Superior Court of Connecticut,
Judicial District of Hartford.
Elizabeth **VALENTIN**
v.
ST. FRANCIS HOSPITAL & MEDICAL CENTER.

No. CV040832314.
Nov. 7, 2005.

Anderson, Reynolds & Lynch LLP, New Britain, for Elizabeth Valentin.

Cooney, Scully & Dowling, Hartford, for St. Francis Hospital & Medical Center.

HALE, J.T.R.

*FACTS*

***1** This action is before the court on the defendant's motion to strike the plaintiff's one-count complaint based upon negligent infliction of emotional distress.[FN1] The plaintiff alleges that her father, the decedent, was admitted to the defendant-hospital on May 5, 2002, with epigastric pain. While there, the decedent allegedly suffered cardiac episodes that resulted in significant, anoxio brain damage. The defendant allegedly placed the decedent on life support. The plaintiff alleges that the decedent did not have a living will or other document, nor had he made any statements to the attending physician or a guardian, indicating his final wishes. On May 14, 2002, the defendant allegedly terminated life support, and the decedent died on May 21, 2002. The defendant allegedly was aware of the existence and location of the plaintiff as next of kin and told to contact her, but the plaintiff allegedly was not contacted about the decision to terminate life support. The plaintiff alleges that she became aware of her father's death on May 24, 2002.

FN1. The cause of action is designated as medical malpractice on the summons, and the plaintiff attached a good faith certificate. She only alleges, however, negligent infliction of emotional distress in her revised complaint. Furthermore, in her memorandum of law in opposition to the defendant's motion to strike, the plaintiff specifically argues that her cause of action is not "premised on medical malpractice" but "based upon a statutory duty on the part of the hospital."

On February 27, 2004, the plaintiff filed a one-count complaint for negligent infliction of emotional distress based on the defendant's failure to contact her so she could participate in the decision to terminate life support. On April 14, 2004, the defendant filed a request to revise. The plaintiff responded with a request to amend and an amended complaint on April 28, 2004. The defendant filed a motion to strike the complaint, based upon a failure to state a claim upon which relief may be granted, and a memorandum in support of its motion on September 24, 2004. On November 3, 2004, the plaintiff filed a memorandum in opposition to the motion to strike, to which the defendant filed a reply memorandum on February 28, 2005.

*DISCUSSION*

"The purpose of a motion to strike is to contest ... the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. Alves,* 262 Conn. 480, 498, 815 A.2d 1188 (2003). "It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted." (Internal quotation marks omitted.) *Commissioner of Labor v. C.J.M Services, Inc.,* 268 Conn. 283, 292, 842 A.2d 1124 (2004). "A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Internal quotation marks omitted.) *Fort Trumbull Conservancy LLC v. Alves, supra,* at

498. In deciding whether to grant the motion to strike, "[t]he court must construe the facts in the complaint most favorably to the plaintiff." (Internal quotation marks omitted.) *Faulkner v. United Technologies Corp.,* 240 Conn. 576, 580, 693 A.2d 293 (1997). "[I]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Internal quotation marks omitted.) *Larobina v. McDonald,* 274 Conn. 394, 400, 876 A.2d 522 (2005).

***2** The question before this court is whether the plaintiff has set forth a cause of action for negligent infliction of emotional distress against the defendant based upon a duty, under common law or General Statutes § 19a–571(a),[FN2] to prevent emotional distress to the plaintiff by contacting her prior to the removal of life support so she could participate in the decision to terminate life support. This issue is one of first impression. The defendant argues that it did not owe a duty to the plaintiff. In response, the plaintiff argues that the defendant owed the plaintiff a duty under § 19a–571(a) and under common law.[FN3] The defendant argues in its reply memorandum that § 19a–571(a) does not create a duty to the plaintiff and that no duty exists under common law.

FN2. General Statutes § 19a–571 is titled *"Liability re removal of life support system of incapacitated patient. Consideration of wishes of patient."* Subsection (a), in pertinent part, provides: "[A]ny [licensed] physician ... or any licensed medical facility who or which withholds, removes or causes the removal of a life support system of an incapacitated patient shall not be liable for damages in any civil action or subject to prosecution in any criminal proceeding for such withholding or removal, provided (1) the decision to withhold or remove such life support system is based on the best medical judgment of the attending physician in accordance with the usual and customary standards of medical practice; (2) the attending physician deems the patient to be in a terminal condition or, in consultation with a physician qualified to make a neurological diagnosis who has examined the patient, deems the patient to be permanently unconscious; and (3) the attending physician has considered the patient's wishes concerning the withholding or withdrawal of life support systems. In the determination of the wishes of the patient, the attending physician shall consider the wishes as expressed by a document executed in accordance with sections 19a–575 and 19a–575a, if any such document is presented to, or in the possession of, the attending physician at the time the decision to withhold or terminate a life support system is made. If the wishes of the patient have not been expressed in a living will the attending physician shall determine the wishes of the patient by consulting any statement made by the patient directly to the attending physician and, if available, the patient's health care agent, the patient's next of kin, the patient's legal guardian or conservator, if any, any person designated by the patient ... and any other person to whom the patient has communicated his wishes, if the attending physician has knowledge of such person. All persons acting on behalf of the patient shall act in good faith. If the attending physician does not deem the incapacitated patient to be in a terminal condition or permanently unconscious, beneficial medical treatment including nutrition and hydration must be provided ."

