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Note

Carey v. Lovett: New Jersey's Unsound Expansion of Medical Malpractice Liability

I. Introduction

During this century, recovery for negligent infliction of emotional distress has developed through an evolutionary process that now encompasses five distinct rules.¹ The earliest cases seeking recovery for negligent infliction of emotional distress were decided under the impact rule.² This rule required the plaintiff to prove physical impact to himself, no matter how slight, in order to recover for resulting emotional distress.³ American courts adhered to this rule until the 1960s, when some jurisdictions adopted the "zone of danger" rule,⁴ allowing, for the first time, recovery to a "bystander" without his proving that he was injured from direct impact.⁵ In 1968, the California Supreme Court abandoned the zone of danger rule and used a "foreseeability test"⁶ in deciding *Dillon v. Legg*.⁷ The *Dillon* rule allowed a bystander to recover for reasonably foreseeable emo-

1. John L. Ropiequet, *Emotional Distress Claims in Medical Malpractice Cases*, 11 J. LEGAL MED. 59, 60 (1990). "The major rules that now govern claims for negligent infliction of emotional distress can be categorized as follows: (1) the impact rule; (2) the zone of physical danger rule; (3) the *Dillon* rule of foreseeability; (4) the relaxed foreseeability rule; and (5) the direct victim rule." *Id.*

2. See, e.g., *Ward v. West Jersey & S. R.R.*, 47 A. 561 (N.J. 1900); *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 354 (1896). See also *infra* part II.A.

3. Ropiequet, *supra* note 1, at 60. See also *Ward*, 47 A. at 561 (recovery denied for mental disturbance caused by fright without accompanying impact); *Mitchell*, 151 N.Y. at 110, 45 N.E. at 355 (no cause of action where plaintiff suffered illness resulting in a miscarriage due to fear of being struck by a negligently driven horse-car when there was no direct impact).

4. See *infra* text accompanying notes 35-37.

5. Ropiequet, *supra* note 1, at 61.

6. *Id.* at 60.

7. 441 P.2d 912 (Cal. 1968).

tional distress as long as certain criteria were met.⁸ In *Dillon*, the court held that in cases where a plaintiff suffered shock that resulted in physical injury, the courts should determine whether the defendant should have foreseen injury to the "bystander" plaintiff by considering the following factors:

- (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 [of the accident] were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.⁹

Over the past twenty-five years, "like the pebble cast into the pond, *Dillon*'s progeny have created ever widening circles of liability."¹⁰

Some courts, in continuing to expand liability for emotional distress, have used a "direct victim" rule,¹¹ although not labeling it as such.¹² Under this theory, plaintiffs have recovered, although they were not physically injured nor considered bystanders for recovery purposes; rather, these plaintiffs were considered the "direct victims"¹³ of the defendants' acts.¹⁴

8. *Dillon*, 441 P.2d at 920.

9. *Id.*

10. *Thing v. La Chusa*, 771 P.2d 814, 819 (Cal. 1989).

11. *See infra* part II.D.

12. *See, e.g., Giardina v. Bennett*, 545 A.2d 139 (N.J. 1988).

13. *See infra* part II.D. The latest definition of the direct victim rule given by the California Supreme Court states that a plaintiff seeking to recover for negligent infliction of emotional distress as a direct victim must prove the traditional elements of negligence—duty, breach, proximate cause, and damages. *Burgess v. Superior Court*, 831 P.2d 1197, 1200 (Cal. 1992). Differing from bystander cases where the defendant does not owe a specific duty of care to the plaintiff, direct victim cases involve defendants who breach a duty of care that is either owed to the plaintiff as a matter of law or that arises out of relationship between the two. *See id.*

14. *Giardina*, 545 A.2d at 143. In *Thing*, the court noted:

Post-*Dillon* decisions have now permitted plaintiffs who suffer emotional distress, but no resultant physical injury, and who were not at the scene of and thus did not witness the event that injured another, to recover damages on grounds that a duty was owed to them solely because it was foreseeable that they would suffer distress on learning of injury to a close relative.

Thing, 771 P.2d at 819.

In 1993, the New Jersey Supreme Court reviewed *Carey v. Lovett*.¹⁵ This case dealt with the recovery of damages by a mother for emotional distress caused by medical malpractice.¹⁶ The alleged malpractice led to the birth and subsequent death of her severely brain damaged daughter.¹⁷ Prior cases dealing with emotional distress claims required direct impact¹⁸ or, for bystander recovery, "that claimants observe contemporaneously the act of malpractice and the resulting injury."¹⁹ The *Carey* court held that a mother may recover for emotional distress caused by the premature birth and death of her baby, without proving either physical injury to herself or contemporaneous observation,²⁰ as long as she proved "that she suffered emotional distress so severe that it resulted in physical manifestations or that it destroyed her basic emotional security."²¹ Although "[t]he Court [did] not define or give examples of 'severe' emotional distress, [i]ts review of the facts suggests that psychiatric treatment, impairment of lifestyle and significant residuals would support a legitimate claim."²²

The *Carey* case is the focus of this Note because it represents a significant departure from prior New Jersey case law, substantially extending liability in medical malpractice cases for negligent infliction of emotional distress, but fails to establish workable guidelines for future court decisions. Part II of this Note reviews the evolution of recovery for negligent infliction of emotional distress in New Jersey. Part III presents the procedural history, substantive facts, and court decision in *Carey v. Lovett*.²³ Part IV is an analysis of the court's decision. Part V discusses the larger social impact of the *Carey* decision.

15. 622 A.2d 1279 (N.J. 1993).

16. *Id.* at 1284. The father also brought suit for emotional distress, but the court denied him recovery because he lacked the same interconnectedness to the fetus as the mother and he did not contemporaneously observe the malpractice. *Id.* at 1287-88.

17. *Id.* at 1284.

18. *Id.* at 1285. See, e.g., *Ward v. West Jersey & S. R.R.*, 47 A. 561 (N.J. 1900); *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 45 N.E. 354 (1896).

19. *Carey*, 622 A.2d at 1286; see *infra* note 37 and cases cited therein.

20. *Carey*, 622 A.2d at 1286-87.

21. *Id.* at 1288.

22. Ronald B. Grayzel, *Tort Law*, N.J. L.J., Sept. 6, 1993, at 66, 76.

23. 622 A.2d 1279 (N.J. 1993).

II. Background

A. Foundation Cases

In the early part of the twentieth century, state courts were reluctant to recognize an actionable interest in peace of mind, especially when the defendant's conduct was merely negligent.²⁴ Three main concerns of the courts have been:

(1) [T]he problem of permitting legal redress for harm that is often temporary and relatively trivial; (2) the danger that claims of mental harm will be falsified or imagined; and (3) the perceived unfairness of imposing heavy and disproportionate financial burdens upon a defendant, whose conduct was only negligent, for consequences which appear remote from the "wrongful act."²⁵

In *Ward v. West Jersey & Seashore Railroad*,²⁶ the plaintiff sued to recover for physical illness resulting from apprehension of physical harm.²⁷ The court, in denying relief, stated that "a person is responsible only for the natural and proximate results of his negligent act; [and] that physical suffering is not the probable or natural consequences of fright, in the case of a person of ordinary physical and mental vigor"²⁸ Reflecting the underlying rationale in a majority of jurisdictions,²⁹ the court was concerned that allowing recovery would result in a "flood of litigation in cases where the injury complained of may be easily feigned . . . and where the damages must rest upon mere conjecture and speculation."³⁰ Consequently, until 1965, the law in

24. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 54, at 360 (5th ed. 1984) [hereinafter PROSSER ON TORTS].

25. *Id.* at 360-61. See, e.g., *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 110, 45 N.E. 354, 354-55 (1896), cited in *Ward v. West Jersey & S. R.R.*, 47 A. 561, 562 (N.J. 1900).

26. 47 A. 561 (N.J. 1900).

27. *Id.* at 561.

28. *Id.* at 562.

29. PROSSER ON TORTS, *supra* note 24, § 54, at 361.

30. *Ward*, 47 A. at 562. "Mental disturbance is easily simulated, and courts which are plagued with fraudulent personal injury claims may be unwilling to open the door to an even more dubious field." PROSSER ON TORTS, *supra* note 24, § 54, at 361. Objections to allowing recovery for negligent infliction of emotional distress have been predicated on the difficulty of measuring mental disturbance in monetary terms and the belief that a substantial increase in litigation would follow. *Id.* § 54, at 360. Therefore, "[w]here the defendant's negligence causes only mental disturbance, without accompanying physical injury . . . [or] illness . . . , the

New Jersey allowed recovery for emotional distress only when accompanied by physical impact.³¹

This rule was overturned by the New Jersey Supreme Court in *Falzone v. Busch*.³² In *Falzone*, plaintiff's husband was struck and injured by the automobile of a negligent driver as he stood in a field adjoining a roadway.³³ The plaintiff, who was sitting nearby in their parked car, sought to recover for illness resulting from fear for her safety caused by the defendant's negligence, although there was no physical impact.³⁴ In overruling *Ward*, the *Falzone* court promulgated a new rule, stating:

[W]here negligence causes fright from a reasonable fear of immediate personal injury, which fright is adequately demonstrated to have resulted in substantial bodily injury or sickness, the injured person may recover if such bodily injury or sickness would be regarded as proper elements of damage had they occurred as a consequence of direct physical injury rather than fright. . . . [W]here fright does not cause *substantial* bodily injury or sickness, it is to be regarded as too lacking in seriousness and too speculative to warrant the imposition of liability.³⁵

This "zone of danger" rule,³⁶ extended recovery for emotional distress to individuals who were within the zone of danger created by the defendant's negligence and were thereby threatened with physical injury themselves.³⁷ The court, realizing that dif-

great majority of courts still hold that . . . there can be no recovery." *Id.* § 54, at 361.

31. *Frame v. Kothari*, 560 A.2d 675, 677 (N.J. 1989).

32. 214 A.2d 12, 17 (N.J. 1965).

33. *Id.* at 13.

34. *Id.*

35. *Id.* at 17 (emphasis added).

36. See PROSSER ON TORTS, *supra* note 24, § 54, at 365.

37. See, e.g., *Diaz v. Drury*, No. 525809, 1993 WL 407929 (Conn. Super. Ct. Oct. 5, 1993) (allowing a mother injured in an automobile accident who witnessed injury to her daughters to recover for emotional distress because, *inter alia*, she was in the zone of danger); *Rickey v. Chicago Transit Auth.*, 457 N.E.2d 1, 5 (Ill. 1983) (holding that an individual "who is in the zone of physical danger and . . . fears for his own safety is given a right of action for physical injury or illness resulting from emotional distress"); *Shirk v. Kelsey*, 617 N.E.2d 152 (Ill. App. Ct. 1993) (affirming cause of action stated for malpractice and emotional distress resulting from an incomplete abortion); *Bovsun v. Sanperi*, 61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 (1984) (permitting plaintiff to recover for injuries resulting from the observation of injury or death of a family member, if the defendant negligently exposed the plaintiff to injury and the negligence was a substantial factor in causing the death or injury).

ficulties could arise, specifically required that the resulting injury be substantial,³⁸ as it was concerned about tracing a causal connection between the fright and the claimed physical injury.³⁹ However, it asserted its confidence that the trial courts, "through the rules of evidence and the requirements as to the sufficiency of evidence, [could] safeguard against the danger that juries will find facts without legally adequate proof."⁴⁰

Bystander recovery for emotional distress was further extended in 1980, when the New Jersey Supreme Court reviewed *Portee v. Jaffee*.⁴¹ In *Portee*, plaintiff watched as her son suffered and died as a result of being trapped between defendant's negligently maintained elevator and the wall of the elevator shaft.⁴² The court had to decide whether a plaintiff could recover for emotional distress resulting from seeing the negligently inflicted injuries to another, even though she was in no danger of personal injury herself.⁴³ As the court noted, "[t]he task in [this] case involve[d] the refinement of principles of liability to remedy violations of reasonable care while avoiding speculative results or punitive liability."⁴⁴ The *Portee* court followed the California Supreme Court decision in *Dillon v. Legg*,⁴⁵ in allowing plaintiff's recovery for negligent infliction of emotional distress.⁴⁶

Building on the criteria set forth in *Dillon*,⁴⁷ *Portee* established the following requirements of proof:

(1) [T]he death or serious physical injury of another caused by defendant's negligence; (2) a marital or intimate, familial relationship between plaintiff and the injured person; (3) observation of the death or injury at the scene of the accident; and (4) resulting severe emotional distress.⁴⁸

38. *Falzone*, 214 A.2d at 16-17.

39. *Id.* at 16.

40. *Id.*

41. 417 A.2d 521 (N.J. 1980).

42. *Id.* at 522-23.

43. *Id.* at 522.

44. *Id.* at 526.

45. 441 P.2d 912 (Cal. 1968). In *Dillon*, the California Supreme Court held that the plaintiff could recover for emotional shock caused by observing the death of her child even though she was not in peril of being injured. *Id.* at 915, 925.

46. *Portee*, 417 A.2d at 526-28.

47. See *supra* text accompanying note 9.

48. *Id.* at 528.

