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Mesa v. Burke: Mental Anguish Damages for Witnessing Injury to a Close Relation

Maria Mesa was driving with her eleven-year-old daughter when they were involved in an automobile accident which was solely the result of the negligence of Mark S. Burke.¹ The child suffered head injuries which required treatment in a hospital's intensive care unit, where she remained unconscious for several days. Upon regaining consciousness, she was partially paralyzed on her right side.²

The driver, Maria Mesa, also sustained physical and mental injuries as a result of the accident. The Mesas brought suit in state court against the negligent driver to recover damages for Mrs. Mesa's physical and emotional injuries which were caused by the automobile accident.

Finding that emotional distress occurred in fact, the trial court awarded the mother compensation for the "mental anguish she experienced immediately after the accident until her child regained consciousness."³ In making this award, the trial court found credible Mrs. Mesa's testimony that "she thought her daughter was dead immediately after the accident at which time the police officer . . . could not find a pulse on Cynthia."⁴ The defendant appealed the trial court's decision to the Louisiana Fifth Circuit Court of Appeal. *Mesa v. Burke*, 506 So. 2d 121 (La. App. 5th Cir. 1987). Although the court of appeal agreed with the factual finding of the lower court, it did not agree that the plaintiff deserved compensation for her mental anguish under Louisiana law, observing that "[i]t has long been the law of this state that mental anguish suffered by a bystander as a result of negligent injury to a third person is not compensable, unless there exists a breach of some independent duty of care owed to the bystander."⁵

The purpose of this note is to examine the history of Louisiana's bystander non-recovery rule and the justification for not compensating plaintiffs such as Mrs. Mesa. It will also explore Louisiana cases which, like *Mesa*, disallow bystander mental anguish damages while at the same time express misgivings about their holdings. Finally, this note will

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1. *Mesa v. Burke*, 506 So. 2d 121, 122 (La. App. 5th Cir. 1987), cert. denied, 506 So. 2d 1226 (1987) (the negligence of the defendant was stipulated to at trial).

2. *Id.*

3. *Id.* at 123.

4. *Id.*

5. *Id.* at 124.

consider the position of other states on this issue and Louisiana cases which show that the courts are developing theories that will aid in the recovery of mental anguish damages for these plaintiffs.

LOUISIANA JURISPRUDENCE ON BYSTANDER RECOVERY

A. *The History of Bystander Recovery*

In January of 1855, the Louisiana Supreme Court spoke directly to the issue of bystander recovery when it held in *Black v. Carrollton R.R.*⁶ that:

[T]he jury cannot . . . take into view the shock to parental feelings, in consequence of the injury to the child, and assess vindictive damages in favor of the parent—such damages being recoverable only by those who, in their own proper persons are victims of the misconduct. . . .⁷

The facts in *Black* were similar to those in *Mesa*, as each case involved a parent witnessing an injury to his child. In *Black*, a father was denied mental anguish damages after he saw a train break his son's legs. The majority in *Black* explained that "vindictive damages"⁸ such as those for mental anguish should only be recoverable by the actual "victim of the misconduct."⁹

Since *Black*, a plethora of cases have been decided based on the question of whether bystander recovery of mental anguish damages should be allowed when the emotional harm is incurred while witnessing injury to another. Many of these cases, following the *Black* rationale, have denied mental anguish damages to bystanders. For example, in 1906, the Louisiana Supreme Court followed *Black* when it denied a mother mental anguish damages for the emotional pain which she claimed to have suffered as a result of the unlawful arrest of her two sons.¹⁰ Another example is the 1917 case of *Kaufman v. Clark*,¹¹ in which the Louisiana Supreme Court followed *Black* and denied emotional damages to a mother who claimed mental anguish injuries resulting from the defendant engaging in sexual intercourse with her young daughter. A more recent example of adherence to the *Black* rule is the 1965 decision of *Laplace v. Minks*,¹² in which the first circuit refused recovery to a father for

6. 10 La. Ann. 33 (1855).

7. *Id.*

8. *Id.* at 38.

9. *Id.*

10. *Sperier v. Ott*, 116 La. 1087, 41 So. 323 (1906).

11. 141 La. 316, 75 So. 65 (1917).

12. 174 So. 2d 895 (La. App. 1st Cir. 1965).

mental anguish damages he claimed to have suffered as a result of the mutilation and subsequent death of his daughter after a car accident.