FN3. In her memorandum, in opposition to the motion to strike, the plaintiff also argues that she has established causes for negligence and negligence per se. Insofar as negligence is part of the plaintiff's claim of negligent infliction of emotional distress, it is discussed herein. As separate causes of action, the plaintiff has not properly alleged the elements of negligence or negligence per se in her complaint or amended complaint. With regard to negligence per se, it is noted that "to establish liability as a result of a statutory violation, a plaintiff must satisfy two conditions. First, the plaintiff must be within the class of persons protected by the statute ... Second, the injury must be of the type which the statute was intended to prevent." (Citations omitted; internal quotation marks omitted.) *Gore v. People's Savings Bank,* 235 Conn. 360, 375–76, 665 A.2d 1341 (1995). In this case, the plaintiff does not allege or argue that she is within the class protected by the statute nor does she allege or argue that her emotional distress is the kind of injury that the statute was designed to prevent. Even if she had alleged a statutory violation, "[t]here is ... nothing to support negligence per se under ... § 19a–571. The only logical construction of this statute is that it was enacted to implement a terminal patient's common law

rights to self determination and privacy ... and, by its express terms, to provide a safe harbor for physicians by insulating them from civil and criminal liability for discontinuing life support measures under certain specified circumstances." (Citation omitted .) *Law v. Camp,* 116 F.Sup.2d 295, 304 n. 4 (D.Conn.2000), aff'd, 15 Fed.Appx. 24 (2d Cir.2001), cert. denied, 534 U.S. 1162, 122 S.Ct. 1172, 152 L.Ed.2d 116 (2002). In this case, the plaintiff was not the patient nor is she a physician or a hospital. Furthermore, it should be emphasized that the plaintiff is not asserting the rights of the decedent. As a result, the question of whether the hospital owed a duty to the decedent under common law or § 19–571 is not discussed here. In sum, a claim for negligence per se would not survive the motion to strike because the plaintiff is not asserting the rights of the decedent, is not part of the protected class and her injury is not of the type the statute was intended to prevent.

Additionally, bystander liability is not an appropriate cause of action in this case. "[A]n action at common law for negligent infliction of emotional distress on a bystander [is recognized], subject to satisfying the following factors: (1) the bystander must be closely related to the injury victim ... (2) the bystander's emotional injury must be caused by the contemporaneous sensory perception of the event or conduct that causes the injury ... (3) the injury to the victim must be substantial, resulting either in death or serious physical injury ... and (4) the bystander must have sustained a serious emotional injury." (Citations omitted; internal quotation marks omitted.) *Craig v. Driscoll,* 262 Conn. 312, 318 n. 8, 813 A.2d 1003 (2003). While the plaintiff was closely related, she was not present at the hospital and did not witness any of the alleged conduct causing injury nor was she immediately aware of her father's death. As a result, the court's decision only addresses the claim of negligent infliction of emotional distress because the plaintiff has not set forth causes of action based upon negligence or negligence per se and because bystander liability is not applicable in this case.

"In *Montinieri v. Southern New England Telephone Co.,* 175 Conn. 337, 345, 398 A.2d 1180 (1978), [our Supreme Court] recognized for the first time that recovery for unintentionally caused emotional distress does not depend on proof of either an ensuing physical injury or a risk of harm from physical impact." (Internal quotation marks omitted.) *Perodeau v. Hartford,* 259 Conn. 729, 749, 792 A.2d 752 (2002). "[I]n order to prevail on a claim of negligent infliction of emotional distress, the plaintiff must prove that the defendant should have realized that its conduct involved an unreasonable risk of causing emotional distress and that that distress, if it were caused, might result in illness or bodily harm ... This ... test essentially requires that the fear or distress experienced by the plaintiffs be reasonable in light of the conduct of the defendants. If such [distress] were reasonable in light of the defendants' conduct, the defendants should have realized that their conduct created an unreasonable risk of causing distress, and they, therefore, properly would be held liable." (Internal quotation marks omitted.) *Larobina v. McDonald, supra,* 274 Conn. at 410.