The court stressed that existence of a close relationship between the plaintiff and the injured party was the most important element, but acknowledged that observation of the death or injury was also essential.⁴⁹ The court reasoned that "[w]ithout such perception, the threat of emotional injury is lessened and the justification for liability is fatally weakened."⁵⁰

B. *Medical Malpractice Cases Decided Under the Impact Rule*

Once the New Jersey Supreme Court adopted the *Dillon* rule allowing for bystander recovery, suits followed specifically dealing with medical malpractice and the emotional distress this caused to family members.⁵¹ From 1979 until the present, when medical malpractice was the basis for emotional distress to close family members, New Jersey courts have relied on either the "direct impact" rule⁵² or *Dillon* bystander rule.⁵³ The "zone of danger" rule does not lend itself to use in medical malpractice cases because family members claiming a cause of action are rarely in physical danger themselves.⁵⁴ Several of these cases are particularly pertinent in analyzing the *Carey v. Lovett* decision.

Prior to the *Portee* decision, in two malpractice cases involving birth defects,⁵⁵ recovery was allowed based on what the court found to be "direct injury" to the parents.⁵⁶ In *Berman v. Allan*,⁵⁷ parents brought medical malpractice actions for, among other things, the "wrongful birth" of their daughter, who was

49. *Id.* at 526-27.

50. *Id.* at 527.

51. See, e.g., *Frame v. Kothari*, 560 A.2d 675 (N.J. 1989); *Polikoff v. Calabro*, 506 A.2d 1285 (N.J. Super. Ct. App. Div. 1986); *Lindenmuth v. Alperin*, 484 A.2d 1316 (N.J. Super. Ct. Law Div. 1984).

52. See, e.g., *Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984); *Berman v. Allan*, 404 A.2d 8 (N.J. 1979); *Friel v. Vineland Obstetrical & Gynecological Professional Ass'n*, 400 A.2d 147 (N.J. Super. Ct. Law Div. 1979).

53. See, e.g., *Frame v. Kothari*, 560 A.2d 675 (N.J. 1989); *Giardina v. Bennett*, 545 A.2d 139 (N.J. 1988); *Polikoff v. Calabro*, 506 A.2d 1285 (N.J. Super. Ct. App. Div. 1986); *Lindenmuth v. Alperin*, 484 A.2d 1316 (N.J. Super. Ct. Law Div. 1984).

54. *Ropiequet*, *supra* note 1, at 62.

55. *Berman v. Allan*, 404 A.2d 8 (N.J. 1979); *Friel v. Vineland Obstetrical and Gynecological Professional Ass'n*, 400 A.2d 147 (N.J. Super. Ct. Law Div. 1979).

56. *Berman*, 404 A.2d at 15; *Friel*, 400 A.2d at 152.

57. 404 A.2d 8 (N.J. 1979).

born afflicted with Down's syndrome.⁵⁸ The parents sought to recover damages for "the emotional anguish they . . . experienced and [would] continue to experience as a result of [their child's] birth defect."⁵⁹ The Bermans alleged that, given Mrs. Berman's age,⁶⁰ the defendants deviated from accepted medical standards by not informing her of the availability of a procedure known as amniocentesis.⁶¹ Since Mrs. Berman was over thirty-five years old when she conceived, the risk was substantial that her child would be born with Down's syndrome.⁶² The plaintiffs asserted that "sound medical practice at the time of [the] pregnancy required defendants to inform her both of this risk and the availability of amniocentesis."⁶³ Mrs. Berman claimed that this would have allowed her to decide, if the test proved positive, whether to abort the fetus.⁶⁴ The trial court granted summary judgment for the defendants on the ground that the Bermans failed to state any actionable claim for relief.⁶⁵ The plaintiffs filed a notice of appeal to the Appellate Division, but the New Jersey Supreme Court directly certified the case on its

58. *Id.* at 9-10. "Down's syndrome [is] a genetic defect commonly referred to as mongolism." *Id.* at 10.

59. *Id.* at 10.

60. *Id.* Mrs. Berman was 38 years old at the time of her pregnancy. *Id.* Amniocentesis is usually recommended only for women over the age of 35 (who are more likely to have a child with Down's syndrome . . .)." AMERICAN MEDICAL ASSOCIATION ENCYCLOPEDIA OF MEDICINE 95 (1989).

61. *Berman*, 404 A.2d at 10.

"[Amniocentesis] involves the insertion of a long needle into the mother's uterus and the removal therefrom of a sample of amniotic fluid containing living fetal cells. Through 'karyotype analysis'—a procedure in which the number and structure of the cells' chromosomes are examined—the sex of the fetus as well as the presence of gross chromosomal defects can be detected Recent studies indicate that amniocentesis is highly accurate in predicting the presence of chromosomal defects, and that the risk of even minor damage to mother or fetus deriving from the procedure is less than one percent."

Id. Amniocentesis is a diagnostic procedure performed in order to detect fetal abnormalities such as Down's syndrome, which is a chromosome abnormality. "There is a slight increased incidence of threatened miscarriage . . . after amniocentesis (older studies show a risk of 1 to 2 percent; more recent studies show a risk of about 0.5 percent)." AMERICAN MEDICAL ASSOCIATION ENCYCLOPEDIA OF MEDICINE 95 (1989).

62. *Berman*, 404 A.2d at 10.

63. *Id.*

64. *Id.*

65. *Id.* at 11.

own motion.⁶⁶ The court held that both parents had stated actionable claims for relief based upon defendants' depriving them "of the option to accept or reject a parental relationship with the child,"⁶⁷ and remanded the case for trial.⁶⁸ The court offered no explanation as to what specific act it deemed to be a "direct impact" on Mrs. Berman, but instead, found a cause of action in the "direct injury" to Mrs. Berman caused by her loss of the right to abort the fetus.⁶⁹

Another case dealing with recovery for emotional distress based on direct injury to the mother was *Friel v. Vineland Obstetrical & Gynecological Professional Ass'n*.⁷⁰ The issue in *Friel* was whether a mother could recover for malpractice,⁷¹ not only for her own injury, but also for her mental anguish related to the premature delivery of her baby.⁷²

The plaintiff, Betty Friel, in her thirty-first week of pregnancy, noticed vaginal bleeding and was instructed by defendants, her treating physicians, to take aspirin and a shot of whiskey.⁷³ A few days later during an office visit, defendant informed Mrs. Friel that she had a bladder infection and prescribed medication.⁷⁴ One week later, Mrs. Friel was still bleeding and suffering from cramps. She went to the hospital, where her doctor "examined her, reaffirmed his diagnosis and advised [her] to go home."⁷⁵ Two days later, Mrs. Friel became violently ill, suffered convulsions, continued to bleed, and was

66. *Id.*

67. *Id.* at 14.

68. *Id.* at 15.

69. *Id.* at 14.

70. 400 A.2d 147 (N.J. Super. Ct. Law Div. 1979).

71. *Id.* at 148, 151. The malpractice claim was based on the plaintiff's allegations that defendant doctors misdiagnosed her illness and were not in attendance when her baby was delivered. *Id.* at 149.

72. *Id.* at 148. Mrs. Friel's baby suffered from several serious disorders at birth. *Id.* at 149. Mrs. Friel's mental anguish and anxiety were allegedly caused by the premature delivery of her baby and uncertainty as to the child's development resulting from its damage at birth. *Id.* at 148.

73. *Id.*

74. *Id.*

75. *Id.* "The final diagnosis was that Betty Friel had suffered an abruptio placenta." *Id.* at 149. Abruptio placenta is a "premature detachment of a normally situated placenta." *STEDMAN'S MEDICAL DICTIONARY* 4 (5th Unabr. Lawyers' ed. 1982).

admitted to the hospital at about 8:00 p.m.⁷⁶ Mrs. Friel was treated with Demerol⁷⁷ and intravenous oxytocin⁷⁸ and left in the labor room with no one in attendance.⁷⁹ When the baby was born at 10:26 p.m., no episiotomy⁸⁰ was performed and no member of defendant doctors' practice was present.⁸¹ The baby was "cyanotic,⁸² suffered intracranial hemorrhaging,⁸³ apnea,⁸⁴ and central nervous system difficulties.⁸⁵

The court held that Mrs. Friel was entitled to recover for any injury caused by the delay in her diagnosis.⁸⁶ Even if she

76. *Friel*, 400 A.2d at 149.

77. Demerol is a "synthetic opioid analgesic . . . [which] is preferred to morphine for obstetric use because its rapid onset of action and shorter duration usually permit greater flexibility in maternal analgesia, possibly with less effect on neonatal respiration." AMERICAN MEDICAL ASSOCIATION DRUG EVALUATIONS ANNUAL 105 (1993).

78. Oxytocin is a "hormone used for the induction or stimulation of labor, in the management of postpartum hemorrhage. . . ." STEDMAN'S MEDICAL DICTIONARY 1012 (5th Unabr. Lawyers' ed. 1982).

79. *Friel*, 400 A.2d at 149. Mrs. Friel's expert witness stated in his report that "[i]t is considered customary practice that during intravenous oxytocin stimulation the following biologic parameters are carefully monitored every ten minutes; the blood pressure, the rate of flow of oxytocin, the frequency and intensity of the uterine contractions and the fetal heart rate." *Id.* There was no record of this having been done. *Id.*

80. An episiotomy is a "[s]urgical incision of the vulva to prevent laceration at the time of delivery" STEDMAN'S MEDICAL DICTIONARY 477-78 (5th Unabr. Lawyers' ed. 1982). Episiotomy is used to enlarge the vaginal opening, which is necessary in a breech delivery, when there is little opportunity for gradual stretching of the perineal tissue to occur. An episiotomy is done to speed delivery when the baby is not getting enough oxygen during labor. It also reduces pressure on the head of a premature baby. AMERICAN MEDICAL ASSOCIATION ENCYCLOPEDIA OF MEDICINE 414-15 (1989).

81. *Friel*, 400 A.2d at 149.

82. Cyanosis is "a bluish discoloration of the skin and mucous membranes resulting from an inadequate amount of oxygen in the blood." BANTAM MEDICAL DICTIONARY 107 (Revised ed. 1990).

83. Intracranial hemorrhaging is the "escape of blood within the cranium . . . frequently leading to [the] formation of" local accumulations of blood. STEDMAN'S MEDICAL DICTIONARY 627, 637 (5th Unabr. Lawyers' ed. 1982). In his report of June 9, 1977, the plaintiff's expert witness noted that "premature infants are occasionally known to suffer intracranial hemorrhage without apparent cause. There would seem sufficient reasons in this case for traumas to the head to produce such injury. I refer specifically to the use of intravenous oxytocin, the omission of episiotomy, etc." *Friel*, 400 A.2d at 149.

84. Apnea means "[t]he absence of breathing." STEDMAN'S MEDICAL DICTIONARY 97 (5th Unabr. Lawyers' ed. 1982).

85. *Friel*, 400 A.2d at 149.

86. *Id.* at 150.

could not prove direct physical injury, she could recover for pain and suffering if she could prove it was proximately caused by defendants' acts and omissions and occurred during the period of delay.⁸⁷ Additionally, the court held that "[i]f negligence in treatment from April 30 to May 9 [could] be shown, . . . any proven emotional upset caused by anxiety over possible harm to the unborn child during that period [was] compensable."⁸⁸ Here, Mrs. Friel did suffer physically due to the doctors' misdiagnosis of her condition. This led the court to find that the direct injury to the mother was sufficient to sustain a claim for the resulting emotional distress caused by the injury to her infant by the same misdiagnosis.⁸⁹ Unlike Mrs. Berman, Mrs. Friel's cause of action was soundly based on "direct impact" because she was physically harmed by defendants' negligence.

In *Procanik v. Cillo*,⁹⁰ parents sued for, among other things, emotional distress resulting from the birth of a child with birth defects.⁹¹ Mrs. Procanik consulted the defendant doctors because she had contracted what was diagnosed as measles during her first trimester of pregnancy.⁹² She did not, however, know if her illness had been measles or German measles.⁹³ The defendant doctor tested Mrs. Procanik to ascertain if she had suffered from German measles.⁹⁴ He mistakenly deduced that she had not been exposed during her pregnancy.⁹⁵ Due to the doctor's negligent interpretation of that test, Mrs. Procanik was denied the opportunity to decide whether to allow her pregnancy to continue or to abort the fetus.⁹⁶

Before trial, the Procaniks stipulated that they knew they had a potential cause of action almost three years before they

87. *Id.*

88. *Id.* at 151.

89. *Id.* at 152. See PROSSER ON TORTS, *supra* note 24, § 54, at 362-63 (stating that where defendant's negligence causes physical injury, the plaintiff may recover for accompanying mental damage).

90. 478 A.2d 755 (N.J. 1984).

