Emotional injuries are problematic. They are difficult to prove for attorneys and
difficult to evaluate for juries. Emotional injuries that are predicated upon witnessing
someone else's injury are even more problematic. In addition to ascertaining the
validity of such a claim, a determination must be made whether the defendant owed
the plaintiff a duty in the first place. If so, another determination must be made
whether the relationship between the injured party and the plaintiff who witnessed his
or her injury is one that gives rise to a cause of action. It is this element that has
created the most confusion.

The zone-of-danger rule allows a person who is threatened with bodily harm resulting
from a defendant's negligence to recover for emotional distress from viewing the
death or serious injury of his immediate family. As the Court of Appeals explained in
the 1984 case *Bovsun v. Sanperi*, "[i]t is premised on the traditional negligence
concept that by unreasonably endangering the plaintiff's physical safety the defendant has breached a duty owed to him or her for which he or she should recover all damages sustained including those occasioned by witnessing the suffering of an immediate family member who is also injured by defendant's conduct."³

In *Dillon v. Legg*⁴ (1968), the California Supreme Court held that damages could be recovered for emotional trauma caused when a plaintiff witnessed the injury or death of a close relative, even though the plaintiff was not himself within the zone-of-danger of physical injury, as long as the emotional injury was reasonably foreseeable.

In 1969, the New York Court of Appeals narrowed this approach in *Tobin v. Grossman*.⁵ The court was confronted with a case in which a mother, who had not herself been in danger, sought to recover for her mental and physical injuries caused by shock and fear for her 2-year-old child who suffered serious injuries in a motor vehicle accident. The mother had not witnessed this accident, but heard the screech of automobile brakes, immediately went to the scene (a few feet away), and found her child injured and lying on the ground. The Court of Appeals posed the question whether the concept of duty should be extended to third persons who do not sustain any physical impact in the accident or fear for their own safety. The court held that the mother could not recover as she did not witness the accident.

'Bovsun'

The zone-of-danger issue was addressed head-on in *Bovsun*. Following mechanical difficulties, the Bovsun family stopped on the side of the highway. Father/husband Jack Bovsun exited the vehicle, went to the rear of the vehicle and leaned inside the open tailgate window. The vehicle was then struck from behind, pinning Bovsun between the two vehicles. Neither Bovsun's wife nor daughter actually witnessed the impact, as they were facing the opposite direction, but both were instantly aware of the impact and that Bovsun must have been injured. The Court of Appeals overruled the state court and Appellate Division, and held that Bovsun's wife and daughter could recover damages for their emotional injuries.

In this seminal case, the court narrowed what was contemplated in *Dillon*. Where *Dillon* appeared to create a duty, *Bovsun* was said to have broadened it to include a plaintiff to whom the defendant already owed a duty to avoid bodily harm. "Use of the zone-of-danger rule thus mitigates the possibility of unlimited recovery, an overriding apprehension expressed in *Tobin*, by restricting liability in a much narrower fashion than does the *Dillon* rule."⁶
The court intended the zone-of-danger rule to narrow the overly broad class of plaintiffs who could recover. "[T]he emotional disturbance suffered must be serious and verifiable…and the distress must be tied, as a matter of proximate causation, to the observation of the serious injury or death of the family member and such injury or death must have been caused by the conduct of the defendant." 7 It would appear that if Tobin were decided under the holdings of Bovsun, the court would reach the same conclusion, but for different reasons.

While the Court of Appeals in Bovsun attempted to create a narrow objective test that would be clearly applicable or inapplicable to each particular set of facts, new and interesting scenarios continue to arise that test the practicality and fairness of the zone-of-danger rule.