"Moreover, the [pleader must] demonstrate the elements necessary to establish negligence ... The essential elements ... are well established: duty; breach of that duty; causation; and actual injury ... If a court determines, as a matter of law, that a defendant owes no duty to a plaintiff, the plaintiff cannot recover in negligence from the defendant ... A duty to use care may arise ... from circumstances under which a reasonable person, knowing what he knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result from his act or failure to act." (Internal quotation marks omitted .) *Sunset Mortgage v. Agolio,* Superior Court, judicial district of New London, Docket No. CV 05 0569833 (June 14, 2005, Jones, J.).

*STATUTORY DUTY*

The plaintiff argues that § 19a–571(a) establishes a duty that the hospital owed to her and that Connecticut law recognizes the right of family members to pursue damages under the statute.[FN4] No case directly discusses, however, whether a decedent's next of kin is a member of the class of persons protected by § 19a–571(a). "[I]n determining whether a duty of care is owed to a specific individual under a statute, the threshold inquiry ... is whether the individual is

in the class of persons protected by the statute." *Ward v. Greene,* 267 Conn. 539, 548, 839 A.2d 1259 (2004). In making this inquiry, the court looks to the statute's policy statement and the entire statutory scheme as enacted. See *id.,* at 549–57.

FN4. In particular, the plaintiff argues that two Connecticut cases support her position. In 1989, the Connecticut Supreme Court provided injunctive and declaratory relief under the statute allowing for removal of a feeding tube from a woman in a permanent vegetative state. *McConnell v. Beverly Enterprises–Connecticut, Inc.,* 209 Conn. 692, 553 A.2d 596 (1989). At the time, the statute required consent of the family. *Id.,* at 708.

This case is distinguishable. Here, the plaintiff is asking for damages. Additionally, a 1991 amendment to the statute, discussed in the main text of this memorandum, struck the requirement of the consent of the family. Thus, *McConnell* does not provide a basis to find that the hospital had a statutory duty to the plaintiff that would allow for damages.

In 2000, a judge of this court denied a defendant's motion to strike a plaintiff's claim for negligent infliction of distress where a hospital disconnected the plaintiff's husband from life support. *O'Connell v. Bridgeport Hospital,* Superior Court, judicial district of Fairfield, Docket No. CV 99 0362525 (May 17, 2000, Skolnick, J.). The court allowed the plaintiff as administratrix to bring a cause of action in wrongful death based on § 19a–571(a). *Id.* On the direct claim of negligent infliction of emotional distress, the defendant challenged the cause of action based upon a failure to use the formal language necessary to establish the claim. *Id.* The court did not address whether a duty to the plaintiff existed under § 19a–571(a). Therefore, these cases do not establish that the plaintiff, as next of kin, is part of a protected class under § 19a–571(a).

***3** No policy statement exists on the face of § 19a–571 or other related statutes. See General Statutes §§ 19a–570 through 19a–580d. The legislative history indicates, however, that statutes concerning the removal of life support were enacted in response to a nationwide movement to provide for living wills. 28 S. Proc., Pt. 12, 1985 Sess., p. 4065. Section 19a–571 was promulgated to give guidelines allowing for appropriate private decision making regarding the termination of life support based upon an individual's right to refuse medical treatment. See *McConnell v. Beverly Enterprises–Connecticut, Inc.,* 209 Conn. 692, 701, 703, 553 A.2d 596 (1989). In honoring patients' choices, hospitals and doctors are protected from liability under this statute. 28 H.R. Proc., Pt. 35, 1985 Sess., p. 12612; 28 S. Proc., Pt. 17, 1985 Sess., p. 5719.

As originally enacted, the statute required the consent of the patient's next of kin before the hospital or physician terminated life support. General Statutes (Rev. to 1991) § 19a–571(a); [FN5] see also *McConnell v. Beverly Enterprises, Connecticut, Inc., supra,* 209 Conn. at 708. In practice, the informed consent requirement allowed the next of kin to veto the patient's wishes. 34 H.R. Proc., Pt. 23, 1991 Sess., p. 8668. In 1991, to change this result, the legislature amended the statute and abolished the requirement of obtaining the consent of next of kin. See *id.* and General Statutes (Rev. to 2005) § 19a–571(a). Thus, the statute does not presently require the consent of the next of kin.[FN6]

FN5. General Statutes § 19a–571(a) originally provided, in relevant part: "Liability re removal of life support system of incompetent patient. Attending physician must obtain consent of next of kin ... Any [licensed] physician or any licensed medical facility which removes or causes the removal of a support system of an incompetent patient shall not be liable for damages in any civil action ... provided (1) the decision to remove such life support system is based on the best medical judgment of the attending physician; (2) the attending physician deems the patient to be in a terminal condition; (3) the attending physician has obtained the informed consent of the next of kin, if known, or legal guardian, if any, of the patient prior to removal; and (4) the attending physician has considered the wishes as expressed by the patient directly, through his next of kin or legal guardian, or in the form of a document executed in accordance with section

19a–575 ...” (Emphasis added.) General Statutes (Rev. to 1991) § 19a–571(a).

