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nal Law.²⁵² Indeed, imposition of such a requirement is particularly inappropriate at a time when the number of alcohol-related traffic accidents is increasing dramatically.²⁵³

Robert J. Gunther, Jr.

No cause of action may be maintained by a nonpatient kidney donor under the rescue doctrine

It is well established that one who is injured while attempting to rescue another may recover from the tortfeasor whose original negligence precipitated the need for the rescue.²⁵⁴ An independent

²⁵² See Note, *Constitutional Limitations on the Taking of Body Evidence*, 78 YALE L.J. 1074, 1078 & n.37 (1979) (discussing the exigency involved in testing for BAC); N.Y. VEH. & TRAF. LAW § 1192(1) (McKinney 1970) (prescribing a 2-hour time limit for the taking of blood samples to determine BAC).

²⁵³ See *supra* note 203.

²⁵⁴ See generally Tiley, *The Rescue Principle*, 30 MOD. L. REV. 25, 25 (1967); Note, *Torts: Proximate Cause: Rescue Doctrine*, 3 OKLA. L. REV. 476, 476-81 (1950). A rescue is considered to be a normal, intervening action which does not break the original chain of causation, regardless of whether the actual rescue was foreseeable. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 44, at 276-77 (4th ed. 1971). Indeed, "[t]he right of one person to render another assistance, when the latter is in danger from any cause, under conditions rendering it safe to do so, is as clear as his right to perform any other lawful act." *Bond v. Baltimore & O. R.R.*, 82 W. Va. 557, 561, 96 S.E. 932, 934 (1918); cf. RESTATEMENT (SECOND) OF TORTS § 294 comment a (1965) (one who creates "an unreasonable risk of harm" to a person may be liable to that person's rescuer).

The first New York case considering the rescue doctrine was *Eckert v. Long Island R.R.*, 43 N.Y. 502 (1871), in which the Court of Appeals stated that negligence will not be imputed to one who attempts to preserve human life, "unless [his act was done] under such circumstances as to constitute rashness. . . ." *Id.* at 506. In a similar vein, Judge Cardozo, in the oft-quoted language of *Wagner v. International Ry.*, 232 N.Y. 176, 133 N.E. 437 (1921), observed:

Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer. . . . The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had.

Id. at 180, 133 N.E. at 437-38 (citation omitted).

The rescue doctrine has been recognized in virtually all jurisdictions. See, e.g., *Barger v. Charles Mach. Works, Inc.*, 658 F.2d 582, 587 (8th Cir. 1981); *Solgaard v. Guy F. Atkinson Co.*, 6 Cal. 3d 361, 368, 491 P.2d 821, 824-25, 99 Cal. Rptr. 29, 32-33 (1971); *Walker Hauling Co. v. Johnson*, 110 Ga. App. 620, 624, 139 S.E.2d 496, 499 (1964); *Seibutis v. Smith*, 83 Ill. App. 3d 1010, 1015-16, 404 N.E.2d 950, 954 (1980); *Brock v. Peabody Coop. Equity Exch.*, 186 Kan. 657, 659-60, 352 P.2d 37, 40 (1960); *Parks v. Starks*, 342 Mich. 443, 450, 70 N.W.2d 805, 808 (1955); *McConnell v. Pic-Walsh Freight Co.*, 432 S.W.2d 292, 299-300 (Mo. 1968);

duty of care is owed by the tortfeasor to the rescuer, who is considered a foreseeable plaintiff, and negligence on the part of the rescuer typically does not bar his recovery.²⁵⁵ New York courts have applied the rescue doctrine in a variety of situations but, in doing so, generally have premised its application upon the same underlying elements.²⁵⁶ Recently, in *Moore v. Shah*,²⁵⁷ the Appellate Divi-

Drummond v. Mid-West Growers Coop. Corp., 91 Nev. 698, 706, 542 P.2d 198, 204 (1975). Interestingly, the rescue doctrine was not applied in Canada until 1910, see *Seymour v. Winnipeg Elec. Ry.*, 13 W.L.R. 566, 571 (1910), and not in England until 1938, see *Haynes v. Harwood*, [1934] 2 K.B. 240, 252, *aff'd*, [1935] 1 K.B. 146. See generally *Linden, Rescuers and Good Samaritans*, 34 MOD. L. REV. 241, 252-59 (1971).

