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Fender Bender Lottery: Direct Victims and Bystanders in Recovery for the Negligent Infliction of Emotional Distress

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Fender Bender Lottery: Direct Victims and Bystanders in Recovery for the Negligent Infliction of Emotional Distress

Jarrett v. Jones[1]

I. INTRODUCTION

Recovery for the negligent infliction of emotional distress has always been a hazy and constantly changing area of the law.[2] Recovery for this tort has generally been premised upon shifting policy concerns. Historically, courts agreed with public policy declaring emotional distress too difficult to prove and too easy to fake and only allowed emotional distress that occurred in connection with a physical injury.[3] This rule flourished and grew into acceptance across America.[4] As the tort developed and scientific advances in authenticating the symptoms of emotional distress became more mainstream, the policy consideration shifted towards allowing recovery for emotional distress based on the idea that, when the negligence of another causes injuries, physical or otherwise, no one should be prevented from recovering damages.[5]

Over the years, courts have developed multiple tests to determine when recovery should be allowed for plaintiffs suffering from emotional distress.[6] Mainly, recovery has been categorized into two distinct classifications: direct-victim recovery and bystander recovery.[7] While the law regarding the standard of recovery for direct victims and bystanders has been settled in Missouri for some time,[8] *Jarrett v. Jones* provides some guidance on how the Supreme Court of Missouri discerns the practical differences between a direct victim and a bystander.[9] While the practical differences are meant to allow

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1. 258 S.W.3d 442 (Mo. 2008) (en banc).

2. Missouri has evolved though the years, invoking various standards for recovery, slowly relaxing those standards with every new decision. *See* Trigg v. St. Louis, Kansas City & N. Ry. Co., 74 Mo. 147 (1881), *abrogated by* Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983) (en banc); Asaro v. Cardinal Glennon Mem'l Hosp., 799 S.W.2d 595 (Mo. 1990) (en banc).

3. *Bass*, 646 S.W.2d at 768-69.

4. *Id.* at 768.

5. *Id.* at 769-70.

6. These tests include the impact rule, the zone of danger test, and the Dillon/Thing test. *See infra* notes 33-41, 67-75 and accompanying text.

7. *See Asaro*, 799 S.W.2d at 598-600; *Bass*, 646 S.W.2d 765.

8. *See supra* note 2.

9. 258 S.W.3d 442, 445-47 (Mo. 2008) (en banc).

Missouri courts to apply the proper standard and, ultimately, determine recovery, it is not entirely clear that the distinctions will matter.

II. FACTS AND HOLDING

The case of *Jarrett v. Jones* stems from a June 8, 2004, car accident which occurred on Interstate 44 in Laclede County, Missouri.[10] On a rainy night in June 2008, Tommy Jarrett (Mr. Jarrett)[11] was driving his tractor-trailer alone in the eastbound lane of Interstate 44.[12] On the opposite side of Interstate 44, Michael Jones (Mr. Jones) was driving westbound with his wife and two daughters.[13] As a result of Mr. Jones' negligence, most important of which was driving too fast for the weather conditions,[14] his car crossed the grassy median and hit Mr. Jarrett's tractor-trailer head on.[15] The collision caused Mr. Jarrett's knees to hit the steering wheel and dashboard, which twisted his ankles and his knees.[16] Aside from that contact, Mr. Jarrett admitted that "there was no physical injury of any kind as a result of impact injury. . . ."[17] After the collision, Mr. Jarrett left his vehicle and went to Mr. Jones' vehicle to make sure that no one was hurt.[18] When he reached the vehicle, he saw that Mr. Jones and his wife were badly injured and that the Jones' two-year-old daughter had been killed in the accident.[19]

As a result of the accident, Mr. Jarrett suffered "mental and emotional injuries, including post-traumatic stress disorder and feelings of anxiety, trauma, anguish and stress."[20] However, Mr. Jarrett admitted that his "emotional struggles, grief and feelings of guilt after the collision stemmed from his viewing of [the Jones'] daughter, not from the collision itself."[21]

Mr. Jarrett brought suit in the Circuit Court of Laclede County, Missouri against Mr. Jones for negligently operating his vehicle, claiming the accident had caused him extreme emotional distress.[22] He specifically alleged that Mr. Jones "was driving too fast for the wet road conditions and, therefore, was

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10. *Id.* at 443.

11. The Southern District referred to both plaintiffs, Mr. and Mrs. Jarrett, in the singular because Mrs. Jarrett's loss of consortium claim was derivative of Mr. Jarrett's emotional distress claim. Jarrett v. Jones, No. 28259, 2007 WL 2231791, at *1 n.1 (Mo. App. S.D. Aug. 6, 2007).

12. *Jarrett*, 258 S.W.3d at 443.

13. *Id.*

14. *Id.* at 443-44.

15. *Jarrett*, 2007 WL 2231791, at *1.

16. *Jarrett*, 258 S.W.3d at 443.

17. *Jarrett*, 2007 WL 2231791, at *1 n.2.

18. *Jarrett*, 258 S.W.3d at 443.

19. *Id.*

20. *Id.*

21. *Jarrett*, 2007 WL 2231791, at *1 n.3.