B. Mental Anguish for Injury to Property

A contrary line of jurisprudence has also developed which allows a plaintiff in Louisiana to recover for the mental anguish he suffers as a result of negligent injury to his property.¹³ For example, in *Brown v. Crocker*,¹⁴ a young boy recovered mental anguish damages for the emotional grief he suffered after his horse was shot. The conflict between this line of cases and *Black* has caused some courts to have misgivings about allowing mental anguish damages for witnessing injury to property, while disallowing these same types of damages for witnessing injury to a person.

Not all of the cases following *Black* on the issue of bystander recovery have been content with the inconsistency between the personal injury and property damage cases. Some courts follow *Black* and disallow the mental anguish damages, but argue that refusing these damages in all cases is irrational. For example, in *Cambrice v. Fern Supply Co.*,¹⁵ the court denied the plaintiff recovery for witnessing injury to her son, but pointed out that Louisiana jurisprudence allows recovery of mental anguish damages for witnessing injury to property, while, ironically, witnessing injury to a person is probably even more damaging. The fourth circuit stated: "[T]he mother's grief over the bloodied and torn clothing of her son might be compensable, but her grief over his bloodied and torn leg is not."¹⁶

13. See *Romero v. Town of Welsh*, 370 So. 2d 1286 (La. App. 3d Cir. 1979) (where plaintiff recovered emotional damages for ruin to his property occasioned by a back-up of sewage into his home); *Deblieux v. P.S. & Sons Painting, Inc.*, 405 So. 2d 600 (La. App. 3d Cir. 1981) (where mental anguish damages were allowed where injuries to the plaintiff were the result of a civil trespass on his land). See also Note, *Mental Anguish for Negligent Property Damage*, 17 Loy. L. Rev. 438 (1970-1971); and Tete, *Tort Roots and Ramifications of the Obligations Revision*, 32 Loy. L. Rev. 47, 112-13 (1986) (discussing the inequities of allowing "moral damages" in association with contractual duties while not allowing these damages to parents witnessing the suffering of their child).

14. 139 So. 2d 779 (La. App. 2d Cir. 1962). Allowing recovery for the mental anguish one suffers upon witnessing the loss of one's property, yet not allowing this type of recovery for witnessing an injury to a close relation is inconsistent. Common experience would indicate that in many cases the actual emotional trauma suffered by one upon witnessing injury to a close relation is of a different type and magnitude than that trauma suffered by one who witnesses damage to his property.

15. 285 So. 2d 863 (La. App. 4th Cir. 1973).

16. *Id.* at 866. Ironically, in *Todd v. Aetna Casualty & Sur. Co.*, 219 So. 2d 538, 544 (La. App. 3d Cir. 1969), the court uses the fact that mental anguish damages are not awarded for witnessing injury to one's child as support for an argument that mental anguish damages for property should not be allowed. In the words of the *Todd* court,

Another case which followed the holding of *Black* while questioning its fairness was *Brauninger v. Ducote*,¹⁷ in which the court denied emotional damages to the mother of a minor child who was allegedly raped by the son of the defendant. The fourth circuit suggested that the inconsistency complained of by the *Cambridge* court could be eliminated: "Perhaps . . . the Supreme Court will . . . either reaffirm . . . or repudiate *Black* . . . and the long line of appellate decisions. It would appear that consistency would require either no recovery for emotional stress for one's property damage or for one's child, or recovery in both cases."¹⁸ The court implied that it would be more logical "to recognize damages for emotional stress resulting from injury to one's child but not to one's property, rather than the converse, as existing under the present state of our jurisprudence."¹⁹

Another case which followed the *Black* opinion in its holding while questioning its rationale was *Blackwell v. Oser*.²⁰ In this case, the fourth circuit refused recovery to a father who was in the delivery room and witnessed the negligent injuring of his child by the obstetrician. However, while denying recovery to the father, the fourth circuit allowed the mother to recover mental anguish for the injury to the child under the theory that an independent duty was owed to her.²¹ In an impassioned and well-reasoned plea urging the supreme court to vacate the *Black* jurisprudence, the *Blackwell* court carefully detailed the reasons the father in this situation *should* recover the mental anguish he sustained.²² Most notably the court stated, "Thus we arrive at the fundamental unsoundness of the doctrine announced in *Black*: inasmuch as the policy reasons underlying the rule are now highly questionable . . . such an absolute bar obliterates the importance of 'foreseeability of harm', and thus does violence to our long-held notion of duty."²³

After denouncing the *Black* rule, the court said:

[W]e are bound by a doctrine that has been followed in countless cases, and although *Black's* premises have not been even briefly discussed by our Supreme Court since 1917 (in *Kaufman v. Clark*, 141 La. 316, 75 So. 65), the persistent denial of writ

"It would be highly illogical to allow damages for mental anguish caused by injury to ones [sic] automobile . . . and refuse to allow damages for mental suffering caused by injuries to ones [sic] child."

