

1988

Jesse Brown v. Kevin K. Loh, Joseph Pulta, Norman
Liwanag, Eugene Long, and Thomas M. Foley :
Brief of Appellant

Utah Court of Appeals

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DOCKET NO.

OF THE STATE OF UTAH

DOCKET NO.

Defendants-
Respondents,

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Category 14b

APPELLANT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL
DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH,
THE HON. BOYD L. PARK, PRESIDING

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FILED
FEB 12 1988

IN THE SUPREME COURT
OF THE STATE OF UTAH

JESSE BROWN, by and	:	
through his guardian	:	
at litem,	:	
JEFFERY BROWN,	:	
	:	
Plaintiff-	:	Case No. 870387
Appellant,	:	
	:	
vs.	:	
	:	Category 14b
KEVIN K. LOH, JOSEPH	:	
PLUTA, NORMAN LIWANAG,	:	
EUGENE LONG, and THOMAS	:	
M. FOLEY, dba THE KNIGHT	:	
BLOCK PARTNERSHIP, a	:	
Hawaii general partnership,	:	
	:	
Defendants-	:	
Respondents,	:	

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IN THE SUPREME COURT
OF THE STATE OF UTAH

JESSE BROWN, by and	:	
through his guardian	:	
ad litem,	:	
JEFFERY BROWN,	:	
	:	
Plaintiff-	:	Case No. 870387
Appellant,	:	
	:	
vs.	:	
	:	Category 14b
KEVIN K. LOH, JOSEPH	:	
PLUTA, NORMAN LIWANAG,	:	
EUGENE LONG, and THOMAS	:	
M. FOLEY, dba THE KNIGHT	:	
BLOCK PARTNERSHIP, a	:	
Hawaii general partnership,	:	
	:	
Defendants-	:	
Respondents,	:	

APPELLANT'S BRIEF

JURISDICTION AND NATURE OF PROCEEDING

This is an appeal from the Judgment of the Fourth Judicial District Court of Utah County, dated September 10, 1987, which granted the defendants' Motion to Dismiss. This Court has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2-2(3)(i) (1987).

ISSUE PRESENTED FOR REVIEW

May a plaintiff recover damages from a defendant when the defendant has negligently inflicted severe emotional distress upon the plaintiff?

DETERMINATIVE STATUTES, RULES, OR REGULATIONS

The plaintiff is unaware of any constitutional provision, statute, rule, or regulation that is determinative of the issue presented for review.

STATEMENT OF THE CASE

The plaintiff filed this action against the defendants to recover damages for the severe emotional distress that was negligently inflicted upon the plaintiff's minor son by the defendants. Arguing that the plaintiff's complaint failed to state a claim for which relief could be granted, the defendants filed a Motion to Dismiss pursuant to Utah R. Civ. P. 12(b)(6), which was granted on September 10, 1987. The plaintiff filed this appeal on October 13, 1987.

On Saturday, August 2, 1986, Jesse Brown¹, then 10 years old (R. 5), and JoeDee² Quinn entered the defendants' building, the Knight Block Building, located at #1 East Center Street, Provo, Utah, to ride the elevator. (R. 4, para. 4.) The elevator's construction makes it possible for a child to position himself between the elevator's inner door and the access door to watch the operation of the elevator while it

¹Jesse Brown is the minor son of Jeffery Brown, the Appellant herein. Jeffery Brown has been duly appointed as the guardian ad litem for Jesse with respect to this action. (R. 9.)

²The complaint uses the spelling of "Jody." (R. 2.) The death certificate in the files of the plaintiff's attorneys, however, reveals that the correct spelling is "JoeDee," and that he was 13 years old at the time of his death.

ascends to another floor.³ (R. 2 para. 9.) The defendants knew

³Information in the files of the plaintiff's attorneys reveals that the elevator's outer door swings from the right into the hallway. The elevator's inner door is made of vertical tubes that are secured at the top, center, and bottom by a series of brackets. The elevator services the basement floor, the main floor, the first floor, and the second floor. When located at the basement floor, the space between the outer and inner doors is approximately seven inches wide, which narrows to approximately three and one-half inches on the main floor.

The elevator is an old model, and is located in the Knight Block Building, an old building in the center of Provo which was renovated and converted into office space while still maintaining its rustic character. The elevator had last been inspected nearly three and a half years before the accident. Children had been frequently observed to play on the elevator without supervision or control.

On August 2, 1986, Jesse and JoeDee had been riding the elevator up and down for a period of approximately two hours, and became curious about how the elevator operated. JoeDee discovered that he could stand between the outer and inner doors of the elevator and observe the elevator operate within the elevator shaft. After placing himself between the doors, JoeDee instructed Jesse, who was still located inside the elevator, to press the main floor button, thereby causing the elevator to rise. As the elevator rose to the main floor, the seven inch space narrowed to three and one-half inches, wedging JoeDee's body between the elevator shaft wall and the elevator, which crushed his legs and waist.

As the elevator began to crush him, JoeDee cried out in pain to Jesse, who was frantically pressing the emergency stop button. Unfortunately, the button did not work and the elevator continued to rise while Jesse looked on in horror and shock. Finally, the force exerted by the wedging of JoeDee's body caused a fuse to blow and the elevator stopped. Jesse immediately cried out for help and tried to speak with JoeDee, who was then only able to whisper. Within two minutes, JoeDee was silent; shortly thereafter, JoeDee was dead.

It was at least fifteen minutes before anyone responded to Jesse's frantic cries for help. During that time, Jesse was trapped inside the elevator cage. Jesse talked to JoeDee for the few minutes until he became silent, and could reach down and touch him, but was powerless to help. Emergency workers eventually arrived and began the laborious process of rescuing Jesse and freeing JoeDee's body. Jesse observed most of the rescue efforts. He continues to suffer from sleeplessness, nightmares, an abnormal refusal to associate with friends, fear and anguish associated with elevators which causes him to relive the ordeal, and other problems related to the trauma he experienced.

or should have known that children might engage in such activity to satisfy their curiosity regarding the operation of the elevator, and that children would thereby be exposed to risk of serious injury or death. (R. 3. para. 10.)

JoeDee placed himself between the doors of the elevator while Jesse operated the controls to move the elevator to the next floor. JoeDee became wedged between the elevator's inner door and the wall of the elevator shaft, and was crushed to death. (R. 3 para. 11.)

Jesse rode the elevator with JoeDee, observed JoeDee between the elevator's doors, witnessed JoeDee's death, and observed the unsuccessful rescue efforts. All of this served to injure and traumatize him and to cause severe emotional distress and damage. Jesse continued to suffer from having witnessed the traumatic and gruesome death of his best friend--that is, Jesse suffered from the emotional trauma that was induced by the severe psychological and mental distress occasioned by JoeDee's death. (R. 3 para. 13.)

The plaintiff filed this action to recover damages from the defendants for the emotional distress that was inflicted upon Jesse as a result of the defendants' negligent maintenance of, and supervision over, the elevator. (R. 3 para. 12.)

