

Post-*Keys*: Negligent infliction of emotional distress on bystanders to medical malpractice

In 1985 it took the tragic death of a teenager to bring about bystander NIED claims in medical malpractice cases; the recent Keys' *decision builds upon that foundation*

By Markus B. Willoughby

In 1985, the California Supreme Court opened the door for claims of Negligent Infliction of Emotional Distress (NIED) in a medical malpractice case in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159. But not until *Keys v. Alta Bates*, (2015 A140038) First Appellate District, has there been a successful reported case for NIED in the context of medical malpractice. This article focuses on how bystander NIED claims in medical malpractice cases were created in California and sets forth the elements plaintiffs must prove in order to be successful in these cases.

The *Dillon* decision

In *Dillon v. Legg* (1968) 68 Cal.2d 728, the California Supreme Court was the first high court in America to hold that a parent who witnessed the death or injury of her child from negligence could recover for the emotional trauma where the parent did not fear imminent physical harm. Because *Dillon* involved an injury to a child from a sudden-onset automobile accident, subsequent cases following the *Dillon* factors emphasized the sudden-injury requirement.[1] This led courts to the conclusion that the "sudden-occurrence" requirement could not be satisfied in

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cases of medical malpractice. (*Jansen v. Children's Hospital Medical Center* (1973) 31 Cal.App.3d 22*; Justus v. Atchison* (1977) 19 Cal.3d 564.)

The *Ochoa* decision

In1985, the "sudden occurrence" requirement was challenged in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159. In *Ochoa*, the California Supreme Court was asked whether, in order to state a cause of action under *Dillon*, the child's injury must have been the result of a brief and sudden occurrence viewed contemporaneously by the plaintiff. In *Ochoa*, a 13-year-old boy was admitted to a juvenile hall infirmary for a cold, which was later diagnosed as pneumonia. Upon first seeing him, his mother believed he was in severe pain and holding his side. She told the nursing staff that her son needed medical treatment, but the nurses told her that her son was fine. The mother was upset and distressed by these events.

The next day, her son was pale and sweaty and continuing to complain of pain. He appeared dehydrated, was vomiting and was complaining of extreme pain on one side. The mother asked the nurses at the juvenile hall infirmary that she be allowed to take her son to see a doctor, but the request was refused. She was "distressed and concerned" as her son's condition worsened and she perceived that the medical staff was not properly caring for him. Her son died the following day.

The Court of Appeal held that the parents failed to state a claim for bystander NIED. The Supreme Court reversed, stating that the mother "was aware of and observed conduct by the defendants which produced injury in her child. She was aware of the fact that her child was in need of immediate medical attention. To her knowledge the defendants had failed to provide the necessary care." (*Id.* at 169-70.)

The landscape created by *Dillon* had changed, the *Ochoa* Court ruled that the "sudden occurrence" requirement was an unwarranted restriction on the ability to recover in bystander NIED cases and held: "We are satisfied that when there is observation of the defendant's conduct and the child's injury and contemporaneous awareness the defendant's conduct or lack thereof is causing harm to the child, recovery is permitted. " (*Id.* at 170)

The *Thing* decision

A few years later, the California Supreme Court again modified how bystander NIED would be applied in *Thing v. La Chusa* (1989) 48 Cal.3d 644. In *Thing*, the Court modified the *Dillon* rule to its present day form: (1) the plaintiff must be closely related to the injured victim; (2) the plaintiff must have been present at the scene of the injury-producing event at the time it occurred, and aware that it was causing injury to the victim; and (3) as a result, the plaintiff must have suffered serious emotional distress – a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances. (*Id.* at 668.)

The California Supreme Court, likely in anticipation of staving off confusion of this rule in the context of medical negligence, confirmed its holding in *Ochoa* by stating:

> *Ochoa* also held that the NIED plaintiff need not be aware that the conduct was "tortious." Reasoning that such a requirement leads to anomalous results, the court held that "when there is observation of the defendant's conduct and the child's injury and contemporaneous awareness the defendant's conduct or lack thereof is causing harm to the child, recovery is permitted."(*citation omitted*.) Thus, the plaintiff in that case did not have to know that the defendants had negligently misdiagnosed her son. It was enough that she knew that they were refusing or neglecting to give him additional treatment and this was the cause of the additional injury he was suffering.

