

SMITH v. TONEY:* THE INDIANA SUPREME COURT NARROWS
THE SCOPE OF “BYSTANDER” CLAIMS FOR NEGLIGENT
INFLECTION OF EMOTIONAL DISTRESS

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I. INTRODUCTION

For nearly 100 years, Indiana adhered to the “impact rule” in cases involving claims for negligent infliction of emotional distress. The rule required a plaintiff to show that he sustained physical impact causing physical injury and that the physical injury, in turn, caused emotional harm. Under the impact rule, therefore, a plaintiff could not recover for emotional trauma caused by witnessing injury to another person.¹ Beginning in 1991, the Indiana Supreme Court embarked upon a slight expansion of the impact rule that, in two separate stages, spawned a proliferation of claims for negligent infliction of emotional distress in Indiana courts.

The 1991 decision in *Shuamber v. Henderson* extended the impact rule to permit a claim for emotional distress caused to a mother and daughter by witnessing the death of a family member. The court ruled that the plaintiffs suffered a “direct impact” by being directly involved in the collision (they were passengers in the same vehicle with the decedent) and held that they could recover for the emotional trauma of witnessing their loved one’s death even though their distress was not accompanied by any physical injury.²

* For text of DTCI Amicus brief filed in this case, see page 295 *infra*.

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¹ See generally *Shuamber v. Henderson*, 579 N.E.2d 452, 454 (Ind. 1991).

² *Shuamber*, 579 N.E.2d at 456. As subsequent decisions in *Atlantic Coast Airlines v. Cook*, 857 N.E.2d 989, 996 (Ind. 2006), and *Ross v. Cheema*, 716 N.E.2d 435, 437 (Ind. Ct. App. 1999), make clear, the modified impact rule maintains the requirement of a direct physical impact even though the impact need not cause physical injury to the plaintiff. See, e.g., *Bader v. Johnson*, 732 N.E.2d 1212, 1221 (Ind. 2000) (mother’s continued pregnancy and the physical transformation of her body satisfied the direct impact requirement); *Alexander v. Scheid*, 726 N.E.2d 272, 283-84 (Ind. 2000) (patient suffering from the destruction of healthy lung tissue due to physician’s failure to diagnose cancer was sufficient for negligent infliction of emotional distress); *Holloway v. Bob Evans Farms, Inc.*, 695 N.E.2d 991, 996 (Ind. Ct. App. 1998) (restaurant patron’s ingestion of a portion of vegetables cooked with a worm was a direct

Shuamber was the controlling law until nine years later when an eight-year-old girl heard the “big pop” of a speeding police vehicle fatally striking her younger brother, turned to determine what had happened behind her, and saw her brother’s body rolling off the highway.³ Addressing the girl’s claim for negligent infliction of emotional distress, the Indiana Supreme Court ruling in *Groves v. Taylor* recognized an alternative, bystander-type claim when the plaintiff suffers no “direct impact” but is “sufficiently directly involved in the incident giving rise to the emotional trauma” that recovery may be had.⁴

Relying in substantial part upon a 1994 Wisconsin Supreme Court decision in *Bowen v. Lumbermens Mutual Casualty Co.*,⁵ the *Groves* court adopted the following three-part test for a bystander claim under Indiana law:

First, the victim must be seriously injured or killed;

Second, the plaintiff must establish a “relationship requirement,” proving an affiliation with the victim analogous to a spouse, parent, child, grandparent, grandchild, or sibling; and

Third, the plaintiff must demonstrate a “temporal requirement” by showing she actually witnessed or came upon the scene soon after the victim’s death or severe injury occurred.⁶

The *Groves* bystander test has since been left largely for interpretation by the Indiana Court of Appeals with varying—and arguably unanticipated—results.⁷

physical impact under the modified impact rule); *Dollar Inn, Inc., v. Slone*, 695 N.E.2d 185, 189 (Ind. Ct. App. 1998) (hotel guest stabbing herself in the thumb with a hypodermic needle concealed in a roll of toilet paper was sufficient for claim of emotional distress associated with guest’s fear of contracting AIDS). *But see* *Keim v. Potter*, 783 N.E.2d 731 (Ind. Ct. App. 2003) (medical malpractice action in which patient wrongly diagnosed with hepatitis C was allowed to pursue emotional distress damages on grounds of his “direct involvement” when there was no physical impact) (transfer not sought).