²⁵⁵ See W. PROSSER, *supra* note 254, § 43, at 258. The rescue doctrine most frequently has been employed to absolve the rescuer from a charge of contributory negligence and thus to permit him to recover for injuries suffered during the course of the rescue. See, e.g., *Provenzo v. Sam*, 23 N.Y.2d 256, 260, 244 N.E.2d 26, 28, 296 N.Y.S.2d 322, 325 (1968); *Eckert v. Long Island R.R.*, 43 N.Y. 502, 506 (1871); *Rodriguez v. New York State Thruway Auth.*, 82 App. Div. 2d 853, 854, 440 N.Y.S.2d 49, 51 (2d Dep't 1981); *Carney v. Buyea*, 271 App. Div. 338, 342, 65 N.Y.S.2d 902, 907 (4th Dep't 1946); see also F. BOHLEN, *STUDIES IN THE LAW OF TORTS* 568 n.33 (1926). The shield which the doctrine provides against a charge of contributory negligence, however, is not impenetrable. See *Wagner v. International Ry.*, 232 N.Y. 176, 180, 133 N.E. 437, 438 (1921); *Eckert v. Long Island R.R.*, 43 N.Y. 502, 506 (1871); *Prior Aviation Serv., Inc. v. State*, 100 Misc. 2d 237, 240, 418 N.Y.S.2d 872, 875 (Ct. Cl. 1979). Whether a rescuer's behavior was reasonable is normally a jury question. See, e.g., *Wardrop v. Santi Moving & Express Co.*, 233 N.Y. 227, 229, 135 N.E. 272, 272 (1922); *Wagner v. International Ry.*, 232 N.Y. 176, 181, 133 N.E. 437, 438 (1921); *Rodriguez v. New York State Thruway Auth.*, 82 App. Div. 2d 853, 854, 440 N.Y.S.2d 49, 51 (2d Dep't 1981).

²⁵⁶ Rescue doctrine cases typically involve a situation in which a person has been placed in "imminent peril" by the negligence of another. E.g., *Provenzo v. Sam*, 23 N.Y.2d 256, 260, 244 N.E.2d 26, 28, 296 N.Y.S.2d 322, 325 (1968). A third person, who voluntarily endangers himself in order to rescue the victim, then becomes part of the scenario. See *id.* Continuity in the chain of causation between the original negligent act and the rescue is not disturbed "by the exercise of volition." *Wagner v. International Ry.*, 232 N.Y. 176, 181, 133 N.E. 437, 438 (1921). In most instances, the reaction of the rescuer is spontaneous, and occurs immediately after the original negligent act. See, e.g., *Gibney v. State*, 137 N.Y. 1, 5, 33 N.E. 142, 142 (1893) (father jumped into canal to save drowning son); *Eckert v. Long Island R.R.*, 43 N.Y. 502, 503-04 (1871) (rescuer pushed child out of path of oncoming train). But see *Guarino v. Mine Safety Appliance Co.*, 25 N.Y.2d 460, 462-63, 255 N.E.2d 173, 174, 306 N.Y.S.2d 942, 943-44 (1969) (defectively manufactured gas mask created subsequent need for rescue of sewage worker); *Rucker v. Andress*, 38 App. Div. 2d 684, 685, 327 N.Y.S.2d 91, 92 (4th Dep't 1971) (plaintiff rescued person who was trapped in car for approximately 15 minutes after collision occurred); *Prior Aviation Serv., Inc. v. State*, 100 Misc. 2d 237, 239, 418 N.Y.S.2d 872, 875 (Ct. Cl. 1979) (helicopter pilot attempted rescue of stranded persons 11 minutes after accident took place).