91. *Id.* at 757. The infant was "born with multiple birth defects, including eye lesions, heart disease, and auditory defects." *Id.* at 758.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

brought suit.⁹⁷ The trial court granted defendant's motion to dismiss, finding that the plaintiff's claim was barred by the two year statute of limitations.⁹⁸ The appellate court affirmed.⁹⁹ On appeal to the New Jersey Supreme Court, the Procaniks sought to renew their claim for emotional distress asserting that their cause of action was derived from the infant's cause of action.¹⁰⁰ This would toll the statute of limitations during infancy and protect their claim.¹⁰¹ Referring to its decision in *Berman v. Allan*,¹⁰² the supreme court noted that "parents may recover for emotional distress for the 'wrongful birth' of a child born with birth defects."¹⁰³ The court found that "[a]t one time Mr. and Mrs. Procanik had independent claims for their emotional distress"¹⁰⁴ because they "were deprived of the choice of terminating the pregnancy."¹⁰⁵ The court held that "the parents' claim was independent from that of the child,"¹⁰⁶ and that their right to recover was not based on the child's injury, but on the "direct injury to their own independent rights."¹⁰⁷ The Procaniks' cause of action for emotional distress was disallowed, however, because the statute of limitations had run.¹⁰⁸

C. *Bystander Recovery Cases—The Dillon Rule*

The criteria for recovery enumerated in *Dillon* were meant "to limit the otherwise potential[ly] infinite liability which would follow every negligent act" by holding the defendant liable only for injuries which he could reasonably foresee.¹⁰⁹ The

97. *Id.*

98. *Id.*

99. *Id.* at 757.

100. *Id.* at 758.

101. *Id.*

102. 404 A.2d 8 (N.J. 1979). See *supra* notes 57-69 and accompanying text.

103. *Procanik*, 478 A.2d at 758.

104. *Id.* at 764.

105. *Id.* at 758.

106. *Id.* at 764.

107. *Id.*

108. *Id.* In *Procanik*, as in *Berman*, the court utilized the impact rule. See *Procanik*, 478 A.2d at 758; *Berman*, 404 A.2d at 14. Yet the only direct injury to the parents discussed by the *Procanik* court was the deprivation of their chance to abort the fetus. *Procanik*, 478 A.2d at 758. It appears that both the *Berman* and *Procanik* courts equated loss of a right with direct impact, when they found that each plaintiff had a cause of action for emotional distress.

109. *Dillon v. Legg*, 441 P.2d 912, 919 (Cal. 1968).

case of *Lindenmuth v. Alperin*¹¹⁰ focused the court's attention on the parameters of bystander recovery for medical malpractice.¹¹¹ In *Lindenmuth*, the parents of a child who died three days after birth from an intestinal obstruction sued for damages resulting from the physician's negligent failure to diagnose and treat the condition.¹¹² The New Jersey Superior Court dismissed the parents' claim for emotional distress, holding that it did not meet the criteria set out in the *Portee* decision.¹¹³ *Portee* required that to recover for negligent infliction of emotional distress resulting from injury to another, one must prove, among other things, that he observed the injury.¹¹⁴ The superior court, relying on the ruling in *Portee*,¹¹⁵ found that "observation of the injury . . . is crucial to [the] plaintiffs' claim."¹¹⁶ Since the misdiagnosis in *Lindenmuth* was not an event that could be perceived by the plaintiff, she could not recover for observing the injury resulting from it.¹¹⁷

Because New Jersey courts had not dealt with the issue of "whether misdiagnosis . . . can be equated with observing the injury,"¹¹⁸ the *Lindenmuth* court also discussed two California cases.¹¹⁹ In *Jansen v. Children's Hospital Center*,¹²⁰ the plaintiff mother sued a hospital for emotional trauma and the alleged resulting physical injury caused "by witnessing the progressive decline and ultimate death of her daughter."¹²¹ The child's death was caused by misdiagnosis that led to a massive gastrointestinal hemorrhage.¹²² The court had to decide if the rule of *Dillon* extended to a situation where the victim's injury did not result from a direct impact, but rather, from the defendant's

110. 484 A.2d 1316 (N.J. Super. Ct. Law Div. 1984).

111. *Id.* at 1316-17.

112. *Id.*

113. *Id.*

114. *Id.* See *supra* text accompanying note 48.

115. See *supra* text accompanying notes 45-50.

116. *Lindenmuth*, 484 A.2d at 1317.

117. *Id.* at 1318.

118. *Id.* at 1317.

119. *Id.* The *Lindenmuth* court included in its discussion *Justus v. Atchison*, 565 P.2d 122 (Cal. 1977) and *Jansen v. Children's Hosp. Ctr.*, 106 Cal. Rptr. 883 (Cal. Ct. App. 1973).

120. 106 Cal. Rptr. 883 (Cal. Ct. App. 1973).

121. *Id.* at 884. The court noted that the complaint did not specify the child's ailment. *Id.*

122. *Id.*

failure to diagnose a medical condition.¹²³ The court held that the event causing injury to the child must itself be perceptible and that a "failure of diagnosis . . . is not an event that can be perceived by a layman."¹²⁴ The *Jansen* court also noted that to allow recovery in a situation where only the results of malpractice were observed rather than the tortious act itself would lead to "potentially infinite liability."¹²⁵ Because of these considerations, the *Jansen* court specifically refused to extend the *Dillon* rule to include visibility of the result of the misdiagnosis rather than observation of the tortious act itself as prescribed by *Dillon*.¹²⁶ Heeding *Dillon's* counsel of moderation, the court refused to broaden the law to include medical malpractice in diagnosis.¹²⁷

The second California case discussed by the *Lindenmuth* court was *Justus v. Atchison*.¹²⁸ It involved two cases brought by two sets of parents against the same doctor and hospital for the wrongful deaths of their unborn children during delivery.¹²⁹ The fathers, suing on their own behalf for their emotional trauma caused by the stillbirths of their children, were denied recovery.¹³⁰ Each father was present in the delivery room during the birth and each witnessed the stillbirth of his baby.¹³¹ Although both of these occurrences were "relatively sudden," the court reasoned that *Dillon* requires more than "mere physical presence," and "the shock must also result from a 'direct emotional impact' on the plaintiff caused by 'sensory contemporaneous observance of the accident.'"¹³² The court went on to

123. *Id.* "*Dillon* . . . sets up three guidelines for determining foreseeability of injury to another than the person actually struck. . . . Th[e] language [of the guidelines] contemplates a sudden and brief event causing the child's injury." *Id.*

124. *Id.* at 885.

125. *Id.* (quoting *Dillon v. Legg*, 441 P.2d 912, 919 (Cal. 1968)).

126. *Id.*

127. *Id.*

128. 565 P.2d 122 (Cal. 1977).

129. *Id.* at 124-25. The court noted that neither cause of action alleged the precise nature of the fetal injuries. They did allege that complications arose in the delivery of their respective babies. The complications involved the premature expulsion (in advance of the fetus) of the umbilical cord. "This event can cause fetal death by compression of the cord between the fetus and the maternal pelvis." *Id.* at 125 n.3.

130. *Id.* at 136.

131. *Id.* at 126 n.3, 135.

132. *Id.* at 135 (quoting *Dillon v. Legg*, 441 P.2d 912, 902 (Cal. 1968)).

explain that as uninvolved spectators the husbands had no way of knowing that the fetus had died until they were informed by the doctor.¹³³ The California Supreme Court held that under the *Dillon* rule, the shock caused by hearing about an accident and the resulting injury of a loved one after its occurrence, from another person, will not support a cause of action for emotional distress.¹³⁴

Two years after *Lindenmuth* was decided, the New Jersey Superior Court extended the *Dillon* rule "to permit recovery for negligent infliction of emotional distress when strict application of the elements in *Dillon*" would have precluded recovery.¹³⁵ The issue on appeal in *Polikoff v. Calabro*,¹³⁶ was "whether the cause of action for negligent infliction of emotional distress, recognized by *Portee v. Jaffee*,¹³⁷ is available to a parent who watches her child die as the result of medical malpractice."¹³⁸

Audrey Polikoff, a six-year old, underwent two surgical procedures.¹³⁹ During the second procedure, the defendant, Dr. Calabro, the anesthesiologist, inserted a catheter¹⁴⁰ into Audrey's jugular vein.¹⁴¹ The catheter was to be used for hyperalimentation.¹⁴² The day after the surgery Audrey was doing well, according to the nurses' records and her father's observations.¹⁴³

133. *Id.* at 135.

134. *Id.* at 135 (citing *Dillon*, 441 P.2d at 919-20).

135. Ropiequet, *supra* note 1, at 70.

136. 506 A.2d 1285 (N.J. Super. Ct. App. Div. 1986).

137. 417 A.2d 512, 528 (N.J. 1980). See *supra* notes 41-50 and accompanying text.

138. *Polikoff*, 506 A.2d at 1286 (citing *Portee*, 417 A.2d at 528).

139. *Id.* The surgical procedures performed on Audrey were to relieve a duodenal obstruction. *Id.*

140. A catheter is "a tubular instrument for the passage of fluid from or into a body cavity" STEDMAN'S MEDICAL DICTIONARY 237 (5th Unabr. Lawyers' ed. 1982).

141. *Polikoff*, 506 A.2d at 1286. The jugular vein is "any of several veins of the neck. The jugular veins receive blood from the head and neck and all converge to form the innominate vein. The innominate veins terminate in the superior vena cava, which opens into the upper posterior portion of the right atrium." 3 ENCYCLOPEDIA BRITANNICA 884 (15th ed. 1974).

142. *Polikoff*, 506 A.2d at 1286. Hyperalimentation is the "administration of fluids containing essential nutrients through a venous catheter positioned in the superior vena cava; therapy is continuous and permits total replacement of nutritional needs at a slow rate, which minimizes overloading and excessive renal losses." STEDMAN'S MEDICAL DICTIONARY 598 (3d Unabr. Lawyers' ed. 1972), cited in *Polikoff*, 506 A.2d at 1286 n.1.

143. *Polikoff*, 506 A.2d at 1286-87.

Mrs. Polikoff, Audrey's mother, visited Audrey that afternoon and was present when hyperalimentation was started.¹⁴⁴ Audrey died two hours later from a "cardiac tamponade"¹⁴⁵ secondary to perforation of the central venous pressure catheter into the pericardial sac.¹⁴⁶ The hospital reports showed that "the fluid which had accumulated [was] the hyperalimentation fluid introduced through the catheter."¹⁴⁷ Mrs. Polikoff, the plaintiff, was with Audrey throughout the two hours that Audrey was in distress and watched as teams of doctors and nurses tried to resuscitate the child.¹⁴⁸ After Audrey's death, Mrs. Polikoff was under psychiatric care due to extreme emotional trauma.¹⁴⁹

Dr. and Mrs. Polikoff sued both Dr. Calabro, the anesthesiologist, and Dr. Panzarino, the surgeon, for negligence.¹⁵⁰ Dr. Calabro moved for summary judgment, claiming that the plaintiff could not recover for emotional distress because she did not satisfy the observation requirement of *Portee*.¹⁵¹ The trial court, relying on *Lindenmuth v. Alperin*,¹⁵² granted defendant's motion.¹⁵³ In reversing the lower court's decision, the *Polikoff* court found *Lindenmuth* inapplicable to this case.¹⁵⁴ In the court's opinion, Audrey died, not from the negligent insertion of the catheter during surgery, but from the "introduction of hyperalimentation fluid into the incorrectly placed catheter."¹⁵⁵ Therefore, the court held that Mrs. Polikoff could recover for emotional distress, because she observed the infliction of the in-

144. *Id.*

145. *Id.* at 1287. Cardiac tamponade is "compression of the heart resulting from accumulation of fluid within the pericardial sac." *STEDMAN'S MEDICAL DICTIONARY* 1253 (3d Unabr. Lawyers' ed. 1972), cited in *Polikoff*, 506 A.2d at 1286 n.2.

146. *Polikoff*, 506 A.2d at 1287.

147. *Id.* at 1287 n.2.

148. *Id.* at 1287.

149. *Id.*

150. *Id.*

151. *Polikoff*, 506 A.2d at 1287 (citing *Portee v. Jaffee*, 471 A.2d 521 (N.J. 1980)). See *supra* text accompanying note 48.

152. 484 A.2d 1316 (N.J. Super Ct. Law Div. 1984). See *supra* notes 110-34 and accompanying text.

153. *Polikoff*, 506 A.2d at 1288.

154. *Id.*

155. *Id.*

jury to her daughter and, thus, satisfied the observation requirement of *Portee*.¹⁵⁶

In *Frame v. Kothari*,¹⁵⁷ parents brought an action to recover for, among other things, their emotional distress which resulted from their infant son's death.¹⁵⁸ His death resulted from a misdiagnosis by the defendant doctor.¹⁵⁹ On January 22, 1982, the plaintiffs' son fell down a flight of stairs in his home.¹⁶⁰ He was immediately taken to a health clinic where he was treated by the defendant, Dr. Kothari.¹⁶¹ After examining the child, Dr. Kothari told the parents that he had a virus.¹⁶² She directed the Frames to take the child home, and to wake him every four hours to check for symptoms of a head injury.¹⁶³ Mr. Frame claimed that when he called the defendant at 2:00 p.m. and told her that the child's eyes were "pivoting" or rolling in the eye sockets," Dr. Kothari told them to let him sleep for four more hours.¹⁶⁴ At 6:00 p.m., when the Frames tried to waken the child, he was lifeless.¹⁶⁵ They rushed him to the hospital "where x-rays revealed a blood clot at the rear of his skull."¹⁶⁶ Emergency surgery was performed, but the child died during the night.¹⁶⁷ "The cause of death was an intra-cerebellar hemorrhage¹⁶⁸ due to a blunt trauma to the skull."¹⁶⁹

After the child's death, Mrs. Frame suffered from nightmares and insomnia.¹⁷⁰ She was under the care of a psychiatrist, who diagnosed her ailment as "a chronic post-traumatic stress disorder" and attributed her illness to "the events sur-

156. *Id.*

157. 560 A.2d 675 (N.J. 1989).