³ *Groves v. Taylor*, 729 N.E.2d 569, 571 (Ind. 2000).

⁴ *Id.* at 572.

⁵ 517 N.W.2d 432 (Wis. 1994).

⁶ *Groves*, 729 N.E.2d at 573.

⁷ *See* *Blackwell v. Dykes Funeral Homes, Inc.*, 771 N.E.2d 692 (Ind. Ct. App. 2002) (permitting parents to pursue damages for emotional distress for loss of son’s cremated remains although there was no physical impact and the elements for a bystander claim were not met). Until its decision in *Smith v. Toney*, the Indiana Supreme Court had further commented upon *Groves* bystander claims only briefly on two occasions. *Bader v. Johnson*, 732 N.E.2d 1212, 1222 (Ind. 2000), involved a medical malpractice claim the facts of which were so undeveloped that the court could mention only in passing that the husband plaintiff was “at most” a bystander whose potential for recovering damages associated with his wife’s miscarriage would depend on the evidence to be adduced at trial. More recently, in *Atlantic Coast Airlines v. Cook*, the court reviewed the elements of the *Groves* bystander test, but was not called upon to apply the test to the plaintiffs’ claims, which were limited to an attempted recovery under the modified impact rule of *Shuamber*. 857 N.E.2d at 997-98.

On March 15, 2007, the Indiana Supreme Court handed down its ruling in *Smith v. Toney*,⁸ providing an authoritative evaluation of a bystander claim for the first time since the *Groves* decision. Answering certified questions posed by Judge Sarah Evans Barker of the U.S. District Court for the Southern District of Indiana, *Smith v. Toney* addressed a bystander claim presented by a plaintiff who was neither the victim's spouse nor his relative and who did not witness or perceive any part of the injury-producing event or even see the accident victim at the scene. The *Smith v. Toney* ruling narrows the scope of bystander claims under Indiana law, but, in so doing, it also leaves significant questions unanswered and ripe for further examination in future Indiana cases.

II. THE BACKGROUND OF *SMITH V. TONEY*

The complaint filed by Amy Smith ("Amy") in the Marion County Superior Court on April 22, 2005, (later removed to federal court) concerned the accidental death of Amy's fiancé, Eli Welch ("Eli"). Summary judgment briefing offered the following essential facts that framed the certified questions posed to the Indiana Supreme Court.

During the early morning hours of June 7, 2003, Eli was driving his Camaro westbound on Interstate 70 toward Plainfield when he collided with a tractor-trailer combination operated by defendant Toney on behalf of codefendant John Christner Trucking. Emergency workers arrived shortly thereafter and determined that Eli was deceased. As a result, the coroner was called, Eli was extricated from his vehicle, and his body was removed from the scene. It was not until more than two hours and twenty minutes after the accident—and after Eli was removed from the scene—that Amy drove by the accident site searching for Eli and saw the badly damaged Camaro facing away from her in the median. Distraught and virtually certain Eli could not have survived, Amy drove to Eli's sister's house in Plainfield where she and family members tracked down officials by telephone and confirmed that Eli had died in the accident.⁹

The federal district court postponed a ruling on whether such facts supported Amy's bystander claim and, in the interim, certified questions to the Indiana Supreme Court concerning both the temporal and relationship requirements for bystander recovery under the 2000 decision in *Groves*.¹⁰

⁸ 862 N.E.2d 656 (Ind. 2007).

⁹ *Id.* at 658. The defendants were able to pinpoint Amy's arrival at the accident site because she used her cellular telephone to call Eli's sister's house as she drove slowly by the wrecked Camaro and remaining emergency vehicles at the scene. Records obtained from the cellular service provider, when compared to the emergency response team's dispatch records and deposition testimony, confirmed that Eli's body was extricated from the Camaro and placed into the coroner's vehicle approximately 19 to 24 minutes before Amy's arrival. *Id.*

¹⁰ The defendants' motion for summary judgment was temporarily denied without prejudice pending the Indiana Supreme Court's ruling on the certified questions.