One New York court extended the rescue doctrine in *Talbert v. Talbert*, 22 Misc. 2d 782, 199 N.Y.S.2d 212 (Sup. Ct. Schenectady County 1960), wherein a father who attempted to commit suicide was rescued by his son, who himself was injured. *Id.* at 783, 199 N.Y.S.2d at 214. That the father's suicide attempt was "not a simple act of negligence," *id.* at 784, 199 N.Y.S.2d at 215, was not considered dispositive by the *Talbert* court. *Id.* The court stated that a legal duty still was owed by the father to anyone in the area who might try to save him. *Id.* Additionally, in *Guarino v. Mine Safety Appliance Co.*, 25 N.Y.2d 460, 255 N.E.2d

sion, Third Department, held that the rescue doctrine does not apply to the voluntary and deliberate donation of a kidney, undertaken in the absence of emergency pressures.²⁵⁸

In *Moore*, the plaintiff's father suffered kidney failure after an allegedly negligent medical diagnosis and treatment by the defendant doctor.²⁵⁹ When it became apparent that a kidney transplant was necessary to alleviate his father's condition, the plaintiff donated one of his kidneys for the operation.²⁶⁰ After the successful transplantation, the plaintiff and his parents brought a negligence action against the father's physician.²⁶¹ The son maintained that as a result of the doctor's negligence, it was foreseeable that the need for a kidney transplant would arise.²⁶² The plaintiff further argued that he came to the rescue of his father by providing the needed kidney, and thus, the doctor was responsible to the son for the physical and mental injuries which he later suffered.²⁶³ Special Term, Chemung County, rejected this contention and granted the defendant's motion to dismiss the complaint.²⁶⁴

On appeal, the Appellate Division, Third Department, affirmed.²⁶⁵ Judge Weiss, writing for a unanimous court,²⁶⁶ initially noted that liability to a plaintiff is predicated upon the existence of a foreseeable duty owed to him by a defendant.²⁶⁷ The court then stated that although the rescue doctrine may be used to es-

173, 306 N.Y.S.2d 942 (1969), the rescue doctrine was extended to cover a situation in which a breach of warranty created a dangerous condition inviting rescue. *Id.* at 465, 255 N.E.2d at 176, 306 N.Y.S.2d at 945-46.

²⁵⁷ 90 App. Div. 2d 389, 458 N.Y.S.2d 33 (3d Dep't 1982).

²⁵⁸ *Id.* at 389-90, 458 N.Y.S.2d at 33.

²⁵⁹ *Id.* at 389, 458 N.Y.S.2d at 33.

²⁶⁰ *Id.*

²⁶¹ Brief for Appellant at 2, *Moore v. Shah*, 90 App. Div. 2d 389, 458 N.Y.S.2d 33 (3d Dep't 1982).

²⁶² 90 App. Div. 2d at 390, 458 N.Y.S.2d at 34. The son, Marvin Richard Moore, argued that as a close relative, he would be the most likely kidney donor. *Id.* It is generally recognized that family members are the most genetically acceptable donors. See Guttman, *Renal Transplantation*, 301 NEW ENG. J. MED. 975, 975 (1979); Woodside, *Organ Transplantation: The Doctor's Dilemma and the Lawyer's Responsibility*, 31 OHIO ST. L.J. 66, 69-71 (1970).

²⁶³ 90 App. Div. 2d at 390, 458 N.Y.S.2d at 34. The plaintiff sought damages for the physical injuries which he suffered as a result of the kidney donation and surgery. Brief for Appellant at 3, *Moore v. Shah*, 90 App. Div. 2d 389, 458 N.Y.S.2d 33 (3d Dep't 1982).

²⁶⁴ 90 App. Div. 2d at 390, 458 N.Y.S.2d at 33.

²⁶⁵ *Id.* at 389-90, 458 N.Y.S.2d at 33.

²⁶⁶ Joining Justice Weiss were Justices Mahoney, Kane, Casey and Mikoll.