158. *Id.* at 676.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 676-77.

165. *Id.* at 677.

166. *Id.*

167. *Id.*

168. Intra-cerebellar hemorrhage is the "extravasation of blood within the brain substance." *STEDMAN'S MEDICAL DICTIONARY* 637 (5th Unabr. Lawyers' ed. 1982). Extravasation is "to pass out of a vessel into tissues." *Id.* at 502.

169. *Frame*, 560 A.2d at 677.

170. *Id.*

rounding the loss of her son."¹⁷¹ After a trial, the jury awarded each parent \$500 for emotional distress.¹⁷² The appellate court reversed the award, holding "that to impose liability where the malpractice merely consists of an improper diagnosis will result in too great a cost to society and have a profoundly deleterious impact on the medical profession to the detriment of our society as a whole."¹⁷³

In considering whether medical misdiagnosis would support a claim for infliction of emotional distress, the New Jersey Supreme Court noted that the only basis for the Frames' emotional distress claim was [the doctor's] alleged negligence in failing "to tell the Frames in their 2:00 p.m. telephone conversation" to bring their child to the hospital.¹⁷⁴ The court went on to discuss the standard of recovery required by *Portee v. Jaffee*¹⁷⁵ and the holdings in *Polikoff v. Calabro*¹⁷⁶ and *Giardina v. Bennett*.¹⁷⁷

The court noted that the parents in *Giardina* could recover because "the experience of pregnancy and child birth itself constitutes the immediacy and presence . . . that was stressed in *Portee*."¹⁷⁸ In distinguishing *Giardina*, the *Frame* court asserted:

Diagnosis is an intellectual undertaking, requiring the physician to analyze symptoms and reach a conclusion. The nature of a misdiagnosis is such that its results may neither manifest themselves immediately nor be shocking. Hours, days, or months may separate a misdiagnosis, the manifestation of the injury to the patient, and the family member's observation of the injury. Thus, the

171. *Id.*

172. *Frame v. Kothari*, 528 A.2d at 86 (N.J. Super. Ct. Law Div. 1987).

173. *Id.* at 91.

174. *Frame*, 560 A.2d at 677.

175. 417 A.2d 521 (N.J. 1980)). See *supra* text accompanying notes 47-50.

176. 506 A.2d 1285 (N.J. Super. Ct. App. Div. 1986)). See *supra* text accompanying note 156.

177. *Frame*, 560 A.2d at 677-78 (citing *Giardina v. Bennett*, 545 A.2d 139 (N.J. 1988)). In *Giardina*, plaintiffs could not recover under the wrongful death statute for the stillbirth of their baby caused by malpractice, but had a cognizable claim for the emotional distress this caused. *Giardina*, 545 A.2d at 139. See also *infra* notes 231-54 and accompanying text for a discussion of *Giardina*.

178. *Frame*, 560 A.2d at 678 (quoting *Giardina*, 545 A.2d at 143; *Portee*, 417 A.2d at 526).

event may not cause the simultaneous concurrence or rapid sequence of events associated with a shocking event.¹⁷⁹

The court also recognized that other jurisdictions¹⁸⁰ held that "one family member should not recover for emotional distress resulting from the misdiagnosis of another family member, at least in the absence of a close temporal connection between the misdiagnosis and the injury, as well as the contemporaneous observation of the injury by the family member."¹⁸¹

The New Jersey Supreme Court thus denied recovery for the emotional distress suffered by the Frames because the misdiagnosis did not manifest an immediate injury to their son and the chain of events spanning eleven hours until the child's death, "although deeply tragic, were not 'shocking.'"¹⁸² The concurring opinion suggested that "the cost to society of expanding medical malpractice liability to allow a family member to recover for his . . . emotional distress as a result of a physician's improper diagnosis will outweigh the benefits to society."¹⁸³

The courts in the cases discussed above basically adhered to the *Dillon* rule and required that its criteria be met before recovery would be allowed.

179. *Id.*

180. *E.g.*, *Budavari v. Barry*, 222 Cal. Rptr. 446 (Cal. Ct. App. 1986) (denying recovery to wife when her husband's cancer was not diagnosed until it was terminal); *Jansen v. Children's Hosp. Med. Ctr.*, 106 Cal. Rptr. 883 (Cal. Ct. App. 1973) (denying recovery to a mother for emotional distress caused by her daughter's death from undiagnosed gastrointestinal hemorrhage); *Amodio v. Cunningham*, 438 A.2d 6 (Conn. 1980) (denying recovery to a mother for emotional distress resulting from her doctor's failure to diagnose and treat child's respiratory problem); *Williams v. Baker*, 540 A.2d 449 (D.C. 1988) (denying recovery to a mother for emotional distress arising from misdiagnosis of her son's serious illness); *Pate v. Children's Hosp.*, 404 N.W.2d 632 (Mich. Ct. App. 1986) (denying recovery to sister for emotional distress caused by defendant's failure to diagnose pneumonia which resulted in the patient's death); *Wilson v. Galt*, 668 P.2d 1104 (N.M. Ct. App.) (denying parents recovery for emotional distress resulting from the failure of doctors to diagnose bilirubin encephalopathy in their newborn son, which caused brain damage to the child), *cert. quashed*, 668 P.2d 308 (N.M. 1983).

181. *Frame*, 560 A.2d at 679.

182. *Id.* at 681.

183. *Id.* at 682 (Garibaldi, J., concurring).

D. *The Direct Victim Rule*

An early definition offered for the direct victim principle stated:

A "direct victim" does not have to be a contemporaneous, percipient witness suffering a direct and substantial shock to the nervous system from observation of harm caused to a loved one. Instead, the victim is the "direct" target of the malpractice or other negligent act and accordingly is permitted to recover for his psychological injuries. The most important feature of the direct victim rule is that the plaintiff is no longer considered a bystander

...¹⁸⁴

In 1980, the California Supreme Court, in deciding *Molien v. Kaiser Foundation Hospital*,¹⁸⁵ substantially extended the requirements established in *Dillon*. The issue in *Molien* was whether damages could be recovered for negligent infliction of emotional distress without the occurrence of any physical injury.¹⁸⁶

Mrs. Molien, after having a routine physical, was incorrectly diagnosed as having contracted syphilis.¹⁸⁷ She underwent treatment for the disease, which included massive doses of penicillin.¹⁸⁸ As a result of the erroneous diagnosis, Mrs. Molien accused her husband of having extramarital sexual activity, which created difficulties in their marriage.¹⁸⁹ This led to the "initiation of dissolution proceedings."¹⁹⁰ Subsequently, Mr. Molien instituted a complaint alleging loss of marital consortium and emotional distress.¹⁹¹

In its decision, the court found that *Dillon* was not controlling.¹⁹² It distinguished *Dillon* from the instant case by finding that Mrs. Dillon "sought recovery of damages she suffered as a percipient witness to the injury of a third person,"¹⁹³ whereas Mr. Molien was "himself a direct victim of the assertedly negli-

184. Ropiequet, *supra* note 1, at 75.

185. 616 P.2d 813 (Cal. 1980).

186. *Id.* at 814.

187. *Id.*

188. *Id.*

189. *Id.* at 814-15.

190. *Id.* at 815.

191. *Id.*

192. *Id.*

193. *Id.* at 816.

gent act.”¹⁹⁴ The court found that the significance of *Dillon* in this case was “its general principle of foreseeability,”¹⁹⁵ rather than its guidelines.¹⁹⁶ Based on its judgment that the defendant knew or should have known that the defendant’s misdiagnosis would cause Mr. Molien emotional distress,¹⁹⁷ the California Supreme Court sanctioned recovery for negligently caused emotional distress unaccompanied by physical injury.¹⁹⁸ The court held that “because the risk of harm to [Mr. Molien] was reasonably foreseeable, . . . under these circumstances defendants owed plaintiff a duty to exercise due care in diagnosing the physical condition of his wife.”¹⁹⁹ Although, the *Molien* court did not establish criteria for determining when a plaintiff is a direct victim,²⁰⁰ the California Supreme Court subsequently defined direct victim as a “person whose emotional distress is a reasonably foreseeable consequence of the conduct of the defendant.”²⁰¹

In 1989, the California Supreme Court, en banc, reconsidered its standards for awarding damages for negligent infliction of emotional distress, when it reviewed *Thing v. La Chusa*.²⁰² In *Thing*, the mother of a child struck by an automobile sought damages for emotional distress she suffered when she arrived at the scene after the accident.²⁰³ She did not see or hear the accident and became aware of it only when told by her daughter what had transpired.²⁰⁴ Mrs. Thing, basing her argument on *Molien*, claimed that she was a direct victim of the defendant’s negligence.²⁰⁵ The court denied recovery and reaffirmed the validity of adhering to the dictates of the *Dillon* rule.²⁰⁶ The California Supreme Court noted that “just as the ‘zone of danger’

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 815.

198. *Id.* at 815, 823.

199. *Id.* at 817.

200. *Thing v. La Chusa*, 771 P.2d 814, 823 (Cal. 1989). The *Molien* court stated that Mr. Molien, the plaintiff, was “a direct victim of the assertedly negligent act.” *Molien*, 616 P.2d at 816.

201. *Thing*, 771 P.2d at 823.

202. 771 P.2d 814 (Cal. 1989).

203. *Id.* at 816.

204. *Id.* at 815.

205. *Id.*

206. *Id.* at 830.

limitation was abandoned in *Dillon* as an arbitrary restriction on recovery, the *Dillon* guidelines have been relaxed on grounds that they, too, created arbitrary limitations on recovery."²⁰⁷ This relaxation only served to muddy the water as the right to recover for emotional distress was expanded and the requirements of physical injury and physical manifestation of the mental distress were abandoned.²⁰⁸ "The subtleties in the distinction between the right to recover as a 'bystander' and as a 'direct victim' created . . . an 'amorphous nether realm'. . . ."²⁰⁹ The court concluded:

[T]he societal benefits of certainty in the law, as well as traditional concepts of tort law, dictate the limitation of bystander recovery of damages or emotional distress. In the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness.²¹⁰

Three years after *Thing*, the California Supreme Court, reviewing *Burgess v. Superior Court*,²¹¹ acknowledged that "the confusion in applying the rules for bystander and direct victim recovery . . . can be traced to [the] court's decision in *Molien* which first used the 'direct victim' label."²¹² The issue in *Burgess* was whether a mother could recover under the direct victim rule for emotional distress resulting from the negligent delivery of her baby boy or, if her claim had to be considered utilizing the bystander rule.

Mrs. Burgess went into labor and was admitted to the hospital.²¹³ After the obstetrician artificially broke Mrs. Burgess' membranes (water), the umbilical cord compressed.²¹⁴ Mrs.

207. *Id.* at 821.

208. *Id.* at 824.

209. *Id.* at 823.

210. *Id.* at 815.

211. 831 P.2d 1197 (Cal. 1992).

212. *Id.* at 1201.

213. *Id.* at 1198.

214. *Id.* When the umbilical cord compresses, it is known as a prolapsed cord. This may diminish or stop the flow of oxygen to the fetus. *Id.* (citing 2 DAVID W.

Burgess was aware that something was wrong as she was prepared for an emergency Cesarean section.²¹⁵ The baby, deprived of oxygen through his umbilical cord for about forty-four minutes, suffered permanent brain damage, as well as damage to his nervous system.²¹⁶ The baby subsequently died, allegedly as a result of the injuries sustained at birth.²¹⁷

Mrs. Burgess sued her obstetrician for, among other things, emotional distress caused by his negligence.²¹⁸ Her obstetrician argued that Mrs. Burgess did not meet the requirements set forth in *Thing v. La Chusa*²¹⁹ and, therefore, could not recover for emotional distress.²²⁰ The court held that Mrs. Burgess was not a bystander, but rather a direct victim and hence, the *Thing* decision did not apply.²²¹ The court went on to note that "[i]n cases involving family relationships and medical treatment, confusion has reigned as to whether and under which 'theory' plaintiffs may seek damages for negligently inflicted emotional distress."²²² In explaining the difference between the two theories, the court reaffirmed that recovery for negligent infliction of emotional distress requires proof of the traditional negligence elements of duty, breach of that duty, causation, and damages²²³ and noted that "[t]he distinction between 'bystander' and 'direct victim' cases is found in the source of the duty owed by the defendant to the plaintiffs."²²⁴

The court explained that bystander cases originate when negligent behavior by the defendant causes physical injury or emotional distress to a plaintiff with whom the defendant had no prior relationship and to whom he did not owe a specific duty of care.²²⁵ On the other hand, the "direct victim" rule is used when the defendant breaches a duty owed to the plaintiff that

LOUISELL & HAROLD WILLIAMS, *MEDICAL MALPRACTICE* § 17G.18[2][c] (1991); F. GARY CUNNINGHAM ET AL., *WILLIAMS OBSTETRICS* 680 (18th ed. 1989)).