'Immediate Family'

Bovsun made it clear that parents, children, and spouses are "immediate family" under the zone-of-danger rule. Also, not surprisingly, siblings have been deemed "immediate family" as well. 8 Earlier this year, the Second Department decided a case in which plaintiff sought to recover emotional injuries as a result of her being in the zone-of-danger and witnessing her stepfather being struck and fatally injured. 9

Plaintiff was standing in front of a barbershop, when two cars collided, one of which jumped onto the sidewalk, struck her stepfather who had been walking on the sidewalk, pushed him through the barbershop window and pinned him against a chair. While the stepfather, who later died of these injuries, was not plaintiff's biological father, she had lived with him since she was 4 years old, he had financially supported her for the majority of her life, he had acted as her father, and he was the only person plaintiff had ever known as a father figure. The Second Department noted that there was no blood relationship between plaintiff and decedent, and held that for purposes of the zone-of-danger rule, stepchildren are not immediate family members.

However, a blood relationship alone is not necessarily enough to be deemed immediate family. In Trombetta v. Conkling, 10 decedent's niece sought recovery for severe emotional trauma after her aunt was killed by a truck. Plaintiff and her aunt were crossing the street and when realizing a truck was not going to stop, plaintiff grabbed her aunt's hand to pull her out of the way, but was unsuccessful. Plaintiff was not physically injured, but watched as her aunt was killed instantly. Plaintiff testified that she had shared a close relationship with her aunt, who had become the maternal figure in her life after her mother died when she was 11 years old (plaintiff was age 37 and her aunt was age 59 at the time of the accident). They always lived close by and saw each other daily. The Court of Appeals refused to extend the definition of
"immediate family" to include plaintiff’s aunt, and held she could not recover for her emotional injuries.

The U.S. District Court, Southern District of New York, took this analysis one step further in **Sullivan v. Ford Motor**, a case in which the plaintiff was not only decedent's aunt, but also his legal custodian. Plaintiff’s nephew was partially decapitated and killed when the front passenger side airbag deployed in a motor vehicle accident. Here, the court held that an “immediate family” relationship existed. The court explained that plaintiff’s nephew was seven years old at the time of his death and that plaintiff was the only family upon which decedent had come to rely, and with whom he shared his life on a daily basis from 12-months-old until the time of his death. The court cited the fact that plaintiff was decedent's legal custodian as a distinguishing factor in this case.

The Second Department held that a decedent's grandmother did not fall within the "immediate family" for purposes of the zone-of-danger rule. In **Jun Chi Guan v. Tuscan Daily Farms**, a grandmother was pushing her infant grandchild in a stroller when they were struck by a delivery truck that killed the infant. Despite the argument that as a result of the culture of the Chinese family, the grandmother was the person the infant spent most waking hours with, the court refused to deem her a member of the decedent's immediate family.

**Scope of Rule**

The Court of Appeals has acknowledged that the zone-of-danger rule "has been said to be a rather arbitrary limiting rule." However, "arbitrary distinctions are an inevitable result of the lines which circumscribe legal duties." The court has held that the boyfriend/girlfriend relationship does not fall into the "immediate family" category. New York does not recognize common law marriages; therefore, a long-time couple who was never married would presumably not meet the "immediate family" threshold. What about a couple who is engaged but not yet married? What about same-sex couples? Would it make a difference if a couple were "domestic partners" or legally married?

Based upon past decisions, the court has historically viewed blood relationships and/or legal relationships as a prerequisite. Thus a couple who is engaged or a couple who are domestic partners would likely not be viewed as "immediate family" in the eyes of the court. However, a couple who is legally married, including a valid common law marriage obtained in a neighboring state or a valid same-sex marriage, would seem to meet this threshold.
The court has effectively narrowed the class of plaintiffs who can recover for emotional injuries by limiting the scope of those to whom defendants owe a duty. However, defining which relationships fall into the category of "immediate family" has proven quite challenging. New relationships and new circumstances will continue to arise that will require the court to perpetually reexamine the scope of the zone-of-danger rule.

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Endnotes:

2. Id.
3. Id. at 229.
7. Id. at 231-32.
13. Bovsun, 61 N.Y.2d at 228.
15. However, a valid common-law marriage contracted in another state will be recognized as valid in New York if it was valid in the state where it was contracted. Baron v. Suissa, 74 A.D.3d 1108 (2d Dept. 2010).