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New York Official Reports

24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554

Philomena Tobin, as Natural Parent and Guardian of Gregory Tobin, an Infant, et al., Appellants,
v.
Stuart Grossman, Respondent.

Court of Appeals of New York
Argued January 23, 1969;
decided April 24, 1969.

CITE TITLE AS: Tobin v Grossman

SUMMARY

Appeal from so much of an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered July 18, 1968, as (1) reversed, on the law and the facts, an order of the Supreme Court at Special Term (Louis G. Bruhn, J.; opinion 55 Misc 2d 304), entered in Albany County, denying a motion to dismiss the third cause of action in plaintiffs' complaint and (2) dismissed the third cause of action.

OPINION OF THE COURT

Breitel, J.

The issue is whether a mother may recover against a tort-feasor for her own mental and physical injuries caused by shock and fear for her two-year-old child who suffered serious injuries in an automobile accident. The appeal rises on the pleading alone which alleges that the accident occurred in the mother's full view and presence. In fact, the examination before trial taken of the mother, and somehow made a part of the record, reveals that the accident did not occur in the mother's presence, but while she was nearby and heard the screech of automobile brakes. She immediately went to the scene, a few feet away, and saw her injured child lying on the ground.

It is concluded that under the well-established applicable doctrines no cause of action lies for unintended harm sustained by one, solely as a result of injuries inflicted directly upon another, regardless of the relationship and whether the one was an eyewitness to the incident which resulted in the direct injuries. Consequently, the order dismissing such a cause of action was proper and should be affirmed.

Until 1968 no upper court case in this country had held that a mother could recover for her own injuries due to shock and fear for her child as a result of an accident occurring in her view . . . . In 1968 the Supreme Court of California, by a closely divided court, overruled its five-year old holding to contrary effect, also by a closely divided court of somewhat ***612** different composition, and permitted recovery but only where the accident had occurred in the mother's presence (*Dillon v. Legg*, 68 Cal. 2d 728, overruling *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295). No American case has held that a mother can recover for her own injuries due to shock and fear for her child as a result of an accident which she did not view. . . .

Plaintiff mother's cause of action was sustained at Special Term on motion by defendant to dismiss for insufficiency the third and relevant cause of action (55 Misc 2d 304). The Appellate Division unanimously reversed and dismissed the cause of action (30 A D 2d 229).

Taking the allegations as true, as one must, on a motion addressed to the pleadings (*Kober v. Kober*, 16 N Y 2d 191, 193), the following appears: On September 18, 1966, defendant, negligently operating his automobile, struck plaintiff's two-year-old son, Gregory, causing severe injuries, including cerebral damage, to him, and emotional and physical injuries to plaintiff, in whose full view and presence the accident occurred. Of course, as already noted, the pretrial examination of the mother reveals that in fact the mother was inside a neighbor's home, outside of which the momentarily unattended child was struck, and she did not see the accident. But she did hear the screech of brakes, noted the absence of her child, went instantly outside, and saw him lying on the ground. . . .

The problem presented is double-faceted. The first is the recoverability for injuries sustained solely as a result of an initial mental or psychological impact, but with ensuing mental illness and physical injury. The second is the scope of duty to one who is not directly the victim of an

accident causing severe physical injury to a third person.

On the first facet, there is no longer any question. Since *Battalla v. State of New York* (10 N Y 2d 237) the rule is now settled that one may have a cause of action for injuries sustained although precipitated by a negligently induced mental trauma without physical impact.. . .

It is the second facet which presents both novelty and difficulty, namely, whether the concept of duty in tort should be extended to third persons, who do not sustain any physical impact in the accident or fear for their own safety. Unlike the problem in the first facet, there are no parallels. Its solution does not depend upon advances in medical science, namely, that mental traumatic causation can now be diagnosed almost as well as physical traumatic causation. The question is profounder than that, because there is now urged the creation of a new duty and therefore an entirely new cause of action. . . .

***615** The impact on a mother of a serious injury to her child of tender years is poignantly evident. This has always been so. Unlike the factors which have brought about most expanding tort concepts, here there are no new technological, economic, or social developments which have changed social and economic relationships and therefore no impetus for a corresponding legal recognition of such changes. Hence, a radical change in policy is required before one may recognize a cause of action in this case. . . .

The several factors most often considered in discussion of this problem are foreseeability of the injury, proliferation of claims, fraudulent claims, inconsistency of the zone of danger rule, unlimited liability, unduly burdensome liability, and the difficulty of circumscribing the area of liability. . . .

***617** Confronted with these considerations, the courts, for the most part, have refused to extend the duty of the negligent actor to cover the mother of the small child. . . .

***619** Beyond practical difficulties there is a limit to attaining essential justice in this area. While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree. The risks of indirect harm from the loss or injury of loved ones is pervasive and inevitably realized at one time or another. Only a very small part of that risk is brought about by the culpable acts of others. This is the risk of living and bearing children. It is enough that the law establishes liability in favor of those directly or intentionally harmed.

Accordingly, the order of the Appellate Division should be affirmed, without costs.

Chief Judge Fuld and Judges Burke, Scileppi, Bergan and Jasen concur with Judge Breitel; Judge Keating dissents and votes to reverse in a separate opinion.

Order affirmed.