

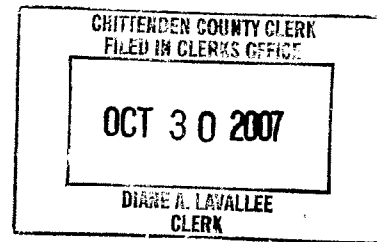
STATE OF VERMONT
Chittenden County, ss.:

SUPERIOR COURT
Docket No. 1159-04 CnC

[HAYES] BURT

v.

VERMONT TENT CO.



ENTRY

Defendants' Motions for Partial Summary Judgment

Defendants Vermont Tent and Anchor Industries seek summary judgment against four plaintiffs, arguing that plaintiffs cannot support a claim of negligent infliction of emotional distress.

All plaintiffs were guests at a wedding who had proceeded into a tent rented from and erected by Vermont Tent and manufactured by Anchor. While they were inside the 60 x 110 foot tent, a sudden and furious wind blew in. It loosened outside stakes, caused side panels to start flapping, and apparently got inside the tent to an extent that it caused parts of the tent to lift up, thereby releasing hefty wooden center poles to fall down, before eventually collapsing. One of those center poles proved lethal, in that it hit plaintiffs' decedent in the head, causing horrible bleeding and exposure of brain matter, leading to death the next day. Another plaintiff's husband was also seriously hit, causing substantial injuries. The plaintiffs subject to the present motion all witnessed, respectively, their mother, grandmother or husband being so injured. Defendants assert that none of the plaintiffs, although all in the physical zone of danger--the collapsing tent, were afraid

of substantial injury to themselves and that they are therefore unable to recover for distress in witnessing the severe injury of a loved one.

In determining whether these plaintiffs set out a claim for negligent infliction of emotional distress, we will review Vermont's caselaw on the subject as well as that generally prevailing among the other states. It is, of course, our duty to apply the law to the admissible evidence presented by plaintiffs. The question is whether plaintiffs make out a prima facie showing of the stated tort under the law of Vermont. Ross v. Times Mirror, Inc., 164 Vt. 13, 18 (1995). In applying "the law," it is inevitable that a trial court must to some extent predict what the appellate court will determine that law to be. But such prediction need not and should not assume unalterable stasis, in the law or the higher court. At least sometimes, the prediction is that local precedent may not prevail. "[S]uch 'underruling' may be an essential part of the process of judicial self-correction, and has occurred in the past to force Supreme Court reconsideration of questionable... decisions." Morrow v. Hood Commc'ns, 59 Cal.App.4th 924, 929-930 (1997)(Kline, P.J., dissenting). See also V. R. Prof'l. Conduct 3.1 (permitting a lawyer to advocate a position not warranted by existing law if the lawyer has a good faith, non-frivolous argument for the extension, modification, or reversal of existing law); Berge v. State, 2006 VT 116, ¶ 18 ("We should not freeze the common law in time").

Without reaching too far back in legal history, the start of our discussion is profitably found in the ancient requirement that recovery for emotional harm caused by negligence required some physical impact. E.g. Nichols v. Central Vt. Ry. Co., 94 Vt. 14, 18 (1919), denying recovery for emotional distress to a mother who witnessed her child's coffin about to be run over by a train. The requirement for physical impact was first repudiated in Thompson v. Green Mountain Power Corp., 120 Vt. 478, 486-87 (1958), although there in the context of damage to property, a flock of

chickens. The significant change came in Savard v. Cody Chevrolet, 126 Vt. 405 (1967), in which our court permitted plaintiff to recover for "severe nervous shock, emotional distress, sleeplessness and loss of appetite," 126 Vt. at 406-07, resulting from being in a house, into which defendant's dump truck negligently crashed. Despite the mayhem caused to the house, Lyse Savard received no physical injury. Reviewing the law of sister states, our court concluded that:

where negligence causes fright from a reasonable fear of immediate personal injury, and such fright is adequately demonstrated to have resulted in substantial bodily injury or sickness, the injured person may recover if such injury or sickness would be proper elements of damage if they had resulted as a consequence of direct physical injury rather than fright. This is the more modern rule now followed in most jurisdictions, and we adopt it here.

Id. at 410.