SUMMARY OF ARGUMENT

The issue of whether Utah recognizes a cause of action for negligently inflicted emotional injury has never been directly addressed and analyzed by this Court. The trial court granted

the defendants' Motion to Dismiss based on the assertion in Reiser v. Lohner, 641 P.2d 93 (Utah 1982), that Utah does not recognize such a cause of action. That statement was not, however, necessary to the holding in Reiser, and was in turn based on dicta from two earlier Utah cases.

To the extent that prior decisions of this Court do deny any redress for negligently inflicted emotional injury, those decisions should be overruled. Every other state in the nation recognizes a cause of action for negligently inflicted emotional injury. The cases generally arise in the context of emotional injury incurred by witnessing severe injury to or death of another person, and can be grouped under three main categories. Six states follow the Impact Rule, and allow recovery only if the plaintiff suffered a physical impact or physical consequences from the emotional injury. Nine states allow bystander recovery only for plaintiffs who were in the same zone of danger as the person physically injured. The growing majority of states, 34 to date, apply the same rule as used in other areas of tort law, and allow recovery for foreseeable injuries.

The Impact and Zone of Danger Rules are grounded in antiquated notions of the difficulty of proving or defending against emotional injuries and on an unfounded fear of a flood of litigation. Only the Foreseeability Rule can be logically supported in light of modern abilities to analyze and measure emotional injuries, and in view of the duty of courts to grant all injured parties equal rights of redress. This Court should

join the majority and better-reasoned decisions and adopt the Foreseeability Rule.

ARGUMENT

UTAH SHOULD ADOPT THE FORESEEABILITY RULE OF RECOVERY FOR NEGLIGENTLY INFLICTED EMOTIONAL INJURY.

I. Historical Background

Seventy-two years ago, this Court recognized a cause of action for intentionally inflicted emotional distress in Jepps v. Jensen, 47 Utah 536, 155 P. 429 (1916). In obiter dictum, however, this Court went on to state that a cause of action for negligently inflicted emotional distress was not generally recognized: "[M]ental suffering, unaccompanied by injury to purse or person, affords no basis for an action predicated upon wrongful acts, merely negligent" Id. at 540, 155 P. at 430 (citation omitted).

This dictum correctly characterized the Nineteenth-Century's posture toward claims for psychic injury. This posture developed simultaneously in England and America. In Victorian Railways Commissioners v. Coultas, 13 App. Cas. 222 (1888), and in Lehman v. Brooklyn City Railroad, 47 Hun. 355, 14 St. R. 575 (N.Y. Sup. Ct. 1888), it was held that damages could not be recovered for negligently inflicted emotional distress unaccompanied by physical injury as such was without precedent.

Scotland rejected the Coultas decision in Gilligan v. Robb, Sess. Cas. 856 (1910), holding that damages could be recovered for negligently inflicted nervous shock even in the absence of

physical impact. Although Ireland had already recognized a cause of action for negligently inflicted emotional distress without impact in Byrne v. Great Southern & Western Railway of Ireland, (unreported), it explicitly repudiated the Coultas decision in Bell v. Great Northern Railway of Ireland, 26 L.R. Ir. 428 (1890). See Throckmorton, Damages for Fright, 34 Harv. L. Rev. 260 (1920-21). England itself finally abandoned the Coultas decision in Dulieu v. White & Sons, 2 K.B. 669 (1901), and held that a person could recover for negligently inflicted nervous shock without physical impact.

In America, however, the holding in Lehman, which denied recovery for psychic injury without physical impact, "became the weight of American authority of the late 1890's." First National Bank v. Langley, 314 So. 2d 324, 329 (Miss. 1975). This authority was the rationale that underlay the dictum announced by this Court in Jeppsen and has been embodied in a rule that has come to be known as the Impact Rule.

II. The Impact Rule

The Impact Rule "provides that only a person who suffers an impact from the same force which injures a third person may recover for emotional distress due to witnessing the injury to the third person." Saechao v. Matsakoun, 78 Or. App. 340, 717 P.2d 165, 167, review dismissed, 302 Or. 155, 727 P.2d 126 (1986). The rule was fashioned out of a belief that psychic injury claims are too "easily . . . fabricated: or as sometimes stated, are easy to assert and hard to defend against." Samms

v. Eccles, 11 Utah 2d 289, 291, 358 P.2d 344, 345 (1961). "[C]ourts generally have not focused on considerations such as whether people have some original entitlement to psychic well-being. Rather, courts have articulated concerns about unlimited liability, false claims, a flood of trivial lawsuits, uncertainty of damages and windfall compensation for plaintiffs." Bell, The Bell Tolls: Toward Full Tort Recovery For Psychic Injury, 36 U. Fla. L. Rev. 333, 347 (1984). The Impact Rule is therefore viewed as a physically reliable guarantee of psychic injury.

The cold injustice worked by the Impact Rule can be seen in Saechao, wherein the defendant, while attempting to park her car, backed over a curb, crushing and killing a two-year old child, Ou Fou Saechao. Ou Fou's brother attempted to pull him from the car's path, but was struck by the car and knocked away from Ou Fou. Also present at a distance of approximately 15 feet were Ou Fou's sister and another brother.

Suit was brought on behalf of the three children for the extreme emotional trauma, physical trauma, nausea, nightmares, and headaches they sustained as a result of the defendant's negligence. Based on the Impact Rule, the trial court granted the defendant's motion to dismiss as to the sister and brother who witnessed Ou Fou's death from a distance of less than 15 feet, while it denied the motion as to the brother who was struck by the car as he attempted to pull Ou Fou from the car's path.

Reasoning that the defendant breached no duty to Ou Fou's onlooking sister and brother, the court of appeals affirmed, stating that the Impact Rule "creates a clear relationship between compensability and the plaintiff's being a victim of a breach of duty." 717 P.2d at 169. Only the brother who was physically impacted by the defendant's negligence was permitted to recover for his psychic injury, despite the fact that his injuries were concededly identical to his bystanding sister and brother.

The Impact Rule thus denies recovery for psychic injuries without physical impact on the ground that there is no duty of due care. The Impact Rule is premised on a belief that "the imposition of duty here would work disaster because it would invite fraudulent claims and it would involve the courts in the hopeless task of defining the extent of the tortfeasor's liability." Dillon v. Legg, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912, 914 (Cal. 1968).

This rationale erroneously assumes that liability is impossible to define and that denying a duty of due care is "the only realistic alternative." Id. It "assumes that juries, confronted by irreconcilable expert medical testimony, will be unable to distinguish the deceitful from the bona fide," and that "only a per se rule denying the entire class of claims that potentially raises this administrative problem can avoid this danger." Id. at 917.

