I FEEL YOUR (LIVESTREAMED) PAIN: VIRTUAL BYSTANDER RECOVERY

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This article examines the trend toward expanding the tort of bystander recovery for negligent infliction of emotional distress to permit recovery for "virtual bystanders"—those whose contemporaneous perception of the serious injury or death of a close family member occurs with the aid of technology (such as FaceTime or livestreaming). As this article discusses, emerging technologies like livestreaming and apps have given users new opportunities to virtually witness events both joyous and tragic. As the legal system refines the bystander recovery doctrine's other elements, technology is reshaping just what contemporaneous perception now means in our increasingly wired world.

INTRODUCTION

At first blush, it could be a scene straight out of a heartwarming television commercial: Grandma and Grandpa enjoying a visit "across the miles" with their young grandson via Facetime as he's playing with the new toy they sent

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him for his birthday. But suddenly, the tableau turns tragic as the toddler begins choking on a small part that he's swallowed, and the grandparents watch helplessly as the child turns blue, even as his parent frantically tries lifesaving measures to dislodge the foreign object and restore the boy's breathing. Through modern technology, a life-and-death situation has become as frighteningly real for the grandparents as if they were in the same room.

In the twenty-first century, emerging technologies like livestreaming and apps that enable consumers to have live access to footage from everything from Ring doorbell cameras to "nanny cams" have given us new opportunities to virtually witness events both joyous and tragic, both uplifting and shocking. Whether the act being chronicled is heartrending and repugnant, like a mass shooter livestreaming his horrific actions, or happy, like a family reunion, technology makes the contemporaneous experience more real. It is perhaps not surprising then that courts are now grappling with whether those who suffer severe emotional distress after virtually witnessing a tragedy brought on by the negligence of a third party may maintain an action for bystander recovery. And although case law arising out of such instances of "virtual bystander recovery" is in a nascent stage, the popularity and rapid spread of technologies that make these virtual experiences possible could very well result in a rise in the number of such "virtual witness" cases and the continued expansion of the doctrine of bystander recovery. After all, it is estimated that by 2025, over fifty billion connected devices will be in use by homeowners. In December 2020 alone, Amazon sold more than 400,000 of its Ring doorbell cameras.[1]

This continued refinement of the bystander recovery doctrine should not come as a shock since legal scholars predicted its possibility, if not inevitability, ten years ago. The Restatement (Third) of Torts observed that:

> Beyond the question of what aspects of an accident must be perceived, [the Restatement] leaves for future development whether the events must be perceived while the plaintiff is physically present or whether contemporaneous transmission by some medium is sufficiently equivalent to physical presence. Continuing developments in

[1] *Doorbell Cameras in the U.S.: Statistics & Facts, 2021*, SAFEHOME.ORG (July 26, 2021), https://www.safehome.org/doorbell-cameras/statistics/.

> communication technology will no doubt affect the determination.[2]

Indeed, while technological innovation since 2012 has continued at a rapid pace, the law has not kept up.

In order to better understand how technology is reshaping our understanding of bystander recovery and just what contemporaneous perception now means in an era of FaceTime, livestreaming apps, and wired homes, this article will begin with a look at the origins and evolution of this tort doctrine. Afterward, the article will examine our current digital environment and the advent of real causes of action stemming from virtual acts. Then, we will look at recent cases involving claims of virtual bystander recovery, including *Ko v. Maxim Healthcare Services, Inc.* in California and *Clotaire v. Garden Spring Center* in Pennsylvania. As we will see, just as technology is altering how some events are experienced or perceived in the Digital Age, preconceived notions of tort liability and recovery may be undergoing a transformation as well.

I. THE EVOLVING TORT OF BYSTANDER RECOVERY

The issue of whether a witness may recover damages for emotional distress suffered as a result of witnessing the tortiously caused serious injury to or death of another has long been controversial. At early common law, damages for "shock" or "fright" were not available except in cases of intentional assault.[3] Gradually, recognition of the validity of psychic injuries led to courts easing restrictions on emotional distress recoveries. This began with courts acknowledging that plaintiffs who suffered physical injuries should be allowed to recover from the mental suffering associated with such harms.[4] Next, courts expanded recovery with the "zone of danger" rule, allowing damages for those who had been threatened with, but did not actually suffer physical harm.[5]

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[2] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 48 cmt. e (AM. L. INST. 2012).

[3] *See, e.g.*, Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1039 n.27 (1936).

[4] *See, e.g.*, Pittsburgh C., C. & St. L. Ry. Co. v. Story, 63 Ill. App. 239, 244 (1896) (holding that in an action for bodily injuries, mental as well as physical suffering resulting from the physical harm may be considered in estimating damages).

[5] *See, e.g.*, Tobin v. Grossman, 249 N.E.2d 419, 419, 424 (N.Y. 1969) (involving a mother who was standing on the sidewalk when her child was struck by a car).

Judicial resistance to the notion of bystander recovery was grounded in public policy considerations that have continued to echo in present-day treatments of virtual bystander recovery. Courts pointed to the potential wave of litigation that would result,[6] the danger of fraudulent claims,[7] and the possibility of unlimited liability for defendants.[8] This resistance manifested itself in three distinct theories that emerged to deal with the concern over providing recovery for bystanders alleging emotional distress. The first of these, the "impact rule," provided that in order to recover for emotional distress, the bystander herself had to be physically injured by the tortfeasor's negligent act.[9] After this theory failed to prevent fraudulent claims, a majority of jurisdictions instead adopted the "zone of danger" rule. Under this theory, the bystander could recover for negligent infliction of emotional distress if she feared for her safety while occupying a zone of possible physical peril. But while many states followed this "zone of danger" reasoning, the test still met with considerable criticism over the "artificial distinctions" it set that dismissed individuals with viable claims.[10]

A handful of states still follow the "impact rule," including Florida,[11] Georgia,[12] Kentucky,[13] and Oregon.[14] A few more states still adhere to the "zone of danger" test, including Alabama,[15] Colorado,[16] Delaware,[17] Illinois,[18] Kansas,[19] Missouri,[20] New York,[21] North Dakota,[22] and Virginia.[23]

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[6] *See, e.g.*, *id.* at 422.

[7] *See, e.g.*, Manie v. Matson Oldsmobile-Cadillac Co., 148 N.W.2d 779, 781–82 (Mich. 1967).

[8] *See, e.g.*, Sinn v. Burd, 404 A.2d 672, 687–92 (Pa. 1979) (Roberts, J., dissenting).

[9] *See, e.g.*, Braun v. Craven, 51 N.E. 657, 664 (Ill. 1898).

[10] *See, e.g.*, Landreth v. Reed, 570 S.W.2d 486, 489 (Tex. App.—Texarkana 1978, no writ).

[11] Willis v. Gami Golden Glades, LLC, 967 So.2d 846, 850 (Fla. 2007).