Savard was quickly followed by Guilmette v. Alexander, 128 Vt. 116 (1969). Poor Mrs. Guilmette came out on her front porch to greet her five-year old getting off the school bus, only to witness defendant ignore the flashing red lights on the bus and crash into the child, injuring her severely. Our court affirmed dismissal of Mrs. Guilmette's claim of negligent infliction of emotional distress, because she was not herself in the zone of danger. Being safely on her porch, Mrs. Guilmette was in no danger of being physically struck by defendant Alexander's auto. The opinion is quite interesting. As did Savard v. Coty, Justice Shangraw reviews the state of Vermont law, as well as cases on point from other states. He notes that England has permitted recovery for emotional distress over the fear of a third person's safety, unaccompanied by fear for plaintiff's own safety, since 1925. Hambrook v. Stokes Bros., 1 KB 141 (1925). He further notes that California had then recently permitted such recovery. Dillon v. Legg, 441 P.2d 912 (1966). Justice Shangraw, however, minimizes Dillon v. Legg by

noting both that it was not a unanimous decision and that it was rejected by New Hampshire in Jelley v. LaFlame, 238 A.2d 728 (1968). 128 Vt. at 118-19. Relying on Jelley and Waube v. Warrington, 258 N.W. 497 (Wisc. 1935), our court rejected Dillon v. Legg, hewing instead to a zone of danger test. On her porch, poor Mrs. Guilmette was out of the zone.

Next up in the line of Vermont jurisprudence on negligent infliction is Vaillancourt v. Medical Ctr. Hosp. of Vt., 139 Vt. 138 (1980). There, Mr. and Mrs. Vaillancourt were in the Hospital's delivery room, while she was in labor. Because of the asserted negligence of defendants, Mrs. Vaillancourt and her baby were denied "adequate monitoring of the fetus, and none at all for a period of 3 1/2 hours, abandoning Mrs. Vaillancourt, as is alleged, without medical care and attention. At the end of this period, the fetus had died..." 139 Vt. at 140. This time, Justice Larrow writes for the court. His opinion spends two pages reaching the conclusion that "there exists statutory wrongful death liability for the negligently caused death of an unborn, viable fetus." Id. at 141-43. He then spends one paragraph analyzing the negligent infliction of emotional distress law governing the claims of the two grieving parents. After setting out the question, the opinion continues:

We consider this issue to be governed by our decisions in Savard v. Cody Chevrolet ... and Guilmette v. Alexander Those cases may be summarized as allowing recovery for negligently caused emotional distress, not accompanied by physical impact, only when accompanied by substantial bodily injury or sickness, and subject to the limitation that the plaintiff himself have been within the "zone of danger" and subject to a reasonable fear of immediate personal injury. The reasons for this rule are clearly stated in the cases quoted, and we see no compelling reasons to modify the views therein adopted.

Id. at 143.

Applying the Savard and Guilmette rule, the Vaillancourt court found the expectant father to be outside the zone of danger, but the not-yet-delivered mother within it, a conclusion it considered "apparent." Perhaps the passage of 27 years has clouded what was once apparent, but what was the zone and what was the danger? Usually, zone of danger portends some external force which projects danger to some spatial "zone" and thereby to the people within it. Typically, a motor vehicle endangers those in its path. Here, if anything, the opposite is true. In Vaillancourt the danger was as internal as can be imagined--failure to monitor (itself the absence of force which causes only a failure to recognize danger, rather than a danger per se) presumably caused fatal injury to vital fetal organs, causing death to the fetus. If the presence of a dead fetus within her was a danger to the mother, in the few hours at issue, the opinion nowhere hints at that fact. So other than being obviously closer to whatever it was that was dangerous, which is itself never described, it is difficult to articulate why the mother was within the zone and the father without. If anything, the distinction was better supported by concluding that the mother actually suffered physical impact, thereby entitling her to recover for emotional distress. She did, in fact, allege direct personal injury beyond emotional distress, making the zone of danger analysis unnecessary in any case. In sum, Vaillancourt merely attempts to restate the zone of danger law but perhaps demonstrates the mystery sometimes inherent in applying it.

The final two cases in our survey of Vermont's interaction with negligent infliction of emotional distress are Leo v. Hillman, 164 Vt. 94 (1995), and Brueckner v. Norwich Univ., 169 Vt. 118 (1999). In Leo, our court was squarely asked to abandon zone of danger in favor of a test based on foreseeability. 164 Vt. at 101. It declined to do so, not for any doctrinal reason but instead because even adopting the broader rule would not have saved plaintiff's claim from the summary judgment she was appealing. The broader rule still would require a plaintiff to have witnessed "severe injury

to a closely related person." As the survivor of a homicide victim, who might have been saved had the assailant's psychiatrist (defendant in the action) informed authorities of his patient's danger, plaintiff claimed negligence and emotional distress but actually witnessed nothing of her sister's suffering. As adoption of a new, broader or more modern rule would have served appellant not at all, her request was obviously denied. Brueckner was not even a bystander case. The plaintiff claimed emotional harm from physical blows to his own body so the Court never needed to employ the zone of danger analysis, let alone consider whether it was the proper yardstick by which to determine the scope of liability. 169 Vt. at 125. Thus, the Court's recitation of the test is mere dicta in the case.