As the court in Dillon noted, however: "[T]he possibility that fraudulent assertions may prompt recovery in isolated cases does not justify a wholesale rejection of the entire class of claims in which that potentiality arises." Id. at 917-18. "The possibility that some fraud will escape detection does not justify an abdication of the judicial responsibility to award damages for sound claims" Id. at 918. In the words of the Supreme Court of Connecticut: "Certainly it is a very questionable position for a court to take, that because of the possibility of encouraging fictitious claims compensation should be denied those who have actually suffered serious injury through the negligence of another." Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402, 405 (1941). This Court has also stated the same principle:

It is further to be observed that the argument against allowing such an action because groundless charges may be made is not a good reason for denying recovery. If the right to recover for injury resulting from the wrongful conduct could be defeated whenever such dangers exist, many of the grievances the law deals with would be eliminated. That some claims may be spurious should not compel those who administer justice to shut their eyes to serious wrongs and let them go without being brought to account. It is the function of courts and juries to determine whether claims are valid or false. This responsibility should not be shunned merely because the task may be difficult to perform.

Samms, 358 P.2d at 347.

In the wake of such reasoning, followers of the Impact Rule have fallen away. "[T]he great majority of courts have now repudiated the requirement of 'impact'" Prosser and Keeton on the Law of Torts (hereinafter Law of Torts) § 54 at

364 (W. Keeton 5th ed. 1984). For a list of the states that have abolished the Impact Rule, see Gates v. Richardson, 719 P.2d 193, 195 n.1 (Wyo. 1986).

Moreover, scholars have pointed out that denying liability for psychic injuries unaccompanied by physical impact on the ground that there is no duty of due care begs the ultimate question--whether an individual's interest in psychic well-being is entitled to legal protection. Common sense alone belies the notion that psychological stability and mental tranquility are trivial and dispensable. "Psychic well-being is the core of what is important to human existence and is too important to the individual to surrender." 36 U. Fla. L. Rev. at 342. "[F]reedom from mental distress is an interest that is today worthy of legal protection." Corso v. Merrill, 119 N.H. 647, 406 A.2d 300, 304 (1979).

In our increasingly complex society, the orderly and normal functioning of a man's mind is as critical to his well-being as physical health. Indeed, a sound mind within a disabled body can accomplish much, while a disabled mind in the soundest of bodies is rarely capable of making any substantial contribution to society.

Comment, Negligently Inflicted Mental Distress: The Case for an Independent Tort, 59 Geo. L.J. 1237 (1970-71).

With respect to duty, Professor Prosser has correctly observed that duty is merely a legal conclusion: "'[D]uty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." Law of Torts

§ 53, at 358. These policy considerations played a critical role in the development of the concept of duty. "In the absence of 'overriding policy considerations . . . foreseeability of risk [is] of . . . primary importance in establishing the element of duty.'" Dillon, 441 P.2d at 919, (quoting Grafton v. Mollica, 231 Cal. App. 2d 860, 42 Cal. Rptr. 306, 310 (1965)). It has long been accepted that "[t]he risk reasonably to be perceived defines the duty to be obeyed." Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 162 N.E. 99, 100 (N.Y. 1928).

Most courts today have abandoned the Impact Rule and adopted the notion of foreseeability as the touchstone of duty. This approach is known as the Foreseeability Rule; it permits a person to recover damages for negligently inflicted emotional distress without impact if the damages sustained were reasonably foreseeable. The physical impact requirement has come to be chastised as an artificial barrier with no place in Twentieth Century jurisprudence.⁴

Today, only the following six jurisdictions still adhere to the Impact Rule: Arkansas: Midwest Buslines, Inc. v. Johnson, 291 Ark. 304, 724 S.W.2d 453 (1987); Georgia: Hamilton

⁴The artificial nature of the barrier is demonstrated by the extent to which courts will strain to find an "impact." The Supreme Court of South Dakota, for example, while not deciding which rule it would follow, recently held that even under the Impact Rule, recovery would be allowed for emotional injury where the only physical "impact" was nausea and diarrhea. Wright v. Coca Cola Bottling Co. of Central South Dakota, Inc., 414 N.W.2d 608 (S.D. 1987).

v. Powell, Goldstein, Frazer & Murphy, 252 Ga. 149, 311 S.E.2d 818 (Ga. 1984); Indiana: Boston v. Chesapeake & Ohio Railway Co., 223 Ind. 425, 61 N.E. 2d 326 (1945); Kentucky: Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980); Oregon⁵: Saechao v. Matsakoun, 78 Or. App. 340, 717 P.2d 165, review dismissed, 302 Or. 155, 727 P.2d 126 (1986); and Washington, D.C.: Waldon v. Covington, 415 A.2d 1070 (D.C. App. 1980).

The Oregon Supreme Court, however, has stated that it has "not had occasion to examine the bystander's claim for psychic injury from witnessing a negligent physical injury to a close relative . . . and we therefore exclude it from the pertinent analogues in Oregon." Norwest v. Presbyterian Intercommunity Hospital, 293 Or. 543, 652 P.2d 318, 327 n.18 (1982). Likewise, the Washington, D.C., Court of Appeals has indicated that it, en banc, could overrule the Impact Rule. Asuncion v. Columbia Hospital for Women, 514 A.2d 1187 (D.C. App. 1986).

III. The Zone of Danger Rule

Some courts that have abandoned the Impact Rule have stopped short of the Foreseeability Rule by adopting the Zone of Danger Rule, which permits a person to recover damages for negligently inflicted emotional distress without impact if the person was within the zone of physical danger when the psychic

⁵It should be observed, however, that Oregon has created an exception to the Impact Rule, which permits a plaintiff to recover damages for negligently inflicted emotional distress unaccompanied by physical impact when the plaintiff is the direct victim of the defendant's tortious conduct. Harris v. Kissling, 721 P.2d 838, 840 (Or. App. 1986).

injury occurred. Courts adopting the Foreseeability Rule have correctly noted that the Zone of Danger Rule is simply another artificial barrier, which, like the Impact Rule, has no place in today's society.

The unwarranted injustice worked by the Zone of Danger Rule can be seen in Dillon, wherein the defendant negligently drove his car into Erin Dillon as she crossed Clover Lane, thereby causing her death. Erin's sister was standing on the curb, and her mother a few yards back, when the defendant's car struck Erin. Both sustained extreme emotional shock and injury.

The trial court granted the defendant's motion for summary judgment as to the mother, dismissing her claim for psychic injury on the ground that she was not personally within the zone of physical danger, but denied the motion as to Erin's sister. The California Supreme Court was repulsed by this bizarre result: "[W]e can hardly justify relief to the sister for trauma which she suffered upon apprehension of [Erin's] death and yet deny it to the mother merely because of a happenstance that the sister was some few yards closer to the accident." 441 P.2d at 915. The court went on to reject the Zone of Danger Rule.

The Zone of Danger Rule has been critically analyzed by the Massachusetts Supreme Court:

The problem with the zone of danger rule . . . is that it is an inadequate measure of the reasonable foreseeability of the possibility of physical injury resulting from a parent's anxiety arising from harm to his child. The reasonable foreseeability of such a physical injury to a parent does not turn on whether

the parent was or was not a reasonable prospect for a contemporaneous injury because of the defendant's negligent conduct. Although the zone of danger rule tends to produce more reasonable results than the [impact] rule and provides a means of limiting the scope of a defendant's liability, it lacks strong logical support.

Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295, 1300 (1978).

In place of the Zone of Danger Rule, the California Supreme Court adopted the Foreseeability Rule. The Dillon decision has come to be viewed as the seminal decision in this area of the law; it has served as the guiding decision for the near-universal adoption of the Foreseeability Rule in contemporary America.

Today, only the following nine jurisdictions still adhere to the Zone of Danger Rule: Arizona: Keck v. Jackson, 122 Ariz. 114, 593 P.2d 668 (1979); Colorado: Towns v. Anderson, 195 Colo. 517, 579 P.2d 1163 (1978); Delaware: Robb v. Pennsylvania Railroad Co., 58 Del. 454, 210 A.2d 709 (1965); Illinois: Rickey v. Chicago Transit Authority, 98 Ill. 2d 546, 457 N.E.2d 1 (1983); Minnesota: Stadler v. Cross, 295 N.W.2d 552 (Minn. 1980); New York: Bovsun v. Sanperi, 61 N.Y.2d 219, 473 N.Y.S.2d 357, 461 N.E.2d 843 (1984); North Dakota: Whetham v. Bismarck Hospital, 197 N.W.2d 678 (N.D. 1972); Tennessee: Shelton v. Russell Pipe & Foundry Co., 570 S.W.2d 861 (Tenn. 1978); Vermont: Vaillancourt v. Medical Center Hospital of Vermont, Inc., 139 Ut. 138, 425 A.2d 92 (1980).

Although Wisconsin follows the Zone of Danger Rule, it has created an exception under the Foreseeability Rule for plaintiffs within the scope of the defendant's tortious activity even though unendangered. Garrett v. City of New Berlin, 122 Wis. 2d 223, 362 N.W.2d 137 (1985).

IV. The Foreseeability Rule

Today, the Foreseeability Rule is the majority approach for compensating claimants for psychic injury. This rule has been adopted by most of the jurisdictions that have considered the issue presented by this appeal. The Foreseeability Rule requires courts to focus upon certain factors on a case-by-case basis to determine whether the plaintiff was emotionally traumatized by the defendant's negligent conduct. In the words of the Dillon court: "The evaluation of these factors will indicate the degree of the defendant's foreseeability." 441 P.2d at 920. The Dillon court identified three factors to be considered when applying the Foreseeability Rule:

(1) Whether plaintiff was located near the scene of the accident as contrasted 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.

Id.

The above-described factors are not mandatory requirements, but meaningful indicators to be considered when determining the

foreseeable results of a defendant's negligent conduct. In the words of the Ohio Supreme Court:

Concomitant with this test of foreseeability, we add several factors which should be considered in order to determine the reasonable foreseeability of a negligently inflicted emotional injury to a plaintiff-bystander. These factors are by no means exclusive, and the mere failure of a plaintiff to satisfy all of them should not preclude an aggrieved party from recovery. Thus, the term "factors" should be underscored to alleviate any misconception that such factors are requirements. The purpose of these factors is to assist and guide the determination of whether the serious emotional injury was reasonably foreseeable to the defendant at the time the accident (which precipitated the cause of action) took place.

Paugh v. Hanks, 6 Ohio St. 3d 72, 451 N.E.2d 759, 766 (1983).

With respect to the first factor, the New Jersey Supreme Court has made the following observation:

Discovering the death or serious injury of an intimate family member will always be expected to threaten one's emotional welfare. Ordinarily, however, only a witness at the scene of the accident causing death or serious injury will suffer a traumatic sense of loss that may destroy his sense of security and cause severe emotional distress.

Portee v. Jaffee, 84 N.J. 88, 417 A.2d 521, 527 (1980) (emphasis added).

The Wyoming Supreme Court has acknowledged that this factor properly limits the class of plaintiffs:

The essence of the tort is the shock caused by the perception of an especially horrendous event. It is more than the shock one suffers when he learns of the death or injury of a child, sibling or parent over the phone, from a witness, or at the hospital. It is more than bad news. The kind of shock the tort requires is the result of the immediate aftermath of an accident.

Gates, 719 P.2d at 199 (citations omitted).

With respect to the second factor, the Wyoming Supreme Court has observed the following:

As an assurance of genuine shock, the courts that have adopted the tort have generally agreed that the person claiming emotional harm must witness a serious accident or its aftermath. The primary victim must, in fact, be seriously injured or killed and the claimant must realize, at the time he witnesses the event, that the injuries are serious.

Id.

The Ohio Supreme Court has added the following variation to this factor:

As far as the second factor is concerned, we believe that it is not necessary for a plaintiff to actually see the accident. Thus, for example, a contemporaneous observance of the accident through the sense of hearing will enhance the likelihood that the emotional injury was reasonably foreseeable.

Paugh, 451 N.E.2d at 766.

The Ohio Supreme Court has perfected the third factor by implementing the following refinement:

With respect to the third factor, we believe that a strict blood relationship between the accident victim and the plaintiff-bystander is not necessarily required.

Id. at 766-67.

The Hawaii Supreme Court follows this rationale:

It is well established, in this jurisdiction, that one has a duty to refrain (duty of care) from the negligent infliction of serious emotional distress upon another. This court has further concluded that in connection with such a duty, relief for the plaintiff exists regardless of the absence of physical impact and resulting physical injury on the plaintiff and the absence of blood relationship between the victim and plaintiff.

Kelley v. Kokua Sales and Supply, Ltd., 56 Hawaii 204, 532 P.2d 673, 675 (Hawaii 1975) (citations omitted).

By combining these three factors, the Wyoming Supreme Court has observed that the class of plaintiffs is properly limited to those truly meritorious claimants.

A timely example is the space shuttle disaster. If every person who witnessed that catastrophic event and suffered mental harm could recover, the courts would be overwhelmed and such projects as the space shuttle would be laden with insuperable risk. As a society, we must tell most of those who observed the disaster and may have suffered because of it, that it is suffering that is not compensable. In this we recognize that part of living involves some unhappy and disagreeable emotions with which we must cope without recovery of damages.

Gates, 719 P.2d at 198.

Thus, the Foreseeability Rule employs the traditional and time-honored approach announced in Palsgraf that "[t]he risk reasonably to be perceived defines the duty to be obeyed." 162 N.E. at 100. This approach anticipates that "foreseeability of risk [is] of . . . primary importance in establishing the element of duty." Grafton, 42 Cal. Rptr. at 310. By carefully analyzing and applying the above-described factors, the Foreseeability Rule reliably and predictably indicates the reasonably foreseeable results of a defendant's negligent conduct.

The persuasive justice worked by the Foreseeability Rule thus framed can be seen in Portee, wherein two children were riding an elevator, one of whom was the plaintiff's seven-year-old son, Guy Portee. Like the facts in this action, Guy noted that he could place himself between the outer and inner doors of

the elevator. After so doing, the elevator was activated and Guy was dragged upward between the elevator shaft and the elevator.