²⁶⁷ *Id.* at 390, 458 N.Y.S.2d at 33-34; see, e.g., *Kimbar v. Estis*, 1 N.Y.2d 399, 403, 135 N.E.2d 708, 709, 153 N.Y.S.2d 197, 199 (1956).

establish this duty, the elements necessary to invoke the doctrine had not been satisfied.²⁶⁸ Specifically, the court observed that an emergency evoking an instinctive reaction on the part of the plaintiff did not exist, and that the son had donated the kidney sometime after the allegedly negligent diagnosis and treatment of his father.²⁶⁹ In addition, Justice Weiss relied upon an earlier case, *Sirianni v. Anna*,²⁷⁰ which dealt with strikingly similar factual circumstances,²⁷¹ and stated that although the court was not bound to follow that decision, the rescue doctrine argument presented in that case properly was rejected.²⁷² The court further reasoned that several New York cases, in denying recovery to third parties who suffered psychic injuries as a result of direct injuries to others, provide additional support for its decision.²⁷³ Finally, Justice Weiss reasoned, notwithstanding the existence of an injury, the creation of a remedy for the plaintiff would be undesirable from a policy standpoint and increasingly difficult to contain.²⁷⁴

It is submitted that the *Moore* court's refusal to extend appli-

²⁶⁸ 90 App. Div. 2d at 390-91, 458 N.Y.S.2d at 34. The court characterized the son's action as "deliberate and reflective," thereby not entitling him to recover under the rescue doctrine. *Id.* at 389, 458 N.Y.S.2d at 33; see *supra* note 256 and accompanying text.

²⁶⁹ 90 App. Div. 2d at 389, 458 N.Y.S.2d at 33. Notwithstanding his reliance upon the nonemergency nature of the circumstances in *Moore*, Justice Weiss noted that the rescue doctrine has been applied, in some cases, when the plaintiff's reaction was not immediate. See *Guarino v. Mine Safety Appliance Co.*, 25 N.Y.2d 460, 464, 255 N.E.2d 173, 175, 306 N.Y.S.2d 942, 945 (1969); *Rucker v. Address*, 38 App. Div. 2d 684, 685, 327 N.Y.S.2d 91, 92 (4th Dep't 1971); *Keith v. Payne*, 164 App. Div. 642-43, 150 N.Y.S. 37, 38 (3d Dep't 1914); *supra* note 256.

²⁷⁰ 55 Misc. 2d 553, 285 N.Y.S.2d 709 (Sup. Ct. Niagara County 1967).

²⁷¹ In *Sirianni*, a mother brought an action against her son's physicians for their allegedly negligent removal of his kidney tissue. *Id.* at 554, 285 N.Y.S.2d at 710. She had voluntarily donated one of her kidneys to save her son. *Id.* The *Sirianni* court labelled the mother's complaint a "brand new cause of action," *id.* at 555, 285 N.Y.S.2d at 712, and considered her donation to be an "independent, intervening act," *id.* at 556, 285 N.Y.S.2d at 712. Significantly, after examining several rescue doctrine cases, the court concluded that a rescuer acts "without knowing his fate." *Id.* The court then stated that the voluntary donation of a kidney is a wanton act, and equated "wanton" with the term "wilful." *Id.* After observing that Judge Cardozo, in *Wagner v. International Ry.*, 232 N.Y. 176, 180, 133 N.E. 437, 438 (1921), had excluded a wanton act from the coverage of the doctrine, the *Sirianni* court ruled that a voluntary, wilful act, such as donating a kidney, fell outside the purview of the rescue principle. 55 Misc. 2d at 556, 285 N.Y.S.2d at 712.

²⁷² 90 App. Div. 2d at 391, 458 N.Y.S.2d at 35.

²⁷³ *Id.* at 391-92, 458 N.Y.S.2d at 35. Judge Weiss specifically cited *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969), in which the Court of Appeals declared that a third party does not possess a cause of action for injuries suffered as a result of a direct injury to another. *Id.* at 611, 249 N.E.2d at 419-20, 301 N.Y.S.2d at 555; see *infra* note 283 and accompanying text.