17. 381 So. 2d 1246 (La. App. 4th Cir. 1980).

18. *Id.* at 1248.

19. *Id.*

20. 436 So. 2d 1293 (La. App. 4th Cir. 1983).

21. See also *Spencer v. Terebelo*, 373 So. 2d 200 (La. App. 4th Cir. 1979) (establishing this independent duty theory as an exception to *Black*).

22. *Blackwell*, 436 So. 2d at 1294-99.

23. *Id.* at 1298.

applications signals that we are to assume the continuing validity of the rule.²⁴

C. *Some Courts Allow Bystander Recovery for Injury to Another*

Still other Louisiana courts have ignored or distinguished *Black*, and, thus, have allowed mental anguish damages for witnessing injury to another. For example, in 1951, in *Valence v. Louisiana Power and Light Co.*,²⁵ a mother and father were allowed mental anguish damages for worrying that their unborn fetus might have been hurt or aborted in a bus wreck. The *Valence* court made no mention of *Black* and based its holding mainly on logic and similar decisions in other states.²⁶

In 1956, in a case similar to *Valence*, the second circuit, in *Jordan v. Fidelity & Casualty Co.*,²⁷ allowed a father to recover for his anxiety and worry over possible injury to his unborn child. In *Jordan*, the father suffered physical injuries in the same accident where his pregnant wife was injured. The *Jordan* court cited the *Valence* opinion as authority for its decision, and made no mention of *Black*.²⁸

In *Holland v. St. Paul Mercury Insurance Co.*,²⁹ the parents who brought the suit likewise recovered mental anguish damages for worrying about their child. In *Holland*, a child ate rat poison, and his parents incurred emotional injuries brought on by worry when the exterminator delayed in informing them of the nature of the poison. *Holland* has been distinguished as not being a total deviation from *Black* since *Holland* specifically stated that it was an exception to the *Black* rule for "those instances wherein a plaintiff suing for mental pain and anguish occasioned by physical injury to another does so on the basis of a breach of a primary legal duty and obligation owed by the defendant directly to the plaintiff seeking such damages."³⁰ The *Holland* court saw the duty of the exterminator to be a duty arising out of the exterminator's contract with the parents.³¹

24. *Id.* at 1299.

25. 50 So. 2d 847 (La. App. Orl. 1951).

26. *Id.* at 853-54. Although it might be argued that this case is distinguishable in that the fetus is not a true person and so might fit under the allowance of mental anguish damages for negligent injury to property, the court here made no attempt to equate the fetus with property. It is also interesting to note that the father in this case was allowed mental anguish damages for his worry even though he was not present or injured at the time of the bus wreck.

27. 90 So. 2d 531 (La. App. 2d Cir. 1956).

28. *Id.* at 532. See also *Champagne v. Hearty*, 76 So. 2d 453 (La. App. Orl. 1954) (mother received damages for anxiety over possible harm to her unborn child).

29. 135 So. 2d 145 (La. App. 1st Cir. 1961).

30. *Id.* at 158-59.

31. *Id.* at 158.

In *Shelmire v. Linton*,³² the plaintiffs recovered damages for mental anguish resulting from the exposure and reinterment of their parents' bodies after a motorist negligently knocked down the burial vaults in which the bodies were housed. In this case, the appellate court used the Louisiana duty-risk test and decided that both drivers involved had a duty to avoid the accident, and that this duty "was designed to protect innocent third parties against the particular risk involved in this accident."³³ In *Shelmire*, mental anguish damages were awarded to two people who actually *saw* the overturned burial vault and the "remains of their respective parents."³⁴ The court further expanded the duty of the tortfeasor to award mental anguish damages to another child who said that he was aware of the accident, but who had not actually seen the exhumed bodies.