The supreme court accepted the following certified questions by order dated February 22, 2006:

- 1) Under the test elaborated in *Groves* for bringing a bystander claim of negligent infliction of emotional distress, are the temporal and relationship determinations regarding whether a plaintiff “actually witnessed or came on the scene soon after the death of a loved one with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling” issues of law or fact, or are they mixed questions of law and fact?
- 2) If an issue of law, is a fiancée an “analogous” relationship as used in *Groves* and is “soon after the death of a loved one” a matter of time alone or also of circumstances?¹¹

The *Smith v. Toney* opinion, authored by Justice Boehm, answered the first of the two certified questions by ruling that the criteria for recovery under a bystander claim “are derived from the public policy considerations that underlie and define a claim for negligent infliction of emotional distress” and therefore present issues of law for resolution by the courts.¹² The majority and concurring opinions then proceeded to address the relationship and temporal requirements more specifically, resulting in a further refinement of the limitations imposed on bystander claims by *Groves*.

III. THE RELATIONSHIP REQUIREMENT DENIES RECOVERY TO A FIANCÉE

Quoting *Groves* directly, the “bystander” plaintiff must have a relationship to the victim that is “analogous to a spouse, parent, child, grandparent, grandchild, or sibling.”¹³ Because Amy was not one of the specified blood relatives of Eli (or even “analogous to” such a relative), she could assert her bystander claim only by arguing that, as Eli’s fiancée, she was “analogous to” a spouse. The *Smith v. Toney* court ruled, however, that *Groves* should not be applied so broadly. Unfortunately, the court did not reconsider the imprecise “analogous to” wording in *Groves*, but, at least in the context of spouses, the majority opinion limits bystander recovery to legally married husbands and wives.

Following a well-established majority trend, the ruling in *Smith v. Toney* held that Amy’s status as a fiancée did not make her “analogous to a spouse” under *Groves*.¹⁴ Borrowing from the reasoning of out-of-state cases that deny bystander recovery for both engaged persons and unmarried cohabitants, the majority opinion thus closed the door on Amy’s claim for neg-

¹¹ *Smith v. Toney*, 862 N.E.2d at 657.

¹² *Id.* at 660.

¹³ 729 N.E.2d at 573.

¹⁴ 862 N.E.2d at 660.

ligent infliction of emotional distress. In this regard, the majority acknowledged that Amy and Eli were not cohabiting partners, but found the analysis of cases that address cohabiting relationships "equally applicable to engaged persons living separately."¹⁵ It is at this point that Justice Sullivan departed from the majority opinion and wrote separately to concur in the result along with Justice Rucker. Justice Sullivan agreed that Amy was not analogous to a spouse because she was *neither* legally married to Eli *nor* engaged in a relationship "of long duration marked by the financial interdependence, intimacy, and other characteristics of the spousal relationship."¹⁶ The concurring opinion then expressed the view that the majority's comments with respect to relationships other than Amy's relationship with Eli were "unnecessary to the decision . . . and therefore not precedential,"¹⁷ thus suggesting that Justices Sullivan and Rucker would in future cases consider bystander recovery for a long-term cohabitant who could establish an intimate spousal-like affiliation with the accident victim.

The majority opinion in *Smith v. Toney* is well supported by Indiana law and its "bright line" distinctions between spouses and nonspouses in many relevant contexts. Perhaps most significantly, under Indiana Code § 31-11-8-5, common law marriages entered into after January 1, 1958, are void as a matter of law. In addition, couples who cohabit without marriage are not presumed to intend to share property or to have "palimony" rights in the absence of an express contract or viable equitable theory.¹⁸ Spouses are also the only nonblood relatives who inherit by way of intestate succession under Indiana Code § 29-1-2-1, and the spousal privilege under Indiana law is limited to those who maintain the legal relationship of husband and wife.¹⁹ Finally, Indiana's wrongful death statute does not permit a fiancée to recover for the death of her betrothed, no matter how grievous her loss.²⁰ Citing to such propositions, the *Smith v. Toney* majority thus acknowledged that married and unmarried couples have distinctly different rights.²¹

The majority also relied upon two lines of reasoning from out-of-state cases holding that neither a fiancé nor an unmarried cohabitant may assert a bystander claim relating to the loss of a betrothed or even a longtime romantic companion.²² First, as one court has observed, expanding the list of

¹⁵ *Id.* at 661 n.1.

¹⁶ *Id.* at 663 (Sullivan, J., concurring in result).

¹⁷ *Id.*

¹⁸ *Bright v. Kuehl*, 650 N.E.2d 311 (Ind. Ct. App. 1995).

