Pennsylvania Superior Court Reaffirms Requirement That Bystander Actually View Act in Negligent Infliction of Emotional Distress Claims

In the common law of Pennsylvania, a claim exists within the medical malpractice arena for "bystander" negligent infliction of emotional distress ("NIED"). In order to prevail on such a claim, a bystander must show that (1) the defendant negligently injured the bystander's loved-one; (2) that the bystander was near the scene of the traumatic event; (3) that the distress resulted from the observation of the traumatic event and the negligence; (4) that the bystander had a close relationship with the injured person; and (5) that the emotional distress caused physical harm. *Sonlin v. Abington Mem'l Hosp.*, 748 A.2d 213 (Pa.Super. 2000). In applying these elements to the particular facts of medical malpractice cases, a recurring issue was raised regarding the viewing of the negligent act and the resultant injury.

In the case of *Bloom v. Dubois Reg'l Med. Ctr.*, 597 A.2d 671 (Pa. Super. 1991), the Pennsylvania Superior Court explicitly recognized that any claim for NIED on behalf of a "bystander" in the medical malpractice context requires that the bystander witness *both* the negligent act and the resultant injury to the bystander's loved one. The Superior Court expanded upon and confirmed this holding in *Love v. Cramer*, 606 A.2d 1175 (Pa. Super. 1992), appeal denied, 621 A.2d 580 (Pa. 1992). In *Love*, the Superior Court recognized that "although it seems odd that the plaintiff must actually witness the negligent act itself and not just the resulting traumatic injury to the loved one, the law as it now stands dictates such a requirement." *Id* at 1179. In the *Love* opinion, Judge Joseph A. Del Sole issued a concurrence which acknowledged that the law required a bystander to witness the negligent act, but he also set forth his disagreement with that requirement.

It is easy to see the juggernaut that could have been created if subsequent opinions of the Appellate Courts found favor with Judge Del Sole's "concurrence." Removing the requirement that a bystander actually witness a negligent act would open up the NIED claim to *every* loved one of any person who suffered a traumatic event as a result of medical malpractice and who happened to be at the bedside when the "injury" (in most cases, the death) occurred. Given the prevalence of hospice care, the bedside bystanders have grown considerably in number.

Accordingly, the Superior's Court most recent decision regarding NIED claims, *Judge v. Wyo. Valley Health Care Sys.*, 2015 Pa.Super. Unpub. LEXIS 1402 (May 18, 2015), is a reassurance that the majority view of NIED claims is still being followed. In *Judge*, 15 year-old Ashley Judge fell down 12 steps at her house. An ambulance was dispatched, and Ashley's Mother, Linda, sat up front in the passenger seat on the ride to the hospital. Due to a snowstorm, and rerouting, the ambulance became lost and it took nearly an hour to get Ashley to a trauma center. At various points in the ride, the ambulance crew placed calls to the hospital for medical direction. Those calls were answered by a paramedic, and were listened to by a medical command physician. The medical command physician was employed by a corporation that supplied emergency department physicians to the hospital. Ashley's physical condition deteriorated during the ride and she was pronounced dead only seven minutes after arriving at the hospital.

The NIED related issue in the case is whether Linda Judge had actually witnessed the allegedly negligent acts of the paramedic and medical command physician (and vicariously, the corporation) who received the calls from the ambulance crew. The Court found that Linda had admitted at her deposition that she did not see nor hear any actions taken by the paramedic or medical command physician who were on the phone with the ambulance crew. The Court also found that Linda did observe the resultant injury caused by the allegedly negligent conduct of the paramedic and medical command physician. The Court reaffirmed that merely witnessing the *result* of the alleged negligent conduct was not sufficient to state a claim for NIED.

This was true even though Linda witnessed one end of the phone conversation and the resultant actions taken by the ambulance crew. The Superior Court therefore affirmed the Trial Court's grant of summary judgment on these NIED claims.

Comment: The Superior Court's holding in *Judge v. Wyo Valley Health Care System* is a welcome reaffirmation of the requirement that a bystander must witness both the negligent act and the resultant traumatic injury in order to set forth a claim for NIED. The Court's continued adherence to this requirement underlines the medical practitioner's need to *document* the medical chart regarding *who* is present at each and every interaction with a patient. This would include office visits, pre-procedure visits, actual procedures and consultations. For nursing practitioners in the hospital environment, the importance of documenting who is at "bedside" at all times cannot be overstated. Under the current law, the easiest way to defeat a potential claim for NIED is to demonstrate that the "bystander" was not present during the act of alleged negligence. Taking a few extra seconds to document a chart could save a practitioner an entire claim.

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