22. *Jarrett*, 258 S.W.3d at 443-44.

negligent in failing to operate his vehicle with the required [degree] of care."[23]

In granting Mr. Jones' motion for summary judgment, the trial court found that, since Mr. Jarrett admitted the sole cause of his emotional distress was seeing the body of the Jones' daughter and not the collision itself, Mr. Jarrett was not in the "zone of danger"[24] because he did not fear personal injury to himself when he viewed her body.[25] Because he was not in the "zone of danger," and the practical differences between direct-victim recovery and bystander recovery were unclear in Missouri, the trial court looked to other states and determined that Mr. Jarrett was seeking bystander recovery.[26] Because he was seeking recovery as a bystander, the trial court found that Mr. Jarrett "failed to present facts that would entitle [him] to recover damages for . . . emotional distress . . . ."[27]

On appeal, the Missouri Court of Appeals for the Southern District found that the trial court did not err in applying the requirements for bystander recovery to Mr. Jarrett's case and affirmed the decision of the trial court.[28] The appellate court found that, because the trial court reasoned that bystander recovery should be applied and Missouri "thus far, ha[d] not permitted bystander recovery," the grant of summary judgment for Mr. Jones was permissible.[29]

The Supreme Court of Missouri answered two primary questions on appeal.[30] First, did the trial court err in applying the standard of recovery for bystanders in negligent infliction of emotional distress cases instead of applying the standard of recovery for direct victims?[31] Second, under the theory of bystander recovery, was it error for the trial court to refuse to consider facts showing that Mr. Jarrett's emotional distress stemmed from seeing the deceased daughter of Mr. Jones?[32] In answering the first question, the Supreme Court of Missouri held that the trial court erred in applying the standard for bystander recovery, because Mr. Jarrett's feelings of grief and emotional distress were a result of the "whole traumatic event" and the concept of a direct victim encompasses the plaintiff's viewing of third parties as long as there is direct involvement in the accident.[33] The supreme court then noted that Mr.

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23. *Id.*

24. *Id.* at 444. For an explanation of the zone of danger test *see infra* notes 84-85 and accompanying text.

25. *Id.*

26. *Jarrett*, 2007 WL 2231791, at *1.

27. *Jarrett*, 258 S.W.3d at 443.

28. *Jarrett*, 2007 WL 2231791, at *2.

29. *Id.* at *1.

30. *Jarrett*, 258 S.W.3d at 444.

31. *Id.*

32. *Id.*

33. *Id.* at 448.

Jarrett was in fact a direct victim.[34] In answering the second question, as to whether it was error for the trial court to refuse consideration of certain facts surrounding Mr. Jarrett's emotional distress, the supreme court held, using direct-victim recovery, that Mr. Jarrett presented facts that, if true, would prove each element of his claim and, thus, summary judgment was granted in error.[35]

III. LEGAL BACKGROUND

The critical legal question in the cases leading up to the decision in *Jarrett v. Jones* was what standard must be met to recover for the negligent infliction of emotional distress in Missouri.[36] The answer to this question had, at one point, been firmly entrenched in Missouri law since the 1881 decision in *Trigg v. The St. Louis, Kansas City & Northern Railway Company*.[37]

Trigg was the seminal Missouri case that made it clear that a defendant is not liable for negligence resulting in emotional distress unless the plaintiff suffered a contemporaneous traumatic physical injury.[38] The Supreme Court of Missouri announced the impact rule, requiring physical injury, as one that "is well established."[39] When there is a lack of "malice, willfulness, wantonness, or inhumanity," a showing of some physical injury tied to the emotional distress is required before one can recover for the emotional distress.[40] Thus, courts would not allow recovery for negligently inflicted emotional distress without proving some physical injury had occurred during the same incident that had caused the emotional distress.[41] The policy underlying this rule was the main reason for its adoption.[42]

For one, the impact rule was premised on the idea that proving mental distress is extremely difficult and, at the least, a physical injury can provide some causal connection to show that harm caused by a defendant's negligence did cause at least enough harm to trace.[43] Another rationale was that if recovery for the negligent infliction of emotional distress were allowed in the absence of cognizable physical injury, it would create a flood of litigation, especially lawsuits involving fraudulent claims from people who invented

34. *Id.*

35. *Id.* at 449.

36. *See* Trigg v. St. Louis, Kansas City & N. Ry. Co., 74 Mo. 147 (1881), *abrogated by* Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983) (en banc); Asaro v. Cardinal Glennon Mem'l Hosp., 799 S.W.2d 595 (Mo. 1990) (en banc).

37. 74 Mo. 147 (1881).

38. *Id.* at 153.

39. Gambill v. White, 303 S.W.2d 41, 43 (Mo. 1957) (per curiam), *abrogated by Bass*, 646 S.W.2d 765.

40. *Id.*

41. *Id.*

42. *Bass*, 646 S.W.2d at 769.