²⁷⁴ 90 App. Div. 2d at 392, 458 N.Y.S.2d at 35.

cation of the rescue doctrine is warranted in light of the past interpretations afforded the doctrine by the New York judiciary. Although the *Moore* panel's treatment of the rescue doctrine as a potential theory of liability was somewhat summary,²⁷⁵ it nonetheless appears that the courts have attempted to keep the rescue principle within certain well-defined bounds.²⁷⁶ It is suggested, however, that the court's effort to negate the doctrine based upon the voluntariness of the plaintiff-donor's act is misplaced, since voluntary conduct on the part of the rescuer traditionally has not precluded application of the doctrine.²⁷⁷ Rather, it seems that the nonpatient donor's claim fails under the rescue principle because his act was not part of the single continuous occurrence beginning with the defendant's negligence and culminating in the rescuer's injury.²⁷⁸ Though variations in the time differential between the effect of the original negligence and the rescue have not rendered the doctrine inapplicable,²⁷⁹ in each of these instances there was a

²⁷⁵ *Id.* at 390, 458 N.Y.S.2d at 34.

²⁷⁶ See *Wardrop v. Santi Moving & Express Co.*, 233 N.Y. 227, 229, 135 N.E. 272, 272 (1922); *Carney v. Buyea*, 271 App. Div. 338, 340, 65 N.Y.S.2d 902, 905 (4th Dep't 1946); *cf.* *Talbert v. Talbert*, 22 Misc. 2d 782, 784, 199 N.Y.S.2d 212, 215 (Sup. Ct. Schenectady County 1960) (father attempting suicide owed duty to potential rescuers); *supra* note 256 and accompanying text. In *Guarino v. Mine Safety Appliance Co.*, 25 N.Y.2d 460, 255 N.E.2d 173, 306 N.Y.S.2d 942 (1969), the Court, while extending the rescue doctrine to cover a breach of warranty on the part of the defendant, *id.* at 465, 255 N.E.2d at 176, 306 N.Y.S.2d at 945-46, required that each of the other elements of the doctrine be established, *id.*, 255 N.E.2d at 175, 306 N.Y.S.2d at 945-46. In *Lafferty v. Manhasset Med. Center Hosp.*, 54 N.Y.2d 277, 429 N.E.2d 789, 445 N.Y.S.2d 111 (1981), the Court recognized that the rescue doctrine never had been used to allow recovery for psychic injury. *Id.* at 279, 429 N.E.2d at 790, 445 N.Y.S.2d at 112.

²⁷⁷ Although the *Sirianni* court emphasized that a "rescuer act[s] without knowing his fate," 55 Misc. 2d at 556, 285 N.Y.S.2d at 712, other rescue cases dispute this interpretation. The Court of Appeals itself has stated that "[t]he law does not discriminate between the rescuer oblivious of peril and the one who counts the cost." *Wagner v. International Ry.*, 232 N.Y. 176, 181, 133 N.E. 437, 438 (1921); see *Eckert v. Long Island R.R.*, 43 N.Y. 502, 506 (1871); *Bond v. Baltimore & O.R.R.*, 82 W. Va. 557, 560, 96 S.E. 932, 933 (1918); see also *Tiley*, *supra* note 254, at 25.

²⁷⁸ See *Gibney v. State*, 137 N.Y. 1, 6, 33 N.E. 141, 142 (1893); see also *Wagner v. International Ry.*, 232 N.Y. 176, 181, 133 N.E. 437, 438 (1921). In *Wagner*, the Court intimated that "peril and rescue must be in substance one transaction; . . . there must be unbroken continuity between the commission of the wrong and the effort to avert its consequences." *Id.*; see *Guarino v. Mine Safety Appliance Co.*, 25 N.Y.2d 460, 466, 255 N.E.2d 173, 175, 306 N.Y.S.2d 942, 946 (1969); *Provenzo v. Sam*, 23 N.Y.2d 256, 261, 244 N.E.2d 26, 28-29, 296 N.Y.S.2d 322, 326 (1968); see also *Barger v. Charles Mach. Works, Inc.*, 658 F.2d 582, 587 (8th Cir. 1981); *Parks v. Starks*, 342 Mich. 443, 447-48, 70 N.W.2d 805, 807 (1955).

