American Family Insurance Company, 340 N.W. 2d 494 (Wis. 1983), and Wangen V. Ford Motor Co. infra. However, the Wisconsin Supreme Court recently refused to extend Shockley v. Prier to the stepfather-stepson relationship, specifically holding that step-parents cannot maintain an action for loss of consortium based on severe injuries sustained by a stepchild.

2. Jurisdictions Refusing to Permit Parental Recovery for the Loss of a Child's Society. Comfort and Companionship

Since Shockley v. Prier, the trend emerging in this area appears to gradually point in the direction of permitting parental recovery for the loss of an injured child's society and companionship. Nevertheless, the majority of jurisdictions still cling to the common law rule. Jurisdictions that still refuse to adopt the Shockley rationale appear to be concerned about the intangible nature of the non—economic relationship between parent and child. For example, see Borer v. American Airlines. Inc., 563 P.2d 858 (Cal. 1977), and Baxter v. Superior Court of Los Angeles County, 563 P. 2d 871 (Alf. 1983).

In Olsen v. Humana. Inc.. Kansas, Johnson Cty fist. Ct., No. 107480 (November 7, 1984), the prolonged failure of nurses to monitor, detect and obtain an obstetrician's aid in treating a newborn infant's distressed fetal heart rate ultimately resulted in severe brain damage to the child, and a verdict of \$15 million (\$6.2 million in compensatory and \$8.8 million in punitive damages) . The court struck the parents' claims for loss of consortium, wrongful interference with the parent-child relationship, and negligent infliction of emotional distress. The trial court based its ruling on Kansas ' adherence to the common law rule. The issue was on appeal before the Kansas Supreme Court, but was never resolved because the parties settled before an opinion was rendered.

The law in Florida is in a state of confusion. In Wilkie v. Roberts, 109 So. 225 (Fla. 1926), the court ordered a new trial in an action for the lost services of an injured ten year old boy on the grounds that the \$2,500 verdict was excessive and directed the plaintiff's father to introduce evidence of the services actually rendered by his son. However, in 1973, the Florida Supreme Court stated in dicta that Wilkie authorized recovery for the "loss of the child's companionship, society and services..." and said that either or both parents could sue for damages due to negligently inflicted injuries to their child. Yordon v. Savage, supra. Recent

Florida cases have followed the Wilkie decision without mentioning the Yordon case. See, for example, City Stores Co. v. Langer, 308 So. 2d 621 (Fla. 3 DCA 1975).

3. Parent's Right to Recover Punitive Damages Arising From Injury to Child

The few courts considering this matter have mostly agreed, with little discussion, that where a parent sues for losses resulting from a personal injury that was negligently inflicted upon their child by the defendant, the recovery is purely compensatory and punitive damages are not allowed. 25 ALR 3d 1417. The only common law exception to the rule prohibiting punitive damages to parents for injury to a child has been in cases involving child seduction, an intentional act. Johnson v Ford Motor Co., 354 F. Supp. 645 (D.C. Miss.) (applying Mississippi law).

Notwithstanding the above, in Wangen v. Ford Motor Company, 294 N.W. 2d 437 (Wis. 1980), the parents of a child severely injured in an automobile accident were permitted to recover pecuniary, consortium, and punitive damages from an automobile manufacturer due to the manufacturer's defective automobile design, where the manufacturer had failed to warn of the defect and had intentionally concealed the defect from the public once it had been discovered.

III. PARENTAL RIGHTS TO RECOVER FOR MENTAL PAIN AND SUFFERING DUE TO NEGLIGENT INJURY TO CHILD

A. BACKGROUND

1. Generally

There has been a substantial conflict of authority in recent years as to the right of parents to recover damages for mental distress resulting from their child's negligently inflicted injury. The traditional view was that an actor could not be held liable for mental distress caused by his injuring a third person, where the actor was negligent. However, recent trends point in the direction of permitting recovery if certain factors are met.