[12] Strickland v. Hodges, 216 S.E.2d 706, 707 (Ga. Ct. App. 1975).

[13] Nationwide Prop. & Cas. Ins. Co. v. Caple, No. 2007-CA-001395-MR, 2008 WL 2696904, at *2 (Ky. Ct. App. July 11, 2008).

[14] Saechao v. Matsakoun, 717 P.2d 165, 169–70 (Or. Ct. App. 1986).

[15] AALAR, Ltd. v. Francis, 716 So.2d 1141, 1147 (Ala. 1998).

[16] Colwell v. Mentzer Invs., Inc., 973 P.2d 631, 638 (Colo. App. 1998).

[17] Pritchett v. Delmarva Builders, No. 97C-03-011, 1998 WL 283376, at *2 (Del. Super. Ct. Feb. 27, 1998).

[18] Corgan v. Muehling, 574 N.E.2d 602, 605 (Ill. 1991).

[19] Grube v. Union Pac. R.R. Co., 886 P.2d 845, 848 (Kan. 1994).

[20] Asaro v. Cardinal Glennon Mem'l Hosp., 799 S.W.2d 595, 600 (Mo. 1990).

[21] Trombetta v. Conkling, 626 N.E.2d 653, 654 (N.Y. 1993).

[22] Whetham v. Bismarck Hosp., 197 N.W.2d 678, 684 (N.D. 1972).

[23] *See* Litton v. Cann, No. L98-19, 1998 WL 1765700 at *1 (Va. Cir. Ct. Nov. 10, 1998).

But the majority of jurisdictions have adopted some version of the "relative bystander" test first articulated by the California Supreme Court in its 1968 decision, *Dillon v. Legg*.[24] In *Dillon*, the California Supreme Court held that a mother could recover for the emotional shock and physical injury resulting from seeing her young daughter run over by the defendant when she was in close proximity to the collision but not in the "zone of danger" herself.[25] Responding to concerns about "potentially infinite liability" for bystander negligent infliction of emotional distress (NIED) claims, the *Dillon* court pronounced three factors that would help determine the element of foreseeability in such cases: (1) whether the plaintiff was located near the scene of the accident; (2) whether the shock resulted from a direct emotional impact stemming from sensory and contemporaneous observance of the incident (as opposed to learning about it from others); and (3) whether the plaintiff and victim were closely related.[26]

Over the following two decades, the California Supreme Court and various appellate courts expanded the bystander recovery doctrine, recognizing viable NIED claims in a variety of circumstances. For example, in one case where the husband was present but did not see his wife struck and killed while unloading groceries from the family car, the court said a visual perception was not necessary as long as there were other sensory, contemporaneous observances.[27] The court also later allowed claims that did not involve a sudden occurrence, as in the NIED claims of a mother who watched her son suffer excruciating pain over several days before dying.[28] Other cases relaxed the "contemporaneous" prong, allowing NIED claims to proceed where a parent came upon the scene of the accident within minutes.[29]

However, beginning with its 1989 decision in *Thing v. La Chusa*, the California Supreme Court pulled back from the expansionist trend, holding that a bystander plaintiff must be "present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim."[30] The primary rationale for narrowing the test (including

[24] *See* 441 P.2d 912, 920 (Cal. 1968).

[25] *See id.*

[26] *Id.*

[27] Krouse v. Graham, 19 Cal. 3d 59, 76 (Cal. 1977).

[28] *See* Ochoa v. Superior Ct., 39 Cal. 3d 159, 164, 171 (Cal. 1985).

[29] *See, e.g.*, Nazaroff v. Superior Ct., 145 Cal. Rptr. 657, 658–59, 665 (Cal. Ct. App. 1978) (permitting a claim where the mother did not witness three-year-old son's drowning, but arrived as he was being pulled from pool).

[30] 48 Cal. 3d 644, 668 (Cal. 1989) (citation omitted).

maintaining and re-affirming the "closely related" prong) was to limit the scope of liability.[31] The *Thing* court, citing an earlier decision, recognized that expanding the scope of recovery would lead to costs "borne by the public generally," in the form of higher insurance premiums and other costs.[32] Following *Thing*, subsequent decisions rejected the NIED claims of daughters whose mother's artery was cut during surgery because the daughters were not present in the operating room when the injury occurred;[33] of a wife who heard (but did not see) the sound of a sign falling on her husband's head;[34] and of a scuba diver's sister who witnessed his death during a dive but did not know it was due to defective equipment.[35]

Dillon and its progeny—in California and elsewhere—sought to impose clear boundaries for recovery for NIED claims, even though these "bright lines" have less to do with foreseeability from the standpoint of the defendant than to elements unique to the plaintiff (i.e., the plaintiff's location, relationship to the victim, and perception of the injury or event). What the *Dillon* court and others did not foresee was how societal changes might impact two of the key aspects of its test. One, of course, is the contemporaneous perception of the injury or event, with modern technology impacting our definition of what it means to contemporaneously perceive or experience the injury of another. As we shall see, recent cases in California and elsewhere may very well be harbingers of the next stage in the evolution of the tort of bystander recovery.

However, it is instructive to note how another societal change, not technological adoption but the changing nature of familial and relationship dynamics, has caused the tort of bystander recovery to evolve by asking the question, "what qualifies as closely related?" This prong has witnessed the most activity, as courts fulfilling their gatekeeping function have struggled to keep up with evolving notions of "closely related" beyond immediate family. For example, the California Supreme Court held that a cohabitation partner did not satisfy the "closely related" prong,[36] while the New Jersey Supreme Court reached the opposite conclusion.[37] Is marriage a bright-line rule? Not according to the Supreme Court of New Hampshire, which permitted NIED

[31] *See id.* at 667.

[32] *Id.* (citing Borer v. Am. Airlines, Inc., 563 P.2d 858, 862 (Cal. 1977)).

[33] Bird v. Saenz, 51 P.3d 324, 332 (Cal. 2002).

[34] Ra v. Superior Ct., 154 Cal. App. 4th 142, 144–45 (Cal. Ct. App. 2007).

[35] Fortman v. Förvaltningsbolaget Insulan AB, 212 Cal. App. 4th 830, 832 (Cal. Ct. App. 2013).

[36] Elden v. Sheldon, 46 Cal. 3d 267, 277 (Cal. 1989).

