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Can You Recover in Missouri for Witnessing Someone Else's Injury?

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Some years ago we were confronted with a claim against a husband/homeowner whose wife had committed suicide in the basement of their home. The wife's sister was assisting in the search when the wife could not be found. The sister discovered the wife's body in the basement, hanging from a rafter with a self-inflicted gunshot wound. The sister claimed severe psychological injury and brought a negligence case against the husband on a premises liability theory as well as one for negligent infliction of emotional distress.

The plaintiff in that case did not see her sister commit suicide and was not in the house when the gun was fired. She admitted she never felt in personal danger of physical injury when she discovered the body, but claimed that the husband had a duty to protect her from the dangerous condition of his premises, *i.e.*, the gruesome sight of a suicide victim in plain sight in his basement. She made no claim that the husband was in any way responsible for the suicide. In this context we looked into the law on recovery for purely psychological injuries when one was not physically injured and only viewed an injury to another party.

Missouri does allow a plaintiff to recover for purely psychological injuries from witnessing an injury to another. There are limits to that type of recovery, however. Until 1983, Missouri law did not permit a plaintiff to recover for emotional distress unless the plaintiff also had sustained a contemporaneous traumatic physical injury. This "impact rule" was in effect until the Supreme Court's decision in *Bass v. Nooney Co.*, 646 S.W.2d 765 (Mo. banc 1983). After tracing the development of the impact rule and its eventual repudiation by some jurisdictions, the Court abandoned the old impact rule in Missouri and adopted a new one – a plaintiff is now permitted to recover solely for emotional distress provided: (1) the defendant should have realized that his conduct involved an unreasonable risk of causing the distress; and (2) the emotional distress or mental injury is medically diagnosable and of sufficient severity so as to be medically significant. 646 S.W.2d at 772-3. The Court specifically declined to address the rules for "bystander" cases, where a plaintiff suffers mental or emotional distress upon observing death or injury to a third party caused by a defendant's negligence. 646 S.W.2d at 770 n. 3.

Seven years later, the Supreme Court addressed the bystander issue left open in *Bass* in the case of *Asaro v. Cardinal Glennon Mem. Hosp.*, 799 S.W.2d 595 (Mo. banc 1990). In that case, a

mother sought damages for emotional distress due to alleged medical malpractice committed on her son. The Court discussed its earlier holding in *Bass*, but found it was not applicable for the cause of action averred by the plaintiff. 799 S.W.2d at 597-8. It then analyzed the development and adoption by some jurisdictions of the "zone of danger" rule for cases wherein a plaintiff claimed emotional distress as a result of seeing injury to a third person which was caused by the defendant's negligence. As the Court explained, the zone of danger rule "permits recovery for emotional distress if the plaintiff can show that he or she is threatened with bodily harm by defendant's negligence and emotional distress results from reasonable fear of personal, physical injury." *Id.* at 599. In this way, the zone of danger permits recovery according to the defendant's already existing duty of care to the plaintiff, and it does not require the defendant to bear a new duty to a potential foreseeable plaintiff. *Id.*

The Court then adopted the zone of danger standard for Missouri and held that in order to state a cause of action for the negligent infliction of emotional distress upon injury to a third person, a plaintiff must show: (1) that the defendant should have realized that his conduct involved an unreasonable risk to the plaintiff; (2) that plaintiff was present at the scene of an injury producing, sudden event; and (3) that plaintiff was in the zone of danger, *i.e.*, placed in a reasonable fear of physical injury to his or her own person. *Asaro*, 799 S.W.2d at 599-600. In adopting the zone of danger rule, the Court pointed out that some have criticized it as arbitrary. Any rule, however, which limits liability short of pure foreseeability is, by its nature, arbitrary. *Id.* at 599. "Such limitations are nonetheless necessary to allow tort law to achieve its purpose of compensating persons injured by the negligence of others without fostering rules of liability which unreasonably inhibit normal human activity." *Id.*

It appears that the rule set out in the zone of danger cases applies regardless of the type of tort being addressed. It is a limitation on when a psychological injury is subject to redress, regardless of the theory of recovery. *Bass* itself was a premises liability case involving a malfunctioning elevator. *Asaro* was a medical malpractice action. The Missouri Supreme Court later addressed the issue in an automobile negligence case. They made it clear that whatever theory of negligence a plaintiff is proceeding under, if the plaintiff is seeking to recover solely for emotional distress, there are <u>additional</u> elements s/he must establish in order to prevail. In *Jarrett v. Jones*, 258 S.W.3d 442 (Mo. banc 2008), the plaintiff truck driver was involved in an auto accident with the defendant car driver. The plaintiff sought damages for the mental distress he suffered upon seeing the defendant's deceased child in the back seat of the defendant's car. The Court found that the plaintiff was a direct victim of the auto accident rather than a bystander and analyzed his claim accordingly. *See* 258 S.W.3d at 447-8.

In its analysis, the Court discussed the development of the law applicable to recovering damages for emotional distress arising from negligence claims. *Id.* at 445. According to the Court, *Asaro*, *supra*, "expanded liability for emotional distress by *recognizing a new cause of action for bystander plaintiffs*." *Id.* (emphasis added). The Court further explained:

> Implicitly finding that bystander claims required a more restrictive test than direct-victim claims, to help ensure the authenticity of claims, the Court limited bystander recovery to a plaintiff within the zone of danger, i.e., "placed in a reasonable fear of physical injury to his or her own person." *Id.* (quoting *Asaro*, *supra*, at 599-600).

The *Jarrett* court also found that "where a direct victim seeks damages for emotional distress, the more restrictive standards for bystander recovery are inapplicable to any part of his claim." 258 S.W.3d at 446.

The *Jarrett* court makes it clear that *Asaro* recognized a new cause of action for bystander plaintiffs, so that before that decision, such plaintiffs had no means of recovery. *See Jarrett*, *supra* at 445. A bystander plaintiff must prove, *inter alia*, that he or she was present at an injury producing, sudden event and that they were in the zone of danger in order to recover damages for emotional distress.

The full extent of bystander recovery has yet to be established, although it appears that the limitations currently placed on the cause of action may be as far as Missouri Appellate Courts are willing to go. As the courts have pointed out, the line cutting off liability in such cases will always be an arbitrary one, but it still must be drawn. The public policy behind such line drawing is to assure that the floodgates are not opened to unfounded claims of emotional injury from merely witnessing a traumatizing event. If there was no such limitation then, in theory, a plaintiff could recover against a party who caused an accident when they viewed the carnage on the evening news. Setting the limitation for recovery to people who were physically present and involved to some degree in the injury event seems both reasonable and practical in a modern society.