The other child was located outside the elevator and raced up a nearby stairway to meet the elevator on the next floor. Upon opening the door, he saw the crushed body of Guy. Guy's mother arrived immediately thereafter and witnessed the excruciating pain suffered by Guy, who flailed his arms and moaned for help. Rescue efforts were unsuccessful and Guy died while the plaintiff helplessly looked on. The plaintiff thereafter suffered severe depression and extreme psychological trauma as a result of the horrifying episode. The plaintiff brought suit for, among other claims, the severe emotional distress that she suffered as a result of the defendant's negligence.

Because the plaintiff was not personally within the zone of danger, the trial court granted the defendant's motion for summary judgment. The New Jersey Supreme Court abandoned the Zone of Danger Rule, adopting instead the Foreseeability Rule and stating:

Our inquiry has led us to conclude that the interest in personal emotional stability is worthy of legal protection against unreasonable conduct. The emotional harm following the perception of the death or serious injury to a loved one is just as foreseeable as the injury itself, for few persons travel through life alone. Ultimately we must decide whether protecting these emotional interests outweighs an interest against burdening freedom of conduct by imposing a new species of negligence liability. We believe that the interest in emotional stability we have described is sufficiently important to warrant this protection.

Portee, 417 A.2d at 528.

The Foreseeability Rule thus achieves a predictable outcome and a just result. Historically, the concept of foreseeability has been utilized in every field of tort law except the field of negligently inflicted emotional distress, which has, unfortunately, been subjected, and continues to be subjected, to such artificial barriers as the Impact Rule and the Zone of Danger Rule. The Foreseeability Rule remedies this flaw by requiring a complete analysis of the circumstances presented by each case to determine whether the plaintiff's psychic injury was a reasonably foreseeable result of the defendant's negligence.

Today, the Foreseeability Rule is followed in every remaining jurisdiction, thirty-four in all: Alabama: Taylor v. Baptist Medical Center, Inc., 400 So. 2d 369 (Ala. 1981); Alaska: Tommy's Elbow Room, Inc. v. Kavorkian, 727 P.2d 1038 (Alaska 1986); California: Dillon v. Legg, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968); Connecticut: Montinieri v. Southern New England Telephone Co., 175 Conn. 337, 398 A.2d 1180 (1978); Florida: Champion v. Gray, 478 So. 2d 17 (Fla. 1985); Idaho: Hatfield v. Max Rouse & Sons Northwest, 100 Idaho 840, 606 P.2d 944 (1980); Iowa: Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981); Hawaii: Kelley v. Kokua Sales & Supply Ltd., 56 Hawaii 204, 532 P.2d 673 (1975); Kansas: Hoard v. Shawnee Mission Medical Center, 233 Kan. 267, 662 P.2d 1214 (1983); Louisiana: Todd v. Aetna Casualty & Surety Co., 219 So. 2d 538 (La. 1969); Mesa v. Burke, 506 So. 2d 121 (La. App.),

cert. denied, 506 So.2d 1226 (La. 1987); Maine: Rowe v. Bennett, 514 A.2d 802 (Me. 1986); Maryland: Vance v. Vance, 286 Md. 490, 408 A.2d 728 (1979); Massachusetts: Dziokonski v. Babineau, 380 N.E.2d 1295 (Mass. 1978); Michigan: Wargelin v. Sisters of Mercy Health Corp., 385 N.W.2d 732 (Mich App. 1986); Mississippi: First National Bank v. Langley, 314 So. 2d 324 (1975); Missouri: Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983); Montana: Versland v. Caron Transport, 671 P.2d 583 (Mont. 1983); Nebraska: James v. Lieb, 375 N.W.2d 109 (Neb. 1985); Nevada: Selsnick v. Horton, 620 P.2d 1256 (Nev. 1980); New Hampshire: Corso v. Merrill, 406 A.2d 300 (N.H. 1979); New Jersey: Portee v. Jaffee, 417 A.2d 521 (N.J. 1980); New Mexico: Ramirez v. Armstrong, 100 N.M. 538, 673 P.2d 822 (1983); North Carolina: Ledford v. Martin, 359 S.E.2d 505 (N.C. App. 1987); Ohio: Paugh v. Hanks, 451 N.E.2d 759 (Ohio 1983); Oklahoma: Ellington v. Coca Cola Bottling Co. of Tulsa, Inc., 717 P.2d 109 (Okla. 1982); Pennsylvania: Sinn v. Burd, 404 A.2d 672 (Pa. 1979); Rhode Island: D'Ambra v. United States, 338 A.2d 524 (R.I. 1975); South Carolina: Kinard v. Augusta Sash & Door Co., 336 S.E.2d 465 (S.C. 1985); South Dakota:⁶ Wright v. Coca Cola Bottling Co. of Central South Dakota, Inc., 414 N.W.2d 608 (S.D. 1987); Texas: St. Eli-

⁶South Dakota has not directly addressed the question of whether it would recognize a cause of action for negligently inflicted emotional injury where there are no physical symptoms. It appears from the cited case, however, that South Dakota would adopt the foreseeability rule if the issue were directly presented.

zabeth Hospital v. Garrard, 730 S.W.2d 649 (Tex. 1987); Virginia: Hughes v. Moore, 197 S.E.2d 214 (Va. 1973); Washington: Hunsley v. Girard, 87 Wash. 2d 424, 553 P.2d 1096 (1976); West Virginia: Harless v. First National Bank in Fairmont, 289 S.E.2d 692 (W. Va. 1982); and Wyoming: Gates v. Richardson, 719 P.2d 193 (Wyo. 1986).

V. Negligently Inflicted Emotional Injury in Utah

With the possible exception of Utah, therefore, every state in the nation, as well as the District of Columbia, recognizes a cause of action for negligently inflicted emotional distress. The rule employed by each state has been heretofore identified. With respect to Utah, however, it is unclear whether such a cause of action even exists. The dictum in Jeppsen indicated that a person could recover damages for negligently inflicted emotional distress if accompanied by "injury to purse or person." 47 Utah at 540, 155 P. at 430. This would seem to imply that Utah adheres, or would have adhered, to the Impact Rule.

This dictum next appeared forty-five years later in Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961), which, like Jeppsen, involved a claim for intentionally inflicted emotional distress. In Samms, this dictum was reiterated when this Court stated, again in obiter dictum, that a cause of action "may not be based upon mere negligence." Id. at 293, 358 P.2d at 346.

Twenty-one years later, this twice-repeated dictum served as the underlying rationale for Reiser v. Lohner, 641 P.2d 93 (Utah 1982), which, unlike Jeppsen and Samms, did involve a

claim for negligently inflicted emotional distress. In Reiser, this Court relied upon Samms and summarily held that, in Utah, "a cause of action for emotional distress may not be based upon mere negligence." Id. at 100. This statement, like those in Jeppsen and Samms, was obiter dictum, for this Court had already held that the plaintiff's claims were barred by the statute of limitations. Nevertheless, this statement served as the basis upon which the trial court granted the defendants' Motion to Dismiss in this action.