²⁷⁹ See, e.g., *Guarino v. Mine Safety Appliance Co.*, 25 N.Y.2d 460, 462-63, 255 N.E.2d 173, 174-75, 306 N.Y.S.2d 942, 943-44 (1969); *Rucker v. Address*, 38 App. Div. 2d 684, 685, 327 N.Y.S.2d 91, 92 (4th Dep't 1971); *Prior Aviation Serv., Inc. v. State*, 100 Misc. 2d 237,

direct causal connection between the initial negligence and the rescuer's action, even if slightly removed in time.²⁸⁰ In *Moore*, it appears that this connection was broken by the plaintiff's subsequent and presumably informed decision to donate one of his kidneys.²⁸¹

In addition, it is submitted that the court's reliance upon earlier decisions which declined to allow bystander recovery for emotional distress was somewhat inappropriate since, in *Moore*, the plaintiff sought recovery for both physical and psychic injuries.²⁸² Those cases do serve, however, to illustrate the New York courts' desire to limit the extent of liability in negligence actions generally, and in "third-party" suits especially.²⁸³ A nonpatient donor,

239, 418 N.Y.S.2d 872, 875 (Ct. Cl. 1979).

²⁸⁰ In *Guarino v. Mine Safety Appliance Co.*, 25 N.Y.2d 460, 255 N.E.2d 173, 306 N.Y.S.2d 942 (1969), the malfunctioning of a defective gas mask, manufactured at some earlier point, necessitated the rescue of a sewage worker in a sewer tunnel. *Id.* at 462-63, 255 N.E.2d at 174-75, 306 N.Y.S.2d at 943-44. Similarly, in *Rucker v. Address*, 38 App. Div. 2d 684, 327 N.Y.S.2d 91 (4th Dep't 1971), the rescuer found the victim approximately 15 minutes after the incident, and was injured in a rescue attempt some 30 minutes later. *Id.* at 685, 327 N.Y.S.2d at 92. In addition, in *Prior Aviation Serv., Inc. v. State*, 100 Misc. 2d 237, 418 N.Y.S.2d 872 (Ct. Cl. 1979), a period of 11 minutes passed between the stranding of pleasure boat passengers and the subsequent helicopter rescue attempt and crash. *Id.* at 239, 418 N.Y.S.2d at 875. It appears that although there was a time lapse between the original negligence and later rescue in each of these cases, the rescuer acted with dispatch upon discovering the dangerous condition. See *Guarino v. Mine Safety Appliance Co.*, 25 N.Y.2d 460, 462-63, 255 N.E.2d 173, 174-75, 306 N.Y.S.2d 942, 943-44 (1969); *Rucker v. Address*, 38 App. Div. 2d 684, 685, 327 N.Y.S.2d 91, 92 (4th Dep't 1971); *Prior Aviation Serv., Inc. v. State*, 100 Misc. 2d 237, 238-39, 418 N.Y.S.2d 872, 875 (Ct. Cl. 1979); cf. *Parks v. Starks*, 342 Mich. 443, 447-48, 70 N.W.2d 805, 806-07 (1955) (9-hour time difference between creation of unsafe condition and plaintiff's attempt to protect children did not preclude application of rescue doctrine). See generally *supra* note 256.

²⁸¹ See 90 App. Div. 2d at 389, 458 N.Y.S.2d at 33. Although not expressly stated in the facts of the case, the plaintiff presumably had a reasonable amount of time to consider the ramifications of his kidney donation. Typically, potential organ donors undergo a period of testing, and their informed consent must be obtained before a transplant operation may proceed. See *Guttman*, *supra* note 262, at 975; *Leavell*, *Legal Problems In Organ Transplantation*, 44 *Miss. L.J.* 865, 868 (1973); *Woodside*, *supra* note 262, at 71-72. Thus, in *Moore*, as in *Sirianni*, the nonpatient donor did not act in one continuous sequence from the point at which he learned of his father's peril, but rather, by necessity, there was a prolonged intervening period during which a knowledgeable decision to donate was reached. See *Sirianni v. Anna*, 55 Misc. 2d 553, 556, 285 N.Y.S.2d 709, 712 (Sup. Ct. Niagara County 1967); see also *Trott v. Dean Witter & Co.*, 438 F. Supp. 842, 846 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1370 (2d Cir. 1978) (rescue doctrine not applicable when there were several months to consider the "best course of action").

²⁸² Brief for Appellant at 3, 13, *Moore v. Smith*, 90 App. Div. 2d 389, 458 N.Y.S.2d 33 (3d Dep't 1982); see *supra* note 263.