[37] Dunphy v. Gregor, 642 A.2d 372, 375 (N.J. 1994).

recovery for a fiancée.[38] Yet courts in Indiana[39] and Hawaii[40] held fast to requiring marriage in denying NIED claims of fiancées. What about same-sex marriages? In *Coon v. Joseph*, a California appellate court denied NIED recovery to the LGBT life partner of the victim, reasoning that only a parent-child, grandparent-grandchild, or legally recognized marriage relationship would satisfy the closely related prong.[41] In a post-*Obergefell* world, it is hard to imagine same-sex marriages being denied this recognition. Existing case authority in multiple jurisdictions has declined to extend bystander recovery for NIED to close cousins[42] and nieces,[43] but in a twenty-first-century reality of blended families, children being raised by aunts and uncles, and other nontraditional family relationships, should such distinctions survive? A growing number of scholars have called for an updating of the "closely related" test.[44]

If the tort of bystander recovery for NIED can evolve in response to changing notions of who constitutes a family member or who is "closely related," then there is no reason why the concept of what constitutes a "contemporaneous perception" of a tortious act cannot adjust to account for emerging technologies.

II. LIVESTREAMING, VIRTUAL PRESENCE, AND THE LAW

To better understand the expansion of the bystander recovery doctrine to allow recovery for those whose contemporaneous perception of a third party's tortious act is made possible by technology, one must first appreciate the impact that livestreaming and technologies that enable us to experience the world virtually have had on society. While some technologies tout an escape from reality, livestreaming offers immediacy and an intimacy

[38] Graves v. Estabrook, 818 A.2d 1235, 1262 (N.H. 2003).

[39] Smith v. Toney, 862 N.E.2d 656, 663 (Ind. 2007).

[40] Milberger v. KBHL, Inc., 486 F. Supp. 2d 1156, 1166 (D. Haw. 2007).

[41] 192 Cal. App. 3d 1269, 1274–77 (Cal. Ct. App. 1987).

[42] Blanyar v. Pagnottie Enters. Inc., 679 A.2d 790, 794 (Pa. Super. Ct. 1996).

[43] Trombetta v. Conkling, 626 N.E.2d 653, 656 (N.Y. 1993).

[44] *See, e.g.*, David Sampedro, *When Living as Husband and Wife Isn't Enough: Reevaluating* Dillon*'s Close Relationship Test in Light of* Dunphy v. Gregor, 25 STETSON L. REV. 1085, 1117–18 (1996); Dennis G. Bassi, Note, *It's All Relative: A Graphical Reasoning Model for Liberalizing Recovery for Negligent Infliction of Emotional Distress Beyond the Immediate Family*, 30 VAL. U.L. REV. 913, 955–56 (1996); Colin E. Flora, *Special Relationship Bystander Test: A Rational Alternative to the Closely Related Requirement of Negligent Infliction of Emotional Distress for Bystanders*, 39 RUTGERS L. REC. 28, 29 (2012).

exceeded only by in-person presence. Whether the platform is Twitch (popular among the gaming community), Facebook Live, or one of multiple others, the user experience is what Facebook founder Mark Zuckerberg has characterized as "raw and visceral."[45]

All too frequently, the experience is *too* raw, too real, and too graphic. In May 2016, a nineteen-year-old French woman used Periscope to broadcast the hours leading up to her suicide and then the act itself.[46] An Ohio teenager, Marina Lonina, used the same app to livestream her underage friend's rape.[47] A prosecutor would later say that Lonina was shown on screen "laughing and giggling," caught up in excitement over the number of "likes" her livestream was receiving.[48] Other individuals have also livestreamed suicides, gang rapes, murders, and armed standoffs with police SWAT teams in what one scholar has dubbed "performance crime."[49]

One of the driving forces behind this seems to be social media attention. According to N.G. Berrill, executive director of the New York Center for Neuropsychology & Forensic Behavioral Science, livestreaming such acts "speaks to a kind of scary place in the culture where people are willing to expose their misled ideas, their sadism, their sexual perversion, their felonious behavior, for the accolades they'll receive through social media."[50] Some of those who took part in the January 6, 2021, assault on the U.S. Capitol livestreamed their actions. The March 15, 2019, mass shootings at the Al Noor Mosque in Christchurch, New Zealand, were livestreamed by the assailant on Facebook Live, as was a portion of the February 8, 2020, mass shootings at Thailand's Terminal 21 Korat Mall.

In one of the most notorious and deadly mass shootings to be livestreamed, the eighteen-year-old accused of killing ten people during a May 14, 2022, attack at a Buffalo supermarket livestreamed the heinous

[45] Caitlin Dewey, *The (Very) Dark Side of Live-Streaming that No One Seems Able to Stop*, WASH. POST (May 26, 2016, 10:22 AM), https://www.washingtonpost.com/news/the-intersect/wp/2016/05/26/the-very-dark-side-of-live-streaming-that-no-one-seems-able-to-stop/.

[46] *Id.*

[47] Mike McPhate, *Teenager is Accused of Live-Streaming a Friend's Rape on Periscope*, N.Y. TIMES (Apr. 18, 2016), https://www.nytimes.com/2016/04/19/us/periscope-rape-case-columbus-ohio-video-livestreaming.html.

[48] *Id.*

[49] Raymond Surette, *Performance Crime and Justice*, 21:2 CURRENT ISSUES IN CRIM. J. 195, 195–96 (2015).

[50] J. Weston Phippen, *The Desire to Live-Stream Violence*, THE ATL. (Jan. 6, 2017), https://www.theatlantic.com/news/archive/2017/01/chicago-beating-facebook-live/512288/.

crime on Twitch. Even though the platform took the video down after less than two minutes, other individuals downloaded and reposted the footage to other sites.[51] One video was viewed more than three million times after a link to it on Facebook received more than 46,000 shares.[52] The disturbing video of the attack was distributed across multiple platforms, with footage later found on YouTube, Facebook, Twitter, Instagram, Reddit, and other sites, prompting renewed criticism of and calls for greater scrutiny of social media platforms' content policies.[53]

What if a close relative of one of the victims of such a mass shooting witnessed it as it was happening on a platform like Facebook Live or even Twitch? In a subsequent wrongful death suit against the premises owner for inadequate or negligent security, could that plaintiff maintain a bystander recovery claim for negligent infliction of emotional distress? In other words, is the traumatic impact and shock from witnessing such an act any less if the sensory experience is aided by technology rather than in person? Such "happenstance viewing" is entirely possible, even foreseeable, and not always dependent on the criminal actor doing the posting. For example, on January 15, 2022, when an armed gunman took multiple people hostage at the Congregation Beth Israel Jewish synagogue in Colleyville, Texas, a portion of the hostage-taking was livestreamed on the synagogue's Facebook account—a regular practice begun during the pandemic for those attending services virtually.[54] While no one was injured or killed, if such violence had occurred and been witnessed live by the housebound close relative of a victim, would that relative's virtual experience be any less worthy of recovery?

Of course, the emotional impact of livestreamed footage has been demonstrated in other contexts. Diamond Reynolds livestreamed her boyfriend, Philando Castile, dying at the hands of Minnesota police officers

[51] Max Zahn, *Buffalo Shooter's Livestream Sparks Criticism of Tech Platforms Over Content Moderation*, ABC NEWS (May 18, 2022, 4:34 PM), https://abcnews.go.com/Business/buffalo-shooters-livestream-sparks-criticism-tech-platforms-content/story?id=84759735.