43. *Id.*

injuries.[44] However, as the impact rule developed, it was interpreted very broadly, so that even the most minimal contact would open the door to recovery.[45] The impact rule remained a staple of Missouri law for more than 100 years, until new policy concerns mandated that it be overruled.[46]

In 1983, *Bass v. Nooney* was the first Missouri case to challenge the impact rule and present new policy concerns, which called for the rule to be changed.[47] In *Bass*, a secretary who frequently made trips between floors of a high-rise office building suffered severe emotional distress after being trapped in one of the building's elevators for more than thirty minutes.[48] After the incident, her doctor made a medical diagnosis of "severe anxiety reaction," which was "precipitated by being stuck in the elevator."[49] The trial court faithfully applied the available case law and denied the recovery, because she suffered no physical injury during her traumatic ride on the elevator.[50]

Upon accepting the case, the Supreme Court of Missouri noted that the impact rule was based upon the policy considerations outlined above[51] and that the rule had always been fraught with scholarly criticism.[52] Over time, courts across the country that applied the impact rule began to apply an "increasing[ly] liber[al]" interpretation of physical impact, to the point where almost no physical injury was required.[53] While the past policy considerations were taken into consideration, the court's survey of other jurisdictions found that by 1959 "a clear majority of the jurisdictions had rejected any requirement of a contemporaneous physical trauma."[54] The court determined

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44. *Id.*

45. Joseph Matye, Note, *Bystander Recovery for Negligent Infliction of Emotional Distress in Missouri*, 60 UMKC L. REV. 169, 171 (1991).

46. The rule was eventually overturned in the Supreme Court of Missouri decision in *Bass v. Nooney*. *See Bass*, 646 S.W.2d at 772.

47. *Id.* at 768-73.

48. *Id.* at 766-67.

49. *Id.* at 767.

50. *Id.*

51. These considerations were the following:

> (1) the difficulty in proving a causal connection between the damages claimed by the plaintiff and the act of the defendant which is claimed to have induced the mental and emotional distress; (2) permitting such suits would encourage imaginary and fraudulent claims; and (3) the probability that permitting recovery would release a flood of new litigation made up of such claims.

Id. at 769.

52. The court gave a long list of citations that points to articles criticizing the impact rule dating back as far as the inception of the rule. *Id.* The court also noted that, more important than the scholarly criticism of the rule itself, "experience showed more and more clearly the unfairness and inequity of the impact rule." *Id.*

53. *Id.*

54. *Id.*

that, although the "impact rule" was based on valid policy considerations, it was also important policy that "difficulty of proof should not bar the plaintiff from the opportunity of attempting to convince the trier of fact of the truth of her claim."[55]

The court found that the fields of medicine and psychology had reached a point where the advances and developments in psychiatric tests and the refinement of diagnostic techniques made the certainty and existence of severe emotional distress and other psychological issues much easier to diagnose.[56] Because these problems became easier to diagnose, older policy considerations guarding against a flood of fraudulent lawsuits seemed less important.[57] Along with the advancements of diagnostic techniques, the court was adamant that "the judiciary must find ways to solve problems, not avoid them."[58] It was also very important not to undermine the important policy allowing people to recover for the actual damages imposed on them due to the negligence of others.[59]

Along with the policy considerations, the court found the approach taken in the Restatement (Second) of Torts,[60] which relies heavily on foreseeability, to be persuasive.[61] The Restatement's approach concludes that an actor is liable for unintentionally causing emotional distress if he should have realized that his conduct created an unacceptable risk of causing emotional distress and that the possible distress could result in illness or bodily harm.[62] This change in public policy seemed natural to the court, because over time it was "proving difficult . . . to separate physical injury from . . . purely mental and emotional [injury]."[63]

For the foregoing reasons, the Supreme Court of Missouri, in *Bass*, found that it was time to overturn the impact rule and announce a new rule for recovery based upon negligent infliction of emotional distress.[64] The court adopted a position that allows a plaintiff to recover for emotional distress, provided that "(1) the defendant should have realized that his conduct involved an unreasonable risk of causing the distress; and (2) the emotional distress or mental injury [is] medically diagnosable and [is] of sufficient severity so as to be medically significant."[65]

However, the *Bass* court explicitly avoided the question of whether recovery was allowed when a plaintiff suffered emotional distress upon observ-

55. *Id.* at 770 (quoting Niederman v. Brodsky, 261 A.2d 84, 87 (Pa. 1970)).
56. *Id.* at 769.
57. *Id.*
58. *Id.* at 770.
59. *Id.*
60. RESTATEMENT (SECOND) OF TORTS § 313(1) (1965).
61. *See Bass*, 646 S.W.2d at 770.
62. RESTATEMENT (SECOND) OF TORTS § 313(1).
63. *Bass*, 646 S.W.2d at 771.
64. *Id.* at 772-73.
65. *Id.*

ing death or injury to a third party, so-called "bystander" recovery.[66] This question surrounding bystander recovery remained unanswered in Missouri for seven years until the Supreme Court of Missouri, in *Asaro v. Cardinal Glennon Memorial Hospital*,[67] finally took up the issue.[68]

Asaro was a case involving doctors who were negligent in performing surgery.[69] These doctors also failed to uncover the mistakes of their negligent operation, which involved attempting to fix a heart condition in a five-year-old child.[70] The mother of the child claimed that, because of the defendants' actions, which allegedly constituted malpractice against her son, she suffered severe emotional distress and sought damages for her emotional distress.[71] After the trial court dismissed her complaint for failure to state a cause of action, the Supreme Court of Missouri granted transfer to determine how to fill the gap created by *Bass* and the availability of recovery for bystanders.[72]