215. *Burgess*, 831 P.2d at 1198.

216. *Id.* at 1199.

217. *Id.*

218. *Id.*

219. 771 P.2d 814 (Cal. 1989). See *supra* text accompanying note 210.

220. *Burgess*, 831 P.2d at 1199.

221. *Id.*

222. *Id.*

223. *Id.* at 1200.

224. *Id.*

225. *Id.*

the defendant has assumed, which is "imposed on the defendant as a matter of law, or that arises out of a relationship between the two."²²⁶ The court went on to state that liability for malpractice arises where there is a doctor-patient relationship between the plaintiff and the defendant giving rise to a duty of care.²²⁷ The court applied the test enunciated in *Thompson v. County of Alameda*,²²⁸ in order to establish whether a duty of care did in fact exist between the defendant and the plaintiff and her fetus.²²⁹ Because Mrs. Burgess' doctor clearly owed her a duty of care, the court held that Mrs. Burgess was a "direct victim" of his negligence and therefore she was entitled to recover for the emotional distress caused by the negligent delivery of the baby.²³⁰

The New Jersey Supreme Court, although not stating so, applied the direct victim rule when it decided *Giardina v. Bennett*.²³¹ The sole issue on appeal was whether parents could recover under the Wrongful Death Act²³² for the stillbirth of their

226. *Id.* at 1201.

227. *Id.* at 1202. The duty of care required from doctors is the knowledge and use of skill and care ordinarily possessed and used by similarly situated members of the profession. PROSSER ON TORTS, *supra* note 24, § 32, at 187-89.

228. 614 P.2d 728, 732-33 (Cal. 1980).

229. *Burgess*, 831 P.2d at 1205. Factors to be considered to establish the existence of a duty are:

the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered [by the plaintiff], the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for a breach, and the availability, cost and prevalence of insurance for the risk involved.

Id. (quoting *Christensen v. Superior Court*, 820 P.2d 181, 190 (Ca. 1991) (quoting *Thompson v. County of Alameda*, 614 P.2d 728, 732-33 (Cal. 1980) (quoting *Roland v. Christian*, 443 P.2d 561, 563 (Cal. 1968) (en banc)))).

230. *Id.* at 1200, 1208-09.

231. 545 A.2d 139 (N.J. 1988).

232. N.J. STAT. ANN. § 2A:31-1 (West 1987). An action for wrongful death lies:

[w]hen the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime.

Id.

child caused by the alleged malpractice of the defendant doctor.²³³ The plaintiff, Mrs. Giardina, was due to deliver her baby on May 19, 1983.²³⁴ When she was two weeks overdue, the defendant doctor ordered a "non-stress test" and found no problems.²³⁵ During the next nine days, Mrs. Giardina had periodic contractions and was examined twice by Dr. Bennett.²³⁶ The doctor considered Mrs. Giardina's symptoms normal and refused to perform a Cesarean section.²³⁷ On June 12, the plaintiff entered the hospital in labor.²³⁸ The obstetric staff could not detect a fetal heartbeat.²³⁹ The defendant subsequently confirmed the baby's death and induced labor.²⁴⁰ On June 13, the baby was stillborn.²⁴¹ The plaintiffs sued Dr. Bennett for malpractice under the Wrongful Death Act.²⁴² Following the New Jersey Supreme Court's ruling in *Graf v. Taggart*,²⁴³ the trial court granted the defendant's motion for summary judgment and the appellate court affirmed.²⁴⁴ Although the New Jersey Supreme Court also held that the plaintiffs could not recover under the Wrongful Death statute, it felt compelled to consider "how [the New Jersey] tort system should respond to the negligently caused death of a fetus."²⁴⁵

The Supreme Court, in discussing prior New Jersey decisions including *Berman v. Allan*,²⁴⁶ *Procanik v. Cillo*,²⁴⁷ *Portee*

233. *Giardina*, 525 A.2d at 139.

234. *Id.* at 140.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. 204 A.2d 140 (N.J. 1964) (denying recovery to a pregnant mother involved in an automobile accident with defendant, which resulted in injury to the fetus and subsequent stillbirth, reasoning that there could be no recovery for the death of an unborn child).

244. *Giardina*, 545 A.2d at 140. In affirming the summary judgement for the defendant in *Graf*, the New Jersey Supreme Court held that "due to the 'uniformly speculative' nature of damages, a wrongful death action could not be maintained with respect to the pre-birth death of an infant." *Id.* (citing *Graf*, 204 A.2d at 145).

245. *Giardina*, 545 A.2d at 139.

246. 404 A.2d 8 (N.J. 1979); see *supra* notes 57-69 and accompanying text.

247. 478 A.2d 755 (N.J. 1984); see *supra* notes 90-108 and accompanying text.

v. Jaffee,²⁴⁸ and *Friel v. Vineland Obstetrical and Gynecological Professional Ass'n*,²⁴⁹ found "a critical element in this spectrum of cases [was] the intimate family relationship between the claimant and the immediate victim."²⁵⁰ The court also established that in *Giardina*, the plaintiff's pregnancy and childbirth were sufficient to take the place of the immediacy and presence of the claimant as prescribed by *Portee*,²⁵¹ and was sufficient to assure the "genuineness of the resulting emotional injury and mental anguish."²⁵² The court concluded that "the wrong committed by a doctor in negligently causing the pre-birth death of an infant constitutes a tort against the parents."²⁵³ Although the court denied recovery for wrongful death, it stated that the *Giardinas* could recover for the emotional distress they suffered as a result of the defendant's malpractice.²⁵⁴

III. *Carey v. Lovett*

A. *Facts*

During the summer of 1983, the plaintiff, Jo Ann Carey, a diabetic, became pregnant for the third time in four years.²⁵⁵ Her treating physicians were Dr. John Osler, III, an internist, and Dr. William E. Lovett Jr., an obstetrician and gynecologist.²⁵⁶ Mrs. Carey had been treated by both doctors for some time and, therefore, they were familiar with her medical history.²⁵⁷ Mrs. Carey's first child was born one month premature[ly] and suffered from toxemia.²⁵⁸ Her second pregnancy ended in a miscarriage.²⁵⁹ On October 9, 1983, during the twenty-sixth week of her third pregnancy, Mrs. Carey awoke

248. 417 A.2d 521 (N.J. 1980); see *supra* notes 41-50 and accompanying text.

249. 400 A.2d 147 (N.J. Super. Ct. Law. Div. 1979); see *supra* notes 70-89 and accompanying text.

250. *Giardina*, 545 A.2d at 142.

251. *Id.* at 142-43. See *supra* text accompanying note 48.

252. *Giardina*, 545 A.2d at 143.

253. *Id.* at 142.

254. *Id.* at 139.

255. *Carey v. Lovett*, 622 A.2d 1279, 1282 (N.J. 1993).

256. *Id.*

257. *Id.*

258. *Id.* Toxemia is a term that refers to "metabolic disorders of pregnancy characterized by hypertension, edema, and albuminuria." *STEDMAN'S MEDICAL DICTIONARY* 1464 (5th Unabr. Lawyers' ed. 1982).

259. *Carey*, 622 A.2d at 1282.

feeling ill.²⁶⁰ After testing her blood sugar level and finding it elevated, Mrs. Carey drank bouillon all day and increased her dosage of insulin.²⁶¹ Still feeling ill the following morning, Mrs. Carey called Dr. Osler's office at 8:30 a.m.²⁶²

According to Dr. Osler, he tried to return Mrs. Carey's call during the day at least twice from his office and twice from the hospital.²⁶³ Each time he called, the line was busy or there was no answer.²⁶⁴ When Dr. Osler finally reached Mrs. Carey, it was 10:00 p.m. that evening.²⁶⁵ In response to his questioning, Mrs. Carey told Dr. Osler that she had not tested her urine for ketones.²⁶⁶ Dr. Osler claimed he told Mrs. Carey to go to the hospital immediately, but she refused.²⁶⁷ Nurse Kathleen McDonald, who was with Dr. Osler when he called Mrs. Carey, corroborated his story when she testified at trial.²⁶⁸ However, Mrs. Carey asserted that Dr. Osler instructed her to report to the hospital the next morning, October 11.²⁶⁹ Although Mr. Carey was present when Dr. Osler called, he testified that he had not heard the conversation because he had not been paying attention.²⁷⁰ At trial, it was undisputed that after the 10:00 p.m. phone conversation, Dr. Osler arranged for Mrs. Carey to enter

260. *Id.*

261. *Id.*

262. *Id.*

263. Brief for Defendants-Appellants, John H. Osler, III, M.D. and John H. Osler, III, M.D., P.A. at 8, *Carey v. Lovett*, No. A-2754-89T2, A-2548-89T2, slip op. (N.J. Super. Ct. App. Div. Aug. 5, 1991) [hereinafter Defendant Osler's App. Div. Brief].

264. *Id.*

265. *Carey*, 622 A.2d at 1282.

266. Defendant Osler's App. Div. Brief, *supra* note 263, at 8.

According to the doctor, the presence of ketones in the urine indicates either a state of starvation or ketoacidosis. Doctor Osler testified that it is his policy for diabetic patients to test for ketones "automatically". . . [since] it is simple to accomplish and can be done [by the patient at home] at any time of the day or night. If ketones are found in the urine, then the patient is to either contact the doctor directly or report to the hospital.

Id. at 8-9.

267. *Id.* at 9. Since Dr. Osler was already at the hospital, he wanted Mrs. Carey to meet him there so that he could examine her and take the necessary steps to treat her. Mrs. Carey declined because she did not want to travel to the hospital at that time and felt that she was not ill enough to require that action. *Id.*

268. *Id.* at 9-10.

269. *Carey*, 622 A.2d at 1282.

270. Defendant Osler's App. Div. Brief, *supra* note 263, at 11.

West Jersey Hospital on October 11.²⁷¹ Dr. Osler testified that he left a message with Dr. Lovett's answering service informing him of the arrangements, yet Dr. Lovett contended he never received the message.²⁷²

On October 11, Mrs. Carey was admitted to the hospital at 1:00 p.m. and was examined at 2:30 p.m. by Dr. Gerard, an internist and associate of Dr. Osler's.²⁷³ After examining Mrs. Carey, Dr. Gerard made the diagnosis of diabetic ketoacidosis,²⁷⁴ which frequently causes intrauterine death.²⁷⁵ He also noted that she was experiencing intermittent contractions.²⁷⁶ Additionally, Dr. Gerard was unable to detect a fetal heartbeat.²⁷⁷ In order to treat the ketoacidosis, Dr. Gerard ordered blood tests, intravenous fluids and, later, the administration of insulin.²⁷⁸ The hospital called Dr. Lovett at 3:00 p.m. to report Dr. Gerard's findings.²⁷⁹ Dr. Lovett made a "tentative diagnosis of fetal demise."²⁸⁰

At 3:30 p.m., Mrs. Carey went into labor and was transferred to the hospital's labor and delivery area.²⁸¹ Her labor progressed and all attempts by the attending nurses to find a fetal heartbeat were unsuccessful.²⁸² During this time, nothing was done to arrest Mrs. Carey's labor.²⁸³ At 5:00 p.m., the nurses called Mr. Carey and Dr. Lovett to report on Mrs. Carey's condition.²⁸⁴ Dr. Lovett instructed the nurses to allow Mrs. Carey to deliver the expected stillborn and ordered them to administer pain killing drugs.²⁸⁵

271. *Carey*, 622 A.2d at 1282.

272. *Id.*

273. *Id.*

274. *Id.* Ketoacidosis is defined "diabetic acidosis, caused by the enhanced production of ketone bodies." STEDMAN'S MEDICAL DICTIONARY 745 (5th Unabr. Lawyers' ed. 1982). Acidosis is defined as "a condition in which the acidity of body fluids and tissues is abnormally high." BANTAM MEDICAL DICTIONARY 4 (1990).

275. *Carey*, 622 A.2d at 1282.

276. *Id.* at 1283.

277. *Id.*

278. Defendant Osler's App. Div. Brief, *supra* note 263, at 13.

279. *Carey*, 622 A.2d at 1283.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

Mr. and Mrs. Carey were informed by the attending obstetric nurses that there was no fetal heartbeat and that the fetus was dead.²⁸⁶ Mrs. Carey, however, insisted that the fetus was alive because she could feel it moving.²⁸⁷ She continued to maintain its viability despite the nurses' repeated insistence that the baby was dead.²⁸⁸

At 7:45 p.m., Mrs. Carey was injected with Pitocin²⁸⁹ to induce her labor. At 8:30 p.m., a nurse broke Mrs. Carey's water in order to speed the delivery.²⁹⁰ At 9:06 p.m., Mrs. Carey delivered the baby in a breech position.²⁹¹ Two nurses were the only hospital personnel present at the birth and neither assisted in the delivery, causing the baby to drop "unsupported onto the labor bed."²⁹² Although the baby was born alive, and was pink at birth,²⁹³ no one realized that she was alive until she was "placed on the weighing scale [and] gasped for air."²⁹⁴ The infant was then rushed to the nursery.²⁹⁵ At this point, Dr. Lovett arrived and told Mrs. Carey that the baby was alive, but very sick.²⁹⁶

Dr. Costarino, a perinatologist²⁹⁷ and neonatologist,²⁹⁸ was summoned to examine the baby.²⁹⁹ "When he arrived, the baby was limp and blue [and] [h]e could not hear any heartbeat."³⁰⁰ After connecting the baby to a resuscitator, the baby's pink

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.* Pitocin, a trade name for the drug oxytocin, is a "hormone, released by the pituitary gland that causes increased contraction of the womb during labor" BANTAM MEDICAL DICTIONARY 313 (1990).