2. Recovery Usually Limited to Anguish Resulting from Injurious Event

In most cases permitting parental recovery for mental anguish, the damages awarded relate solely to whatever emotional trauma the parents have based on their sensory perceptions of the injurious event involving their child, as opposed to the right of the parents to recover for their never ending anxiety and stress. Therefore, if the parents did not witness or perceive the incident which caused injury to their child, they are usually not entitled to recover for their mental anguish, and their damages are limited to their perceptions of the tortious event.

3. Recovery Which Includes Emotional Anguish Sustained in the Course of Caring for the Child

Contrary to the above, two California decisions hold that in addition to compensating traumatized parents as a result of their witnessing the incident causing injury to their child, parents may also recover for “physical or mental injury sustained in the course of caring for the child and responding to [its~ needs.” Cortez v. County of Los Angeles, 96 F.R.D. 427 (C.D. Cal. 1983) Capelouto v. Kaiser Foundation Hospitals, 500 P.2d 880 (Calf. 1972). Both decisions specifically recognized the distinction between the emotional anguish of a parent who has witnessed who their child’s injurious event, and that which developed as a result of their caring for the child and coping with its post— injury condition on a daily basis.

B. THEORIES OF RECOVERY

No single rule has been reached that resolves the question of parental rights to recover damages for mental anguish as a result of negligent injury to their own child by a third party tortfeasor. As stated above, the law has been reluctant to permit such recovery. Therefore, courts have experimented with a myriad of tests which limit liability but do not absolutely ignore the possibility of substantial and bona fide negligently inflicted emotional harm.

1. The Impact Rule

The most relied upon test as to whether a cause of action lies for mental trauma has been the “Impact Rule”. Quite simply, this doctrine holds that no liability may exist for negligent acts that occasion fright or terror where there has been no accompanying physical “impact”, even if nervous shock, which develops into or results in physical injury, occurs.

a. Application of the Impact Rule

The theory supporting the doctrine was that the “impact” requirement would guarantee the mental disturbance to be genuine. However, the same courts have found “impact” in minor contacts. For example, “impact” has meant a slight blow, a trifling burn or electric shock, a trivial jolt or jar, a forcible seating on the floor, dust in the eye, or the inhalation of smoke. One case found “impact” where the defendant’s horse “evacuated his bowels” into the plaintiff’s lap. Prosser and Keaton on Torts, Sec. 54 (West 1985)

On the other hand, as a tool to preclude recovery, a Florida appellate court once interpreted the impact rule in a prenatal injury situation. In Pazo v. Upjohn Co., 310 So.2d 30 (Fla. 2 DCA 1975), the parents of a minor child sued a drug manufacturer on the ground that the drug taken by the mother during her pregnancy and under prescription caused physical anomalies to the child. The court held that the parents could not recover mental pain and suffering damages because of an absence of “impact” between the drug and the parents, even though it was the mother who had ingested the drug.

b. Impact Rule Applied in the Nightingale Case

The parents’ mental pain and suffering claim in the Nightingale complaint was struck by the trial court based on Florida’s adherence to the impact rule. Because Courtney’s parents had not been “physically impacted” by her pediatrician’s malpractice, the court ruled her parents could not state a cause of action as to their emotional trauma. (Since the

Nightingale and Pazo cases, Florida has abandoned the impact rule in Champion v. Gray, 478 So. 2d 17 (Fla. 1985), and adopted the “foreseeability” test, discussed below).

c. Abandonment of Impact Rule

The majority of jurisdictions, beginning with California, have abandoned the impact rule on the grounds that it is arbitrary, obsolete, and that it bars meritorious claims. A few states, however, still adhere to the doctrine, i.e., Oklahoma and West Virginia.

2. Zone of Danger Test

a. Application of the Zone of Danger Test

In the late 1960’s, several jurisdictions adopted the “zone of danger” test in lieu of the impact rule. Those “progressive” jurisdictions recognized the rigidity of the impact rule, and began to allow a claimant to state a cause of action for his mental trauma where the plaintiff had been in personal danger and reasonably feared that a negligent force was immediate, even though he was not physically impacted by the negligent force.

b. Zone of Danger Test Expanded to Bystander Cases

The zone of danger test was expanded to permit recovery of one who, as a bystander, witnessed injury to a loved one. Nevertheless, this application of the test retained the requirement that the plaintiff be within the zone of danger and to have been in fear for his own safety.

c. Abandonment of Zone of Danger Test

The zone of danger test, much like the impact doctrine, was designed to guarantee against “fraudulent” or “trivial” claims. However, most jurisdictions that employed the test became dissatisfied with the large number of valid mental trauma claims that could not meet the criteria required by the test. Thus, those states that adopted the zone of danger

test in lieu of the impact rule have mostly abandoned it in favor of the foreseeability test, discussed below.