FN6. In its current form, § 19a–571(a) requires that a hospital or physician “shall” determine whether the patient expressed his or her final wishes to the next of kin if no living will exists or if no expression of these wishes was made to an attending physician or to the patient's health care agent. General Statutes § 19a–571(a)(3). In the present case, the plaintiff does not allege that any statements were made to her or that she knew what the decedent's final wishes were.

More importantly, and despite changes in the statute, nothing in either the language of the statute or the legislative history supports the notion that the plaintiff is part of any class protected under § 19a–571. “The only logical construction of this statute is that it was enacted to implement a terminal patient's common law rights to self determination and privacy ... and, by its express terms, to provide a safe harbor for physicians by insulating them from civil and criminal liability for discontinuing life support measures under certain specified circumstances.” (Citation omitted.) *Law v. Camp,* 116 F.Sup.2d 295, 304 n. 4 (D .Conn.2000), aff'd, 15 Fed.Appx. 24 (2nd Cir.2001), cert. denied, 534 U.S. 1162, 122 S.Ct. 1172, 152 L.Ed.2d 116 (2002). Thus, the statute appears to protect only physicians, hospitals and patients. Because the plaintiff is not a doctor, hospital or a patient, she is not a protected class member according to the statute's underlying purpose as expressed in its legislative history.

Additionally, nothing can be found in the statutory scheme to support a conclusion that the plaintiff is part of a protected class. “In determining the class of persons protected by a statute, [the court] do[es] not rely solely on the statute's broad policy statement. Rather, [the court] review[s] the statutory scheme in its entirety, including the design of the scheme as enacted.” (Internal quotation marks omitted.) *Ward v. Greene, supra,* 267 Conn. at 551. The statutory scheme for removal of life support is encompassed within General Statutes § 19a–570 through § 19a–580d.[FN7]

FN7. Additionally, the legislature set forth criteria for the determination of death for the purposes of continuing or removing life support in § 19a–504a. See *State v. Guess,* 244 Conn. 761, 777, 715 A.2d 643 (1998). This statute provides in pertinent part: “(b) For purposes of making a determination concerning the continuation or removal of any life support system in a general hospital ... an individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. Determination of death shall be made in accordance with accepted medical standards.” General Statutes § 19a–504a. It is not clear how this statute fits in, if at all, with the other statutes involving life support. It was enacted prior to the others, and notification or consent of next of kin is not mentioned in the legislative history. Public Acts 1984, No. 84–261, §§ 1, 2.

***4** “Next of kin” is defined in General Statutes § 19a–570(8) and is referred to in § 19a–571(a) and General Statutes § 19a–580. Section 19a–571 includes the next of kin in the list of people to be consulted in determining the patient's wishes regarding care if no living will exists and the decedent has not expressed the final wishes to the attending physician. Additionally, § 19a–580 requires that the attending physician make reasonable efforts to notify the next of kin prior to the removal of life support.[FN8] Enacted in 1991 as part of the changes to the living will statutes, § 19a–580 appears to replace the requirement that the physician or hospital obtain informed consent of the next of kin. Public Acts 1991, No. 91–283, § 8; 34 H.R. Proc., Pt. 23, 1991 Sess., p. 8668.

FN8. The issue of whether a duty is owed under this statute is not addressed in this memorandum because the plaintiff does not allege a cause of action based upon § 19a–580. Even if she had alleged a cause of action under this statute, it does not appear from the

statutory purpose or the scheme that the legislature intended to make next of kin a protected class.

Further, although originally the plaintiff appeared to make an allegation using some of the language of § 19a–580 in paragraph nine of her original complaint, she removed it from her amended complaint. Instead, she alleges the defendant had a duty to inform her so she could participate in the decision to terminate life support. She seems to be implying that the defendant had a strict duty to inform her so she could participate. Under the present statutory scheme, a hospital or physician need only make reasonable efforts to inform, not allow the participation of, the next of kin. General Statutes §§ 19a–571(a) and 19a–580. Consequently, even if the plaintiff were part of a protected class, the statutes do not create a duty, strict or otherwise, to inform next of kin so that they may participate.