¹⁹ *Holt v. State*, 481 N.E.2d 1324, 1326 (Ind. 1985) (expressly declining to extend the privilege to engaged couples).

²⁰ *Manczunski v. Frye*, 689 N.E.2d 473, 474 (Ind. Ct. App. 1997).

²¹ *Smith v. Toney*, 862 N.E.2d at 661.

²² In *Lindsey v. Vistee, Inc.*, 804 F. Supp. 1340 (W.D. Wash. 1992) (interpreting Washington law), and *Grotts v. Zahner*, 989 P.2d 415 (Nev. 1999), the courts rejected bystander claims brought by plaintiffs

persons potentially entitled to recover as bystanders would impose a significant burden on courts to conduct “massive intrusions into the private lives of partners to dissect the ‘closeness’ of the relationship.”²³ Under such circumstances, courts would be compelled to rank the quality of relationships based upon factors not readily knowable, and, as Justice Boehm pointedly observes, defendants would be seriously disadvantaged “because the only person in a position to know the true intimate details of the relationship will be the surviving claimant asserting the ‘bystander’ claim.”²⁴ Second, courts have stressed the need for “an objective test for standing to seek this type of legal redress,”²⁵ in order to avoid an “unreasonable extension of the scope of liability of a negligent actor.”²⁶ In other words, failure to draw a line in the sand on bystander recovery “would expose defendants to limitless liability, out of proportion to the degree of their negligence,”²⁷ which was clearly a concern for the *Smith v. Toney* majority, if not for Justices Sullivan and Rucker.²⁸

IV. THE TEMPORAL DETERMINATION “IS A MATTER OF BOTH TIME AND CIRCUMSTANCES”

Under *Groves*, a bystander plaintiff must be “sufficiently directly involved in the incident giving rise to the emotional trauma.”²⁹ According to the *Groves* ruling, this means the plaintiff must prove she “actually witnessed or *came on the scene soon after* the death or severe injury” of her loved one.³⁰ In *Groves*, for example, the plaintiff did not see her brother struck by an automobile, but did experience a portion of the accident by hearing its “pop.” Furthermore, the plaintiff actually witnessed part of the injury-producing event when she turned and saw her brother’s body roll away and off the highway. In contrast, Amy’s attempt to tailor her case to the *Groves* case scenario could have provoked endless debate as to whether

who witnessed the accidental deaths of their fiancés. Similarly, *Sollars v. City of Albuquerque*, 794 F. Supp. 360 (D. N. Mex. 1992), *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988), and *Hastie v. Rodriguez*, 716 S.W.2d 675 (Tex. Ct. App. 1986), all rejected the bystander claims of plaintiffs who witnessed the death of companions with whom they had cohabitated romantically for many years. See also *Montoya v. Pearson*, 142 P.3d 11 (N. Mex. Ct. App. 2006) (fiancé is not a close family member as required for bystander claims under New Mexico law).

²³ *Sollars*, 794 F. Supp. at 364. See also *Trombetta v. Conkling*, 605 N.Y.S.2d 678, 680 (N.Y. Ct. App. 1993) (declining to impose “complex responsibility” on courts to assess “an enormous range and array of emotional ties of, at times, an attenuated or easily embroidered nature”).

²⁴ *Smith v. Toney*, 862 N.E.2d at 661-62.

²⁵ *Grotts*, 989 P.2d at 417 n.6.

²⁶ *Elden*, 758 P.2d at 588.

²⁷ *Nugent v. Bauermeister*, 489 N.W.2d 148, 150 (Mich. Ct. App. 1992), *appeal denied*, 503 N.W.2d 904 (Mich. 1993).

²⁸ Compare *Smith v. Toney*, 862 N.E.2d at 662 (expressing the need to draw “bright line rules”) with *id.* at 663 (suggesting room for recovery by a long-term cohabitating partner) (Sullivan, J., concurring).

²⁹ 729 N.E.2d at 572.

³⁰ *Id.* at 573 (emphasis supplied).

she came on the scene any time "soon" after the accident occurred. Amy's claim thus called for a more "black and white" rule.