(*Id.* at 661)

Indeed, *Thing* confirmed that plaintiffs did not need to know that the medical provider's conduct was "negligent," rather, they only needed to know that the medical provider was neglecting to give treatment and that this was the cause of additional injury.

The *Bird* decision

The first real test of *Ochoa* came in the Supreme Court case of *Bird v. Saenz* (2002) 28 Cal.4th 910. In *Bird*, a mother died in the operating room during a medical procedure. The medical negligence at issue was the transection of an artery. The undisputed evidence was that plaintiffs had not been present in the operating room at the time of the injury, but had learned about it from others only after it had occurred. (*Id*. at 914.) On appeal, plaintiffs attempted to argue that while they were not present for the transection, they understood that their mother's artery had been injured and that defendants failed to timely treat that injury. What plaintiffs perceived was their mother being rushed from one part of the hospital to another, and hearing a generic hospital page for a surgeon. (*Id.* at 916.)

The Court found that under those facts, plaintiffs "had no reason to know that the care their mother was receiving to diagnose and correct the cause of the problem was inadequate. While they eventually became aware that one injury-producing event – the transected artery – had occurred, they had no basis for believing that another, subtler event was occurring in its wake." (*Id.* at 917.)

The *Bird* Court distinguished the facts from *Ochoa*, stating that in *Ochoa*, there was a failure of medical staff "to respond significantly to symptoms obviously requiring immediate medical attention. Such a failure to provide medical assistance, as opposed to a misdiagnosis, unsuccessful treatment, or treatment that turns out to have been inappropriate only in retrospect, is not necessarily hidden from the understanding

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awareness of a layperson." (*Id.* at 919-20.) As such, the Court confirmed that where there is observation of the defendant's conduct and the loved one's injury, "and contemporaneous awareness the defendant's conduct or lack thereof is causing harm to the [third party], recovery is permitted." (*Id. at* 920)

In *Bird*, the Court stated that "except in the most obvious cases, a misdiagnosis is beyond the awareness of lay bystanders." (*Id.* at 917.) The truth is, almost every medical malpractice case involves some form of "misdiagnosis." This language has been used by defense attorneys very effectively to argue that the injury-producing event was a failure to diagnose the true cause of a victim's injury, and that a layperson could not meaningfully perceive that "event." The defense points out very convincingly "how can a layperson understand the misdiagnosis when the experts cannot even agree on what was happening? In fact, not until *Keys v. Alta Bates Summit Medical Center* has there been a reported case since the 1985 *Ochoa* supporting a claim for bystander NIED in the context of medical malpractice.

The *Keys'* decision

In *Keys*, decedent, Ms. Knox, was the mother and sister of plaintiffs who accompanied her to Alta Bates Summit Medical Center where she underwent thyroid surgery. At approximately 6:45 p.m., Ms. Knox was transferred from the recovery unit to the medical-surgical floor. Upon arrival to the floor, she was pale, sweaty and having difficulty breathing. The sister brought this to the attention of the nurse, who described the breathing as "stridorous," suggesting Ms. Knox's airway was obstructed.

The nurse called the hospital's rapid response team at 6:46 p.m. to evaluate Ms. Knox. The rapid response team arrived at 6:48 and left the room at 6:57 p.m. While there, the respiratory therapist suctioned Ms. Knox's mouth twice, once at the direction of plaintiffs, who were not satisfied the suctioning solved the breathing problem. There was no attempt to determine why Ms. Knox was having difficulty breathing.[2]

At trial, both plaintiffs testified that Ms. Knox looked uncomfortable, was pale, sweaty and had clear breathing difficulties, and both separately asked the nurse to call Ms. Knox's surgeon for help. The nurse called Ms. Knox's surgeon at 6:56 p.m. He was at his home, 15 minutes away. He was told Ms. Knox had stridor and responded that he would come immediately. Between the phone call and the surgeon's arrival, no care was provided to Ms. Knox.

When the surgeon entered the room he repositioned Ms. Knox and suctioned her throat. He then removed the bandages and began removing the sutures on her incision to relieve pressure when decedent stopped breathing. A code blue was called at 7:23 p.m. but Ms. Knox was without a pulse for a number of minutes and, as a result of her blocked airway, she suffered a permanent brain injury. Ms. Knox died two weeks later, after life support was withdrawn.