In plain terms, the Reiser holding eliminated the right to recover damages for negligently inflicted emotional distress even if accompanied by physical impact, which is an even more draconian approach than that announced in Jeppsen.⁷ It would thus appear that Utah has retreated from, although it never adopted, the antiquated Impact Rule articulated in dictum seventy-two years ago, thereby making it the only jurisdiction in America that does not recognize a cause of action for negligently inflicted emotional distress.

The problem lies in the fact that this Court has never directly addressed the issue of whether a plaintiff may recover damages for negligently inflicted emotional distress. The dictum announced in Jeppsen and reiterated in Samms has never been questioned, analyzed, or studied. Today, it stands

⁷In Oregon, for example, the Impact Rule would still have allowed the plaintiff in Reiser to recover because she was the direct victim of the defendant's tortious activity even though not physically impacted by the defendant's conduct. Harris, 721 P.2d at 840.

abandoned though never accepted; and in its place, an even more anachronistic rule has emerged in Reiser. The mere passing of time, however, should not overshadow the fact that this dictum is, and was, dictum:

Dictum thrice repeated is still dictum. It is a court's statement on a question not necessarily involved in the case and, hence, is without force of adjudication. It is not controlling as precedent.

Town of Chino Valley v. City of Prescott, 638 P.2d 1324, 1327 (1981) (citations omitted).

Jeppsen, Samms, and Reiser simply perpetuate a Nineteenth Century notion that has been uniformly rejected on two continents. The Impact Rule has been rejected by both of the courts that originally articulated it. This Court should therefore utilize the opportunity presented by this appeal to carefully question, thoughtfully study, and directly address the circumstances under which a plaintiff may recover damages for negligently inflicted emotional distress in Utah. In so doing, this Court should adopt the superior and majority approach embodied in the Foreseeability Rule. In the words of the Ohio Supreme Court:

Today, this court has the unique opportunity to establish standards in this ever evolving area of tort law. To our credit, we need not experience the slow, cynical recognition of an individual's right to emotional tranquillity; other jurisdictions have both the experiences and illustrations which aid us in adopting a course which brings our law securely in step with the modern advances made in medical and psychiatric science. While some may view our decision today as an unsettling quantum leap into this difficult area of the law, the situation is one of paramount necessity in fitting the law to the dynamics and nuances of modern twentieth century society. We

view our decision today as a bold and promising step in ensuring an individual's right to emotional tranquillity which is redressable in an action against a blameworthy defendant for the negligent infliction of serious emotional distress.

Paugh, 451 N.E.2d at 762-63.

VI. Objections to Recovery

Historically, five arguments have been raised as grounds for denying recovery of damages for negligently inflicted emotional distress:

They are [1] medical science's supposed difficulty in proving causation between the claimed damages and the alleged fright, [2] the fear of fraudulent or exaggerated claims, [3] the concern that to allow such a recovery will precipitate a veritable flood of litigation, [4] the problem of unlimited and unduly burdensome liability, and [5] the difficulty of reasonably circumscribing the area of liability.

Sinn, 404 A.2d at 678 (numbering added).

Each argument will be addressed hereafter⁸ despite the fact that, in the words of Professor Prosser, "[a]ll these objections have been answered many times, and it is threshing old straw to deal with them." Law of Torts § 54, at 360.

a. Medical science is able to supply a causal link between the psychic damage suffered by the bystander and the shock or fright attendant to having witnessed the accident.

Even before the tort of negligently inflicted emotional distress was recognized, it was "assumed that medical science [was] unable to establish that the alleged psychic injuries in fact resulted from seeing a gruesome accident." Sinn, 404 A.2d

⁸The subheadings used hereafter have been taken verbatim from Sinn.

at 678. Professor Leibson has pointed out that this assumption "was certainly a product of its time" and stated:

It was a time when medical science, especially that branch concerned with the study of emotions, was in its infancy. The courts regarded with suspicion complainants who experienced no physical injuries but who maintained they suffered grievous emotional damage. At that time, there was no assurance that psychiatric study had become sophisticated enough to satisfactorily establish a cause and effect relationship between the injury and the incident which allegedly gave rise to it. Indeed, courts were reluctant even to recognize the existence of damages in such a case because, at that time, there was no universal acceptance of the fact that emotional problems could be triggered by a single event and that, with care and treatment, they could be cured. The medical profession itself gave such an idea little thought. For a long time, insanity and other emotional illnesses were considered to be the result of one's own sins.

Leibson, Recovery of Damages for Emotional Distress Caused by Physical Injury to Another, 15 J. Family L. 163, 163-64 (1976-77).

Modern advances in psychiatry have "discredited these hoary beliefs." Sinn, 404 A.2d at 678. As one commentator has observed:

The growing competence of medical science in the field of psychic injuries has diminished the problems of proof in mental distress cases. The development of psychiatric tests and the refinement of diagnostic techniques has led . . . authorities to conclude that science can establish with reasonable medical certainty the existence and severity of psychic harm. [Unfortunately] . . . changes in the law have not kept pace with the increased sophistication of psychiatry. Special rules created to deal with problems of proof that were a legitimate concern in mental distress cases 50 years ago have restricted modern courts in their handling of these claims.

63 Geo. L.J. 1179, 1184-85 (1975).

Thus, "[t]here is no reason to believe that the causal connection involved here is any more difficult for lawyers to prove or for judges and jurors to comprehend than many others which occur elsewhere in the law." Niederman v. Brodsky, 261 A.2d 84, 87 (Pa. 1970).

b. Bystander recovery will not open the courthouse door to fictitious injuries and fraudulent claims.

The anchor of the American system is that "[c]ourts must depend upon the efficacy of the judicial processes to ferret out the meritorious from the fraudulent." Dillon, 441 P.2d at 918.

Any rule which seeks to bar fraud incidently by withholding legal protection from all claims, just and unjust, employs a medieval technique which, however satisfying it may be defendants and defense attorneys, is scarcely in keeping with the acknowledged function of a modern legal system.

R. Leflar & L. Sanders, Mental Suffering and Its Consequences--Arkansas Law, 7 U. Ark. L. Sch. Bull. 43, 60 (1939).

Thus, courts today uniformly reject fraud as a ground for denying judicial relief. "A contrary position would not only exhibit a cynical lack of faith in the entire judicial system, but would also penalize the honest because of the potential activities of the dishonest." Sinn, 404 A.2d at 679-80 n.11.

c. The fear of a flood of similar litigation is an insufficient reason to deny bystander recovery.

Historically, courts have assumed that permitting recovery for negligently inflicted emotional distress would cause them to "be swamped by an avalanche of cases." Knaub v. Gotwalt, 220 A.2d 646, 647 (Pa. 1966). This rationale is inherently delud-

ing, for "if the only purpose of our law was to unburden the court system, then we would reach the zenith of judicial achievement simply by closing the district courts to all litigants and allowing all wrongs to come to rest on innocent victims." Gates, 719 P.2d at 197.