[52] *Id.*

[53] *Footage of Buffalo Attack Spread Quickly Across Platforms, Has Been Online for Days*, ADL BLOG (May 24, 2022), https://www.adl.org/resources/blog/footage-buffalo-attack-spread-quickly-across-platforms-has-been-online-days.

[54] Michael Williams, Catherine Marfin, & Jamie Landers, *All Hostages Inside Colleyville Synagogue Rescued After 11-Hour Standoff, Hostage-Taker Dead*, DALL. MORNING NEWS (Jan. 15, 2022, 11:10 PM), https://www.dallasnews.com/news/crime/2022/01/15/colleyville-police-swat-team-involved-in-incident-at-synagogue/.

after being pulled over on July 6, 2016, for a broken taillight. The shocking, powerful footage helped galvanize a national reckoning on racial injustice, one that would gain additional momentum in 2020 with footage of the death of George Floyd in police custody, footage captured by onlookers at the scene.

Virtual experiences can still be traumatizing to those involved, separate and apart from bystanders. The "Zoom fatigue" experienced by many during the pandemic may have signaled how jaded people had become about remote working environments, but Zoom felt real enough to make it the basis for one surviving spouse's claims for the wrongful death and "false imprisonment" of her late husband. In 2021, Gabriella Tabak's husband, Adam, worked as a financial controller for Recology, a waste-hauling company.[55] The firm was in the midst of multiple scandals, including allegations of bribery to get certain contracts. On December 1, 2020, Tabak had a meeting via Zoom with Recology's general counsel Cary Chen and "at least four outside counsel from the firm of Morrison & Foerster."[56] Ms. Tabak's lawsuit claims that Adam was "not allowed to leave" the Zoom meeting and was subjected to threats and duress in connection with the attorneys' corruption investigation.[57] The lawsuit goes on to blame Recology, and this alleged virtual haranguing for driving Mr. Tabak into taking his own life just weeks later.[58]

Virtual experiences can lead to real-world legal proceedings. In 2016, Niantic Labs' Pokémon Go app became the top-grossing app in the United States and introduced millions of smartphone users to the wonders of augmented reality.[59] It also spawned a class action lawsuit by landowners alleging nuisance due to enthusiastic players "pursuing" virtual creatures

[55] Joe Eskenazi, *Recology VP's Widow Sues—Claims Company Drove Him to Suicide in Corruption Probe*, MISSION LOC. (Nov. 2, 2021), https://missionlocal.org/2021/11/adam-tabak-recology-lawsuit/.

[56] Complaint, Gabriella Tabak et al. v. Recology, Inc. et al., Case No. 4:21-cv-08460-HSG, (U.S.D.C. for the N.D. of Cal., Aug. 20, 2021).

[57] *Id.*

[58] *Id.*

[59] Travis Alley, *Pokémon Go: Emerging Liability Arising From Virtual Trespass for Augmented Reality Applications*, 4:4 TEX. A&M J. PROP. L. 273, 277 (2018).

onto real-life property.[60] Activities done in the virtual world Second Life conferred real-world jurisdiction by a federal court in Pennsylvania.[61]

And what about Mark Zuckerberg's much-ballyhooed metaverse? With real-world companies—including fast food chains, churches, and even law firms—opening their own digital presences in the metaverse, will there be real-world liability for virtual wrongs or even crimes committed virtually? Horizon Worlds, a space in the metaverse where anyone will be able to create (and sell) a "world," opened to the public in 2021 after two years of beta testing.[62] One such beta tester, Nina Jane Patel (the vice president of an IT consulting company), appeared on the platform and was "virtually gang raped" within seconds by three or four male-appearing avatars.[63] It was an experience she described later as "surreal" and "a nightmare."[64] In response to the incident, Meta created a new Personal Boundary feature to protect those exploring the metaverse from unwanted interactions.[65]

Thanks to technology, there is a whole range of activities, both lawful and unlawful, that can be experienced virtually. Does the fact that it is experienced or witnessed virtually make it feel less real or less meaningful? Certainly, those who choose to livestream their actions intend for the observing audience to have a raw, visceral reaction, while many audience members no doubt react accordingly. Companies may be setting up virtual shop in the metaverse, but in doing so, they hope to reap real-world financial benefits.

For those who remain unconvinced about the physical impact and emotional shock that can come from experiencing something filtered through the lens of technology, consider the case of journalist Kurt Eichenwald. Eichenwald, who has epilepsy, experienced an attack on his Twitter account

[60] *Id.* at 288.

[61] Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 601–02 (E.D. Pa. 2007); *see generally* Zachary Schaengold, *Personal Jurisdiction Over Offenses Committed in Virtual Worlds*, 81 U. CIN. L. REV. 361 (2013).

[62] Meta, *The Metaverse and How We'll Build It Together*, YOUTUBE (Oct. 28, 2021), https://www.youtube.com/watch?v=Uvufun6xer8.

[63] Cedra Mayfield, *Buckle Up: Lawsuits Over Offenses in Virtual Reality Could Become the Next Litigation Trend*, LAW.COM (Mar. 9, 2022, 4:08 PM), https://www.law.com/dailyreportonline/2022/03/09/buckle-up-lawsuits-over-offenses-in-virtual-reality-could-become-the-next-litigation-trend/?slreturn=20221002005311.

[64] Maya Oppenheim, *Woman reveals 'nightmare' of being 'gang raped' in virtual reality*, INDEP. (Feb. 23, 2022, 9:25 AM), https://www.independent.co.uk/news/uk/home-news/metaverse-gang-rape-virtual-world-b2005959.html.

[65] Mayfield, *supra* note 63.

in which an online assailant (John Rivello) sent a flashing strobe GIF directly to Eichenwald's personal inbox.[66] Overlaid on the GIF was the text "YOU DESERVE A SEIZURE FOR YOUR POSTS." Eichenwald did suffer a seizure. The assailant, Rivello, was later caught and prosecuted for assault—with a tweet as the weapon.[67] It was one of the first—but not the last—instances of such a virtual assault that had real-world consequences, and it stands as yet another reminder that what might be experienced virtually, thanks to technology, is no less real than if Eichenwald's attacker had stood in front of him with a strobe light.