290. *Carey*, 622 A.2d at 1283.

291. *Id.* The breech presentation is defined as a "position of a baby in the womb such that it is delivered buttocks first This type of delivery increases the risk of damage to the baby." BANTAM MEDICAL DICTIONARY 57 (1990).

292. *Carey*, 622 A.2d at 1283.

293. *Id.*

294. *Id.* at 1284.

295. *Id.*

296. *Id.*

297. Perinatal refers to "the period from about 3 months before birth to 1 month after birth." BANTAM MEDICAL DICTIONARY 326 (1990).

298. Neonate refers to "an infant at any time during the first four weeks of life." BANTAM MEDICAL DICTIONARY 288 (1990).

299. *Carey*, 622 A.2d at 1284.

300. *Id.*

color returned and a heartbeat was detected.³⁰¹ Dr. Costarino treated the baby with drugs to counteract the pain killers that had been given to Mrs. Carey, placed the baby on a ventilator, and administered antibiotics.³⁰² Later that night the baby was transferred to Children's Hospital in Philadelphia.³⁰³

Two days later, "the doctors at Children's Hospital discovered that the baby was hemorrhaging from both sides of her brain."³⁰⁴ Mr. Carey was informed that the baby was severely brain damaged and was not expected to live much longer.³⁰⁵ On October 21, the baby was still alive, but in a vegetative state with no chance of improvement.³⁰⁶ The Careys decided to disconnect the baby from life support machines.³⁰⁷ The baby died that day.³⁰⁸

Dr. Bowen, Director of Newborn Pediatrics at Pennsylvania Hospital, testified as an expert for the Careys at trial on the issue of proximate causation.³⁰⁹ In Dr. Bowen's opinion, the proximate cause of the baby's death was "prematurity complicated by perinatal asphyxia."³¹⁰ He testified that the asphyxia was caused by "Jo Ann Carey's ketoacidosis being corrected by insulin too quickly."³¹¹

Mr. and Mrs. Carey visited Dr. Janet Berson, a clinical psychologist, on December 20, 1983.³¹² Mrs. Carey complained of a recurrence of migraine headaches, from which she had suffered for ten to fifteen years, tenseness, and fits of crying.³¹³ Mrs. Carey returned to work after this initial visit and saw Dr. Berson

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. Brief for Defendant-Appellant, William E. Lovett, Jr., M.D. at 21, *Carey v. Lovett*, No. A-2754-89T2, slip op. (N.J. Super. Ct. App. Div. Aug. 5, 1991) [hereinafter *Defendant Lovett's App. Div. Brief*].

310. *Id.* Asphyxia is "a life threatening condition in which oxygen is prevented from reaching the tissues by obstruction of or damage to any part of the respiratory system. . . . Brain cells cannot live for more than about four minutes without oxygen." BANTAM MEDICAL DICTIONARY 34 (1990).

311. *Defendant Lovett's App. Div. Brief*, *supra* note 309, at 22.

312. *Carey*, 622 A.2d at 1290.

313. *Id.*

ten times between December, 1983 and June, 1984.³¹⁴ By May, Mrs. Carey was pregnant and Dr. Berson noted that she was "much improved."³¹⁵ Mr. Carey saw Dr. Berson only once after the initial visit.³¹⁶

B. *Procedural History*

Mr. and Mrs. Carey sued Drs. Lovett and Osler, among others, for alleged malpractice, which resulted in the death of their infant daughter.³¹⁷ Their suit for malpractice against Dr. Osler was based on his alleged negligent failure to instruct Mrs. Carey to go to the hospital immediately, instead of instructing her to go to the hospital the next morning.³¹⁸ According to the plaintiffs, Dr. Lovett was negligent in two respects: his failure to come to the hospital to examine Mrs. Carey personally³¹⁹ and his misdiagnosis of Mrs. Carey's condition as "fetal demise" based on Dr. Gerard's finding no fetal heartbeat.³²⁰ Before and during the trial, the court granted motions to dismiss some defendants.³²¹ The jury returned a verdict against Drs. Lovett and Osler.³²² The doctors moved for judgment notwithstanding the verdict, a new trial, or remittitur.³²³ The court denied these motions and defendants appealed.³²⁴

The Superior Court, Appellate Division, reversed in an unreported opinion.³²⁵ The court held in accordance with *Frame v.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Carey*, 622 A.2d at 1284. "The Careys, individually and as general administrators and administrators ad prosequendum, sued Drs. Lovett and Osler, certain other physicians, as well as various nurses, hospital administrators, and the manufacturers of the fetal monitors." *Id.*

318. *Id.*

319. Defendant Osler's App. Div. Brief, *supra* note 263, at 18.

320. Brief and Appendix for Amicus Curiae Medical Society of New Jersey at 4, *Carey v. Lovett*, 622 A.2d 1279 (N.J. Apr. 6, 1993) (No. 34,210).

321. *Carey*, 622 A.2d at 1284. "All defendants were dismissed by various pre-trial motions, except Drs. Lovett, Osler, Gerard, and Pathikonda, West Jersey Hospital," and five nurses. During the trial, Dr. Pathikonda and two nurses were dismissed as defendants. Defendant Osler's App. Div. Brief, *supra* note 263, at 1.

322. *Carey*, 622 A.2d at 1284.

323. *Id.*

324. *Id.*

325. *Id.* at 1282; *see Carey v. Lovett*, No. A-2754-8972, A-2458-89T2, slip op. at 20 (N.J. Super. Ct. App. Div. Aug. 5, 1991).

Kothari,³²⁶ that the trial court should not have considered the parents' claims as direct claims as stated in *Giardina*, but rather, as indirect or "bystander" claims,³²⁷ as in the *Frame* case.³²⁸ Relying on the *Frame* decision, the Appellate Division found that the Careys had no cause of action.³²⁹ The Careys appealed.³³⁰

The New Jersey Supreme Court reversed, holding that the parents could recover for their emotional distress caused by medical malpractice in the birth and death of their daughter,³³¹ that the charge to the jury as to the father's claim for emotional distress was erroneous,³³² and that the awards were excessive.³³³ The case was remanded for a trial on both liability and damages.³³⁴

C. *The Carey Decision*

The issue in the *Carey* appeal was "whether parents, without attempting to prove any physical injury to themselves, may recover for their emotional distress caused by medical malpractice resulting in the premature birth and death of their baby."³³⁵ In reviewing *Carey*, the New Jersey Supreme Court discussed the evolution of recovery for emotional distress claims in New Jersey.³³⁶ It acknowledged the development of two lines of cases: those where the claimant herself is injured, as evidenced by *Berman v. Allan*,³³⁷ and those where the claimant's emotional distress arises from injury to another,³³⁸ as in *Portee*

326. 560 A.2d 675, 681 (N.J. 1989); see *supra* notes 157-83 and accompanying text.

327. *Carey*, 622 A.2d at 1282; see *Carey v. Lovett*, No A-2654-8972, A-2458-89T2, slip op. at 14-16 (N.J. Super. Ct. App. Div. Aug. 5, 1991).

328. *Carey*, 622 A.2d at 1281.

329. *Carey*, 622 A.2d at 1282; see *Carey v. Lovett*, No. A-2754-8972, A- 2458-89T2, slip op. at 14-16 (N.J. Super. Ct. App. Div 1991).

330. *Carey*, 622 A.2d at 1282.

331. *Id.* at 1292.

332. *Id.* at 1288.

333. *Id.* at 1292.

334. *Id.*

335. *Id.* at 1284.

336. *Id.* at 1284-86.

337. *Id.* at 1284-85; see *Berman v. Allan*, 404 A.2d 8, 10-11 (N.J. 1979); see also *supra* notes 57-69 and accompanying text for a discussion of *Berman*.

338. *Carey*, 622 A.2d at 1284-85.

v. Jaffee.³³⁹ Although injury resulting from medical misdiagnosis or malpractice may be the basis for recovery under either theory, the court noted:

[It is only] under limited circumstances that the medical misdiagnosis of one member of a family member may entitle another member to recover for his or her own emotional distress. . . . [Recovery is] limited . . . to the 'observation of shocking events'

....

. . . With medical malpractice claims, we have required that claimants observe contemporaneously the act of malpractice and the resultant injury.³⁴⁰

Referring to *Giardina v. Bennett*³⁴¹, the court maintained that "the experience of pregnancy and childbirth itself constitutes the immediacy and presence of the claimant in the face of inflicted personal injury or death of a loved one that was stressed in *Portee*."³⁴² These requirements in bystander cases serve to "assure the genuineness of the resulting emotional injury and mental anguish."³⁴³ The court found that because the mother and fetus are so interconnected, the mother is more than a bystander and, therefore, "an injury to the fetus could be viewed as supporting a direct parental claim for emotional distress"³⁴⁴ It concluded that the close mother-fetal relationship eliminates the need for the presence and the need to fulfill the contemporaneous observation requirements of a bystander claim for emotional distress.³⁴⁵ The requirement that the emotional distress be severe is "a sufficient guaranty of genuineness to substitute for physical injury to the claimant, which until now has been an element of a direct claim for emotional distress."³⁴⁶ Although the New Jersey Supreme Court found that the Careys had a "direct" cause of action for their emotional distress, it remanded the case for a new trial on both liability and

339. *Id.* at 1285; see *Portee v. Jaffee*, 417 A.2d 521, 527-28 (N.J. 1980); see also *supra* notes 41-50 and accompanying text.

340. *Carey*, 622 A.2d at 1285, 1286 (citations omitted).

341. 545 A.2d 139 (N.J. 1988). See *supra* notes 231-54 and accompanying text.

342. *Id.* at 1285 (quoting *Giardina*, 545 A.2d at 143).

343. *Id.* at 1285-86.

344. *Id.* at 1286.

345. *Id.* at 1287.

346. *Id.*

damages.³⁴⁷ After a review of the record, the New Jersey Supreme Court agreed with the Appellate Division that the trial court "had lost its sense of impartiality . . . and had tilted impermissibly in favor of the plaintiffs."³⁴⁸ This bias was evidenced by the trial court's constant intrusions, reprimands, and restrictions aimed against the defense.³⁴⁹ The New Jersey Supreme Court found that "the court removed from the jury's consideration its determination of the nature of the parents' emotional distress and the extent to which their distress was related to the conduct of each defendant."³⁵⁰ Additionally, it found that the awards made by the jury were excessive, attributing the verdict to "prejudice, partiality or passion," which tainted the entire verdict.³⁵¹ In ordering a new trial, it noted that the absence of any evidence of psychiatric hospitalization or significant interference with the lifestyle or employment relationships of either Mr. or Mrs. Carey precluded the substantial recoveries awarded by the jury.³⁵²

IV. Analysis

In light of the rules established in prior New Jersey case law addressing negligent infliction of emotional distress,³⁵³ the New Jersey Supreme Court's holding in *Carey v. Lovett* constitutes a substantial extension of negligence law.³⁵⁴ Although the holding of the case reflects application of the direct victim rule,³⁵⁵ the New Jersey Supreme Court ignored the traditional elements for recovery in negligence,³⁵⁶ did not address the issue

347. *Id.* at 1292.

348. *Id.* at 1288, 1289.

349. *Id.* at 1289.

350. *Id.* at 1290.

351. *Id.* at 1291.

352. *Id.* at 1290.

353. *See supra* part II.C.

354. *Carey* represents a direct extension of New Jersey law in that the New Jersey Supreme Court effectively used the "direct victim" rule without the key element of foreseeability. *See infra* text accompanying notes 356-57. Additionally, the New Jersey Supreme Court would have had to extend existing law even to allow the Careys to recover under a bystander theory, since it did not require the third *Portee* element, observation of the injury rather than of the result. *See infra* text accompanying notes 420-28.

355. *See supra* part II.D.

356. The traditional elements necessary for recovery in negligence are: a duty, requiring a person to behave in a way that protects others from unreasonable risk;

of proximate cause³⁵⁷ or the requirement of foreseeability. The only testimony on the issue of proximate cause was offered by Dr. Bowen, the plaintiff's expert witness.³⁵⁸ Dr. Bowen testified that the Carey baby died from "prematurity complicated by perinatal asphyxia[tion]," which was caused by Mrs. Carey's "ketoacidosis [having been] corrected by insulin too quickly."³⁵⁹ His testimony did not establish a causative link between the actions of Drs. Lovett and Osler and the death of the baby.³⁶⁰ Neither of them treated Mrs. Carey in the hospital nor prescribed the increased insulin dosage.³⁶¹ In addition, Dr. Bowen's testimony did not show that Dr. Lovett's alleged deviation from a standard of care³⁶² caused the prematurity or

breach of duty, failure to adhere to the required standard of care; proximate cause, a causal connection between the breach of duty and the injury; and actual loss or damage. PROSSER ON TORTS, *supra* note 24, § 30, at 164-65.