The Dillon court corrected this error by pointing out "that courts are responsible for dealing with cases on their merits, whether there be few suits or many; the existence of a multitude of claims merely shows society's pressing need for legal redress." 441 P.2d at 917 n.3. In the words of Professor Prosser: "It is the business of law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation'; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the court too much work to do." Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 Mich. L. Rev. 874, 877 (1939).

Although these statements are undeniably correct, it may nevertheless be fortunate for the public fisc that the underlying assumption that courts would be swamped with cases has proven to be misguided. "[T]hose courts which have relaxed their limitations on recovery of this type have not experienced any substantial increase in litigation." Negligent Infliction of Mental Distress: Reaction to Dillon v. Legg in California and Other States, 25 Hastings L.J. 1248, 1250 (1974). As Professor Prosser noted:

[T]he law is not for the protection of the physically sound alone. It is the business of the courts to make precedent where a wrong calls for redress, even if lawsuits must be multiplied; and there has long been precedent enough, and no great increase in litigation has been observed.

Law of Torts § 54, at 360 (emphasis added).

d. Bystander recovery would not present a problem of unlimited or unduly burdensome liability.

It has previously been explained that the Foreseeability Rule properly limits the class of plaintiffs to those claimants who fall within the scope of the modified factors listed in Dillon. Carefully applied, these factors reliably predict the reasonably foreseeable results of a defendant's negligent conduct. In the words of the Pennsylvania Supreme Court:

In considering the wisdom of extending civil liability for tortious conduct, courts have been inclined to impose a duty where public policy demands that "as between the tortfeasor who started the chain of circumstances resulting in the injury and the entirely innocent plaintiff, the tortfeasor should suffer the consequences."

Sinn, 404 A.2d at 681 (quoting Comment, Bystander Recovery for Mental Distress, 37 Fordham L. Rev. 429, 449 (1969)).

Thus, the argument becomes compelling that "[t]he more complex and interwoven societal relations become the greater the responsibility one must accept for his or her conduct." 404 A.2d at 681. It should be noted, however, that the fear of unlimited liability can be tailored under the Foreseeability Rule to allay the fears of those who face claims for negligently inflicted emotional distress. The Hawaii Supreme Court, for example, has limited recovery under the Foreseeability Rule "to

claims of serious mental distress." Leong v. Takasaki, 520 P.2d 758, 764 (Hawaii 1974) (emphasis added).

Certainly the law should not compensate for every minor psychic shock incurred in the course of daily living; it should not reinforce the neurotic patterns of our society. At some point, however, a person threatened by severe mental injury should be able to enforce his claim to reasonable psychological tranquillity.

D'Ambra, 338 A.2d at 529.

e. It is possible to reasonably circumscribe the area of liability.

This concern was dispelled by the Pennsylvania Supreme Court:

We are confident that the application of the traditional tort concept of foreseeability will reasonably circumscribe the tortfeasor's liability in such cases. Foreseeability enters into the determination of liability in determining whether the emotional injuries sustained by the plaintiff were reasonably foreseeable to the defendant.

Sinn, 404 A.2d at 684.

In this context, we are satisfied that the developments in the fields of medical science and psychiatry do provide the impetus for expanding our legal recognition of the consequences of the negligent act. To arbitrarily refuse to recognize a now demonstrable injury flowing from a negligent act would be wholly indefensible.

Id. at 683.

The Foreseeability Rule fully embodies the notion that this area of the law must be reasonably circumscribed, for liability is only extended to the reasonably foreseeable results of a defendant's negligent conduct. The factors enumerated under the Foreseeability Rule illustrate the perpetual evolution of the

common law in its effort to keep abreast of change and progress. This Court should utilize the opportunity presented by this appeal to update Utah's approach to negligently inflicted emotional distress. In this regard, the words of the Missouri Supreme Court when it adopted the Foreseeability Rule are persuasive:

A painstaking review of this whole subject has convinced this court that the time has come for Missouri to join the mainstream of Anglo-American jurisprudence by abandoning the classic impact rule.

Bass, 646 S.W.2d at 772.

The Colorado Supreme Court has stated: "[W]hile recognizing the importance of stare decisis to our system of jurisprudence, we note at the same time that the strength of the common law has always been its responsiveness to the changing needs of society."

The time has come for the dictum uttered in Jeppsen to be studied, reformed, and modernized. This Court should adopt the majority approach embodied in the Foreseeability Rule and overrule the trail of dictum that began in Jeppsen and ended in Reiser, for this dictum has evolved into an unprecedented rule of law. In the words of the Hawaii Supreme Court:

Blind adherence to legal rules constitutes an abrogation of the judicial function. Such blind adherence may result as much from adoption of a rule without adequate analysis as from application of a precedent without examination of its claim to validity. Legal rules should result from, rather than be a substitute for, legal analysis. Judicial rumination of ideas in the multitude of factual circumstances gives birth to rules. And continued rumination insures that such rules will be applied only as long as they serve the function for which they were designed.

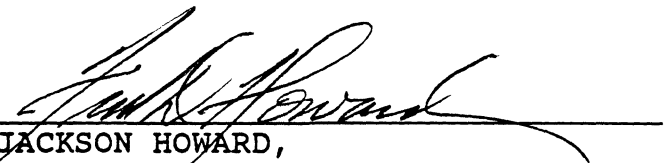
Columbia Casualty Co. v. Hoohuli, 437 P.2d 99, 104 (Hawaii 1968).

This Court should therefore conclude that negligently inflicted emotional distress is actionable in Utah under the Foreseeability Rule.

CONCLUSION

The Foreseeability Rule is a logically sound and modern approach, and should be adopted by this Court as the applicable rule for granting relief to those who suffer severe emotional injuries by reason of another's negligence. Dicta in prior decisions of this Court to the contrary should be overruled. The trial court's judgment of dismissal should be reversed, and this case remanded for trial.

DATED this 10th day of February, 1988.


JACKSON HOWARD,
FRED D. HOWARD, and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Appellant

MAILING CERTIFICATE

I hereby certify that a four true and correct copies of the foregoing were mailed to the following, postage prepaid, this 10th day of February, 1988.

Ray Phillips Ivie
IVIE & YOUNG
48 North University Ave.
P. O. Box 672
Provo, Utah 84603

A handwritten signature in cursive script, reading "Leshi Haugh", is written over a horizontal line.

APPENDIX A

JACKSON HOWARD and
FRED D. HOWARD, for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 778
Provo, Utah 84603
Telephone: (801) 373-6345

FILED
FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY
1987 JAN -8 PM 4:27
WILLIAM F. HARRIS, CLERK
Our File No. _____

Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

JESSE BROWN, by and through
his guardian ad litem,
JEFFERY BROWN,

Plaintiff,

vs.

KEVIN K. LOH, JOSEPH PLUTA,
NORMAN LIWANAG, EUGENE LONG,
AND THOMAS M. FOLEY, d/b/a
THE KNIGHT BLOCK PARTNERSHIP,
a Hawaii General Partnership,

Defendants.