In sum, Vermont's law of negligent infliction of emotional distress without impact was born out of Savard, limited in Guilmette and applied in Vaillancourt, Leo, and Brueckner. It is of relatively recent derivation. It is based upon developments in the law outside Vermont, which were adopted by our court. It has not actually been reviewed since Guilmette in 1968.

By contrast, the development of the law of negligent infliction of emotional distress has been quite substantial among our sister states. Dillon v. Legg, 441 P.2d 912 (1968) is no longer viewed as the "divided court" ruling perceived by Justice Shangraw. Instead Dillon is considered the source of law for "bystander liability" now generally followed by 32 American jurisdictions. Reporters' Note, Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm, (Council Draft No. 6, 2006), 65. The proposed Restatement section itself, not yet adopted by the American Law Institute Council, reads as follows:

§47. Negligent Infliction of Emotional
Disturbance Resulting from Bodily Harm to a
Third Person

An actor who negligently causes serious bodily

injury to a third person is subject to liability for serious emotional disturbance thereby caused to a person who:

- (a) is sufficiently near the accident to perceive it contemporaneously, and
- (b) is a close family member of the person suffering bodily injury.

What this means is that the law over which plaintiffs and defendants are arguing is no longer the general law around the country. The Reporter's Note goes on to state that thirteen jurisdictions reject Dillon and follow only the zone of danger test, including Vermont in the count and citing Vaillancourt. As we discussed above, Vaillancourt made no effort to survey the law on negligent infliction of emotional distress, or as it might better be labeled, liability to bystanders. The opinion's author was clearly more interested in other subjects. The court was doing nothing more than adhering to earlier expressions of the law of liability to bystanders. The better clue to understanding our law regarding such liability comes from Guilmette, which, albeit briefly, surveyed other states' decisions and stated its reasons for following New Hampshire and Wisconsin, rather than California.

From the vantage of 2007, things have changed. Both New Hampshire and Wisconsin have since rejected the decisions relied upon by Justice Shangraw, in favor of following Dillon. Corso v. Merrill, 406 A.2d 300, 306 (N.H. 1979) ("The zone of danger rule Jelley v. LaFlame ... has been criticized by several courts and commentators It has been termed a mechanical rule that does 'more harm than good.' ... We adopt the traditional negligence [foreseeability] approach and will allow parent recovery for emotional distress."); Bowen v. Lumbermens Mut. Cas. Co., 517 N.W.2d 432, 434 (Wis. 1994) ("we abandon the zone of danger and fear for one's safety rules this court has applied in earlier bystander cases."). Justice Abrahamson's opinion in Bowen is particularly enlightening for its

review of Wisconsin's contortions in seeking to apply zone of danger and fear for one's safety. 517 N.W.2d at 436-42. In it, she points out several cases under the purported old rule in which plaintiffs were able to recover although not in fear for their own safety or not in the zone of danger. Some plaintiffs succeeded by being labeled "participants," rather than mere "witnesses." 517 N.W.2d at 442. Wisconsin's experience with the shifting sands of zone of danger and fear of one's safety in part reflects its status as a much larger state than Vermont's, with more cases, more strained applications. But we can confidently nominate Justice Larrow's intuitive application of zone of danger in Vaillancourt to compete in the Zone League.

The facts of this case point out the vagaries of zone of danger and fear for one's self. Defendants argue that plaintiffs White, Guyette, and Cullen never feared for their own safety but that their "entire focus" was on the late Mrs. Hayes. Similarly, it is said Mrs. Randall was concerned solely for her husband. In a case such as this, where there is a generalized danger within a circumscribed zone, would strict enforcement of fear for one's self end up being more a test of how well plaintiffs were coached for testimony rather than an objective demarcation of objective fact? Would courts begin to ponder such questions as whether the reasonable wedding guest would instantly realize the potentially lethal danger of free-falling tent timbers, rather than the inconvenience of collapsing fabric? Should juries? The law's legitimate concerns for limiting negligence liability in the absence of physical injury are not furthered by requiring such metaphysical discussion. The Restatement's test of contemporaneous presence at the injury of a close family member more objectively, and still humanely, determines which plaintiffs may seek recovery.

For these reasons, we conclude that Vermont will follow the lengthening majority which subscribes to Dillon, as demonstrated by the draft Restatement. On that basis, defendants' motions for summary judgment are denied.

Dated at Burlington, Vermont, October 30, 2007.



M. I. Katz, Judge