The court found that the decision in *Bass* paralleled the Restatement (Second) of Torts and thus used the Restatement as a starting point.[73] The section of the Restatement relied on by the court only applies to negligently inflicted emotional distress, which stems from experiencing harm or peril to a third person if "the negligence of the actor has otherwise created an unreasonable risk of bodily harm" to the plaintiff.[74] Because there was never an "unreasonable risk of bodily harm" to Ms. Asaro, the analysis in *Bass* did not cover the claim asserted in the case.[75] Since the recovery sought was not covered under *Bass*, the court found that the issue was a question of first impression for Missouri courts.[76] The court determined that there were two alternative approaches it could take: the Dillon/Thing[77] test adopted in California, or the zone of danger[78] test used in New York.[79]

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66. *Id.* at 770 n.3. The footnote states that the court will not digress into the "extensive debate" of the types of recovery allowed in bystander cases where the emotional distress stems from the plaintiff viewing injury to a third party. *Id.*

67. 799 S.W.2d 595 (Mo. 1990) (en banc).

68. *Id.* at 597-98.

69. *Id.* at 596-97.

70. *Id.* at 597.

71. *Id.* at 596.

72. *Id.* at 596-97.

73. *Id.* at 597-98. See *supra* notes 61-63 and accompanying text for a discussion of the Restatement's treatment of this issue.

74. *Asaro*, 799 S.W.2d at 597 (quoting RESTATEMENT (SECOND) OF TORTS § 313(2) (1965)).

75. *Id.* at 597-98.

76. *Id.*

77. Thing v. La Chusa, 771 P.2d 814, 829-30 (Cal. 1989) (in bank).

78. *See* Tobin v. Grossman, 249 N.E.2d 419, 423 (N.Y. 1969). "The zone of danger rule is applied in the majority of jurisdictions." Thomas C. Zaret, Comment, *Negligent Infliction of Emotional Distress: Reconciling the Bystander and Direct Victim Causes of Action*, 18 U.S.F. L. REV. 145, 149 (1983).

79. *Asaro*, 799 S.W.2d at 598.

The Dillon/Thing test emerged from a compilation of two cases in California.[80] Both cases involved mothers who saw their children killed at the hands of negligent drivers.[81] After the developments in *Dillon* and *Thing*, California allowed a plaintiff to recover for the negligent infliction of emotional distress from viewing an injury to a third person caused by the negligence of another only if (1) the plaintiff is closely related to the victim; (2) the plaintiff is present at the scene of the injury-producing event at the time it occurs and is aware at that time that it is causing injury to the victim; and (3) the plaintiff suffers severe emotional distress as a result of viewing the injury to the third person and the defendant should have anticipated the emotional distress because it is not an abnormal response to the circumstances.[82] At the same time, New York began pushing for a different test.

In the case of *Tobin v. Grossman*, New York adopted the zone of danger test.[83] The zone of danger rule only allows recovery for the negligent infliction of emotional distress from viewing injury to a third person if the plaintiff was himself "threatened with bodily harm in consequence of the defendant's negligence."[84]

After considering both tests carefully, the *Asaro* court concluded that the zone of danger test was more favorable and applied the zone of danger test to the facts of the case.[85] This test was preferred because it did not feature the limitation that a plaintiff must be an eyewitness to the injury-producing event, a requirement of the Dillon/Thing test that the *Asaro* court did not feel was a "rational practical boundary for liability."[86] Using the New York zone of danger test as a base, the court explicitly held that in Missouri a plaintiff may only bring a cause of action for negligent infliction of emotional distress which arises from injury to a third person if three specific criteria are met: (1) the defendant should have realized that the conduct in which he was engaging "involved an unreasonable risk to the plaintiff;" (2) the plaintiff must be present at the time and in the location in which the injury took place; and (3) the plaintiff must be in "the zone of danger, i.e., placed in a reasonable fear of physical injury to his or her own person."[87]

Because these cases laid out the standards for recovery for direct victims and bystanders but failed to note the distinction between the two, the court in *Jarrett v. Jones* was forced to revisit the issue to determine this distinction.

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80. *See Thing*, 771 P.2d 814; Dillon v. Legg, 441 P.2d 912 (Cal. 1968) (in bank).
81. *Thing*, 771 P.2d at 815, 819.
82. *Id.* at 829-30.
83. *See* 249 N.E.2d 419.
84. Bovsun v. Sanperi, 461 N.E.2d 843, 847 (N.Y. 1984).
85. *Asaro*, 799 S.W.2d at 599-600.
86. *Id.* at 599 (quoting *Tobin*, 249 N.E.2d at 424).
87. *Id.*

IV. INSTANT DECISION

A. The Majority Opinion

The majority in *Jarrett v. Jones* focused on two questions before reversing the grant of summary judgment in favor of Mr. Jones.[88] First, in seeking recovery for emotional distress stemming from viewing the Jones' daughter, should Mr. Jarrett seek recovery as a bystander or a direct victim?[89] After the court decided that the direct-victim standard for recovery applied, it then turned to the question of whether the facts of the case were such that summary judgment in favor of Mr. Jones was inappropriate.[90]

