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NIED Claims & the Observance Requirement

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Most lawyers associate claims for negligent infliction of emotional distress (NIED) with being nearby the individual who was injured, or actually witnessing the injury. But attorneys have been successful in surviving challenges to NIED claims at the pleading stage and thereafter when the family members arrived on the scene minutes later, and saw their loved one bloody and in pain before leaving in an ambulance. As such, it is important to not automatically discount a potential claim for NIED simply because your client did not witness the harmful event.

A claim for NIED can arise if a plaintiff asserts that distress was caused by observing serious injury or death of a close family member due to physical injury caused by the defendants.[1] "A sensory and contemporaneous observance is not limited to visual observances; aural perception . . . is also permitted."[2] Defendants will argue that if the plaintiffs did not actually see the incident, then their claims for NIED must fail. However, a review of extensive case law indicates this is simply untrue.[3]

In *Kratzer v. Unger*,[4] plaintiff-foster mother heard a loud thump and turned to see that her foster son had been struck by an automobile and was lying unconscious in the road. She brought a cause of action for NIED, which the defendant argued was invalid because the perception of the accident's happening was auditory rather than visual.[5] The trial court disagreed, stating:

> Clearly our Supreme Court focused upon the first-hand observation by plaintiff of her son's fatal accident in Sinn v. Burd. However, we cannot believe that the court intended thereby to limit recovery to those situations where the shocking event might manifest itself through the eyesight of the witness, to the exclusion of other types of sensory observation. The important element is the immediate and direct awareness of what has occurred, and the appellate court's concern was to limit recovery to persons 'on the scene' when such a tragedy happens, as opposed to those who might learn of it from someone else who had been present. There is no rational reason to believe that what an eyewitness sees will be any more or less shocking than what an 'earwitness' hears.[6]

Similarly, in *Anfuso v. Smith*,[7] the plaintiff-mother observed her daughter shortly before her child was struck by an automobile, heard the impact, and witnessed the accident scene immediately thereafter. The trial court rejected the contention that visual perception of the impact was the only sensory observance sufficient to give rise to a cause of action and concluded that the facts as pled established that she was a "percipient witness" to the impact.[8] Arriving at the scene shortly after an incident and seeing the injured individual thus could be a contemporaneous perception.[9]

Defendants often rely on *Neff v. Lasso*,[10] where the plaintiff-widow did not visually observe her husband's motor vehicle accident but heard the impact between the two vehicles.[11] She arrived at the scene immediately after and found her husband lying unconscious.[12] She brought a claim for NIED based upon the injuries she incurred as a result of the defendant's negligence.[13] The defendant filed preliminary objections arguing that since she did not visually observe the accident her claim for NIED should fail.[14] The trial court agreed, sustaining the preliminary objections, and the plaintiff appealed.[15] On appeal, the Superior Court noted that

they had to determine whether visual awareness of the setting, simultaneous auditory perception of the impact, and immediate visual observation of the results of the impact later was sufficient to constitute a "sensory and contemporaneous observance" within the meaning of those terms as used in *Sinn*.[16]

Prior to reaching its decision, the Superior Court analyzed cases in which the Supreme Court was asked to consider the parameters for pleading a cause of action for NIED; specifically the contemporaneous observance requirement.[17] In one, *Yandrich v. Radic*,[18] the Court denied recovery to a plaintiff-father who did not witness the accident and who did not arrive at the scene until after his son had already been taken to the hospital.[19] The plaintiff-father was found to not have experienced a direct and contemporaneous sensory experience of the event itself.[20] In another, *Brooks v. Decker*,[21] a father did not witness the accident and instead saw an ambulance drive by and then saw his son's bicycle on the ground, realizing that his son was the victim of an accident.[22] The Court refused to extend liability to the plaintiff-father.[23] The *Neff* Court then returned to the facts of their case, noting they were dealing with a case that fell in between the facts of Sinn and the facts of *Yandrich* and *Brooks*, *inter alia*.24 As such, the Court concluded the following:

> Our reading of [prior cases] leads us to conclude that our Supreme Court, in considering the parameters of the 'sensory and contemporaneous observance' requirement, focused upon whether the emotional shock was immediate and direct rather than distant and indirect, and not upon the sense employed in perceiving the accident. With these principles in mind, we now consider the question of whether appellant's 'shock resulted from a direct emotional impact upon her from a sensory and contemporaneous observance of the accident,' keeping in mind that our focus is on the degree of appellant's awareness of the negligent act rather than the source of her awareness.
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> To deny [plaintiff's] claim solely because she did not see the precise moment of the impact would ignore the plain reality that the *entire incident* produced the emotional injury for which the plaintiff seeks redress, and would be contrary to the very policy and purpose of the Court in *Sinn* when it abandoned the 'zone of danger' rule, i.e. eliminating arbitrariness. Therefore, we conclude that 'sensory and contemporaneous observance' is not limited to visual sensory perception but properly includes an aural sensory awareness as well. Succinctly, it is not the source of the awareness, rather, it is the degree of the awareness arising from all of the individual's senses and memory which must be determinative of whether the plaintiff's emotional shock resulted from a 'sensory and contemporaneous observance' of the accident.[25]

This is an important area of law to be familiar with, as in some situations, it may open up additional coverage, in that an NIED claim is not merely derivative, like a loss of consortium claim is. Ask where your clients' family members were when they first learned of the incident and saw the injured plaintiff, and do not automatically concede the claim simply because a husband was not at the scene to visually see his wife get hit by a car. Plead the count with specific details of where they were when the incident occurred, how quickly they arrived at the scene, what they saw, and how they felt.

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1 Sinn v. Burd, *404 A.2d 672 (Pa. 1979).*
2 Rideout v. Hershey Medical Ctr., *30 Pa. D. & C. 4th 57 (C.P. Dauphin 1995). See also* DeJesus v. U.S. Dep't of Veteran Affairs, *384 F. Supp. 2d 780 (E.D. Pa. 2005) (the aural perception together with the surrounding circumstances may produce a full, direct, and immediate awareness of the nature and import of negligent conduct that may foreseeably result in emotional injury).*
3 See Pearsall v. Emhart Industries, Inc., *599 F. Supp. 207 (E.D. Pa. 1984) (claim for NIED was proper when plaintiff-family member arrived upon the scene of a fire and feared for her family while the fire was still smoldering despite not witnessing their actual burning);* Bliss v. Allentown Public Library, *497 F. Supp. 487 (E.D. Pa. 1980) (direct visual observation of accident is unnecessary to state claim for NIED).*
4 17 Pa. D. & C. 3d 771 (C.P. Bucks 1981).
5 Id.
6 Id. *at 773.*
7 15 Pa. D. & C. 3d 389 (C.P. North. 1980).
8 Id. *at 393.*
9 See also Bonson v. Diocese of Altoona-Johnstown, *67 Pa. D. & C. 4th 419, 431 (Com. Pl. 2004) (plaintiff-mother was allowed to proceed with an NIED claim against a Diocese for failing to warn her of a known abusive priest that would go on to abuse her son whom she had entrusted to be alone with the priest) (citing* Corbett v. Morgenstern, *934 F. Supp. 680, 683-84 (E.D. Pa. 1996);* Hunger v. Grand Central Sanitation, *670 A.2d 173, 183 (Pa. Super. Ct. 1996) (Beck, J., concurring);* Armstrong v. Paoli Memorial Hospital, *633 A.2d 605, 612-15 (Pa. Super. Ct. 1993);* Crivellaro v. Pennsylvania Power and Light Co., *491 A.2d 207, 212 (Pa. Super. Ct. 1985)).*
10 555 A.2d 1304 (Pa. Super. Ct. 1989).
11 Id. *at 1306.*
12 Id.
13 Id.
14 Id.
15 Id.
16 Id. *at 1308.*
17 Id. *at 1308-09.*
18 433 A.2d 459 (Pa. 1981).
19 Neff supra, *555 A.2d at 1309.*
20 Id. Citing Yandrich supra, *433 A.2d at 463).*
21 516 A.2d 1380 (Pa. 1986).
22 Neff supra, *555 A.2d at 1310.*
23 Id.
24 Id.
25 Id.