In *Skorlich v. East Jefferson General Hospital*,³⁵ in a factual situation almost identical to the fourth circuit *Blackwell* case, the fifth circuit court *did* allow the father in the delivery room to recover damages for mental anguish he suffered when he witnessed the negligent injuring of his child at the hands of the defendant obstetrician. The *Skorlich* court followed the duty-risk analysis through which the *Blackwell* court had found that the obstetrician's duty extended only as far as the mother. However, the *Skorlich* court stretched the duty of the doctor not to injure the child one step further to include the father when it said,

[a]lthough the father does not carry the fetus within his own body, it is his seed which created the fetus and thus imposed on him the obligation to care, protect and raise [sic] the fetus to adulthood. For that reason, the duty of the physician . . . is a duty owed to the father as well as to the mother.³⁶

32. 343 So. 2d. 301 (La. App. 1st Cir. 1977).

33. *Id.* at 305.

34. *Id.* Although the facts of this case do not specifically state the circumstances under which the plaintiffs viewed the bodies, it can be assumed from the wording of the opinion that the plaintiffs were not actually present at the time of the accident, but that they were informed of the damage and then went to the scene.

35. 478 So. 2d 916 (La. App. 5th Cir. 1985).

36. *Id.* at 918. It is interesting to note at this point that the *Mesa* court made no mention of the *Skorlich* case in its opinion. Instead, the fifth circuit, which decided both *Mesa* and *Skorlich*, ignored its own jurisprudence (*Skorlich*), which specifically had rejected the *Blackwell* opinion, and chose instead to cite the fourth circuit's *Blackwell* opinion as its main jurisprudential authority in the mental anguish portion of *Mesa*. It is also ironic that the *Mesa* court uses *Blackwell* as support for their statement that: "Although we, like our brothers on the *Blackwell* court, find the [Black] rule often harsh, we are nonetheless bound by it until . . . it is revised or abolished by the Supreme Court or the legislature." *Mesa*, 506 So. 2d 121, 124 (La. App. 5th Cir. 1987).

D. *The Rationale Behind Black*

The *Black* decision must be assessed as to its viability, given the conditions which exist in modern society. The *Black* court based its ruling on the feared consequence of allowing bystanders to recover for witnessing injury to another, specifically, that the tortfeasor would be subject to greater or fewer claims against him "in proportion to the larger or smaller circle of [the victim's] friends".³⁷ The court's concern was that the liability of the tortfeasor would be unpredictable if bystanders were allowed to recover.³⁸ Looking at this "indefinite number of claims" argument more closely, it is sensed that the court in *Black* was concerned that if bystanders were allowed to recover, unfounded claims might inundate the courts,³⁹ that people who had suffered no actual injury would try to claim some mental anguish damages, or that they would overstate the severity of their emotional hurt.

However, courts *have* realized that mental anguish damages are "actual damages"⁴⁰ which can be quantified by judges and juries who rely on common experience to assess the injury. Academicians also assert the reality of mental anguish damages as true damages. Prosser and Keeton point out that:

Mental suffering is no more difficult to estimate in financial terms, and no less a real injury, than 'physical' pain; it is not an independent intervening cause, but a thing brought about by the defendant's negligence itself, . . . and while it may be true that its consequences are seldom very serious unless there is some predisposing physical condition, the law is not for the protection of the physically sound alone. It is the business of the courts to make precedent where a wrong calls for redress, even if lawsuits must be multiplied; and there has long been precedent enough, and no great increase in litigation has been observed.⁴¹

E. *Parents as an Exception to Black*

It has been shown that some Louisiana courts are uncomfortable with a blanket rule such as that expressed in *Black*, which disallows mental

37. *Black v. Carrollton R.R.*, 10 La. Ann. 33, 39 (1855).

38. *Id.* Also, for more reasons used by courts to support the *Black* decision and for criticisms of the modern-day applicability of these reasons see Stone, *Louisiana Tort Doctrine: Emotional Distress Occasioned by Another's Peril*, 48 Tul. L. Rev. 782, 789-92 (1974).

39. Stone, *supra* note 38, at 791.

40. *Bank of New Orleans v. Phillips*, 415 So. 2d 973 (La. App. 4th Cir. 1982).

41. W. Prosser & W. Keeton, *The Law of Torts* § 54, at 360 (5th ed. 1984) (footnotes omitted).

anguish to *all* bystanders. The courts recognize that there are certain personal relationships which are so intimate that physical injury to one party in the relationship will often lead to actual mental anguish on the part of the other party who witnesses the injury.⁴² These relationships are those traditionally close ones, such as the parent-child relationship. Judges and jurors can draw on their own experiences to evaluate the likelihood and severity of grief occurring when one member in the parent-child relationship is injured.