Nevertheless, the legislative history of the entire scheme does not suggest any intent to make next of kin a protected class. In fact, the legislature intended only to codify existing law, not to create any new duties. 341 H.R. Proc., Pt. 23, 1991 Sess., p. 8736, remarks of Representative Ann P. Dandrow ("I should point out that we really are not changing the law regarding the withdrawal of a life support system. We're only conforming our statutes to what is now the law in Connecticut based on the *McConnell* case and throughout the nation, based on the *Cruzan* case."); Conn. Joint Standing Committee Hearings, Judiciary, Pt. 5, 1991 Sess., p. 1408, remarks of Representative Michael P. Lawlor ("[D]o you understand that all this bill does? It doesn't allow people to do things. I[t] just tells them if they do certain things under certain circumstances they won't be held liable for it and that's all this bill does?"); Conn. Joint Standing Committee Hearings, Judiciary, Pt. 5, 1985 Sess., p. 1614, remarks of Dr. Robert Harkins, Esq. ("Your enactment of the living will statute will not create any new public policy. Your enactment of the living will statute will merely affirm what already exists in the common law.") The court does not find a duty to the plaintiff because the statute's underlying purpose and statutory scheme militate against such a finding.

*COMMON–LAW DUTY*

The plaintiff also argues in its memorandum of law that the hospital owed her a duty based on common law and the federal constitution. Beyond summarily asserting the decedent's federal constitutional and common-law rights of self-determination and privacy, the plaintiff does not adequately identify the grounds of such a duty.[FN9] The plaintiff asserts a direct cause of action, not a claim based on the decedent's rights. Consequently, any duty to the plaintiff may not be based upon the decedent's federal constitutional rights. Furthermore, "[w]hile ... the Constitution supports a right to reject life-sustaining medical treatment as a function of the fundamental right to bodily integrity under the Due Process Clause ... it does not follow from this ... that an incompetent person ... has a constitutional right to have a surrogate make critical medical decisions, including a decision to withdraw life support. While former proposition finds support in case law, the latter does not ..." (Citation omitted .) *Blouin ex rel. Estate of Pouliot v. Spitzer,* 356 F.3d 348, 359 (2d Cir.2004). Therefore, if the plaintiff's right exists, it is not a federal constitutional right and must be a common-law right based upon a duty owed directly to the plaintiff.

FN9. In a footnote of her memorandum, the plaintiff asserts that a duty based on the right of the surviving kin to the possession of the decedent's body is "closely analogous." The right to possession of the decedent's body is a quasi-property right based upon physical custody of the body. See *Del Core v. Mohican Historic Housing Associates,* 81 Conn.App. 120, 125, 837 A.2d 902 (2004); *Strachan v. John F. Kennedy Memorial Hospital,* 209 N.J.Super. 300, 311, 507 A.2d 718 (1986), aff'd in part and rev'd in part on other grounds, en banc, 109 N.J. 523, 538 A.2d 346 (1988). "[T]he quasi-right in property of the next of kin ... [does] not vest until the pronouncement of death." *Id.*

In this case, the plaintiff is not arguing that she had a right to possess the body *after* the pronouncement of death, but, rather, she attempts to assert a right to participate in the

decedent's medical decisions *before* the pronouncement of death. Not only is the timing of the right to possession of the body different, but the degree of control she seeks to assert is more than mere possession. As a result, the duty to give the right to possession over the body is not analogous to the proposed duty of a hospital to inform the plaintiff so that she could participate in the life support decision. Therefore, the court declines to recognize this as a basis for finding a duty to the plaintiff in this case.

***5** "[T]he test for the existence of a legal duty of care entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case ... The first part invokes the question of foreseeability, and the second part invokes the question of policy." (Internal quotation marks omitted .) *Murillo v. Seymour Ambulance Assn.,* 264 Conn. 474, 478–79, 823 A.2d 1202 (2003).

"Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative to a negligence cause of action ... The ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised ... [In other words], would the ordinary [person] in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?" (Internal quotation marks omitted.) *Monk v. Temple George Associates, LLC,* 273 Conn. 108, 115, 869 A.2d 179 (2005). "In negligent infliction of emotional distress claims, unlike general negligence claims, the foreseeability of the precise nature of the harm to be anticipated [is] a prerequisite to recovery even where a breach of duty might otherwise be found." (Internal quotation marks omitted). *Perodeau v. Hartford, supra,* 259 Conn. at 754.

In this case, the defendant is a hospital and likely deals with life and death decisions every day involving patients and their families. Recent debates in the press illustrate that the decision to terminate life support is emotionally charged and often controversial with differing points of view leading to bitter disagreements, even within the same family. See A. Goodnough, "Schiavo Dies, Ending Bitter Dispute Over Feeding Tube," *N.Y. Times,* April 1, 2005, p. A1. Even the defendant recognizes, in its memorandum in support of the motion to strike, that emotional distress to next of kin may be anticipated. Therefore, infliction of emotional distress to the known and available next of kin is a foreseeable consequence of a hospital's failure to contact them prior to terminating life support.