357. Proximate cause is a basic element of a plaintiff's cause of action for negligence. "[T]here [must] be some reasonable connection between the defendant's act or omission and the damage which the plaintiff has suffered." PROSSER ON TORTS, *supra* note 24, § 41, at 263. "[L]egal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability." *Id.* § 41, at 264. There are two components to proximate cause, causation of fact and legal cause. Causation of fact is based on the premise that "an act or omission is not regarded as a cause of an event if the particular event would have occurred without it." *Id.* § 41, at 265. The plaintiff bears the burden of proving causation in fact. *Id.* § 41, at 269. "A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, . . . it becomes the duty of the court to direct a verdict for the defendant. Where the conclusion is not one within common knowledge, expert testimony may provide a sufficient basis for it . . ." *Id.* Legal cause requires that "the scope of liability should ordinarily extend to but not beyond" the scope of foreseeable risks. *Id.* § 42, at 273. Under this theory, "the defendant is liable only if the harm suffered is the 'natural and probable' consequence of the defendant's act." *Id.* § 43, at 282.

358. Defendant Lovett's App. Div. Brief, *supra* note 309, at 21; *see also supra* text accompanying note 309.

359. Defendant Lovett's App. Div. Brief, *supra* note 309, at 21; *see also supra* text accompanying notes 310-11.

360. Defendant Lovett's App. Div. Brief, *supra* note 309, at 22.

361. *See generally Carey*, 622 A.2d at 1282-84.

362. The standard of care is "determined upon a risk-benefit analysis: by balancing the risk, in light of the social value of the interest threatened, and the probability and extent of the harm, against the value of the interest which the actor is seeking to protect, and the expedience of the course pursued." PROSSER ON TORTS, *supra* note 24, § 32, at 173. The standard of care changes with the circumstances and the occasion so that what might be considered proper conduct in one instance could be negligence in another situation. *Id.* The standard of care is objective and based upon what the "reasonable man of ordinary prudence" would do

asphyxiation.³⁶³

Looking at the evidence in a light most favorable to the plaintiff, there was a failure of proof as to the defendants liability for proximately causing the baby's death. Considering this failure of proof by the plaintiff's own expert witness, the court should have directed a verdict for the defendants.³⁶⁴

Another issue that was not discussed by either the Appellate Division or the Supreme Court was Mrs. Carey's own negligence³⁶⁵ in failing to monitor her diabetes effectively and whether her actions proximately caused the baby's death. Mrs. Carey had suffered from diabetes since childhood,³⁶⁶ and knew the level of self-care that was necessary to control her diabetes, especially during pregnancy.³⁶⁷ She was also aware of the possibility of developing ketoacidosis, and could recognize its symptoms.³⁶⁸ On cross examination, Mrs. Carey admitted that she did not consistently comply with her doctor's instructions.³⁶⁹ The trial court did not allow Dr. Osler to admit into evidence his journal which would have shown that on two occasions, Mrs. Carey was hospitalized with ketoacidosis.³⁷⁰ Mrs. Carey also testified that she and Dr. Lovett discussed the fact that "diabetes carried a bad omen with pregnancy" and that close management of the disease was therefore necessary.³⁷¹ Dr. Lovett delivered Mrs. Carey's first child in 1980. The child was born

in a given situation. This standard takes into account the actor's physical deficiencies. Thus, a person who has a disability is held to the same standard as a reasonable man with the same disability. *Id.* § 32, at 176. In the case of the medical profession, doctors must use the care which is reasonable in light of their superior learning and experience. *Id.* § 32, at 185. They must have and use the "skill of the 'average' member of the profession." *Id.* § 32, at 187.

363. Defendant Lovett's App. Div. Brief, *supra* note 309, at 22.

364. In addition, it is apparent that because of the trial judge's prejudice and excessive involvement, culpable defendants were dismissed from the case. Clearly, the conduct of all who were directly involved with Mrs. Carey's hospital treatment and delivery care was of such a nature as to have required a determination by the trier of fact.

365. New Jersey follows a 51% fault bar system, under which a plaintiff can recover if the defendant's fault is equal to or greater than the fault of the plaintiff. See N.J. STAT. ANN. 2A:15-5.1 (West 1987).

366. Defendant Osler's App. Div. Brief, *supra* note 263, at 4.

367. *Id.*

368. *Id.* at 3.

369. *Id.* at 6.

370. *Id.*

371. *Id.* at 4-5.

"one month prematurely and suffered from toxemia."³⁷² Mrs. Carey's second pregnancy ended in miscarriage in March of 1983.³⁷³ Considering these facts, it is difficult to understand Jo Ann Carey's failure to realize the gravity of her illness and her failure to seek medical assistance sooner. Her failure to test for ketones in her urine prior to speaking to Dr. Osler must be questioned. There was no indication that the court considered the possible damage that the baby might have suffered as a result of the ketoacidosis prior to Mrs. Carey's hospitalization. Despite these possibly exacerbating circumstances, none of the courts discussed whether Mrs. Carey was herself negligent. Considering that the baby's death was proximately caused in part by Mrs. Carey's treatment for ketoacidosis, her actions should have been considered by the jury. Because the courts did not decide the case based on these causation issues, the question is whether the Supreme Court should have handled *Carey* as a bystander case rather than a direct injury case because there was no direct physical impact. As in *Carey*, the *Berman v. Allan*,³⁷⁴ *Procanik v. Cillo*³⁷⁵ and *Friel v. Vineland Obstetrical & Gynecological Professional Ass'n*³⁷⁶ cases dealt with recovery for the parents' emotional distress resulting from medical malpractice and misdiagnosis.³⁷⁷ It is here that any similarity ends.

In *Berman*, the court found direct injury, albeit the loss of a right, caused by the doctor's failure to perform an amniocentesis.³⁷⁸ This failure led to Mrs. Berman's delivery of a child with Down's syndrome, which resulted in the parents' emotional distress.³⁷⁹ The doctor's omission effectively precluded Mr. and Mrs. Berman from exercising their right to abort the damaged fetus and was thus deemed to be an injury

372. *Carey*, 622 A.2d at 1282.

373. *Id.*

374. 404 A.2d 8 (N.J. 1979). See *supra* notes 57-69 and accompanying text.

375. 478 A.2d 755 (N.J. 1984). See *supra* notes 90-108 and accompanying text.

376. 400 A.2d 147 (N.J. Super. Ct. Law Div. 1979). See *supra* notes 70-89 and accompanying text.

377. See *Berman*, 404 A.2d at 11, 14; *Procanik*, 478 A.2d at 758; *Friel*, 400 A.2d at 148.

378. *Berman*, 404 A.2d at 14; see *supra* text accompanying note 69.

379. *Berman*, 404 A.2d at 11.

inflicted directly on them.³⁸⁰ The *Procanik* case was basically the same as *Berman*, in that the Procaniks lost their right to terminate the wife's pregnancy due to the doctor's misdiagnosis of a test for German measles.³⁸¹

In contrast, Mr. and Mrs. Carey did not realize any actual direct injury from the birth of their seriously ill child.³⁸² The alleged omissions by Drs. Osler and Lovett did not have any physical impact on the Careys. Nor did they compromise the Careys' rights as parents.³⁸³

While it is alleged that Dr. Osler was negligent in failing to direct Mrs. Carey to go to the hospital on October 10, Mrs. Carey was aware that if, after performing the urine test for ketones, she observed a positive result, according to the doctor's standard instructions she was to go to the hospital.³⁸⁴ Mrs. Carey did not perform the test.³⁸⁵ The *Berman* case is significantly different since Mrs. Berman could not have performed her own amniocentesis and did not even know that the test existed.

The facts in *Friel*³⁸⁶ are similar to those in *Carey*.³⁸⁷ Like the plaintiff in *Friel*, the plaintiff in *Carey* was pregnant and became ill.³⁸⁸ Like Betty Friel, Jo Ann Carey went into premature labor and delivered a severely ill infant without the assistance of her obstetrician.³⁸⁹ Unlike Betty Friel's delivery, which took place with no one in attendance,³⁹⁰ Jo Ann Carey's delivery was attended by experienced delivery room nurses.³⁹¹ The major difference between the two cases, however, was that in *Friel*, the mother was directly injured when her doctor misdiagnosed her condition as a bladder infection.³⁹² Mrs. Friel suffered both physically and emotionally for almost two weeks as a result of

380. *Id.* at 14.

381. *See Procanik*, 478 A.2d at 758. *See also supra* text accompanying notes 95-96.

382. *See generally Carey*, 622 A.2d at 1282-84.

383. *See generally id.* at 1282-84, 1290.

384. *See Defendant Osler's App. Div. Brief, supra* note 263, at 5.

385. *See Carey*, 622 A.2d at 1282.

386. *See supra* notes 73-85 and accompanying text.

387. *See supra* part III.A.

388. *Friel*, 400 A.2d at 148-49; *Carey*, 622 A.2d at 1282-83.

389. *Friel*, 400 A.2d at 149; *Carey*, 622 A.2d at 1283.

390. *Friel*, 400 A.2d at 149.

391. *Carey*, 622 A.2d at 1283.

392. *Friel*, 400 A.2d at 148.

her doctor's misdiagnosis.³⁹³ Jo Ann Carey was not physically or emotionally damaged by Dr. Lovett's failure to attend the delivery or by his alleged negligent misdiagnosis of fetal demise, since the baby was born alive.³⁹⁴

The finding by the courts of actual direct injury in *Berman*, *Procanik*, and *Friel* satisfied the traditional standards for recovery for emotional distress, as opposed to *Carey*, where direct injury was absent and should have precluded such recovery. Additionally, it should be noted that since *Berman* and *Friel* were decided before *Portee*,³⁹⁵ which allowed for bystander recovery,³⁹⁶ had the respective plaintiffs not been able to prove direct injury they would have been barred from any recovery.

In *Giardina v. Bennett*,³⁹⁷ which was relied on by the Careys at trial, the New Jersey Supreme Court extended the law for recovery for emotional distress, but only when the case involved a stillbirth.³⁹⁸ Mr. and Mrs. Giardina sought to recover damages for the death of their baby before birth under New Jersey's Wrongful Death Act.³⁹⁹

Mrs. Giardina was almost two weeks overdue when her doctor performed tests and informed her that there was no problem.⁴⁰⁰ Nine days later, when Mrs. Giardina began having contractions, believing that her symptoms were normal, the doctor refused to perform a Cesarean section.⁴⁰¹ Nearly one month overdue, Mrs. Giardina entered the hospital in labor and delivered a stillborn baby.⁴⁰²

One significant difference between *Giardina* and *Carey* is that the plaintiff in *Giardina* had every right to expect the normal birth of a healthy baby, whereas the plaintiff in *Carey* was

393. *Id.*

394. Defendant Lovett's App. Div. Brief, *supra* note 309, at 22.

395. See *Portee v. Jaffee*, 417 A.2d 521 (N.J. 1980); *Berman v. Allan*, 404 A.2d 8 (N.J. 1979); *Friel v. Vineland Obstetrical and Gynecological Professional Ass'n*, 400 A.2d 147 (N.J. Super. Ct. Law Div. 1979).

396. See *Portee*, 417 A.2d at 528; see also *supra* notes and 41-50 accompanying text.

397. 545 A.2d 139 (N.J. 1988). See *supra* notes 231-54 and accompanying text.

398. *Giardina*, 545 A.2d at 143.

399. *Id.* at 139; see N.J. STAT. ANN. § 2A:31-1 (West 1987).

400. *Giardina*, 545 A.2d at 140.

401. *Id.*

402. *Id.*

told before the birth that the baby would be stillborn.⁴⁰³ Thus, while Mrs. Giardina's shock was foreseeable, Mrs. Carey's claim that she was shocked was not, since her baby was not stillborn as anticipated.⁴⁰⁴ Another distinction between these two cases is that the Giardina's doctor directly caused the injury to the fetus by not performing the Cesarean section before the fetus' death.⁴⁰⁵ In *Carey*, neither Dr. Lovett nor Dr. Osler caused direct injury to Mrs. Carey or her baby.⁴⁰⁶

The New Jersey Supreme Court, in *Giardina*, found that "[t]he plaintiffs . . . as parents of a stillborn have suffered a cognizable injury deserving of compensation. The Wrongful Death Act, however, does not recognize this cause of action."⁴⁰⁷ The court did not allow recovery under the Act,⁴⁰⁸ but did state that:

[m]edical malpractice causing a stillbirth results in infliction of a direct injury to the mother as well as to her unborn child. Even without any permanent physical harm, the mother suffers severe and genuine injuries in the form of emotional distress and mental anguish occasioned by her baby's stillbirth.⁴⁰⁹

Hence, the *Giardina* decision was specifically limited to recovery for emotional distress as a result of medical malpractice leading to a stillbirth.