Plaintiffs and their family filed suit for wrongful death and separate claims for NIED on behalf of Ms. Knox's daughter and sister. Plaintiffs premised their NIED claims on the fact that they were present and witnessed Ms. Knox unable to breathe and, despite urges on their part, the hospital staff did not adequately respond to this obvious need for medical attention. This caused plaintiffs' distress. The jury returned a plaintiff 's verdict on all three claims.

Alta Bates Summit Medical Center appealed the NIED awards arguing that plaintiffs could not see or perceive that a hematoma was developing in Ms. Knox's throat, causing decedent's airway to occlude. They further argued that this was not a case of failure to provide care because Ms. Knox was seen by a nurse, the rapid assessment team and by a physician. Instead, this was, simply a case of unsuccessful treatment and a misdiagnosis of the true nature of Ms. Knox's condition.

The *Keys* Court disagreed with defendant's characterization that the hematoma was the injury-producing event which could not be perceived by plaintiffs. As in *Ochoa*, the Court found instead that the negligence of defendant was the failure to respond to an obvious need for immediate medical care:

> The negligence in this case was the failure of defendant's to intubate the decedent or otherwise treat her compromised airway, not a failure to diagnose her post-surgical hematoma. The injury producing event here was defendant's lack of acuity and response to [decedent's] inability to breathe, a condition the plaintiffs observed and were aware was causing her injury.

The Court went on to explain that plaintiffs established that they were contemporaneously aware of the injury-producing event, and perceived it was inadequate treatment because they asked for more medical care than Ms. Knox was receiving. The court reasoned:

> The evidence here showed that the plaintiffs were present when Knox, their mother and sister, had difficulty breathing following thyroid surgery. They observed inadequate efforts to assist her breathing, and called for help from the respiratory therapist, directing him at one point to suction her throat. They also directed hospital staff to call for the surgeon to return to Knox's bedside to treat her breathing problems. *These facts could be properly considered by the jury to demonstrate that the plaintiffs were contemporaneously aware of Knox's injury and the inadequate treatment provided her by defendants.* (*emphasis added)*

The Court upheld the jury's findings and confirmed the NIED award.

For the first time since *Ochoa*, *Keys* helps define bystander NIED in medical malpractice cases and shapes the argument for future claims: In order to satisfy the contemporaneous awareness requirement

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in a bystander NIED case in a medical malpractice case, plaintiff must be able to show 1) the injury-producing event was the failure of the medical providers to respond significantly to symptoms which obviously require immediate medical attention; 2) that the plaintiffs were aware of the inadequate treatment by demonstrating that they asked for more medical care than was being given; and, 3) medical attention was delayed or not given.

Conclusion

NIED claims in California in the context of medical malpractice have been successfully defended for years by the defense bar because they have been able to focus on the complexities of medicine versus the lack of sophistication of the lay plaintiffs; the focus has been on the disease rather than the symptoms which give rise to the bystander's awareness that their loved one is being injured. *Keys v. Alta Bates* provides a framework for analyzing these claims and redirecting the courts to the principles of *Ochoa*, which give rise to this claim.


Willoughby

Markus B. Willoughby is the principal at Willoughby Law Firm *in Oakland and counsel for the plaintiffs in* Keys v. Alta Bates. *Markus concentrates his law practice on personal injury litigation throughout California, focusing almost exclusively on medical negligence and wrongful death. Markus was nominated as Trial Lawyer of the Year in 2013 and 2014 by the SFTLA, received the 2014 Civil Justice Award from the SFTLA and was selected as a Northern California* SuperLawyer *2015.*

Endnotes

[1] See, e.g., *Hathaway v. Superior Court* (1980) 112 Cal.App.3d 728 [169 Cal.Rptr. 435] [electrocution]; *Parsons v. Superior Court* (1978) 81 Cal.App.3d 506 [146 Cal.Rptr. 495, 5 A.L.R.4th 826] [car accident]; *Nazaroff v. Superior Court* (1978) 80 Cal.App.3d 553 [145 Cal.Rptr. 657] [drowning]; *Powers v. Sissoev* (1974) 39 Cal.App.3d 865 [114 Cal.Rptr. 868] [car accident]; *Archibald v. Braverman* (1969) 275 Cal.App.2d 253 [79 Cal.Rptr. 723] [explosion].)

[2] All treating nurses, doctors and experts testified that a developing throat hematoma is a common post-operative complication from thyroid surgery and is a life threatening medical emergency.

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