III. *CLIFTON V. MCCAMMACK*: INDIANA REJECTS VIRTUAL BYSTANDER CLAIM

Just what would qualify as "witnessing" or "experiencing" the sudden and unexpected death or serious injury of a close family member as a result of a tortfeasor's actions in the age of streaming technology and social media faced its first test in 2015 before the Indiana Supreme Court. *Clifton v. McCammack* dealt with the bystander recovery claims of Ray Clifton as a result of the death of his fifty-one-year-old son, Darryl Clifton.[68]

Darryl lived with Ray, serving as his father's caregiver after Ray had back surgery. On August 3, 2012, Darryl left the house on his moped at about 11:15 a.m.[69] Not long after, at 11:28 a.m., Ruby McCammack negligently turned her car left in front of Darryl's moped; Darryl struck the car violently, suffering severe face, neck, and back trauma.[70] Witnesses and emergency medical personnel attempted to resuscitate him, but he was pronounced dead at 11:43 a.m.[71]

Ray Clifton had been home watching television. On the noon news broadcast, he saw the breaking news story about a "fatal accident involving a moped had occurred on the 3300 block of Kentucky Avenue."[72] Knowing that his son rode a moped and usually took a route into Indianapolis that

[66] Reis Thebault, *A Tweet Gave a Journalist a Seizure. His Case Brings New Meaning to the Idea of "Online Assault"*, WASH. POST (Dec. 16, 2019, 8:21 PM), https://www.washingtonpost.com/health/2019/12/16/eichenwald-strobe-gif-seizure-case/.

[67] Eichenwald v. Rivello, 318 F. Supp. 3d 766, 770 (D. Md. 2018).

[68] *See* 43 N.E.3d 213, 214–15 (Ind. 2015).

[69] *Id.* at 215.

[70] *Id.*

[71] *Id.*

[72] *Id.*

involved Kentucky Avenue, Clifton had a "very bad feeling" and "definitely was upset."[73] He quickly got in his car and drove the four miles from his home to the scene, "pray[ing] all the way" that the deceased was not Darryl.[74] The news segment he had viewed had shown no photos or video of the accident and had not identified or provided any details about the victim.[75]

Upon arrival, Clifton saw "a lot of police cars and people," and from a distance of twenty to twenty-five feet, he also saw Darryl's moped near the front of McCammack's car and a body on the ground covered with a white sheet.[76] Although he did not approach the body for a closer look, Clifton recognized the shoes sticking out from under the sheet as Darryl's.[77] He spoke with a police officer, who confirmed that the victim was, in fact, Darryl.[78] Two hours later, Clifton was counseled by a minister and his wife; they later took him home.[79] Clifton never witnessed the removal of his son's body.[80] Following the accident, Clifton underwent counseling and was prescribed antidepressant medication.[81]

Clifton filed suit against McCammack in May 2013.[82] On the issue of negligent infliction of emotional distress, McCammack filed for and was granted, summary judgment.[83] Clifton appealed, and the court of appeals reversed and remanded the case for trial.[84] Despite the fact that many of the traditional bystander recovery factors were stretched—Clifton learned of the accident via television but was not sure it was his son and never saw his son's body—the appellate court held that Clifton did view the "gruesome aftermath of Darryl's death, and accordingly his claim satisfies the temporal prong of the bystander rule's proximity requirement."[85]

Indiana had already expanded its concept of bystander recovery for negligent infliction of emotional distress, abandoning the "impact rule" for a

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.* at 216.

[84] Clifton v. McCammack, 20 N.E.3d 589, 590 (Ind. Ct. App. 2014).

[85] *Id.* at 600.

"modified impact rule" in 1991. In *Shuamber v. Henderson*, the Indiana Supreme Court allowed the mother and sister of a boy killed in a car accident to recover since they were in the same vehicle as the boy.[86] Under this "modified impact rule," the emotionally traumatized plaintiff would not have to demonstrate a contemporaneous physical injury to themselves but would have to show that a physical impact occurred.[87]

Later, in 2000, the court expanded its notion of bystander recovery again, recognizing that there would be a right to recovery under "circumstances where, while the plaintiff does not sustain a direct impact, the plaintiff is sufficiently *directly involved* in the incident giving rise to the emotional trauma."[88] In *Groves*, a sister heard a loud "pop" and turned around just in time to see her brother's body rolling off the highway after being struck by a vehicle.[89] The brother's injuries were fatal, and the sister claimed emotional distress from being an "ear witness" to the accident that took his life.[90] The court recognized that even in cases *not* involving a direct impact, recovery would be permitted as long as there was: (1) a fatal or serious injury involved; (2) to a close relative; and (3) that the plaintiff either witness the incident itself "or the gruesome aftermath of such an event minutes after it occurs" since that is "an extraordinary experience, distinct from the experience of learning of a loved one's death or serious injury by indirect means."[91]

When McCammack appealed the lower court's ruling to the Indiana Supreme Court, the court noted how the state's treatment of bystander recovery claims had evolved over time.[92] Observing the importance of bright line rules for this tort and the need to limit the number of potential claimants, the court saw no need for further expansion of Indiana's bystander recovery doctrine.[93] After discussing how Clifton had not met at least one of the circumstantial components identified in *Groves* since he came to the accident scene after it had undergone changes rather than stumbling by chance across the original scene, the court held that Clifton did not see the "gruesome aftermath" of the incident.[94] As a result, the court concluded, "Clifton did not

[86] *See* 579 N.E.2d 452, 455–57 (Ind. 1991).

[87] *Id.*

[88] Groves v. Taylor, 729 N.E.2d 569, 572 (Ind. 2000) (emphasis added) (citation omitted).

[89] *Id.* at 571.

[90] *See id.*

[91] *Id.* at 572–73.

[92] *See* Clifton v. McCammack, 43 N.E.3d 213, 216, 220 (Ind. 2015).

[93] *See id.* at 223.

[94] *Id.* at 222.

have the sudden sensory experience necessary to establish direct involvement."[95]

However, the biggest obstacle to recovery, according to the court, was the fact that Clifton had learned indirectly of the accident before arriving at the scene.[96] As the court required, the last circumstantial factor allowing a bystander to recover for emotional distress demands some degree of fortuity.[97] What triggers the emotional distress, the court said, is not some prior knowledge of the incident but rather "the happenstance contemporaneous or near-contemporaneous sensory experience of the incident itself."[98] Holding that Clifton's learning of the event indirectly through watching television negated his chances for recovery, the court concluded that "emotional trauma triggered by a news story of an accident is distinct from sudden shock that arises when one unwittingly comes upon a scene of an accident."[99]

Significantly, the court acknowledged that advances in communications technology were threatening to alter this part of the legal landscape.[100] "Major public policy concerns" and the need to set out straightforward limits for recovery, the court stated, mandated that a bright line be drawn since allowing claimants to recover under a bystander theory when their emotional distress resulted from seeing a news story would lead to "virtually limitless litigation."[101] The Indiana Supreme Court was keenly aware that technology could have a transformative effect on this tort doctrine. As the court opined:

> Our quickly evolving state of social media and instantaneous news coverage further underscores the importance of setting parameters for this tort. We are at a point in time when people are often subjected to seeing live, streaming footage—on high-definition televisions, smart phones, or other devices—of emergencies possibly involving their immediate beloved relatives. There must be a point at which a defendant's exposure to liability for negligent infliction of emotional distress ends—not to diminish real anguish, but

[95] *Id.*

[96] *Id.* at 222–23.