Disappointingly, but perhaps because its ruling on the *Groves* relationship element was determinative of Amy's claim, the *Smith v. Toney* court declined to express a definitive rule precisely explaining the temporal requirement for bystander claims. Answering the federal district court's certified question literally, the court found that the temporal determination under *Groves* "is a matter of both time and circumstances."³¹ At the same time, however, the court offered some guidance to future litigants who seek to define the outer temporal limits for bystander claim recovery.

Smith v. Toney acknowledges that bystander claims are not designed to compensate every emotional trauma but, rather, are limited to emotional distress that arises from the shock of *experiencing* the death or serious injury of a loved one. Thus, in the words of the court, there are three subelements to the temporal requirement for a bystander claim under *Groves*:

- 1) The scene viewed by the claimant must be essentially as it was at the time of the incident;
- 2) The victim must be in essentially the same condition as immediately following the incident; and
- 3) The claimant must not have been informed of the incident before coming upon the scene.³²

As further discussed below, the court's wording should be interpreted as requiring the bystander plaintiff either to experience the injury-producing event or, if she comes upon the scene soon after, to at least view the victim and his injury at that very time and place.

V. UNRESOLVED ISSUES REMAINING

A. THE RELATIONSHIP REQUIREMENT: WHAT DOES THE COURT'S "ANALOGOUS TO" LANGUAGE MEAN?

Because common synonyms for the word "analogous" include "similar," "comparable," "alike," and even "cast in the same mold,"³³ the imprecise nature of such meanings is likely to produce cases in which many types of plaintiffs will assert they are "analogous to" one of the family members identified in *Groves*. Such cases may generate far-reaching, unpredictable, and inconsistent results. Half-siblings who grow up many miles apart may or may not be comparable to actual siblings, yet a nurturing stepmother who raises a spouse's child from an early age could certainly be viewed as a parent—unless, perhaps, if the child's natural mother visits regularly. And

³¹ *Smith v. Toney*, 862 N.E.2d at 663.

³² *Id.*

³³ THE SYNONYM FINDER at 48 (J. I. Rodale 1978).

then what of the kindly aunt who has always been “like a grandmother” to her niece? Finally, as in the *Smith v. Toney* case, at what point does the mere act of *planning* to become another’s wife make one similar or comparable to a spouse?

Notably, the fact-sensitive inquiry suggested by the Indiana Supreme Court’s “analogous to” qualification is unsupported by the Wisconsin ruling upon which the *Groves* decision relied. The Wisconsin Supreme Court opinion in *Bowen v. Lumbermens Mutual Casualty Co.* very specifically limited recovery to spouses, parents, children, grandparents, grandchildren, and siblings,³⁴ and it appears the Indiana court’s use of the phrase “analogous to” was borrowed from the singular view of Justice Shirley Abrahamson expressed in a footnote to her majority opinion.³⁵ As the majority opinion in *Bowen* explains, however, immediate family members share an intimate connection that is arguably unmatched by any other affiliation. Consequently,

the suffering that flows from beholding the agony or death of a spouse, parent, child, grandparent, grandchild or sibling is *unique in human experience* and such harm to a plaintiff’s emotional tranquility is so serious and compelling as to warrant compensation.³⁶

Furthermore, limiting recovery to spouses and immediate relatives “acknowledges the *special qualities of close family relationships*, yet places a reasonable limit on the liability of the tortfeasor.”³⁷ For similar reasons, even courts that do not expressly limit bystander recovery to specified persons require the victim and the plaintiff to be “closely related” or have an “immediate family relationship.”³⁸

If there were any question regarding the hazards of the “analogous to” qualification, one need look no further than the isolated decisions recognizing potential bystander recovery by a fiancé. In *Dunphy v. Gregor*,³⁹ the first of the cases, the plaintiff witnessed the infliction of fatal injuries upon her betrothed, with whom she had cohabitated for almost two years. According to the New Jersey court, the plaintiff should have had the opportunity to demonstrate the existence of a “stable, enduring, substantial, and mutually supportive” relationship with her fiancé that was sufficiently “in-

³⁴ 517 N.W.2d at 657.

³⁵ *Id.* at 657 n.28.

³⁶ *Id.* at 657 (emphasis supplied).

³⁷ *Id.* (emphasis supplied).