1. Standard of Recovery for Emotional Distress: Direct Victim v. Bystander

The court noted that the standard of recovery for emotional distress arising from negligence claims in Missouri stems from one of two decisions.[91] The court had to choose between the decisions in *Bass*, laying out the standard of recovery for emotional distress for direct victims,[92] and *Asaro*, laying out the standard of recovery for emotional distress for bystanders.[93] The court noted that, since neither *Bass* nor *Asaro* expressly identified the crucial distinction between direct victims and bystanders, the issue which arose in this case was a matter of first impression for Missouri, and thus it would need to be decided before the standards in *Bass* or *Asaro* could be applied.[94]

The court began its analysis by noting the distinction between a direct victim and a bystander.[95] A direct victim was defined as one who is "directly involved in the accident whose emotional distress is either caused by fear for [his] own safety or caused by the suffering of another."[96] In contrast, a bystander was defined as one who is "not directly involved in the accident, but whose emotional distress is caused solely by observing acts that result in injury to a third party, rather than from the plaintiff's own personal involve-

88. Jarrett v. Jones, 258 S.W.3d 442, 444 (Mo. 2008) (en banc).

89. *Id.*

90. *Id.* at 448.

91. *Id.* at 445-46.

92. Bass v. Nooney Co., 646 S.W.2d 765, 772-73 (Mo. 1983) (en banc). For a discussion of *Bass*, see *supra* notes 46-66 and accompanying text.

93. Asaro v. Cardinal Glennon Mem'l Hosp., 799 S.W.2d 595, 599-600 (Mo. 1990) (en banc). When the court in *Asaro* discussed bystander recovery, it answered the question "[m]ay a plaintiff recover for emotional distress resulting solely from observing injury to a third party caused by a defendant's negligence?" *Id.* at 598.

94. *Jarrett*, 258 S.W.3d at 445-46.

95. *Id.* at 445-46.

96. *Id.* at 446 (citing Kraszewski v. Baptist Med. Ctr. of Okla., 916 P.2d 241, 246 (Okla. 1996)).

ment."[97] While the court realized that it could be possible to have a plaintiff suffer some emotional distress as a direct victim and some as a bystander, the court found this inapplicable to the current case.[98] The court instead chose to focus on the idea that "where a direct victim seeks damages for emotional distress, the more restrictive standards for bystander recovery are inapplicable to any part of his claim."[99]

The majority made it clear from the outset that it believed *Asaro* expanded the liability for negligently inflicted emotional distress by allowing recovery for bystanders and in no way limited the scope of recovery for direct victims.[100] In making this assertion, the court recognized that the additional proof elements required for bystander recovery in *Asaro* only applied to situations in which *Bass* did not apply.[101] The court found that *Bass* did in fact apply in this case, preventing the need for an *Asaro*-type analysis, because Mr. Jarrett had "direct involvement," and thus his injuries were inseparable from the accident itself.[102]

The court relied heavily on Mr. Jarrett's admissions in determining that the "grief and distress Mr. Jarrett experienced were a result of his participation in the accident . . . not simply from viewing [Mr. Jones' daughter's] body."[103] Although Mr. Jarrett was suing for emotional damages that originated from viewing a third party's death, "his role was not that of a passive, shocked witness," and his mental and emotional injuries were linked to his direct involvement in the accident.[104] The majority announced that Mr. Jarrett's act of exiting his truck to check on the patrons in the other vehicle in no way rendered him merely a bystander at the time he viewed the "carnage" of the wreck, including the body of the little girl.[105]

The majority expanded the direct-victim concept to include plaintiffs who suffer emotional distress when observing an injury or a death to a third party, as long as it stemmed from an event in which the plaintiff was in-

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97. *Id.* (citing *Kraszewski*, 916 P.2d at 246; BLACK'S LAW DICTIONARY 214 (8th ed. 2004)).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* When *Bass* does not apply strictly, the plaintiff must show, in addition to the requirements of *Bass*, that he or she was in a "zone of danger" in order to recover. *See* Asaro v. Cardinal Glennon Mem'l Hosp., 799 S.W.2d 595, 596 (Mo. 1990) (en banc).

102. *Jarrett*, 258 S.W.3d at 447-48.

103. *Id.* at 447. Mr. Jarrett admitted that "[t]he worst image for plaintiff was the baby lying in the mangled car" and "[p]laintiff experienced the paradox of knowing he had no responsibility in her death and wanting her to forgive him at the same time." *Id.* (internal quotations omitted).