Of course, there are also situations where the parent and child are not particularly close, and as such, a blanket rule of allowing all parents to recover for witnessing injuries to their children may be overcompensatory. The particular closeness of the parent and child may be disputed by the defendant in court, and the jury may decide not to award these damages to estranged children and parents. However, the tort goals of compensating true injury, while denying recovery to those whose claims or alleged losses are simply strategic, are better served by making the recovery turn on the *facts* rather than on a rule of law which mandates a blanket denial of the victim's claim.

JURISPRUDENCE OF OTHER STATES

Other states have confronted the question of who should be allowed to recover damages for witnessing injury to another. Some states use "the impact rule" and limit recovery of emotional damages to bystanders who are themselves physically injured by the tortfeasor's negligence.⁴³ Other states have adopted a "zone-of-danger" test in which bystanders who are threatened with physical injury as a result of the negligence of another are allowed to recover mental anguish damages.⁴⁴ Still other states allow bystanders to recover if it is foreseeable that they will suffer some emotional harm, and if they are related to the accident victim.⁴⁵

The Restatement (Second) of Torts follows the traditional idea that a plaintiff may not recover emotional damages for harm to another unless the witness is himself harmed or threatened with harm by the negligent conduct.⁴⁶ The Restatement, however, creates an exception to this general "no recovery without physical impact" rule when it allows

42. The category of "witnesses" may be limited to those actually present when the injury in question took place (as in *Skorlich*), or it may be expanded to include those parties who were informed of the injury after it happened (as in *Shelmire*).

43. See Annot., Right to Recover Damages in Negligence for Fear of Injury to Another, or Shock or Mental Anguish at Witnessing Such Injury, 29 A.L.R. 3d 1337 (1970).

44. See Annotation, *supra* note 43.

45. See, e.g., *Dillon v. Legg*, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968).

46. Restatement (Second) of Torts § 313(1)-(2) (1965).

recovery to bystanders who are family members of the victim and who are present when the victim is injured even though there is no physical harm to the bystander. Thus, the Restatement recognizes the special likelihood that claims of mental anguish by family members who witness injury to their relatives are likely to be sufficiently reliable such that the jury can be encouraged to award compensation for them.

All of these methods for identifying which bystanders will be allowed to recover mental anguish damages (and those who will not) go beyond the *Black* rule. Identifying some "actual injury" to tie to the mental anguish claim is an attempt to guarantee the likely validity of the emotional damages claim. In other words, these rules attempt to lend some predictability to who is entitled to assert a claim against the tortfeasor, and thus address the *Black* court's fear that the population of claimants is potentially infinite.⁴⁷ With the physical impact and zone-of-danger tests, the mental anguish claim is more plausible and predictable since it is tied to either actual physical injury or threatened physical injury. With the foreseeability test and the Restatement view, the tortfeasor is more able to predict to whom he may be liable.

DUTY-RISK ANALYSIS

Some of the Louisiana courts which have not followed *Black* and allowed mental anguish damages to be recovered⁴⁸ have utilized the duty-risk analysis. This method fits between the zone-of-danger test used by some states and the foreseeability test used by others. Under the duty-risk analysis, once it is established that the defendant's negligence was a cause in fact of the harm, then damages are recoverable if the "defendant breached a . . . duty imposed to protect against the particular risk involved."⁴⁹ In other words, the tortfeasor "owes a duty of care to all persons who are foreseeably endangered by his conduct with respect to all risk which makes the conduct unreasonably dangerous."⁵⁰

To determine whether or not a duty should be imposed on a tortfeasor, various policy considerations must be explored. Professor Crowe sets forth six factors of duty, which include: "(1) administrative; (2) ease of association; (3) economic; (4) moral; (5) type of activity; and

47. *Black v. Carrollton R.R.*, 10 La. Ann. 33, 39 (1855). Also, identifying an "actual injury" furthers the public policy of limiting liability to reasonable levels, a policy evidenced by the existence of prescriptive periods and limited duties.

48. 343 So. 2d 301 (La. App. 1st Cir. 1977); 478 So. 2d 916 (La. App. 5th Cir. 1985).

49. *Hill v. Lundin & Assoc., Inc.*, 256 So. 2d 620, 622 (1972).