³⁸ See *Nugent v. Bauermeister*, 489 N.W.2d 148, 150 (Mich. Ct. App. 1992), *appeal denied*, 503 N.W.2d 904 (Mich. 1993); *Trombetta v. Conkling*, 605 N.Y.S.2d 678, 678 (N.Y. Ct. App. 1993); *Blanyar v. Pagnotti Enters., Inc.*, 679 A.2d 790 (Pa. Super. Ct. 1996), *aff’d per curiam*, 710 A.2d 608 (Pa. 1998).

³⁹ 642 A.2d 372 (N.J. 1994).

timate” and “familial” so as to permit her recovery as a bystander.⁴⁰ The comprehensive, multipart standard of proof established was thus described as follows:

[T]his critical determination must be guided as much as possible by a standard that focuses on those factors that identify and define the intimacy and familial nature of such a relationship. That standard must take into account the duration of the relationship, the degree of mutual dependence, the extent of common contributions to a life together, the extent and quality of shared experience, and . . . whether the plaintiff and the injured person were members of the same household, their emotional reliance on each other, the particulars of their day to day relationship, and the manner in which they related to each other in attending to life’s mundane requirements.⁴¹

Following the standards set by the *Dunphy* case, a New Hampshire court later held that a plaintiff who lived with her fiancé for approximately seven years and witnessed his fatal accident was entitled to go to the jury with her case.⁴² As the dissent in that case recognized, however, the case-by-case analysis of these decisions—which measures the right to recovery based upon the subjective emotional connection of the parties—is “so ambiguous as to limit the class of plaintiffs . . . only by the imagination of counsel drafting the pleadings.”⁴³

Smith v. Toney thus offered the Indiana Supreme Court the opportunity to close what might originally have been an unintended “loophole” in the *Groves* decision. The “analogous to” qualification in *Groves* creates difficult issues of interpretation not just in this case, but in many others as well because, as one court has observed, one “cannot draw a principled decision between an unmarried cohabitant who claims to have a de facto marriage relationship with his partner and de facto siblings, parents, grandparents or children.”⁴⁴ A reasonable limitation on bystander recovery, therefore, would have objectively confined a defendant’s liability to spouses and those persons with the unique familial relationships specified in *Groves*. Disap-

⁴⁰ *Id.* at 380.

⁴¹ *Id.* at 378.

⁴² *Graves v. Easterbrook*, 818 A.2d 1255 (N.H. 2003). Notably, as observed in both *Dunphy* and *Graves*, New Jersey and New Hampshire courts otherwise limit bystander recovery to one who *contemporaneously* perceives the event that causes the victim’s harm. Similarly, in Massachusetts, which requires the plaintiff to be in the “zone of danger” of the accident, a superior court has permitted a long-term cohabitating fiancée to present her claim to the jury after witnessing the death of her betrothed. See *Richmond v. Shatford*, 1995 W.L. 1146885 (Mass. Super. Ct. 1995).

⁴³ *Graves*, 818 A.2d at 1263 (Dalianis, J., dissenting) (quoting *Lindsey v. Vistee, Inc.*, 804 F. Supp. 1340, 1344 (W.D. Wash. 1992)).

⁴⁴ *Elden v. Sheldon*, 758 P.2d 582, 588 (Cal. 1988).

pointingly, however, although the *Smith v. Toney* majority has closed the door on bystander recovery by fiancés, the court has chosen to reserve for another day's consideration the question of whether someone analogous to the blood relatives listed in *Groves* may assert a bystander claim for negligently inflicted distress.

B. THE TEMPORAL REQUIREMENT: MUST THE BYSTANDER EITHER EXPERIENCE THE INJURY-PRODUCING EVENT OR AT LEAST VIEW THE VICTIM'S INJURY AT THE SCENE?

The undisputed facts in *Smith v. Toney* established that Amy neither witnessed nor perceived any portion of Eli's accident. Indeed, the accident occurred sometime before the fire department's emergency response team was dispatched two hours and twenty-one minutes before Amy drove by the accident site. Moreover, although his wrecked Camaro was still in the median, *Eli was no longer at the scene* when Amy drove by, having been extricated and placed into the coroner's vehicle approximately nineteen to twenty-four minutes earlier. Amy, therefore, was fortunate enough not only to avoid the shocking sights and sounds of the accident, but also to escape the heart-wrenching horror of seeing her loved one's wounded body at the scene.

