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HEALTH LAW

# Bystander Emotional Distress Claims Permitted in Med-Mal Suits

## Supreme Court elaborates on new, seemingly restrictive standard

By JEFFREY R. BABBIN

Medical malpractice claims are often accompanied by emotional distress claims asserted by the patient's family members. In *Maloney v. Conroy,* 208 Conn. 392 (1988), the Connecticut Supreme Court held that "bystanders" to medical malpractice may not recover for their own emotional distress. When *Maloney* was decided, the Supreme Court had not yet recognized bystander emotional distress claims in any context, but later did so in *Clohessy v. Bachelor,* 237 Conn. 31 (1996). *Clohessy* permitted claims by a child's mother and brother for emotional injuries from the shock of witnessing the child's fatal injuries from a negligently driven automobile. State trial courts have since split over whether *Clohessy* overrode *Maloney's* holding in a medical malpractice case. The Supreme Court has now resolved the issue, recognizing a claim of bystander emotional distress from witnessing medical malpractice. *See Squeo v. Norwalk Hospital Association,* No. SC 19283, 316 Conn. 558 (April 28, 2015).

In *Squeo*, the plaintiffs' son, age 29, had a history of mental illness and lived at home. In August 2007, he was hospitalized for an emergency psychiatric examination after expressing suicidal thoughts and was evaluated by an advanced practice registered nurse. The nurse left a telephone message for the plaintiffs the morning after admission, saying that the son was no longer a danger to himself or others and would be discharged. The son walked home and hung himself from a tree with an electrical cord. The parents did not know of the discharge until 35 minutes later, when they found the son in their yard. They cut the cord and performed CPR, but their son soon died from a brain injury. The estate sued the hospital and nurse for malpractice, and the parents added their own claims for bystander emotional distress. The trial court granted the defendants' summary judgment motion on the bystander claims, and the parents appealed.

In its recently issued decision, the Supreme Court affirmed the summary judgment, but only after affirmatively holding that there is no per se bar to bystander emotional distress claims in a medical setting. The court ruled that *Clohessy's* recognition of bystander claims was not limited to particular types of negligence claims and could apply to claims against health care providers. *Maloney* had expressed policy concerns about financial burdens on health care providers, the curtailing of visitation rights, and interference with the doctor-patient relationship from addressing the needs and concerns of family members. But the court stated in Squeo that these concerns can be accommodated by applying *Clohessy's* limitations on the bystander cause of action to the medical context in a way that will avoid "the parade

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of horribles" envisioned by the defendants.

Specifically, the court is recognizing bystander claims "only in those rare cases in which the medical mistake is the result of gross negligence such that it would be readily apparent and independently traumatizing to a lay observer." This limitation, according to the court, addresses the problem that (unlike in the *Clohessy* automobile context) family members typically cannot discern when difficult, distressing medical decisions and procedures they might witness are acts of negligence. This accords with the rule dispensing with expert testimony in cases of gross medical negligence readily apparent to the layperson. The court cited examples of cases from other states where a patient rolled off an ambulance cot during transport, came out of a vascular operation with burns on unrelated parts of the body, was blatantly ignored when symptoms required immediate medical attention, or had a healthy limb mistakenly amputated.

The court elaborated on its new standard, allowing "a bystander to medical malpractice [to] recover for the severe emotional distress that he or she suffers as a direct result of contemporaneously observing gross professional negligence such that the bystander is aware, at the time, not only that the defendant's conduct is improper but also that it will likely result in the death of or serious injury to the primary victim."

Whether this limitation is as restrictive as the court purports to make it remains to be seen. In *Squeo* itself, the court found that the parents' bystander claims *satisfied* this standard where the parents "alleged that the defendants prematurely and improperly discharged Stephen, a patient who was imminently suicidal and who had a long-standing psychiatric history that was known to the defendants. We are unable to conclude, as a matter of law, that a hospital that discharges a potentially suicidal patient under the circumstances alleged could not have demonstrated gross negligence in so doing, when the patient then proceeded to take his own life shortly after discharge."

The court, however, did not decide whether the parents—unaware of the discharge until 35 minutes had elapsed—had "contemporaneously observ[ed]" gross professional negligence. The court said in a footnote that the defendants had not raised this issue in their summary judgment papers, but the parents would still ultimately have to demonstrate why "the relatively long period of time that had elapsed from the alleged medical negligence to the discovery of the incident" does not bar the bystander claims.

The court nevertheless proceeded to emphasize that bystander plaintiffs must satisfy *Clohessy's* "four conditions," namely that: (1) the bystander is closely related to the primary victim of the accident or injury; (2) the bystander's emotional distress is caused by the contemporaneous sensory perception of the event or conduct that causes the accident or injury, or by arriving on the scene soon thereafter and before substantial change has occurred in the primary victim's condition or location; (3) the primary victim dies or sustains serious physical injury; and (4) the bystander experiences serious emotional distress as a result.

The parents in *Squeo* fell short on the fourth factor, despite what the court referred to as the inherent distress felt by parents in these circumstances.

The court adopted a middle ground from the various tests that states nationally have adopted for the "serious emotional distress" requirement. It rejected the requirement by some states that the distress be so serious that it also caused a physical ailment. But it also rejected some states' test that the bystander suffer only some degree of temporary shock, fright or comparable emotional distress. Instead, it adopted the test used in other states that the bystander suffer emotional injuries that are disabling or that render the bystander unable to cope with the challenges of daily life. In other words, while a formal psychiatric diagnosis is not required, there must be a disruption in the bystander's emotional state or behavior that is dysfunctional within the meaning of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), demonstrated by significant distress or disability in social, occupational or other important activities.

The court imposed this requirement to distinguish the normal grief associated with a family member's death or injury from the additional injury caused by witnessing the event. The court emphasized the need for proof of psychological injuries that are both severe and debilitating, impairing the ability to cope with life's daily routines and demands.

The summary judgment record showed that the parents in *Squeo* had undergone a minimal amount of counseling, taken sleeping pills for a few days but no other medications for emotional distress, and been continuously employed in demanding occupations with no lost wages. The father wanted to pursue counseling, but his "tight schedule" did not afford him the time. The court resolved that this evidence, as a matter of law, negated any allegation that the parents' emotional distress was so extreme as to render them unable to navigate the challenges of daily life. The court did say that the father's screams at the sight of his son and the mother's testimony of nightmares and bad images could present "a close question," but that evidence, "standing alone," did not suffice to satisfy the standard for severe emotional distress. The court therefore affirmed the defendants' summary judgment on the bystander claims.

Now that the Connecticut Supreme Court has opened the door to bystander emotional distress claims in medical negligence cases, it may be years before the implications of the decision are known. Will the cause of action be as limited as the court paints it, or will trial judges find sufficient evidence to let claims go to trial? The Supreme Court has drawn a detailed road map for enterprising plaintiffs counsel to survive summary judgment if they can fit some evidence into the evidentiary buckets the court has created. But it may also be that the gross negligence, contemporaneous perception and severe emotional injury requirements will defeat most attempts to expand health care liability to patients' family members. It also must be remembered that the bystander claim is derivative, viable only if the primary victim can prove that professional negligence caused that victim's serious injuries or death. ■