"A simple conclusion that the harm to the plaintiff was foreseeable, however, cannot by itself mandate a determination that a legal duty exists." (Internal quotation marks omitted.) *Perodeau v. Hartford, supra,* 295 Conn. at 756. "Many harms are quite literally foreseeable, yet for pragmatic reasons, no recovery is allowed ... A further inquiry must be made, for we recognize that duty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection ... While it may seem that there should be a remedy for every wrong, this is an ideal limited ... by the realities of this world ... The problem for the law is to limit the legal consequences of wrongs to a controllable degree." (Internal quotation marks omitted.) *Ward v. Greene, supra,* 267 Conn. at 557–58. "The final step in the duty inquiry, then, is to make a determination of the fundamental policy of the law, as to whether the defendant's responsibility should extend to such results." (Internal quotation marks omitted.) *Murillo v. Seymour Ambulance Ass'n., Inc., supra,* 264 Conn. at 480.

***6** "[I]n considering whether public policy suggests the imposition of a duty, we ... consider the following four factors: (1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions." (Internal quotation marks omitted.) *Monk v. Temple George Associates, LLC,*

*supra,* 273 Conn. at 118. Upon applying these four factors, the court concludes that imposing a duty of care on the defendant under the common law, and in the circumstances of the present case, is consistent with public policy.

Under the first factor, the court looks to the normal expectations of the parties in the activity under review. The activity under review is the decision to disconnect life support. See, e.g., *Monk v. Temple George Associates, LLC, supra,* 273 Conn. at 118 (activity in question is parking in the defendant's lot); *Seguro v. Cummiskey,* 82 Conn.App. 186, 195, 844 A.2d 224 (2004) (activity in question is consumption of alcohol in bars and restaurants). "Generally, life support systems cannot be removed from an incompetent patient with no family or relative to give consent unless an appointed guardian consents." *Benoy v. Simons,* 831 P.2d 167, 171 n. 3, 66 Wash.App. 56, cert. denied, 844 P.2d 435, 120 Wash.2d 1014 (1992). But see *Strachan v. John F. Kennedy Memorial Hospital,* 209 N.J.Super. 300, 317, 507 A.2d 718, aff'd in part and rev'd in part on other grounds, en banc, 109 N.J. 523, 538 A.2d 346 (1988 (1986) ("It seems ... fundamental that the decision whether to withdraw the life support systems from a brain dead patient is a medical decision that can be made only by a physician."). Additionally, § 19a–571(a), enacted in 1985, instructs physicians and hospitals to consider the wishes of the patient by determining whether any statements were made to the next of kin where no living will or other document, or oral statement to the attending physician or to a guardian, are available. See § 19a–571(a). To abide by the statute and to avoid liability, the defendant likely had procedures in place for decades. While the court gives no weight to the defendant's assertion in their memorandum of law in support of the motion to strike that they attempted to contact the plaintiff, it would appear that this attempt does illustrate some recognition of a need to contact her. Thus, where there is no living will or other statement of final wishes of the decedent, the involvement of the next of kin in the decision to remove life support from the decedent would normally be expected.

The second factor requires the court to consider the benefits of encouraging the underlying activity. Cases involving life support termination usually recognize four interests: "(1) the preservation of life; (2) the prevention of suicide; (3) the protection of interest of innocent third parties; and (4) the maintenance of the ethical integrity of the medical profession." *McConnell v. Beverly Enterprises–Connecticut, Inc., supra,* 209 Conn. at 716 (Healey, J., concurring). Recognizing a duty in this case supports these interests.

***7** For example, in terms of preservation of life, the patient's rights may be better protected by encouraging the next of kin's participation in the decision. "[T]he 'only practical way' to prevent the loss of [the incompetent patient's] privacy right ... was to allow [the] guardian and family to decide 'whether [the patient] would exercise it in these circumstances.' " *Cruzan v. Director, Missouri Department of Health,* 497 U.S. 261, 271, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990) (quoting *In re Quinlan,* 70 N.J. 10, 41, 355 A.2d 647, cert. denied sub nom. *Garger v. New Jersey,* 429 U.S. 922, 97 S.Ct. 319, 50 L.Ed.2d 289 (1976)).

