Robert I. Reardon Jr., above, urged the state Supreme Court to recognize the tort of bystander emotional distress—as New York, New Jersey, Pennsylvania and every other New England state already do.

A Long-Awaited Tort?

The personal tragedy that befell Mary A. Clohessy is a textbook case of the tort commonly known as bystander emotional distress, argued her lawyer, Robert I. Reardon Jr., in another case heard last Tuesday morning. Reardon, of New London's The Reardon Law Firm, urged the Supreme Court formally to recognize this cause of action. It allows recovery for the emotional injuries suffered by one who witnesses the death or serious injury of a close relative. All the other New England states, plus New York, New Jersey and Pennsylvania, have made it part of their common law.

Clohessy left St. Mary's Church in New Haven just after 5 p.m. on Monday, Mar. 22, 1993. She attempted to cross the street within a crosswalk with her sons Liam, 5, to her right, and Brendan, 7, to her left. Her suit, *Clohessy v. Bachelor*, alleges that when Kenneth Bachelor, driving a 1985 Buick, sped towards them, the driver's side mirror struck Brendan in the head, hurling him to the street. His distraught mother and brother tried to assist him, but he died shortly afterwards.

Reardon urged the court to adopt the definition of the tort of bystander emotional distress set out in the Restatement of the Law of Torts. The cause of action grows out of the 1968 California case of *Dillon v. Legg*. Reardon, who is also vice president of the Connecticut Trial Lawyers Association, was backed up by an amicus curiae brief filed by that group.

Early in Reardon's argument, Justice Robert I. Berdon noted the high level of action in Connecticut's trial courts on this issue. Reardon replied that the Superior Court judges who have recognized the tort are about evenly split on where to draw the line that defines the tort—whether the plaintiff must also have been within the zone of danger, or whether the harm must have been foreseeable.

Reardon urged the court to adopt the zone-of-danger rule, which is a narrower definition.

Katz posited a hypothetical: If Mrs. Clohessy had trailed her son by enough time to still be on the curb, and hence out of the zone of danger, wouldn't that prevent her recovery? It would, Reardon acknowledged. "Many of the lines the law draws are harsh," replied Reardon, but described the "zone of danger" test as a logical "safe harbor" for the tort.

For the defense, Francis D. Paola Jr., of the seven-lawyer in-house insurance firm of Paola & Associates in Wallingford, contended that Mrs. Clohessy, and Connecticut, do not need this new cause of action. He pointed out that she is a beneficiary of Brendan's estate and is compensated under his wrongful-death claim, and also that Connecticut case law now allows her to recover for the fright and emotional distress arising from her concern about her personal safety.

The bystander emotional distress tort, Paola argued, arose in an era when courts never met a cause of action they didn't like.

From the tone of the justices' questions, it appeared to be an uphill battle for Paola. Paola argued that California opened a Pandora's box with *Dillon*, and has since had to trim back the remedy. Berdon asked, "If we adopt this, why can't we do so with those limits?" Paola could only warn that the tort would become an "intellectual black hole."

On rebuttal, Reardon contended that the Pandora's box of bystander emotional distress "has been open in the Superior Courts for a long time." (Nearly 100 cases discussing the issue have been reported so far this decade, according to a computerized case search.)