104. *Id.*

105. *Id.* at 447-48. The court found that the "feeling[s of] grief over [Mr. Jones' daughter's] death are inseparable components of the emotional distress he suffered as a result of the whole traumatic event, caused by Mr. Jones' negligence." *Id.* at 448.

volved.[106] Because of this holding, Mr. Jarrett could seek damages as a direct victim, and the court could consider if the grant of summary judgment for Mr. Jones was appropriate.[107]

2. Appropriateness of Summary Judgment

Because the court determined Mr. Jarrett was a direct victim, the court noted that, in order to recover for emotional distress, Mr. Jarrett only needed to prove "(1) the defendant should have realized that his conduct involved an unreasonable risk of causing the distress and (2) the emotional distress or mental injury [was] medically diagnosable and . . . of sufficient severity so as to be medically significant."[108] According to the majority, when there is an accident created by the negligence of the defendant and the plaintiff is directly involved, the defendant is liable for the foreseeable emotional distress which stems from the accident.[109]

The court determined that Mr. Jones owed a duty to operate his vehicle with a high degree of care.[110] Since the Missouri Highway Patrol stated the accident happened because Mr. Jones was driving too fast for the weather conditions, failed to maintain his rear tires, and over-steered his vehicle when it began to hydroplane, it was determined that the evidence supported a finding that Mr. Jones was not operating his vehicle with a high degree of care.[111] The court also found that Mr. Jarrett presented sufficient facts to establish that his condition was serious enough to meet the second prong of the recovery test by providing evidence that he was treated by his physician and two other social workers for his post-traumatic stress disorder.[112] The court also found that Mr. Jarrett presented enough facts to show that the negligent operation of a motor vehicle could result in an accident involving death or serious injury, which could cause emotional distress in others.[113]

Under the theory of direct-victim recovery, the court found that there were sufficient facts that, if true, could prove the elements required for recovery, and therefore the grant of summary judgment was inappropriate.[114] Since it was determined that Mr. Jones was a direct victim, the court reversed the decisions of the lower courts on the basis that they misapplied the law by

106. *Id.*
107. *Id.*
108. *Id.* (citing Bass v. Nooney Co., 646 S.W.2d 765, 772-73 (Mo. 1983) (en banc)).
109. *Id.* at 446.
110. *Id.* at 448.
111. *Id.* at 448-49.
112. *Id.* at 449.
113. *Id.*
114. *Id.*

using the standard for bystander recovery and remanded the case for consideration under the direct-victim theory of recovery.[115]

B. The Dissent

In his dissenting opinion, Judge Limbaugh began by noting "the sad irony that the party to this action who is most subject to emotional distress – the father who lost his child – is the party being sued for having caused emotional distress to a stranger who merely saw the child."[116] Judge Limbaugh believed that the majority misread and misapplied both *Bass* and *Asaro*.[117]

His first main contention was that *Asaro* is not an expansion of *Bass*, as the majority found, but rather a limitation of *Bass*.[118] He stated that the holding of *Asaro* "is unequivocal and unqualified: '[A] plaintiff may recover for emotional distress resulting from observing physical injury to a third person only if the plaintiff is within the zone of danger.'"[119] In the dissenting opinion, Judge Limbaugh indicated that *Asaro* seemed to preclude the recovery that the court granted in this case.[120] Judge Limbaugh stated that *Asaro* does not require that the plaintiff must not be involved in the accident, but only that the plaintiff's injuries stem from viewing harm to a third party.[121]

Judge Limbaugh pointed out that the majority could only avoid the zone of danger test if it classified the entire situation as one event and classified the plaintiff as a direct victim.[122] In recognizing this, the dissenting judge took issue with the majority's determination that the accident and the viewing of the body were tied together.[123] His disagreement stemmed from Mr. Jarrett's concession that "he did not suffer emotional distress from the accident itself, but that the sole cause of his emotional distress was the viewing of the child's body after the accident."[124] Because the plaintiff admitted that his emotional distress was not caused by the accident, and the time at which he viewed the body was clearly after the accident, Judge Limbaugh believed it was inappropriate to consider him a direct victim at the time the emotional distress occurred.[125] He found there to be a temporal disparity which precluded Mr. Jones from being a direct victim because, although he was a participant in the accident, he was not injured and, at the time he observed the body, the acci-

115. *Id.* at 449-50.
116. *Id.* (Limbaugh, J., dissenting).
117. *Id.*
118. *Id.*
119. *Id.* at 451 (citing Asaro v. Cardinal Glennon Mem'l Hosp., 799 S.W.2d 595 (Mo. 1990) (en banc)).
120. *Id.*
121. *Id.*
122. *Id.* at 450-51.
123. *Id.* at 451.
124. *Id.*
125. *Id.*

dent was over.[126] Judge Limbaugh "[was] at a loss" to understand how the emotional distress was inseparable from the accident when the plaintiff himself stated that it was separate.[127]

The dissenter's final disagreement with the majority opinion stemmed from the majority's analysis of *Asaro*.[128] The dissenter wondered how a mother could be denied recovery for the emotional distress stemming from negligent care of her child, as in *Asaro*, but another parent, after losing a child, could be forced to pay a stranger who happened to see his child's dead body.[129] For the foregoing reasons, Judge Limbaugh dissented.[130]

V. COMMENT

The majority in *Jarrett* aimed to provide some clarity to the distinction between direct victims and bystanders for the purposes of recovery for the negligent infliction of emotional distress.[131] This distinction, which had not been made under Missouri law, is crucial, because the standards of recovery for the negligent infliction of emotional distress for direct victims and bystanders are vastly different.[132] While the majority laid out clear definitions of a direct victim and a bystander, it refused to delve into the practical difficulties of ascertaining exactly when a direct victim shifts to a bystander under the two definitions.[133] The closest the court came to providing some guidance on this point was when it said that "a plaintiff's direct involvement in an accident influences the plaintiff's emotional distress because the plaintiff's mental injuries are generally inseparable from the plaintiff's role in the event."[134] This limited guidance ultimately created more questions than it answered by leaving a large class of victims entitled to recovery it might not deserve.[135]