50. *Skorlich v. East Jefferson Gen. Hosp.*, 478 So. 2d 916, 917 (La. App. 5th Cir. 1985).

(6) precedent or historical.”⁵¹ These factors can be applied to tortfeasors such as Mr. Burke to determine whether or not a duty not to inflict mental distress on bystanders, particularly family members, should be imposed on these tortfeasors.

Crowe sees the administrative factor as requiring the court to ask if “the imposition of a duty in a given situation [would] open the floodgates to unmanageable litigation.”⁵² He then goes on to posit that the courts have a legitimate right to be concerned “with a significant number of fabricated claims in the area of mental distress because the genuineness of a mental distress claim is often difficult to ascertain.”⁵³ While this is a legitimate concern, as discussed earlier, if bystander mental anguish recoveries are limited to intimate family members, particularly parents, then it would be easier for the courts to find an “actual” verifiable injury despite the illusive nature of “mental distress” itself.⁵⁴

The ease of association factor is related to how easily the plaintiff’s alleged injury and the conduct of the tortfeasor can be associated.⁵⁵ Applying this test to defendants such as Burke, a close correlation can be seen between the negligence which injures a child and the worry and mental anguish suffered by the victim’s parent. Also, it is certainly foreseeable that a parent in Mrs. Mesa’s situation would suffer mental anguish upon witnessing an injury to her child. It is possible to imagine cases in which the ease of association between the tortfeasor’s negligence and the mental anguish claimed by a bystander would *not* be readily apparent. For example, a witness who was in no way related to the victims of a car accident might indeed be disturbed by what he saw, but his mental distress might not be as acute as that of a mother in Mrs. Mesa’s situation. A court might therefore choose not to extend the duty of the defendant to include anyone other than a relative of the victim or one actually physically harmed by the negligence of the tortfeasor. Also, family member status alone should not be the determining factor in whether or not a claim is valid, rather the fact of actual mental injury should also be considered. The actual relationship between the bystander and the victim should be assessed by the trial court.⁵⁶

51. Crowe, *The Anatomy of a Tort—Greenian, as Interpreted by Crowe who has been Influenced by Malone—a Primer*, 22 Loy. L. Rev. 903, 906 (1976) (italics deleted).

52. *Id.* at 907.

53. *Id.*

54. See *supra* text accompanying note 42.

55. Crowe, *supra* note 51, at 907.

56. See *supra* text accompanying note 42.

Exerting influence on the decisions of courts is which of the parties involved is better able to bear the loss or avoid the loss.⁵⁷ In a car accident such as that which occurred in *Mesa*, it is possible that neither of the parties is in a better position economically to bear the loss associated with the mental anguish of the bystander. Both parties probably have automobile insurance policies, and Burke's insurance company is named as a defendant in this suit. The question then is which of the parties is better able to avoid the mental anguish loss. An argument could be made that Mrs. Mesa should have been able to control her emotions better so that the injury never would have occurred. However, the stronger position is that the defendant had the ability to avoid the accident altogether, especially since the accident in *Mesa* was stipulated to be solely a result of his negligence.⁵⁸ Therefore, one would assert that Burke should bear the loss, since he had the most control over it.

Another factor which Crowe suggests involves looking at the type of activity involved to determine whether or not a duty exists. This factor takes into consideration whether the defendant's activity is so dangerous as to have no social utility, or if the activity is one that has so much social utility that it should be protected.⁵⁹ Although driving a car certainly does have social utility, and therefore should not be subject to strict liability, driving so negligently as to cause an accident is not the type of activity that should be given a high measure of protection.

The final factor which Crowe enumerates for determining whether or not a duty exists is the historical or precedent factor. This factor involves examining what the rule in this area of the law was in the past, analyzing the validity of the rule, and interpreting how the rule applies in modern society.⁶⁰ Here, defendants like Burke certainly have the weight of the *Black* opinion on their side. However, as discussed earlier, *Black* may have been at least partially eroded.⁶¹

Louisiana courts have also examined the issue of who should have a duty to the bystander claiming mental anguish damages and how far this duty should extend. The *Shelmire*⁶² and *Skorlich*⁶³ courts articulated how far the duty of the tortfeasor should extend by including within the tortfeasor's duty a child who heard about his parent's body being

57. Crowe, *supra* note 51, at 907-08.

58. See *supra* note 1 and accompanying text.

59. Crowe, *supra* note 51, at 908.

60. *Id.*

61. See *supra* notes 15-24 and accompanying text.

62. 343 So. 2d 301 (La. App. 1st Cir. 1977).