Under such circumstances, tragic as they may be, the Indiana Supreme Court was urged to rule that Amy was not "directly involved" within the meaning of a bystander claim because Amy, quite simply, was not a "bystander" at all. Guidance on this point comes from the Wisconsin decision in *Bowen* upon which the *Groves* court relied. In *Bowen*, the plaintiff arrived on the scene of a serious accident minutes after it occurred and saw her fourteen-year-old son fatally injured and entangled in the wreckage. According to the *Bowen* court, this was an "extraordinary event" that justified recovery based upon the following rationale:

The tort of negligent infliction of emotional distress is not designed to compensate all emotional traumas of everyday life. All of us can expect at least once in our lives to be informed of the serious injury or death of a close family member . . . perhaps due to the negligence of another. Although the shock and grief growing out of such news is great, it is not compensable emotional distress under this tort action. The distinction between on the one hand *witnessing the incident or the gruesome aftermath* of a serious accident minutes after it occurs and on the other hand the experience of *learning of the family member's death through indirect means* is an appropriate place to draw the line between recoverable and non-recoverable claims.⁴⁵

⁴⁵ *Bowen*, 517 N.W.2d 432, 659 (Wis. 1994) (emphasis supplied).

In other words, as confirmed in subsequent Wisconsin cases, *Bowen* requires "a contemporaneous or nearly contemporaneous sensory perception of a sudden, traumatic, injury-producing event."⁴⁶ This is because the emotional distress in a bystander setting flows not from the *deduction or reasoning* that occurs when one learns of a family member's death or injury indirectly, but rather from the *perception or experience* of observing the death or injury itself. Thus, the compensable emotional distress in a bystander claim is trauma that occurs "because an event is observed (witnessed) and therefore *experienced*."⁴⁷ The bottom line, therefore, is that the *Bowen* case upon which the *Groves* decision relied "requires personal and contemporaneous observation either of the victim's death or serious injury or the scene soon after the incident *with the injured victim at the scene*."⁴⁸ Amy's observation of Eli's Camaro as she drove by more than two hours and twenty minutes after the accident did not even approach that standard.

It should be noted that many courts around the country would have denied Amy recovery because she did not contemporaneously observe any portion of the injury-causing accident itself.⁴⁹ Other courts, like *Bowen*, recognize the trauma associated with coming upon the accident moments later and experiencing its immediate aftermath. Such courts still require, however, that the victim be *at the scene* and perceived by the plaintiff upon the plaintiff's arrival.⁵⁰

Finally, two significant policy considerations in Indiana law support limiting bystander claims to those who either experience the injury-producing

⁴⁶ *Finnegan v. Wisconsin Patients Compensation Fund*, 666 N.W.2d 797, 812 (Wis. 2003).

⁴⁷ *Rosin v. Fort Howard Corp.*, 588 N.W.2d 58, 62 (Wis. Ct. App. 1998), *rev. denied*, 589 N.W.2d 630 (Wis. 1998) (emphasis in original).

⁴⁸ *Id.* (emphasis supplied).

⁴⁹ See *Thing v. LaChusa*, 771 P.2d 814, 830 (Ca. 1989); *Graves v. Easterbrook*, 818 A.2d 1255, 1259 (N.H. 2003); *Dunphy v. Gregor*, 642 A.2d 372, 376 (N.J. 1994); *Engler v. Illinois Farmers Ins. Co.*, 706 N.W.2d 764 (Minn. 2005); *Mazzagatti v. Everingham*, 516 A.2d 672, 679 (Pa. 1986); *Marchetti v. Parsons*, 638 A.2d 1047 (R.I. 1994).

