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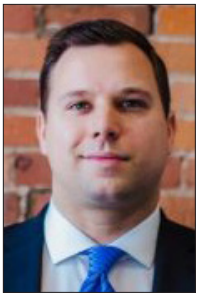
Insurance and Injury Corner: Expanding 'immediate family' in claims for negligent infliction of emotional distress



By DANIEL S. GALAN

Courts have often grappled with ever-evolving familial relationships in applying the law where relevant. A recent Court of Appeals decision involving negligent infliction of emotional distress illustrates the challenges associated with defining "immediate family" in the 21st century.

On Feb. 18, the Court of Appeals expanded the definition of "immediate family" as to claims for negligent infliction of emotion distress to include grandparents. (*Greene v Esplanade Venture Partnership*, 2021 WL 623832, *1 [2021]) A cause of action for negligent infliction of emotional distress allows a plaintiff who is "threatened with bodily harm [otherwise known as the zone-of-danger] in consequence of the defendant's negligence to recover for emotional distress flowing only from the viewing of the death or serious physical injury of a member of that person's immediate family." (*Greene*, 2021 WL 623832 at *1, citing *Bovsun v Sanperi*, 61 NY2d 219, 228 [1984] [emphasis added] [internal citations omitted])

Sadly, in *Greene*, a 2-year-old infant died shortly after being struck by debris falling from a building while with her grandmother. The infant decedent's mother and grandmother filed an action seeking damages (*id*). Shortly thereafter, an amended complaint was filed for negligence and wrongful death alleging that defendants were negligent with respect to the inspection of the building's facade (*id*). The decedent's grandmother later sought to assert a claim for negligent infliction of emotional distress through a motion for leave to amend the amended complaint (*id*).

The Supreme Court granted plaintiffs' motion in light of the "specific recognition of the custody rights of grandparents with respect to their grandchildren" and determined that the decedent's grandmother "should be considered an 'immediate family member' and afforded a right to recover for her emotional injuries caused by this tragic accident.'" (*Greene* 2021 WL 623832 at *2, citing *Greene v Esplanade Venture Partnership*, 2017 WL 5006606, *4 [Sup Ct, Kings County]) In this case, the decedent's grandmother "participated in [the decedent's] birthing process, helped to care for [the decedent] during the first few weeks of [the decedent's] life, and subsequently developed a 'powerful' 'emotional bond' with [the decedent]." (*Greene*, 2021 WL 623832 at *1) The Second Department reversed the Supreme Court and denied plaintiffs' motion to amend the amended complaint finding that *Bovsun* (61 NY2d at 233-234) "stands for the proposition that [only] spouses and their children are immediate family members." (*Greene v Esplanade Venture Partnership*, 172 AD3d 1013, 1015 [2d Dept 2019]) Additionally, the Second Department analogized *Greene* to *Trombetta v Conkling* (82 NY2d 549, 605 [1993]), where the Court of Appeals declined to allow the plaintiff-niece to assert a cause of action for negligent infliction of emotion distress despite the "significant emotional bond" between the plaintiff-niece and her deceased aunt. (*Greene*, 2021 WL 623832 at *2)

In examining the certified question of whether the Second Department's Order as to its denial of plaintiffs' motion to amend the amended complaint was properly made, the Court of Appeals reversed the Second Department following a careful analysis of zone-of-danger litigation over time. (*id* at *3) Citing a variety of legislation and cases outside of tort law involving an analysis of an individual's familial relationship to another, the Court of Appeals held that, while expressly declining to establish an "outer boundary for 'the immediate family' element of the zone of danger rule," "we simply conclude that a grandchild is within our understanding of what is meant by 'immediate family' … the relationship of grandparent and grandchild enjoys a 'special status' among familiar relationships, inclusion of grandparents in the common-law term 'immediate family' under these circumstances is more than warranted." (*id* at *6)

In a concurring opinion, Justice Rivera provides that *Greene* offered the Court of Appeals an opportunity to discard the limitation that a plaintiff within the zone-of-danger be the third-party's "immediate family" based on marriage and degrees of consanguinity and instead formulate a rule where "a person may recover for the emotional distress caused by perceiving the serious injury or death of any person with whom they shared a strong personal and loving bond." (*id* at *8) Further, Justice Rivera would have the majority expand the cause of action to include recovery regardless of relationship in order to eliminate the arbitrary requirement of marriage or consanguinity. (*id*)

As Justice Rivera aptly points out, "the majority's inclusion of grandparents and grandchildren within the definition of 'immediate family,' removes any rational ground for excluding other close bonds that are functional equivalents." (*id* at *12) Although the countervailing arguments often cite unlimited liability as a justification for adherence to easily defined familial relationships, "[i]t is the business of the

courts to make precedent where a wrong calls for redress, even if lawsuits must be multiplied." (*Prosser and Keeton*, Torts § 54 at 360 [5th ed 1984])

While answering the issue of whether the grandparent in *Greene* qualified for "zone of danger" recovery in her emotional distress claim, the Court of Appeals' decision suggests the possibility of a broader fact and relationship-based approach to such claims in the future — rather than hardline rules. However, its current majority opinion does not go so far. Rather, it analyzes the foreseeability of liability (for sufficient proximate causation) by recognizing the evolution of family law jurisprudence which acknowledges — as a class — grandparents' rights.

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