While the definitions provided for a direct victim and a bystander are easy to apply in clear-cut cases,[136] when an "artificial distinction," which the

126. *Id.*
127. *Id.*
128. *Id.* at 452.
129. *Id.*
130. *Id.*
131. *See id.* at 446 (majority opinion).
132. For the requirements for direct-victim recovery see *supra* note 65 and accompanying text. For the requirements of bystander recovery see *supra* notes 87 and accompanying text.
133. *See Jarrett*, 258 S.W.3d at 445-48.
134. *Id.* at 447.
135. *Id.* at 452 (Limbaugh, J., dissenting).
136. These would include cases where a line need not be drawn, such as a mother watching her child get run over by a car clearly as a bystander, or a driver in an automobile accident watching the passenger being thrown out of the seat next to him during an automobile accident. The mother and driver in these situations clearly would be direct victims.

court would rather ignore,[137] must be made, the definitions become hazy.[138] At some point, even someone directly involved in an accident due to the negligence of another must lose his or her direct-victim status.[139] Despite this fact, the majority seems content to support the idea that, as long as the plaintiff is a direct victim in an accident, there is nothing stopping him from recovering for the negligent infliction of emotional distress, even after the accident is over.[140] This negligent infliction of emotional distress extends to any distress caused by viewing injuries to a third party, so long as the plaintiff is involved in the same accident.[141] The first question which must be answered, and was ignored in the majority opinion, is at what point does status as a direct victim lapse? Is it immediately after the crash? Once the police arrive? In the ambulance? At the hospital?

The majority never addressed this timing issue, but, based on its holding that a direct victim can recover for any foreseeable emotional distress,[142] it seemed to indicate that this direct-victim status would stretch to any foreseeable emotional distress.[143] Imagine if Mr. Jarrett had exited his vehicle to find all of the members of the Jones' vehicle alive after the accident. Then, while waiting for the ambulance, Mr. Jones attempted to remove his daughter from the car, at which time something happened and she was killed. If Mr. Jarrett witnessed her death at this point, would he still fall under the standard of recovery for a direct victim, or would he now be required to meet the standard of recovery for a bystander? Under the definition put forward by the majority, he would still be a direct victim because the injury to the third party stems out of the same accident.[144] While it would seem absurd to hold Mr.

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137. The majority refuses to create an "artificial distinction" as to when a direct victim becomes a bystander due to the practical difficulties involved with making such a distinction. *Jarrett*, 258 S.W.3d at 447 n.4.

138. This is the biggest problem with the majority opinion in *Jarrett*. The majority clearly decides the easy issue, the definition of a direct victim and a bystander, but ignores the key issue in the case, the practical distinction of when direct-victim status ceases and bystander status begins.

139. This stems out of logical necessity. It would be ridiculous to allow a victim to recover for any far-fetched, yet foreseeable, injury after an accident. For example, it is foreseeable that someone involved in a car accident will need medical attention and go to a hospital. If a ceiling tile falls and hits the victim on the head at the hospital, he cannot recover from whoever caused the wreck simply because of the causal chain that led him to the injury. *See* Palsgraf v. Long Island R.R. Co., 248 N.Y. 339 (1928).

140. *Jarrett*, 258 S.W.3d at 448.

141. *Id.*

142. *Id.* at 449.

143. All that is required by the majority is that the plaintiff is involved in the same accident as the third party who is injured or has died. *Id.* at 448. *See also* Bass v. Nooney Co., 646 S.W.2d 765, 768 (Mo. 1983) (en banc).

144. *See Jarrett*, 258 S.W.3d at 448.

Jones liable in a circumstance such as the one laid out above, it is the proper result under *Jarrett.*

In order to parse out the distinction between direct victims and bystanders, and to better understand how to make the determination of when a direct victim ceases to be a direct victim and becomes something else, perhaps the court should have started with what it means to be a victim. A victim is "one that is acted on and [usually] adversely affected by a force or agent."[145] Since an outside force adversely affected Mr. Jarrett, he was indeed a victim of the car accident.[146] However, when Mr. Jarrett made the decision to get out of his truck and walk to the Jones' car, which was an action of independent choice and judgment not being forced upon him, Mr. Jarrett was no longer being adversely affected by a force; he was being affected by his own choice – his own judgment. At this point, Mr. Jarrett was no longer a victim; he became something else. Regardless of what he became, at this point, Mr. Jarrett could no longer be a victim because he was controlling his own actions and was no longer being adversely affected by the actions of Mr. Jones, because those actions had come to an end. Mr. Jarrett undoubtedly remained a victim of the accident, but at the time he took the affirmative steps to walk to the Jones' car, he ceased being a victim. Since Mr. Jarrett was no longer a victim, it is a stretch to contend that he is still the direct victim envisioned by the majority.