⁵⁰ See *Beck v. State of Alaska*, 837 P.2d 105 (Alaska 1992) (plaintiff must observe victim's traumatic injuries during the continuous flow of events and the immediate aftermath of the accident); *Clohessy v. Bachelor*, 675 A.2d 852 (Conn. 1996) (plaintiff must view the victim immediately after the injury-causing event before material change has occurred with respect to the victim's location and condition); *Hegel v. McMahan*, 960 P.2d 424 (Wash. 1998) (plaintiff must observe injured relative at the scene before change in condition or location); *Contreras v. Carbon County Sch. Dist.*, 843 P.2d 589 (Wyo. 1992) (once victim's condition or location has materially changed, the moment of crisis has passed); *Ruttley v. Lee*, 761 So. 2d 777 (La. Ct. App. 2000) (mother who saw victim's covered body at the scene had bystander claim, but sister who arrived after victim was extricated did not); *Detroit Auto. Inter-Insurance Exch. v. McMillan*, 406 N.W.2d 232 (Mich. Ct. App. 1987) (recovery denied when plaintiff arrived more than one hour after accident and after daughter had been removed from the car); *Colbert v. Moomba Sports, Inc.*, 135 P.3d 485 (Wash. Ct. App. 2006) (father who witnesses removal of daughter's covered body from a lake from 100 yards away two to three hours after drowning did not state a claim). See also *Gabalton v. Jay-Bi Prop. Mgmt., Inc.*, 925 P.2d 510 (N. Mex. 1996) (bystander must observe victim before arrival of emergency medical personnel). Additional authority evidencing the majority rule may be found in "Immediacy of Observation of Injury as Affecting Right to Recover Damages for Shock or Mental Anguish from Witnessing Injury to Another," 99 A.L.R. 5th 301 (2002-04).

event or come upon the victim at the scene. First, it is important to recall the original foundation for the impact rule in claims for negligently inflicted distress, which was (1) concern over a flood of litigation, (2) the risk of fraudulent claims, and (3) uncertainty in proving a causal connection between the original negligence of the defendant and the plaintiff's alleged distress.⁵¹ Although Indiana has since modified the physical injury requirement to permit recovery for those who suffer "direct impact" under *Shuamber* or the "direct involvement" required by *Groves*, it should continue to require the bystander plaintiff's participation in the shocking event or, as Judge Tinder recently delimited, a witnessing of "the gruesome aftermath in the immediate minutes after it occurred."⁵² Otherwise, Indiana courts will have all but abandoned any kind of impact requirement, and the original concerns that produced the requirement in the first place will give way to claims for speculative and highly remote consequences of an endless variety of allegedly negligent acts.

Second, for more than a century, it has been the rule in cases of wrongful death that Indiana law prohibits the recovery of damages as solatium for wounded feelings, grief, or bereavement.⁵³ Any rule that permits bystander recovery for those who do not actually experience the victim's death at the accident scene will make it impossible to distinguish between the type of compensable distress contemplated by *Groves* and the noncompensable emotional suffering, grief, and sorrow that anyone endures when a loved one is killed. Under such circumstances, defendants would be exposed to unforeseen liability for solatium damages that are heretofore unknown in Indiana and are out of proportion to the defendants' original culpability. The *Smith v. Toney* comments that both the scene and the victim must be in "essentially the same condition"⁵⁴ as at the time of the accident will hopefully be read strictly in future cases so as to avoid such an unfortunate result.

VI. CONCLUSION

Just three months before it handed down *Smith v. Toney*, the Indiana Supreme Court held the line on the modified impact rule, rejecting an argument that the "constructive impact" of symptoms of anxiety—a rapid pulse, perspiration, increased production of adrenalin and the like—is sufficient to satisfy the physical impact requirement of *Shuamber*.⁵⁵ Similarly, despite the questions it leaves unanswered, *Smith v. Toney* may signal an effort by

⁵¹ *Shuamber v. Henderson*, 579 N.E.2d 452, 455 (Ind. 1991).

⁵² *Luttrull v. McDonald's Corp.*, 2004 W.L. 2750244, *3 (S.D. Ind. 2004).

⁵³ *Board of Comm'rs v. Legg*, 93 Ind. 523 (Ind. 1884); *Challenger Wrecker Mfg., Inc. v. Estate of Boundy*, 560 N.E.2d 94, 99 (Ind. Ct. App. 1990); *Commercial Club of Indianapolis v. Hilliker*, 50 N.E. 578, 580 (Ind. Ct. App. 1898). See also Ind. Code § 34-23-1-2(e)(2) (prohibiting damages for grief).

⁵⁴ 862 N.E.2d at 663.

⁵⁵ *Atlantic Coast Airlines v. Cook*, 857 N.E.2d 989, 998-99 (Ind. 2006)

2006] *Court Narrows the Scope of "Bystander" Claims* 227

the court to forestall any further expansion of claims for negligently inflicted emotional distress in Indiana courts. At the least, these recent pronouncements from Indiana's highest court, along with substantial case law from around the country, should arm defense counsel with persuasive authority supporting an effort to construct reasonable limitations upon emotional distress claims and recovery at trial.