[97] *Id.* at 222.

[98] *Id.*

[99] *Id.* at 222–23.

[100] *See id.* at 223.

[101] *Id.*

> simply because pragmatism demands that the line be drawn somewhere.[102]

The Indiana Supreme Court elected to take a pragmatic approach, cognizant of the revolutionary impact of new technologies, yet committed to a public policy against opening the floodgates of litigation.[103] With the factual scenario in question—indirect learning of an incident via a news report without knowing with certainty of a loved one's involvement—the court's reasoning is hard to dispute. But what if the facts had been different? What if Clifton had witnessed live news footage that showed his son's death and identified him in the process? As we will see, other courts confronting immediate perceptions of a close relative's severe injury or death—perceptions rendered possible through technology—may reach different results.

IV. *KO V. MAXIM HEALTHCARE SERVICES, INC.*

After the Indiana Supreme Court declined to expand bystander recovery to encompass becoming aware of the injury or death by viewing a television news report, it would be several more years before a case would come along to demonstrate just how prescient the Restatement (Third) of Tort's words actually were. That case would be *Ko v. Maxim Healthcare Services, Inc.*, decided by the Court of Appeals for California's Second Appellate District in December 2020.[104]

On April 22, 2017, Dyana and Khristopher Ko took their two older children to a youth basketball tournament.[105] Their youngest child, two-year-old Landon, was home under the care of Thelma Manalastas, a nurse from Maxim Healthcare Services who had been one of Landon's full-time caregivers for over a year.[106] Landon had a genetic disorder, Rubinstein-Taybi Syndrome, that caused him to suffer a myriad of health problems, including blindness in one eye, an inability to walk, difficulty hearing, the need for a feeding tube, and severe developmental delays.[107] While at the basketball tournament, Dyana Ko "opened a phone application that allows her to live-stream video and audio from her home that is being shot in real-

[102] *Id.*

[103] *See id.*

[104] 272 Cal. Rptr. 3d 906 (Cal. Ct. App. 2020).

[105] *Id.* at 909.

[106] *Id.* at 908-09.

[107] *Id.* at 909.

time on a 'nanny cam.'"[108] According to the Kos' complaint, the parents "watched and heard in shock and horror while the incident was happening in real-time, as . . . Manalastas physically assaulted Landon by acts including hitting, slapping, pinching, and shaking Landon in a violent manner."[109] The Kos called 911, police were dispatched to their residence, and when the couple arrived, they showed the police the video of the abuse.[110] Manalastas was arrested.[111] The Kos reported the abuse to Maxim, which reassigned Manalastas instead of firing her.[112]

The Kos filed a lawsuit against Manalastas and Maxim on June 21, 2017.[113] The asserted claims for negligence, battery, assault, and negligent infliction of emotional distress (NIED).[114] Landon had suffered various physical injuries, necessitating the surgical removal of one of his eyes.[115] On April 24, 2018, while the lawsuit was still pending, Landon passed away.[116] Defendants Maxim and Manalastas filed demurrers to the Kos' claims for NIED.[117] The trial court sustained the demurrers, noting that under existing California case law, "NIED bystander liability is limited to circumstances where a plaintiff is physically 'present at the scene of the injury-producing event at the time it occurs.'"[118] The trial court observed that cases upholding NIED liability had only involved plaintiffs with some physical proximity to the injury-producing event, even though appellate courts had never defined what it means to be "present at the scene."[119] The trial court went on to say that "[i]t is unclear how existing case law on NIED applies to existing technology, such as live-streaming video and audio on smart phones."[120]

On appeal, the court noted the Kos' contention that "their 'virtual presence' during Landon's abuse through a real-time audiovisual connection

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.* at 909-10.

[118] *Id.* at 910.

[119] *Id.*

[120] *Id.* (citation omitted).

satisfies the requirement in *Thing* [*v. La Chusa*] of contemporaneous presence."[121] The appellate court signaled its agreement, observing that:

> In the three decades since the Supreme Court decided *Thing*, technology for virtual presence has developed dramatically, such that it is now common for families to experience events as they unfold through the livestreaming of video and audio. Recognition of an NIED claim where a person uses modern technology to contemporaneously perceive an event causing injury to a close family member is consistent with the Supreme Court's requirements for NIED liability and the court's desire to establish a bright-line test for bystander recovery.[122]

The appellate court began with a historical overview of *Dillon v. Legg* and its progeny up until *Thing v. La Chusa*.[123] After describing how California courts had expanded the definition of contemporaneous observance of an accident, it moved on to discuss *Thing* and its crystallization of the three requirements necessary for bystander recovery of NIED.[124] In looking at how subsequent cases had interpreted the second *Thing* requirement of contemporaneous presence, the court took particular note of *Wilks v. Hom*, a 1992 case in which a mother was in a different room than her three young daughters when a gas explosion ripped through the home, killing one daughter and severely burning another.[125] The *Wilks* court upheld bystander recovery for the mother, reasoning that because she was "sensorially aware, in some important way, of the accident and the necessarily inflicted injury to her child," it was sufficient to establish that "she personally and contemporaneously perceived the injury-producing events and its traumatic consequences."[126]

The court then moved on to discuss whether, in light of the technological advances that had taken place in the thirty years that had elapsed since *Thing* was decided, a virtual presence would suffice.[127] Holding that it would, the court reasoned that there was nothing inconsistent about approving recovery

[121] *Id.* at 908.

[122] *Id.*

[123] *See id.* at 911–13.

[124] *See id.* at 913–14.

[125] *Id.* at 915 (citing Wilks v. Hom, 2 Cal. App. 4th 1264, 1270–72 (1992)).

[126] *Id.* (quoting *Wilks*, 2 Cal. App. 4th at 1271, 1273)

[127] *Id.* at 916.

for parents who observed their child's abuse as it happened via a livestream feed while denying recovery if the parents "had walked into their home moments after the abuse and observed their injured son."[128] After all, the court noted, *Thing* had emphasized the emotional "impact of personally observing the injury-producing event," which could be distinguished from the emotions "felt when one learns of the loved one's injury or death from another" source or one who observes the loved one's pain and suffering, "but not the traumatic cause of the injury."[129]

The court also brushed aside defense arguments that there was nothing new about remote surveillance or live broadcasts.[130] While such technology certainly existed when *Thing* was decided, the court held that the Supreme Court back then,

> could not have reasonably anticipated the technological advances that now allow parents (and other family members) to have a contemporaneous sensory awareness of an event causing an injury to their child while not in physical proximity to the child. Certainly live television and remote video surveillance existed in 1989, but numerous technological, regulatory, and commercial developments in image capture (such as an internet-enabled nanny cam), transmission (including the streaming of audiovisual data over the internet and mobile data networks), and reception (such as on pocket-sized smartphones with high resolution screens) were necessary to create a world where parents could contemporaneously observe their at-home child while attending a basketball game.[131]

The court took pains to explain that it did not consider its ruling an outlier but rather a natural application of *Thing*'s requirements to life in the Digital Age, where "the ubiquity of home surveillance systems and videoconferencing applications since the advent of Internet-enabled smartphones has manifestly changed the manner in which families spend time together and monitor their children."[132] It also referenced how, when it came to how the law has considered traditional conceptions of physical

[128] *Id.* at 917 (footnote omitted).