Another issue arising out of the failure of the majority to differentiate between these two positions is the involvement necessary to allow a person to be granted direct-victim status in an accident. Imagine the same accident, but add in another vehicle. This third driver comes upon the scene of the accident not paying attention. After trying to stop, the driver lightly taps the back of Mr. Jarrett's truck and suffers very little damage to his vehicle and absolutely no injuries. By the logic of the majority, this third person is also a direct victim of the accident.[147] So if this third party were to leave his vehicle and also view the body of Mr. Jones' daughter, could he too recover for the emotional distress which ensues? I fail to see the distinction between an uninjured, minor participant in the accident and a bystander who simply stops his car because he sees an accident and walks up to the car in much the same way. The difference provided by the majority is that the minor participant recovers and the bystander does not.

I am not the only one concerned about these scenarios. In his dissent, Judge Limbaugh worried about equally absurd scenarios.[148] His concern stemmed from the odd result that occurs when comparing *Asaro* and *Jarrett* side-by-side. In *Asaro*, a mother suffered from emotional distress due to the

145. Merriam-Webster Dictionary Online, http://www.merriam-webster.com/dictionary/victim (last visited May 28, 2009).

146. *Jarrett*, 258 S.W.3d at 443.

147. *See id.* at 448.

148. *Id.* at 452 (Limbaugh, J., dissenting).

negligent care of her child while in the hospital.[149] While the court realized that she was "intimately involved with her son's treatment," it forbid her from recovering, saying that "[her] understandable distress follow[ed] solely from seeing the harm and suffering endured by her young son . . . [and she was not within] the zone of danger standard . . . adopt[ed]. . . ."[150] However, in *Jarrett*, Mr. Jarrett, a total stranger, was allowed to seek recovery for witnessing the harm and suffering endured not by his child, but by Mr. Jones' child. The result seems grossly inadequate, allowing a stranger to recover when a mother cannot.

Even if we were to say that Mr. Jarrett was a direct victim of the accident and apply the foreseeability test[151] to determine recovery under *Bass*, why should this same foreseeability not apply to Mr. Jarrett? The first part of the test in *Bass* requires only that the person realize that the conduct involved an unreasonable risk of causing the distress.[152] It would be hard to dispute the foreseeability of viewing an injured or dead person when walking up to a vehicle after an accident. If we hold Mr. Jones responsible for the foreseeable consequences of his actions, isn't it only fair that we also hold Mr. Jarrett responsible for the foreseeable consequences of his actions as well? Missouri is a comparative fault state,[153] and thus a jury should hear whether Mr. Jarrett was responsible and partially at fault for his emotional distress by walking up to a vehicle when there was a high probability of a person being injured or even killed. If we hold Mr. Jones liable for his negligence, it is only fair to hold Mr. Jarrett liable for his as well.

The distinction made between direct victims and bystanders is not in itself faulty. However, the failure of the court to clearly define this distinction can and will lead to future problems in the application of the legal standard to be applied in cases involving the negligent infliction of emotional distress. By allowing plaintiffs who are directly involved in accidents to recover for injuries to third parties that are viewed *after* the accident, negligent actors will be punished beyond their culpability.

Perhaps the solution would be to add an additional standard of recovery alongside the bystander and direct-victim standards. A third category ought to be added, and it should envision a person who is directly involved in an accident caused by the negligence of another but who "takes some independent action" that perpetuates the injury to himself. A category such as this would treat the plaintiff as one who could be contributorily negligent, which is only fair because, if the plaintiff takes affirmative actions that the defendant has no power to control, it would be unfair to hold the defendant completely liable for those actions. This extra category would at least allow a

149. Asaro v. Cardinal Glennon Mem'l Hosp., 799 S.W.2d 595, 596 (Mo. 1990) (en banc).

150. *Jarrett*, 258 S.W.3d at 452 (quoting *Asaro*, 799 S.W.2d at 600).

151. *See supra* notes 63-64 and accompanying text.

152. Bass v. Nooney Co., 646 S.W.2d 765, 770 (Mo. 1983) (en banc).

153. *See* Gustafson v. Benda, 661 S.W.2d 11, 15-16 (Mo. 1983) (en banc).

jury to hear the case and make a fair determination of the responsibility for, and the extent of, the damages suffered by the plaintiff.

This type of hybrid category would have made much more sense in the case at hand. Mr. Jones was negligent in the operation of his vehicle, but, instead of being punished for this negligence, he was hit two additional times: once by the death of his daughter and once more by a stranger capitalizing off of it. While Mr. Jones was culpable in the accident, he should not be punished beyond his culpability, and the courts should try to avoid results as bizarre as the result in this case.

VI. CONCLUSION

While the court in *Jarrett* tried to introduce a distinction into the law to clear up a question that was left open by *Bass* and *Asaro*, it succeeded only in defining direct victims and bystanders without providing any clue as to the distinction between them. The black and white definitions of direct victim and bystander are now clear in Missouri. However, a new question remains: to what extent does a plaintiff remain a direct victim when he is involved in an accident that produces emotional distress? If we only use the definition of direct victim laid out by the court, the doors to recovery seem wide open, and any person involved in an accident, in even the smallest way, can claim emotional distress for even the most ridiculous of reasons. The Supreme Court of Missouri in *Jarrett* seems to have made a confusing situation even more confusing, and clarification will eventually be needed again.

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