63. 478 So. 2d 916 (La. App. 5th Cir. 1985).

exhumed, and a father who saw the doctor negligently injure his child in the delivery room.⁶⁴

Several other decisions in which mental anguish damages were denied to a bystander help to define the outer boundaries of the scope of the tortfeasor's duty in Louisiana. These opinions are nevertheless consistent with the theory advanced here that bystander recovery may rationally be limited to those in close relationship to the tort victim and whose claims of actual loss are likely to be reliable.⁶⁵ For example, in *Dierker v. Gypsum Transportation Ltd.*,⁶⁶ a repairman was not allowed damages as a bystander for mental anguish where he was not subject to an "unreasonable risk of bodily harm"⁶⁷ and was not related to the accident victim. Also, in *LeConte v. Pan American World Airways, Inc.*,⁶⁸ police at the scene of an airplane crash were found to be "purely bystanders"⁶⁹ and were denied mental distress damages for viewing crash victims.

How *Mesa* Could Fit Into These Theories

Applying these parameters to the *Mesa* case, the area of allowable recovery envisioned by some Louisiana courts is one in which Mrs. Mesa fits comfortably. Mrs. Mesa was physically injured and was intimately related to the victim, unlike the *Dierker* and *LeConte* cases where bystanders who did not meet these criteria were denied recovery. Surely an area of protection broad enough to encompass a father in a delivery room⁷⁰ and a child who was just told about the disinterment of his parent's body⁷¹ is likewise broad enough to include a mother like the plaintiff in *Mesa* who is in the car with her daughter and who believes that the child died as a result of her injuries. Under a duty-risk analysis, Mrs. Mesa appears to be one of the persons "foreseeably endangered by his conduct."⁷² Also, the duty of the tortfeasor not to crash into Mrs. Mesa's car and injure either her or her daughter was designed to protect Mrs. Mesa from the actual injury she suffered here.⁷³

64. 343 So. 2d 301 (La. App. 1st Cir. 1977); 478 So. 2d 916 (La. App. 5th Cir. 1985).

65. See also *Mayo v. Borden, Inc.*, 784 F.2d 671 (5th Cir. 1986) (worker was not allowed to recover for mental or emotional pain and suffering for witnessing co-worker's injuries).

66. 606 F. Supp. 566 (E.D. La. 1985).

67. *Id.* at 568.

68. 736 F.2d 1019 (5th Cir. 1984).

69. *Id.* at 1021.

70. 478 So. 2d 916 (La. App. 5th Cir. 1985).

71. 343 So. 2d 301 (La. App. 1st Cir. 1977).

72. *Skorlich v. East Jefferson Gen. Hosp.*, 478 So. 2d 916, 917 (La. App. 5th Cir. 1985).

73. *Hill v. Lundin & Assoc., Inc.*, 256 So. 2d 620, 623 (1972).

If Louisiana courts are uncomfortable with the breadth of the duty-risk analysis as applied here, they might allow parental recovery in cases like *Mesa* by looking to the jurisprudence of other states.⁷⁴ There the court would find that Mrs. Mesa also fits into all three of the categories used by other states to allow bystander recovery. She is physically injured under the impact rule, she is threatened with physical injury within the zone-of-danger test, and she is a relative of the accident victim foreseeably subject to risk under *Dillon* and the Restatement exception.

CONCLUSION

The question of whether or not to allow emotional recovery to a witness of an injury to a third party is not easily answered. Different states have developed various theories to allow compensation where deserved, while at the same time, these theories do not subject the tortfeasor to a never-ending line of possible strategic claims. Upon looking at the litany of Louisiana cases in this area, a sense of the uncertainty is apparent in the appellate courts as to just exactly what the law is on this issue. Some courts follow *Black*, while others have developed their own theories to allow what they see as justified recoveries. The weight of respectable opinion is that the Louisiana Supreme Court should alleviate the confusion in this area by making a modern pronouncement either reaffirming *Black* and its progeny or adopting some modification of the *Black* position. However, until the supreme court or the legislature clarify this area, the cases and theories set forth in this note help identify several possible cracks in the previously immovable wall of *Black* which may aid parental plaintiffs or trap unwary negligent tortfeasor defendants. May the most convincing party win.

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74. See supra notes 42-44 and accompanying text.