COMPLAINT

Civil No. CV 87 37

COMES NOW the plaintiff and complains of the defendants and for cause of action allege:

1. Plaintiff is a resident of Utah County, State of Utah.
2. The plaintiff, Jeffery Brown is the father and guardian ad litem of Jesse Brown, a minor child, and this is an action for damages pursuant to Rule 17 of the Utah Rules of Civil Procedure.
3. Plaintiff is without information as to the residents of the defendants, Kevin K. Loh, Joseph Pluta, Norman Liwanag, Eugene Long and Thomas M. Foley, d/b/a The Knight Block Partnership, a Hawaii General Partnership, but alleges that

its principal place of business is in Provo, Utah County, Utah; and that said partnership does own and operate the property which gives rise to this lawsuit.

4. On or about the 2nd day of August, 1986, the plaintiff, Jesse Brown witnessed the injury and death of the decedent Jody Quinn who was killed in defendants' building referred to as the Knight Block, in an elevator shaft and by mechanisms owned and controlled by the defendants.

5. At all times herein mentioned said defendants were the owners and operators of the Knight Block Building and the elevator therein contained.

6. The defendants hereto failed to maintain and safeguard the said elevator in a manner that would prevent its use by children at a time when it knew that the elevator was defective and attractive to children.

7. Said defendants knew or should have known that children were attracted to the building in question; that they used the elevator for recreational purposes and were naturally and inherently curious about its methods of operation.

8. On August 2, 1986, Jody Quinn, in the company of his friend, plaintiff Jesse Brown, were attracted to the elevator for recreational purposes and for a period of approximately two hours rode the elevator up and down and became curious about the manner in which the elevator operated mechanically.

9. The nature of the operation of the elevator was such that a child could satisfy his curiosity concerning the internal operation of the elevator by wedging himself between the cage door and the access door to the elevator so as to allow the elevator to proceed to another level while the child remained at the floor level so as to be in the shaft itself after the elevator ascended.

10. The defendant Knight Block knew or should have known that this was possible and that a child could satisfy his curiosity regarding the operation of the elevator in this manner but that to do so would expose the child to ultimate risk.

11. On the day in question the two boys did perform exactly that which could have been foreseen by the defendants, such that in operating the elevator, the decedent Jody Quinn became caught in between the two doors in such a way as to be crushed by the elevator itself, resulting in his death; and all of which was witnessed by the plaintiff, Jesse Brown, and which served to injure and traumatize him, and cause severe emotional distress to him to his general and special damage.

12. The defendants hereto were negligent in the manner in which they maintained, operated, guarded and cared for the said elevator and in their failure to warn users of the potential risks and hazards inherent in its operation.

13. By reason of the negligence of the defendants, the plaintiff has sustained great pain and suffering; and has incurred hospital and medical expenses, the exact amount of which is unknown at this time, but for which plaintiff shall be entitled to recover upon proof.

14. The plaintiff has sustained general damages, the exact amount of which is unknown at this time, but for which the plaintiff is entitled to recover upon proof.

15. The plaintiff is entitled to interest pursuant to statute upon all special damages incurred from the date of injury.

APPENDIX B

1987 SEP 11 PM 4:32

WILLIAM F. HUGHES, CLERK

DEPUTY

RAY PHILLIPS IVIE, #3657
IVIE & YOUNG
Attorneys for Defendants
48 North University Avenue
P. O. Box 672
Provo, Utah 84603

375-3000

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

JESSE BROWN, by and through	:	
his guardian ad litem,	:	FINDINGS OF FACT AND
JEFFERY BROWN,	:	CONCLUSIONS OF LAW
Plaintiff,	:	
vs.	:	
KEVIN K. LOH, JOSEPH PLUTA,	:	
NORMAN LIWANAG, EUGENE LONG,	:	
and THOMAS M. FOLEY, d/b/a	:	
THE KNIGHT BLOCK PARTNERSHIP,	:	
a Hawaii General Partnership,	:	Civil No. CV-87-37
Defendants.	:	Judge Park

The above-entitled matter came on regularly and duly for hearing before the above-entitled court on the 28th day of August, 1987, on defendants' Motion to Dismiss. Attorney Fred D. Howard appeared as counsel for plaintiff. Attorney Ray Phillips Ivie appeared as counsel for defendants.

The matter having been submitted to the Court upon written briefs and oral argument and the Court now being fully advised in the matter, makes and enters the following:

FINDINGS OF FACT

Plaintiff brings this action against defendants to recover for negligently inflicting emotional injury.

The Court having found as above set forth, now makes and enters the following:

CONCLUSIONS OF LAW

A cause of action for emotional distress may not be based upon mere negligence. See Reiser v. Lohner 641 P.2d 93.

Defendants are entitled to summary judgment dismissing plaintiff's action with prejudice.

DATED AND SIGNED this 10 day of September, 1987.

BY THE COURT:


BOYD L. PARK, Judge

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Findings of Fact and Conclusions of Law with postage prepaid thereon, this 15th day of September, 1987, to:

Jackson Howard, Esq.
Fred Howard, Esq.
HOWARD, LEWIS & PETERSEN
120 East 300 North
P. O. Box 778
Provo, Utah 84603


Secretary

APPENDIX C

FILED
FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY OF UTAH

1987 SEP 11 PM 4:32

WILLIAM E. BROWN, CLERK

OK

RAY PHILLIPS IVIE, #3657
IVIE & YOUNG
Attorneys for Defendants
48 North University Avenue
P. O. Box 672
Provo, Utah 84603

375-3000

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

JESSE BROWN, by and through	:	
his guardian ad litem,	:	JUDGMENT ✓
JEFFERY BROWN,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
KEVIN K. LOH, JOSEPH PLUTA,	:	
NORMAN LIWANAG, EUGENE LONG,	:	
and THOMAS M. FOLEY, d/b/a	:	
THE KNIGHT BLOCK PARTNERSHIP,	:	
a Hawaii General Partnership,	:	Civil No. CV-87-37
	:	
Defendants.	:	Judge Park

The Court having heretofor made and entered Findings
of Fact and Conclusions of Law, now makes and enters the
following:

JUDGMENT

Defendants are hereby awarded judgment against
plaintiff as a matter of law, no cause for action. Plaintiff's
Complaint on file herein is dismissed with prejudice.

DATED AND SIGNED this 10 day of September, 1987.

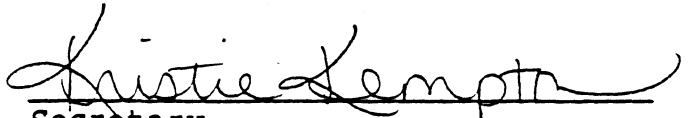
BY THE COURT:


BOYD L. PARK, Judge

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct
copy of the foregoing Judgment with postage prepaid
thereon, this 1ST day of September, 1987, to:

Jackson Howard, Esq.
Fred Howard, Esq.
HOWARD, LEWIS & PETERSEN
120 East 300 North
P. O. Box 778
Provo, Utah 84603


Secretary