3. The Foreseeability Test

As stated above, application of the impact doctrine and/or zone of danger tests to situations where the death or serious injury of a child was witnessed by a parent resulted in the very evil that the tests were designed to eliminate: arbitrariness. Accordingly, beginning with the now landmark case of Dillon v. Legg, 68 Cal. 2nd 728, 69 Cal. Rptr. 72, 441 P. 2nd 912 (Cal. 1968) , most jurisdictions have, or are on the verge of, focusing on whether the mental trauma was a foreseeable aftermath of the defendant's negligence. Whether the plaintiff was physically impacted outside the zone of danger is irrelevant; rather, those jurisdictions following Dillon ask whether the claimant would be a foreseeable plaintiff from the defendant's perspective.

a. Element of the Test

In order for the plaintiff to have been a foreseeable bystander, three criteria must be met: 1) the plaintiff must have been located near the scene of the incident; 2) the plaintiff must have contemporaneously observed, heard, or perceived the incident; and 3) the plaintiff must have been closely related or emotionally attached to the injured party. In addition to the foreseeable plaintiff requirement, most jurisdictions that follow Dillon have required that the plaintiff's mental trauma exhibit some form of significant, discernible physical injury in order for the claimant to state a cause of action.

b. Physical Injury Requirement

The physical injury requirement is, in effect, akin to the impact or zone of danger barriers, and represents yet another arbitrary and difficult obstacle for otherwise legitimate mental trauma cases. For example, see Hair v. County of Monterrey, 45 Cal. App. 3rd

538, 119 Cal. Rptr. 639 (Calf., 1975), where parental claim for mental trauma after parents witnessed injuries to their nine year old son during surgery was held to be insufficient as there was no allegation of physical injury to the parents themselves.

On the other hand, the complaints of two fathers who witnessed the negligent deliveries of their stillborn sons, and sustained “great emotional disturbance, shock, and injury to their nervous systems”, were held to have sufficiently stated “actual physical injury” within the meaning of Dillon. Justis v. Atchison, 53 Cal. App. 3rd, 126 Cal. Rptr. 150 (Calf. 1975).

Some jurisdictions have been somewhat liberal in defining what constitutes a “physical injury”. For example, under Texas law, physical injury is not restricted to damages to only physical structures of the body, but also extends to nervous disorders as well as physical and mental ailments directly resulting from objective fright or mental shock. See, e.g., Duty v. General Finance Company, 273 SW 2nd 64 (Tex 1954), where Texas Supreme Court held that allegations of high nervousness, irritability, and upset stomach, loss of sleep, and an inability to perform previous employment were sufficient physical injuries to sustain a cause of action. In Haught v. Maceluch, 685 F.2d 1385 (C.A. 5 Tex. 1982), the court determined that a mother’s depression, nervousness, weight gain and nightmares due to the negligent delivery of her child constituted physical injury for purposes of a cause of action.

c. Application of the Foreseeability Test

Recent cases applying the Dillon test have focused on its various aspects, and include the following examples:

(1) Duty

In Blackwell v. Oser, 436 So.2d 1293 (La. App. 1983), the father of a child born with permanent brain damage due to medical malpractice did not have a claim for mental anguish because the physician owed him no duty; however, the mother was

permitted to recover damages for her mental anguish based on a contractual duty the obstetrician owed her, as his patient, to avoid treating her in such a manner as to cause injury to the child.