Looking to maintenance of the integrity of the medical profession, physicians and hospitals may be prevented from becoming the patient's surrogate decision maker when the next of kin's involvement is encouraged. "Common law and statutory law have not given the physician any right to be the incompetent patient's surrogate. Connecticut statues do have provisions by which surrogates can be appointed." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 5, 1985 Sess., p. 1613, remarks of Dr. Robert Harkins, Esq. Moreover, the physician or hospital's judgment may be checked by the judgment of the next of kin. Conn. Joint Standing Committee Hearings, Judiciary, Pt. 5, 1991 Sess., p. 1314. ("[Representative Richard P. Tulisano:] [How do we develop a system in which that M.D.'s judgment is checked? [Attorney Joseph Healey:] ... [Here, one relies on the advocates for the patient.]"). Further, the involvement of the next of kin provides a safeguard against fabrication of a statement of the patient's last wishes. 34 H.R. Proc., Pt. 23, 1991 Sess., pp. 8762–63 ("[Representative Raymond M.H. Joyce:] [W]hat would stop the physician from saying ... [the patient] expressed his wish to die. [Representative Michael P. Lawlor:] [I]f the physician believes he's met the test, he's required to notify the next of kin ... and must allow for a reasonable time to pass for them to become involved in the

process."). Moreover, any pressure physicians and hospitals might feel to disconnect a patient from life support based upon financial considerations may be countered by participation of the next of kin. See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 5, 1991 Sess., p. 1307–08, remarks of Representative Richard P. Tulisano; [FN10] and G. Anand, "Who Gets Health Care? Rationing in an Age of Rising Costs; Life Support: The Big Secret in Health Care: Rationing is Here; With Little Guidance Workers On Front Lines Decide Who Gets What Treatment; Nurse Micheletti's Tough Calls," *Wall St. J.,* September 12, 2003, p. A1. Finally, in terms of the next of kin and the grieving process, encouraging participation may help give the next of kin a sense of control. See 28 H.R. Proc., Pt. 30, 1985 Sess ., p. 11178, remarks of Representative Richard D. Tulisano ("It is when that final decision to pull the plug is made that the family should and must be involved, not just for the person. So that they do not have a lonely death, but for those who survive and are involved in that.").

FN10. Representative Tulisano stated, "Since most health care providers end up being paid for or actually being the state of Connecticut, in our current context, somebody on public assistance. I guess I'm not sure or do I feel very comfortable about giving the guy who's paying the bill, the power to start ... making decisions about terminating life because it's too expensive ... [D]o we now make it easier for the state ... to make decisions, based on its own economic self-interest ... My concern is there's tons of folks [who will not have living wills or made their wishes known to a physician] who will be on public assistance ... who will then [have] some ... illness ... I know you want the health care provider to go back and see what the person wants, that's not real world. That's not what's happening ... [N]ow ... we'll have state sponsored individuals who will make decisions about life based on their own economic self-interest.").

***8** In evaluating the benefits of encouraging the next of kin's involvement, the court is mindful of the paramount duty of the hospital to its patients. The defendant correctly argues that the focus in these situations should be on determining the patient's wishes. In most cases, however, the next of kin is likely to know, better than the hospital where care may have been provided only on an emergency basis, what the final wishes of the patient were, because of the time spent with the family member and the nature of the relationship. Therefore, encouraging the next of kin's involvement would be beneficial to this determination.

Regarding the third factor, the court considers the possibility of increased litigation. "[T]here are fears of flooding the courts with spurious and fraudulent claims; problems of proof of the damage suffered; [and] exposing the defendant to an endless number of claims." (Internal quotation marks omitted.) *Myers v. Hartford,* 84 Conn.App. 395, 402–03, 853 A.2d 621, cert. denied, 271 Conn. 927, 859 A.2d 582 (2004). In recognizing a duty to next of kin in this case, the possibility of litigation is, however, limited to the person or persons considered to be the next of kin. "Next of kin" would likely be defined as, in order of priority: the spouse, an adult son or daughter, a parent, an adult brother or sister, or a grandparent. See General Statutes § 19a–570(8). While the next of kin could be multiple siblings, both parents, or both grandparents, the class of persons to bring suit over the issue would be sufficiently limited. Furthermore, the number of possible lawsuits are limited to situations where the patient has not expressed his or her final wishes orally or in writing. Thus, physicians and hospitals would not likely experience increased litigation.

Fourth, the court considers what other jurisdictions have done. Research does not reveal any case law from another jurisdiction articulating a duty in a case such as this. It should be noted that Connecticut precedent weighs against finding a duty to a third party .[FN11] No case addresses, however, the issue presented in this case. Therefore, the court finds that the defendant owed the plaintiff a common-law duty in this case.