[129] *Id.* (quoting Thing v. La Chusa, 48 Cal. 3d 644, 666 (Cal. 1989).

[130] *See id.*

[131] *Id.*

[132] *Id.* at 917–18.

presence in other contexts, courts "have been called upon to interpret long-standing precedent in light of new technologies."[133] From GPS devices constituting a "search" for Fourth Amendment purposes[134] to family law cases approving of electronic communications and videoconferencing in lieu of in-person visitation,[135] the *Ko* court concluded that virtual presence was an issue that courts have already addressed.[136]

The court also rejected the defense's reliance on the reasoning of the Indiana Supreme Court in *Clifton v. McCammack*, distinguishing the father's learning of his son's injury forty minutes after the accident there from the Kos' contemporaneous awareness of the injury-producing event "through modern technology that streamed the audio and video on which they watched Manalastas assaulting Landon in real time."[137] This virtual presence, the court held, was no different from any other plaintiff recovering for NIED based on an event perceived by other senses. In the case of the Kos, they contemporaneously saw and heard Landon's abuse since "their senses [were] technologically extended beyond the walls of their home."[138] Accordingly, the court reversed the trial court's judgment, holding that the Kos had stated facts sufficient to constitute a case for NIED.[139] In 2021, the California Supreme Court declined to review the lower appellate court's decision.[140]

As the *Ko* court recognized, the ubiquity of emerging technologies demands a reevaluation of what can be considered "presence." Will a person at work who witnesses the death of a spouse captured via Ring doorbell camera or home surveillance technology be able to assert bystander recovery claims for NIED? What about an individual who witnesses a close relative's injury or death in real-time on Facebook Live? In a society gripped by the pandemic, working remotely or virtually became the rule rather than the exception; in the legal system, courts all over the country pivoted to remote proceedings and made extensive use of videoconferencing platforms like Zoom and Microsoft Teams. A virtual presence has been deemed sufficient for these and other purposes, so why not for bystander recovery? After all, in addressing other justifications for expanding bystander recovery that have

[133] *Id.* at 918.

[134] United States v. Jones, 565 U.S. 400, 413 (2012).

[135] *See In re* Marriage of Lasich, 99 Cal. App. 4th 702 (2002).

[136] *Ko*, 272 Cal. Rptr. 3d at 918.

[137] *Id.* at 919 (citation omitted).

[138] *Id.*

[139] *Id.*

[140] *Id.*

nothing to do with technology, one court warned about the dangers of following "archaic [laws that do] not fully address all plaintiffs who are deserving of relief."[141] Just because the Kos' contemporaneous perception was enabled by technology does not make them any less deserving of relief.

How will other jurisdictions determine whether the contemporaneous perception required by most for bystander recovery can be enabled through technological means? That question remains to be seen. Some jurisdictions are more flexible than others. Texas, for example, requires not only a close familial relationship between the plaintiff and victim as well as a close proximity to the accident scene but also requires shock as a result of "a direct emotional impact . . . from a sensory and contemporaneous observance of the accident."[142] Texas courts have not had to consider a case in which technology played any role in the contemporaneous perception of an accident, but they have had to consider the boundaries of perception itself. For example, while a mother who did not see or hear the crash that occurred a block away was not considered "at the scene,"[143] a father who found his son dead at the bottom of a hospital's airshaft after a three-hour search for him in the facility was deemed to be at the scene with contemporaneous perception.[144]

As the *Ko* court reminds the jurisdictions that may follow in its footsteps, the technology that makes a virtual presence possible is here to stay. Our jurisprudence needs to catch up.

V. *CLOTAIRE V. GARDEN SPRING CENTER SNF, LLC*

The most recent case to examine virtually witnessing a serious injury to or death of a close family member with the aid of technology is not a reported appellate decision but rather is an ongoing lawsuit filed on June 29, 2022, in the Court of Common Pleas of Montgomery County, Pennsylvania.[145] The facts are fairly straightforward. Seventy-four-year-old Marie Joseph was admitted to a nursing home, Garden Spring Nursing and Rehabilitation

[141] Sacco v. High Cnty. Indep. Press, Inc., 896 P.2d 411, 425 (Mont. 1995).

[142] United Servs. Auto. Ass'n v. Keith, 970 S.W.2d 540, 541–42 (Tex. 1998) (citation omitted).

[143] Gen. Motors Corp. v. Grizzle, 642 S.W.2d 837, 842–44 (Tex. App.—Waco 1982, writ dism'd).

[144] City of Austin v. Davis, 693 S.W.2d 31, 34 (Tex. App.—Austin 1985, writ ref'd n.r.e.).

[145] Clotaire *ex rel.* Joseph v. Garden Spring Ctr. SNF, LLC et al., No. 2022-10849; Ct. of Common Pleas, Montgomery Cty., Pa. (filed June 29, 2022) (copy of Complaint on file with author).

Center, on August 25, 2021.[146] She had just been hospitalized for hypoxic respiration failure and the placement of a tracheostomy.[147] "Tracheostomy patients . . . are at an increased risk of death [if] the tracheal tube becomes obstructed with excess mucus [(a "mucus plug")], because they are otherwise unable to breathe independently."[148] Because of this, regular tracheostomy care, including tracheal suctioning to prevent mucus plugging, is imperative for such patients in a nursing home setting.[149] Upon being admitted to Garden Springs, Ms. Joseph was evaluated by a physician who ordered that her tracheal tube be suctioned "as necessary" and that an extra tracheal tube be kept readily available at her bedside.[150]

Ms. Joseph's daughter, Norma Clotaire, had given her elderly mother a cellphone that had the FaceTime app installed, enabling them not only to stay in contact but also serving as an emergency means of communication.[151] Although patients like Ms. Joseph had a call bell to contact nursing staff, Ms. Clotaire was concerned about her mother's calls being ignored or neglected. She apparently had good reason for these concerns.[152] On September 10, 2021, Ms. Clotaire emailed Yehuda Brody, an administrator at Garden Springs, to inform him that Ms. Joseph had called her to let her know that she was "having trouble breathing with the trach that needs to be suctioned" and that "the call bells don't work on the floor."[153] Ms. Clotaire explained that she herself had been calling the facility "for almost an hour" trying to summon nursing help for her mother.[154] She implored Brody to "have someone take care of this, or I will be calling 911 to her rescue" and stated, "I would hate to have to lose my mom because of neglectful behaviors from your staff."[155]

[146] *Id.* at 15.