In New York, damages were not recoverable for a mother's emotional harm after her newborn died the day following its birth. The court reasoned that the defendant—healthcare providers could not be held liable for all ensuing damages and that the injuries complained of were not directly related to the defendant's breach of duty; rather, the cause of action "arose indirectly from the loss of the child." Aquilio v. Nelson, 434 NYS 2nd 520 (N.Y. 4th Dept., 1980) Compare Aquilio with Vacaro v. Squibb Corporation, 422 NYS 2nd 679 (N.Y. 1st Dept. 1979), where the court ruled that a mother who was administered Delalutin could maintain a cause of action against the manufacturer and administering physician for mental anguish caused by the birth of her deformed child. The Vacaro court specifically held that New York recognizes a mother's cause of action for psychic injuries sustained upon the birth of a deformed child. The court noted in dicta that the father could not maintain a cause of action as he was owed no duty by the defendants.

(2) Dillon contemplates a "Sudden and Brief" Event

In Jansen v. Childrens Hospital Medical Center, 31 Cal. App. 3rd 22, 106 Cal. Rptr. 883 (Calif., 1973) a mother's claim for her own emotional trauma and physical injury caused by witnessing the progressive decline and ultimate death of her five year old daughter in the defendant—hospital was not allowed. The court noted that Dillon contemplated a sudden and brief event causing the child's injury and one which could be the subject of sensory perception. The court rejected the contention that a daily encounter with the results, as distinguished from the tortious act itself, is the essential element. Also, the court observed that "negligent diagnosis" is not an event which can itself be perceived by laymen.

In Owens v. Children's Memorial Hospital, 480 F.2d 465 (C.A. 8 Neb. 1973) the court denied parental recovery for mental distress caused by improper medical care to a child because "the incident was slowly unfolding rather than traumatic," even though the parents had been in close proximity to their son throughout the period of his hospitalization, had personally witnessed the malpractice of the defendants, and had seen the physical and mental suffering of their son. (In dicta, the court discussed the possibility of an alternative remedy for the parents, pointing to a Nebraska Supreme Court decision that had held that damages for the loss of society, comfort and companionship of a minor child could be recovered under that state's wrongful death statute.)

(3) Personal Observation Required

In Haught v. Maceluch, supra, the mother brought a malpractice claim against an obstetrician for the negligent delivery of her child. The court ruled that the mother was entitled to recover for her emotional distress even though she was not conscious at the time the child was born and did not see the child's injury, where she was conscious during more than eleven hours of labor and was aware of the physician's negligent acts, particularly his absence in a near emergency situation and his over administration of a labor inducing drug. Under such circumstances, the court held that the mother had an experimental perception of the accident that befell her child and could state a cause of action under Texas law for negligent infliction of emotional distress.

In Hoffner v. Hodge, 407 A.2d 940 (Pa. 1979), the parents of a child injured during surgery did not have a cause of action because the parents did not personally observe the negligent event.

(4) Anguish Must Timely Follow Injurious Incident

In Miles v. Tabor, 443 NE 2nd 1302 (Mass. 1982), a mother's claim for emotional distress as a result of negligent obstetrical care to her child was struck because her subsequent depression and anxiety was too far removed from the time of the negligent act.

(5) Parent—Child Relationship qualified as Close Emotional Attachment

Another factor in the foreseeability requirement is that the secondarily injured party must have an especially close emotional attachment to the directly injured person. The natural parent child relationship automatically qualifies; however, step-parent/step-child relations may or may not, depending on the circumstances. Champion v. Gray, *supra*.

4. Modern Trend Allows Recovery for Serious Psychic Injury Without Physical Injury. Impact or Physical Consequences

The modern trend of cases in the negligently inflicted fright-without-impact area abandons any requirement that their emotional trauma be manifested in physical injury or impairment. This is not yet a prevailing rule, but clearly is an increasing and progressive trend. Therefore, the more recent view has been not only to repudiate the outmoded impact rule and zone of danger tests, but also to do away with the mechanical requirements of resulting physical injury, as set forth in the Dillon foreseeability test and those cases following it.

a. Objective Standard

The plaintiff must show that the defendant's *misconduct* would cause or induce serious psychic consequences in normally constituted people. In effect, this objective standard would require that the plaintiff be within the "zone of psychic danger" as opposed to the conventional zone of physical danger.