FN11. For example, the Supreme Court has held "that, for reasons of public policy, a psychiatrist engaged to examine children for possible sexual abuse owed no duty of care to the children's father, who was the suspected abuser; *Zamstein v. Marvasti,* 240 Conn. 549, 559, 692 A.2d 781

(1997); a psychotherapist owed no duty of care to a third party injured by his psychiatric outpatient; *Fraser v. United States,* 236 Conn. 625, 632, 674 A.2d 811 [aff'd, 83 F.3d 591, cert. denied, 519 U.S. 872, 117 S.Ct. 188, 136 L.Ed.2d 126] (1996); a physician owed no duty of care to his patient's daughter, who suffered emotional distress from observing her mother's health deteriorate from the physician's substandard care; *Maloney v. Conroy,* 208 Conn. 392, 399, 545 A.2d 1059 (1988); and an attorney owed no duty of care to his client's intended beneficiaries for failing to arrange for timely execution of estate planning documents. *Krawczyk v. Stingle,* 208 Conn. 239, 244–46, 543 A.2d 733 (1988); see also *Dodd v. Middlesex Mutual Assurance Co.,* 242 Conn. 375, 383, 698 A.2d 859 (1997) ('[t]he ability of someone other than the injured party, e.g., the [injured party's] employer, to bring or to intervene in an action against [the tortfeasor] is a clear deviation from the common law')." *Mendillo v. Board of Education,* 246 Conn. 456, 480–81, 717 A.2d 1177 (1998). See also *Murillo v. Seymour Ambulance Ass'n ., Inc., supra,* 264 Conn. at 480–84 (emergency personnel owed no duty to a bystander, who fainted, while emergency surgery was performed on the bystander's sister). But see *Monk v. Temple George Associates, LLC, supra,* 273 Conn. at 18–22 (duty exists for a parking lot owner to protect a nightclub patron from criminal assault).

See also *Weigold v. Patel,* 81 Conn.App. 347, 358, 840 A.2d 19, cert. denied, 268 Conn. 918, 847 A.2d 314 (2004) (no duty owed by a psychiatrist and a psychologist to an accident victim to warn the patient of the danger of operating a car while on medication); *Stokes v. Lyddy,* 75 Conn.App. 252, 276, 815 A.2d 263 (2003) (no duty owed by a landlord to a pedestrian on a public sidewalk to protect her from tenant's dog); *Ludemann v. East Hartford,* Superior Court, judicial district of Hartford, Docket No. CV 03 0824930 (November 24, 2004, Lavine, J.) (no duty owed by an employer to an accident victim hit by a hypoglycemic employee to keep the employee from driving). But see *Seguro v. Cummiskey, supra,* 82 Conn.App. at 198 (duty exists between a bar owner and an accident victim to supervise an employee's consumption of alcohol while on the job); *Shackels v. Pfizer, Inc.,* Superior Court, judicial district of New London, Docket No. CV 03 0565313 (December 1, 2003, Hurley, J.T.R.) (duty exists between an employer and plaintiff-employee to keep another employee from harassing plaintiff via employer's e-mail system).

The common-law duty in this case can be informed by the existing statutes. A court can look "to statutes as a source of policy for common-law adjudication, particularly where there is a close relationship between the statutory and common-law subject matters." (Internal quotation marks omitted.) *Ireland v. Ireland,* 246 Conn. 413, 420, 717 A.2d 676 (1998). See also *State v. Guess,* 244 Conn. 761, 779–80, 715 A.2d 643 (1998); *Fahy v. Fahy,* 227 Conn. 505, 514–16, 630 A.2d 1328 (1993); *Newman v. Newman,* 235 Conn. 82, 100, 663 A.2d 980 (1995); accord *New England Savings Bank v. Lopez,* 227 Conn. 270, 281, 630 A.2d 1010 (1993); *Hamm v. Taylor,* 180 Conn. 491, 495, 429 A.2d 946 (1980); *Canton Motorcar Works, Inc. v. DiMartino,* 6 Conn.App. 447, 453, 505 A.2d 1255, cert. denied, 200 Conn. 802, 509 A.2d 516 (1986). The lifesupport statutes are clearly closely related to any common-law duty in this case. "Just as the legislature is presumed to enact legislation that renders the body of the law coherent and consistent, rather than contradictory and inconsistent ... courts must discharge their responsibility, in case by case adjudication, to assure that the body of the law-both common and statutory-remains coherent and consistent." (Internal quotation marks omitted.) *Ireland v. Ireland, supra,* 246 Conn. at 420. To remain coherent and consistent with §§ 19a–571(a) and 19a–580, the hospital's duty to the plaintiff should be construed as a duty to make reasonable efforts to inform the known and available next of kin so that he or she could participate in the decision, based upon what the decedent would have wanted, prior to the removal of life support. In her amended complaint, the plaintiff has alleged that the hospital knew or should have known that ordering termination of the decedent's life support without contacting her involved an unreasonable risk of causing her emotional distress and that this distress might result in illness or bodily harm. Thus, because the plaintiff has alleged the elements of negligent infliction of emotional distress and because a common-law duty exists, the plaintiff has properly alleged a cause of action. Accordingly, the motion to strike is denied.