²⁸³ See, e.g., *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969). In *Tobin*, the Court of Appeals refused to recognize a mother's cause of action for psychic injuries which she allegedly suffered after seeing her injured child shortly after an

although concededly a foreseeable plaintiff,²⁸⁴ does not lie within the requisite "zone of danger,"²⁸⁵ as the court recognized,²⁸⁶ and to permit recovery under such circumstances seemingly would be to create a new cause of action,²⁸⁷ a matter more properly left to the legislature.²⁸⁸

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automobile accident. *Id.* at 611, 249 N.E.2d at 419-20, 301 N.Y.S.2d at 555. The *Tobin* Court observed that although a parent's subsequent presence at the scene of such an accident undoubtedly is foreseeable, the inability to place rational limits on foreseeable third parties who might be entitled to recover renders the asserted cause of action undesirable. *See id.* at 615, 249 N.E.2d 422, 301 N.Y.S.2d at 558. The Court thus ruled that only those who are directly injured by the defendant should have a cause of action. *Id.* at 619, 249 N.E.2d at 424, 301 N.Y.S.2d at 562. This still represents the view of a majority of jurisdictions. *See Note, The Negligent Infliction Of Mental Distress: The Scope Of Duty And Foreseeability Of Injury*, 57 N.D.L. REV. 577, 581 (1981); *Note, Negligent Infliction of Emotional Distress: Keeping Dillon In Bounds*, 37 WASH. & LEE L. REV. 1235, 1237 (1980); *Comment, Portee v. Jaffee: Dillon Comes to New Jersey*, 33 RUTGERS L. REV. 1171, 1173 (1981). *But see Dillon v. Legg*, 68 Cal. 2d 728, 740, 441 P.2d 912, 921, 69 Cal. Rptr. 72, 81 (1968).

²⁸⁴ 90 App. Div. 2d at 390, 458 N.Y.S.2d at 34; *see supra* note 262.

²⁸⁵ *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928). The *Palsgraf* Court stated that "[t]he risk to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or others within the range of apprehension." *Id.*

²⁸⁶ 90 App. Div. 2d at 391, 458 N.Y.S.2d at 34.

²⁸⁷ New York courts have been reluctant to recognize new causes of action in the negligence area. *See, e.g., Howard v. Lecher*, 42 N.Y.2d 109, 113, 366 N.E.2d 64, 66, 397 N.Y.S.2d 363, 365 (1977) (parents have no cause of action for psychic injuries incurred as a result of watching their child suffer from a degenerative disease); *Kennedy v. McKesson Co.*, 88 App. Div. 2d 785, 785, 451 N.Y.S.2d 530, 531 (4th Dep't 1982) (dentist's emotional injuries suffered as a result of patient's death held not actionable); *Albala v. City of New York*, 78 App. Div. 2d 389, 393, 434 N.Y.S.2d 400, 403 (1st Dep't), *aff'd*, 54 N.Y.2d 269, 429 N.E.2d 786, 445 N.Y.S.2d 108 (1981) (no cause of action permitted for preconception tort); *Bessette v. St. Peter's Hosp.*, 51 App. Div. 2d 286, 288, 381 N.Y.S.2d 339, 341 (3d Dep't 1976) (no recovery allowed to wife who witnessed her husband's leg amputation); *Sirianni v. Anna*, 55 Misc. 2d 553, 557, 285 N.Y.S.2d 709, 712 (Sup. Ct. Niagara County 1967) (no cause of action exists for voluntary organ donor).

²⁸⁸ *See Becker v. Schwartz*, 46 N.Y.2d 401, 415, 386 N.E.2d 807, 814, 413 N.Y.S.2d 895, 902 (1978); *Albala v. City of New York*, 78 App. Div. 2d 389, 393, 434 N.Y.S.2d 400, 403 (1st Dep't), *aff'd*, 54 N.Y.2d 269, 429 N.E.2d 786, 445 N.Y.S.2d 108 (1981); *Sirianni v. Anna*, 55 Misc. 2d 553, 556-57, 285 N.Y.S.2d 709, 713 (Sup. Ct. Niagara County 1967).