b. Application of the Modern Trend

For modern decisions adopting this advanced view, see, Culbert v. Sampson's Supermarkets. Inc., 444 A.2d 433 (Me. 1982), where the court held that the mother could recover for her serious psychic injury after seeing her baby choke on a foreign substance which came from a jar of baby food. Based on Culbert, Maine now recognizes the right of bystanders to recover from serious mental anguish without having to allege or prove physical impact, physical injury, or physical consequences; also see Sinn v. Burd, 404 A.2d 672 (Pa. 1979), which held that Pennsylvania bystanders may recover damages for "serious mental injury" without having to prove physical impact, injuries or consequences; and Berman v. Allan, 404 A.2d 8 (N.J. 1979), where parents were allowed to recover for their mental anguish caused by defendant doctors' negligent genetic counseling and failure to inform them of availability of amniocentesis, leading parents to birth a child with Down's Syndrome.

IV. CONCLUSION

In sum, research overwhelmingly indicates that parents of negligently injured children experience deep and lasting effects upon their lifestyles and emotional well-being.

When such an injury occurs, the common law has always entitled the injured child's parents to recover their pecuniary losses, i.e., loss of services and medical expenses. Whether the child's parents may recover money damages for their non-pecuniary losses depends upon the jurisdiction in which the cause of action is brought.

The two common forms of non-pecuniary parental recovery are mental pain and suffering and loss of society, comfort and companionship, also referred to as consortium.

Generally, the common law did not recognize parental claims related to the loss of a child's society, comfort and companionship, where the child was negligently injured by a third party defendant. A parent could only claim for the loss of his injured child's past and future lost

wages and income up to the age of minority, as well as whatever medical expenses were incurred. The underlying theory of this rule was that a child was considered an economic asset.

In 1975, however, the Wisconsin Supreme Court decided Shockley v. Prier, and held that parents of an injured infant could bring an action against third party tortfeasors for the loss of the injured child's society, comfort and companionship. The Shockley court noted the societal distinctions between today's parent-child relationship and that which existed when the common law rule was formulated.

Since 1975, several jurisdictions have recognized parental claims for loss of society, citing Shockley as precedent. Also, three states have enacted statutes permitting parents to recover for their loss of an injured child's society and companionship.

On the other hand, the vast majority of jurisdictions still adhere to the common law rule, primarily due to concerns about the intangible nature of the non-economic relationship between parent and child. Courts also cite the common law master-servant analogy and lack of authority argument as reasons for denying a parent's claim for loss of an injured child's society.

Generally, parents cannot recover punitive damages for negligently inflicted injuries sustained by their child. The only exception to this rule has been in cases involving child seduction. Recently, however, parents were entitled to recover punitive damages based on severe injuries to a child where a manufacturer intentionally concealed its knowledge of a defective design from the public.

The other common form of recovery is based upon the parent's mental pain and suffering. The prevailing view limits parental recovery to their perceptions of the child's injurious event; however, two recent California cases permit recovery for parental emotional trauma sustained 'during the course of caring for the child and responding to its needs.'

Though reluctant to allow recovery for the mental pain and suffering of plaintiffs who were not physically impacted, the courts have experimented with several tests which do not

totally bar such recovery. The impact rule and zone of danger tests appear to be fading as most courts have adopted the Dillon v. Legg “foreseeability” test. Nevertheless, as with the impact rule and zone of danger tests, the foreseeability test’s physical injury requirement provides yet another arbitrary barrier that often prevents compensation to legitimate mental trauma claims. Accordingly, the modern trend of cases in the negligently inflicted fright - without - impact area abandon any requirements concerning physical injury and instead apply an objective standard which asks whether the defendant’s misconduct would cause or induce serious psychic consequences in normally constituted people.

In conclusion, the traditional justifications denying parental recovery for mental pain and suffering and/or loss of society, comfort and companionship based on negligently inflicted injuries to a child are no longer convincing. Research overwhelmingly concludes that a tortious interference with the parent-child relationship can cause genuine losses. Given the importance of the parent-child relationship and the devastation that childhood injuries may bring, recent trends that abrogate the traditional prohibitions and allow parental recovery for their non-pecuniary losses should continue.