In reviewing *Carey*, the New Jersey Supreme Court should have affirmed the decision of the Appellate Division, which relied on the bystander rule⁴¹⁰ for recovery,⁴¹¹ rather than extending its holding in *Giardina*. The bystander requirements offer a much sounder approach because the principles can be readily applied to the facts of *Carey* without entering a labyrinth of speculative injuries. Since there was no actual direct injury to Mr. or Mrs. Carey,⁴¹² they should have been considered bystanders.

403. See *Carey*, 622 A.2d at 1284.

404. Defendant Lovett's App. Div. Brief, *supra* note 309, at 21.

405. *Giardina*, 545 A.2d at 140, 142.

406. *Carey*, 622 A.2d at 1284.

407. *Giardina*, 545 A.2d at 147.

408. *Id.* at 139.

409. *Id.* at 140.

410. See *supra* text accompanying notes 8-9; see also *supra* part II.C.

411. See *Carey v. Lovett*, No A-2654-8972, A-2458-89T2, slip op. at 14-16 (N.J. Super. Ct. App. Div. Aug. 5, 1991); see also *Carey*, 622 A.2d at 1281.

412. See generally *Carey*, 622 A.2d at 1282-84.

As in *Lindenmuth v. Alperin*,⁴¹³ *Jansen v. Children's Hospital Medical Center*,⁴¹⁴ and *Frame v. Kothari*,⁴¹⁵ where parents sued for their emotional distress caused by the misdiagnosis of their children's illnesses,⁴¹⁶ so too, the Careys sued for emotional distress allegedly caused by Dr. Lovett's misdiagnosis and Dr. Osler's alleged failure to have Jo Ann Carey admitted into the hospital on October 10th.⁴¹⁷ Heretofore, in most bystander cases where the *Dillon* rule⁴¹⁸ is followed, the claimant has not recovered without proof of a contemporaneous observation of the injury caused by the misdiagnosis or malpractice.⁴¹⁹

The court in *Lindenmuth* denied recovery because the misdiagnosis could not be perceived and the plaintiff could not recover for observing the result rather than an act.⁴²⁰ In *Jansen*, the court denied recovery and refused to extend the bystander rule to encompass the observation of the result of misdiagnosis rather than observation of the negligent act.⁴²¹ In *Frame*, the New Jersey Supreme Court denied recovery because the doctor's negligence in failing to tell the parents to take their son to the hospital did not result in an immediate injury to the child and his death did not occur until eleven hours later.⁴²² Additionally, the court noted that recovery would not be allowed without a contemporaneous observation of the injury.⁴²³ Similarly, the Carey's emotional distress, founded on the birth of their seriously ill baby, resulted from alleged malpractice that

413. 484 A.2d 1316 (N.J. Super. Ct. Law. Div. 1984); see *supra* notes 110-34 and accompanying text.

414. 106 Cal. Rptr. 883 (Cal. Ct. App. 1973); see *supra* notes 120-27 and accompanying text.

415. 560 A.2d 675 (N.J. 1989); see *supra* notes 157-83 and accompanying text.

416. *Lindenmuth*, 484 A.2d at 1316; *Jansen*, 106 Cal. Rptr. at 884; *Frame*, 560 A.2d at 676.

417. See *Carey*, 622 A.2d at 1281-82.

418. See *supra* text accompanying notes 6-9. See also *supra* part II.C.

419. See generally *Justus v. Atchison*, 565 P.2d 122 (Cal. 1977); *Jansen v. Children's Hospital Ctr.*, 106 Cal. Rptr. 883 (Cal. Ct. App. 1973); *Frame v. Kothari*, 560 A.2d 675 (N.J. 1989); *Portee v. Jaffee*, 417 A.2d 521 (N.J. 1980); *Lindenmuth v. Alperin*, 484 A.2d 1316 (N.J. Super. Ct. Law Div. 1984). But cf. *Polikoff v. Calabro*, 506 A.2d 1285 (N.J. Super. Ct. Law Div. 1986). Had the court in *Polikoff* strictly adhered to the third requirement of the *Dillon* rule, requiring observation of the death or injury, the *Polikoff*'s would have been denied recovery.

420. 484 A.2d at 1318.

421. 106 Cal. Rptr. at 885.

422. 560 A.2d at 681.

423. *Id.* at 678-79.

was not observable by either of them.⁴²⁴ Dr. Osler's alleged failure to order Mrs. Carey into the hospital preceded the birth by approximately twenty-four hours⁴²⁵ and the baby's eventual death⁴²⁶ by more than ten days.⁴²⁷ Similarly, Dr. Lovett's alleged misdiagnosis of fetal demise preceded the birth by six hours.⁴²⁸ Thus, the Careys sought to recover for emotional distress from observing the result rather than the act of the alleged malpractice.

When compared to *Justus v. Atchison*⁴²⁹ and *Polikoff v. Calabro*,⁴³⁰ the Careys' claim fails as well. In *Justus*, the plaintiffs were denied recovery because the court held that their shock did not result from a direct emotional impact.⁴³¹ Neither father knew of his infant's death until their doctor informed them, despite being present in the delivery room and witnessing the troubled birth.⁴³² A different circumstance existed in *Polikoff*, where the mother witnessed the actual injury to her daughter and was allowed to recover for her emotional distress.⁴³³ The Careys did not know of their daughter's serious state until they were informed by the medical personnel in the hospital.⁴³⁴ Additionally, as the appellate division noted, the Careys were told to expect their child to be stillborn,⁴³⁵ and thus "the circumstances do not fall within the category of 'shocking'" as established by the New Jersey Supreme Court.⁴³⁶

As in *Giardina*, the New Jersey Supreme Court in the *Carey* decision seemed to be skirting the direct victim rule. Had the court discussed the foreseeability issue it so carefully avoided, it might have been able to fashion a decision that did

424. See generally *Carey*, 622 A.2d at 1282-84, 1286.

425. *Id.* at 1282-83.

426. *Id.* at 1284.

427. *Id.* at 1282-84.

428. *Id.* at 1283.

429. 565 A.2d 122 (N.J. 1977); see *supra* notes 128-34 and accompanying text.

430. 506 A.2d 1285 (N.J. Super. Ct. App. Div. 1986); see *supra* notes 136-56 and accompanying text.

431. *Justus*, 565 A.2d at 135-36.

432. *Id.* at 136.

433. *Polikoff*, 506 A.2d at 1288.

434. *Carey*, 622 A.2d at 1283.

435. *Carey v. Lovett*, No. A-2754-89T2, A-2748-89T2, slip op. at 16 (N.J. Super. Ct. App. Div. Aug. 5, 1991).

436. *Id.*

not wreak havoc on prior case law and establish workable guidelines for future decisions.

V. Ramifications of the *Carey* Decision

The direct victim rule, together with the prodigal *Carey* expansion of the law, have serious and far reaching implications for the medical profession, courts of law, and health care recipients. In November of 1985, Drug Research Reports published the results of a 1985 survey released by the American College of Obstetricians and Gynecologists (ACOG).⁴³⁷ "The survey of 1,400 obstetricians/gynecologists examined what effects the threat of malpractice suits has on the practice of obstetrics and gynecology."⁴³⁸ Ninety percent of the doctors surveyed reported an increase in their malpractice insurance, with the average increase amounting to \$9,871.⁴³⁹ Eighty percent of the physicians increased their fees because of increased insurance premiums.⁴⁴⁰ Two-thirds of the doctors participating in the survey reported that they increased their use of defensive medicine,⁴⁴¹ twelve percent had stopped practicing obstetrics and fourteen percent decreased the number of deliveries they handled, all as a result of the threat of malpractice suits.⁴⁴²

These facts have not gone unnoticed by the courts. In their concurring opinion in *Frame*, Justices Wilentz and Garibaldi voiced their concerns about expanding recovery for emotional distress, caused by medical malpractice, to family members.⁴⁴³

437. DRUG RESEARCH REPORTS, F-D-C REPORTS, INC., MEDICAL LIABILITY INSURANCE COST INCREASES THREATEN ACCESS TO OBSTETRICS/GYNECOLOGY SERVICES, THE BLUE SHEET, 28(47): 5, Nov. 20, 1985 (F-D-C Reports, Inc.), available in LEXIS, Genmed Library, F-D-C Reports File [hereinafter THE BLUE SHEET]. The survey was conducted by Needham, Porter, and Novelli, Inc., a Washington D.C. based survey company. *Id.* at 5.

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.* Defensive medicine includes the use of unnecessary Cesarean sections, excessive diagnostic tests, and refusal of patients who are uninsured or have only Medicaid coverage. Randall R. Bovbjerg et al., *Obstetrics and Malpractice: Evidence on the Performance of a Selective No-Fault System*, JAMA, June 5, 1991, at 1.

442. THE BLUE SHEET, *supra* note 437, at 5.

443. *Frame*, 560 A.2d at 682 (Wilentz & Garibaldi, JJ., concurring).

[C]hanges in the law must be preceded "by a balancing of social interests, and estimate of social values."

.
 . . . We suspect that the cost to society of expanding medical malpractice liability to allow a family member to recover for his or her emotional distress as a result of a physician's improper diagnosis will outweigh the benefits to society. Possible costs to society include the increasing number of physicians who refuse to practice in certain fields, the cost, in all fields, of an increase in "defensive medicine," and the increasing cost of medical treatment itself.⁴⁴⁴

The Connecticut Supreme Court, which follows the *Dillon* rule,⁴⁴⁵ has refused to apply it to medical malpractice cases.⁴⁴⁶ Among other reasons, the court is concerned that "the detrimental consequences to the community are far too great compared to 'the benefit a few hypersensitive individuals would be likely to derive'"⁴⁴⁷

Even the California Supreme Court, which developed the direct victim rule, has backtracked from its holding in *Molien v. Kaiser Foundation Hospital*,⁴⁴⁸ the first direct victim case. Its initial rule that a person was a direct victim if their emotional distress was a reasonably foreseeable consequence of the defendant's conduct,⁴⁴⁹ cast a wide net.

The California Supreme Court seemed to totally retreat from the direct victim rule when it reviewed *Thing v. La Chusa*.⁴⁵⁰ However, in 1992, the court once again embraced direct victim recovery in *Burgess v. Superior Court*.⁴⁵¹ In that decision, the court specifically noted the continuing confusion about application of the direct victim rule in the lower courts.⁴⁵²

444. *Id.* (Wilentz & Garibaldi, JJ., concurring) (citations omitted).

445. *See supra* text accompanying 8-9.

446. Blanche Wilkinson, Student Note, *Bystander Emotional Distress Claims in Medical Malpractice Actions*, 15 AM. J. TRIAL ADVOC. 605 (1992) (citing *Maloney v. Conroy*, 545 A.2d 1059 (Conn. 1988)).

447. *Id.* at 621 (quoting *Maloney*, 545 A.2d at 1064).

448. 616 P.2d 813 (Cal. 1980). *See supra* notes 185-201 and accompanying text.

449. *See Thing v. La Chusa*, 771 P.2d 814, 823 (Cal. 1989). *See also supra* text accompanying note 201.

450. 771 P.2d 814 (Cal. 1989). *See supra* notes 202-10 and accompanying text.

451. 831 P.2d 1197 (Cal. 1992). *See supra* notes 211-30 and accompanying text.

452. *Burgess*, 831 P.2d at 1199 & n.5.

It stated that proof of traditional negligence elements are required for recovery for negligent infliction of emotional distress,⁴⁵³ and also held that the duty owed to the plaintiff by the defendant had to arise out of an existing relationship between the two.⁴⁵⁴ Unlike the New Jersey Supreme Court in *Carey*, the California Supreme Court in *Burgess* offered an in depth explanation and analysis of recovery under this rule. Additionally, unlike the *Carey* court, the *Burgess* court acknowledged the impact of their decision on the medical malpractice insurance crisis.⁴⁵⁵

VI. Conclusion

Rather than clarifying the standards for recovery in New Jersey cases involving negligent infliction of emotional distress and alleviating future inconsistencies, the *Carey* court has created more confusion. When other states are weighing the effects of expanded liability on medical providers and recipients and reverting to stricter standards, the New Jersey Supreme Court is expanding the law without such consideration. It appears that the New Jersey appellate court had a better grasp of the facts of *Carey*, the standards used for awarding damages for negligent infliction of emotional distress, and the great social implications for the practice of gynecology in New Jersey than did the New Jersey Supreme Court. In its zeal to protect the interests of those with perceived injuries, the New Jersey Supreme Court has framed a rule which attempts to insure what even medical science can not guarantee.

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453. *Id.* at 1200. See also *supra* text accompanying note 223.

454. *Burgess*, 831 P.2d at 1201. See also *supra* text accompanying note 226.

455. *Burgess*, 831 P.2d at 1207. The court noted that "[t]he problem of professional liability adversely affects the delivery of obstetrical services, especially to disadvantaged women, those living in rural areas, and those with high risk pregnancies." *Id.* They went on to note that the California Legislature had taken steps to "alleviate the 'crisis' in medical malpractice liability" by limiting the recovery of noneconomic damages to \$250,000 and the statute of limitations for medical malpractice claims brought by adults to three years from the date of injury or one year after discovery of the injury. *Id.* at 1208.

* Dedicated to my husband Richard, sons Mitchell and Jason, and my parents, for their constant support and love. Special thanks to Professor Joseph Olivenbaum.