[147] *Id.* A tracheostomy is an opening surgically created through the neck into the trachea (or windpipe) to allow placement of and direct access to a breathing tube, placed there to provide an airway and to remove secretions (such as mucus) from the lungs. *What is a Tracheostomy?*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/tracheostomy/about/what.html.

[148] *Clotaire*, Case No. 2022-10849, at 15.

[149] *Id.*

[150] *Id.* at 16.

[151] *Id.*

[152] *See id.* at 18.

[153] *Id.*

[154] *Id.*

[155] *Id.*

On October 14, 2021, Ms. Clotaire's worst fears were realized.[156] At 5:43 a.m., Marie Joseph contacted her daughter via FaceTime to tell her she could not breathe because her tracheal tube needed suctioning, but the staff was not responding to her call bell.[157] Via FaceTime, Ms. Clotaire could see her mother and could see that her call bell was on but that no facility staff members were in her mother's room.[158] While remaining on FaceTime with her mother and observing her "to be terrified and struggling to breathe," Clotaire contacted Emergency Medical Services (EMS) on her home phone.[159] EMS personnel arrived at the Garden Spring facility at 5:49 a.m., where they found Marie Joseph in respiratory and cardiac arrest.[160] Marie Joseph was moved to Abington Memorial Hospital at 6:15 a.m.[161]

At the hospital, Ms. Joseph was placed on a ventilator after her tracheostomy tube was removed and replaced; it was found to have a large mucus plug at the end.[162] A CT scan revealed diffuse cerebral edema—swelling due to fluid buildup around the brain.[163] On October 16, 2021, Ms. Joseph passed away.[164] Her death certificate revealed that she had died of "diffuse cerebral edema, cardiopulmonary arrest, and mucus plugging leading to hypoxia."[165] Following Ms. Joseph's death, the Department of Human Services conducted unscheduled inspections of the Garden Spring facility, which resulted in the center being cited for (among other things) failing to provide tracheostomy care and suctioning and "failing to ensure call bells [were] accessible and responded to in a timely manner."[166]

As administrator of her late mother's estate, Norma Clotaire filed suit against Garden Spring and its owners and operators, asserting claims for wrongful death, corporate negligence, and professional negligence.[167] In her individual capacity, she brought a claim for negligent infliction of emotional

[156] *See id.* at 19.

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.* at 20.

[163] *Id.*; *See* Aaron Kandola, *Cerebral Edema: Everything You Need to Know*, MED. NEWS TODAY (July 16, 2018), https://www.medicalnewstoday.com/articles/322475.

[164] *Clotaire*, Case No. 2022-10849, at 20.

[165] *Id.*

[166] *Id.* at 21.

[167] *Id.* at 21, 24, 27.

distress against the defendants, based on having "contemporaneously observed her mother struggling to breathe and then losing consciousness," as well as "the failures of the medical staff . . . to provide timely and appropriate tracheostomy care."[168] Clotaire maintained that she "had no opportunity to prepare for the shock of watching her mother struggle to breathe and then lose consciousness" and that she had suffered severe emotional distress as a result of "the impact of watching, perceiving, and experiencing defendants' wrongful conduct as well as her mother's suffering."[169]

Obviously, the *Clotaire* case is in the early stages of litigation. It remains to be seen whether the bystander recovery claim will be the subject of a dispositive motion by the defendants or if the case will proceed to trial or be settled out of court. In the event that the case, or at least the bystander recovery claim, is the subject of an appeal, a Pennsylvania appellate court may have the opportunity to take the next step toward providing further refinement of the concept of virtual bystander recovery. As Clotaire's attorney, Bethany Nikitenko, told *Law.com*, "[t]he case presents a very interesting question, which is whether the courts are going to adjust with the times and whether the caselaw is going to adjust with the times in terms of the definition of bystander."[170]

With Indiana's highest court rejecting an admittedly weaker case for virtual bystander recovery in 2015 and California supporting the doctrine in 2021, a decision in the *Clotaire* case may not only break the jurisdictional tie but potentially usher in a new chapter in the development of the tort of bystander recovery.

CONCLUSION

In comparison to most torts, the doctrine of bystander recovery for negligent infliction of emotional distress is still in its infancy. Yet, in the roughly fifty-five years since *Dillon v. Legg*, this doctrine has experienced considerable change. Public policy considerations, such as limiting liability and setting bright-line rules to guide courts, have formed the underpinnings of the three-part test for determining whether a plaintiff may recover for this

[168] *Id.* at 29.

[169] *Id.*

[170] Debra Cassens Weiss, *Suit Seeks Damages for Traumatic Event Witnessed Over FaceTime; Bystander Definition at Issue*, ABA J. (July 7, 2022, 1:21 PM), https://www.abajournal.com/news/article/suit-seeks-damages-for-traumatic-event-witnessed-over-facetime-bystander-definition-at-issue.

tort. Two of the most important factors—who may recover and under what circumstances—have evolved as society has. The first of these, the requirement of a close family relationship, has expanded as traditional notions of marriage and "close relations" have undergone change. But the more exciting transformation is in what constitutes a "contemporaneous perception" of a tortious act, especially now that technology has fostered a seismic shift in how we experience things. In today's Digital Age, in which people seemingly cannot exist without their smartphones to connect them to the outside world, what we experience in high resolution on a screen is often more "real" than in-person interactions.

In an era of livestreaming, digital assistants like the Amazon Echo, home surveillance technology like doorbell cameras, and an explosion of devices that make up the ever-expanding Internet of Things, virtual interactions have become a staple of everyday life. As a result, it is hardly surprising that bystander recovery claims like those of Dyanna and Khristopher Ko and Norma Clotaire have begun to surface in the legal system. The Restatement (Third) of Torts was certainly justified ten years ago in its prediction that "continuing developments in communication technology will no doubt affect the determination" of whether an accident must be perceived while physically present or contemporaneously via some medium. And even though the law's development inevitably lags behind the pace of technological advancement, cases like *Ko* and *Clotaire* will likely form the vanguard of a growing body of cases to view bystander recovery through the lens of emerging technologies. Spurred by technology, the line between physical presence and virtual presence has blurred. Yet the shock and emotional distress from contemporaneously witnessing the severe injury or death of a close relative is no less painful and enduring when observed with the aid of technology than it is when experienced in person. Livestreamed pain is still pain.

Technology will continue to transform the human experience. Today's entertainment options may include virtual reality games and experiences with an Oculus or attending a concert featuring the hologram of a long-dead artist, while the horizons of tomorrow's technology are limitless. As our technology evolves, so must our definition of "presence" and our notions of tort recovery.