Washington and Lee Law Review

Volume 37 | Issue 4 Article 13

Fall 9-1-1980

Negligent Infliction of Emotional Distress: Keeping Dillon in Bounds

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS: KEEPING *DILLON* IN BOUNDS

Although physical and emotional harm resulting from mental shock may be severe,[1] the judiciary has only recently recognized the negligent infliction of emotional distress as a viable cause of action.[2] Courts have been reluctant to recognize emotional injury claims due to the absence of either physical contact[3] or the threat of physical danger between the tortfeasor and the claimant.[4] In the 1968 decision of *Dillon v. Legg*,[5] however, the California Supreme Court broke precedent by recognizing an emotional distress claim without requiring the claimant to allege the existence of any threat of physical danger resulting from the defendant's

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[1] Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1237, 1252 (1971) [hereinafter cited as *Independent Tort*]. The wide range of disabilities resulting from mental shock include gastritis, diabetes, ulcers, and angina pectoris. Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 215-26 (1944) [hereinafter cited as Smith].

See, e.g., Nuckles v. Tennessee Elec. Power, 155 Tenn. 611, 299 S.W. 775 (1927). In *Nuckles*, a mother suffered emotional distress as a consequence of witnessing a street car run over her minor son. *Id.* The Tennessee court refused to recognize the claim since no precedent existed to support the imposition of liability. *Id.*

The reluctance of the judiciary to recognize mental distress claims is largely attributable to the fact that, until the turn of the century, society did not place much importance on mental health as a community concern. *See* Note, *A Mother Witnessing the Negligent Injury of Her Child May Recover for Her Emotional Distress Even Though She Was In No Personal Danger*, 47 TEX. L. REV. 518, 518 (1969) [hereinafter cited as *A Mother Witnessing*]. Consequently, one commentator has described the development of emotional distress law as varying from "the spirit of extreme caution to hesitant experimentation." Goodhart, *Shock Cases and Area of Risk*. 16 MOD. L. REV. 14, 14 (1953) [hereinafter cited as Goodhart]. *See generally* Green, *"Fright" Cases*, 27 ILL. L. REV. 761 (1932).

[2] Courts which have granted relief for negligent infliction of emotional distress have disagreed on the elements required to grant recovery to the plaintiff. *Compare* Tobin v. Grossman, 24 N.Y.2d 609, 618, 249 N.E. 2d 419, 424, 301 N.Y.S.2d 554, 561 (1969) (requiring impact or fear of physical danger) *with* Dillon v. Legg, 68 Cal. 2d 728, ___, 441 P.2d 912, 917, 69 Cal. Rptr. 72, 77 (1968) (fear of physical danger not required for recovery). Some courts have limited recovery to physical injuries, *see* D'Amicol v. Alvarez Shipping Co., 31 Conn. Supp. 164, ___, 326 A.2d 129, 131 (Super. Ct. 1973), while other courts have granted relief for both emotional and physical injuries. Sinn v. Burd, 404 A.2d 672, 679 (Pa. 1979).

[3] *See, e.g.*, Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896). In *Mitchell*, a negligently driven team of horses came dangerously close to the plaintiff, causing her to experience great emotional distress. 45 N.E. at 354. The *Mitchell* court refused to award damages since no physical impact occurred between the plaintiff and tortfeasor. *Id.*

[4] *See, e.g.*, Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963). *Amaya* involved a mother who suffered emotional shock as a consequence of witnessing a negligently operated ice truck run over her seventeen month old infant. 379 P.2d at 514. The California court denied recovery since the mother did not allege that her shock-induced injuries resulted from fear for her safety. *Id.* at 517.

[5] Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

negligence.[6] Thus, by eliminating the physical danger requirement, *Dillon* provided the impetus for the increased recognition of emotional distress claims.[7]

The emotional distress claimant is often a bystander who witnesses the commission of a negligent act upon a closely-related third party and, through his close emotional ties with the victim, suffers an immediate emotional response.[8] The triggered response, typically characterized by fright or shock, ordinarily is absorbed by the bystander without serious emotional complications.[9] When the initial stimulus is severe and occurs suddenly, however, the primary reaction may become intensified and manifest itself through secondary psychic responses involving emotional and physical repercussions.[10] The party asserting the negligent infliction of emotional distress claim desires compensation for injuries resulting from these secondary responses.

Traditionally, courts adjudicated distress cases by applying the "impact test."[11] Under the impact analysis, the negligent tortfeasor was absolved from liability for the infliction of emotional distress upon the claimant unless physical contact occurred between the parties.[12] So long as the tortfeasor caused some physical injury, however slight, courts ap-

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[6] *Id.* at _, 441 P.2d at 914, 69 Cal. Rptr. at 74.

[7] *See* text accompanying notes 54-68 *infra.*

[8] Bystander claims for the negligent infliction of emotional distress typically arise in the context of automobile accidents. *See, e.g.*, Guilmette v. Alexander, 128 Vt. 116, 259 A.2d 12 (1969). In *Guilmette* the tortfeasor negligently passed a school bus and struck a five year old child who had exited from the bus. *Id.* at 13. The child's mother suffered physical illness and depression as a result of having witnessed the accident. *Id.*

Emotional distress claims have arisen in a variety of contexts. *See, e.g.*, Keck v. Jackson, 122 Ariz. 114, 593 P.2d 668 (1979) (automobile accident); Jansen v. Children's Hosp. Med. Center, 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1973) (medical malpractice); Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961) (improperly maintained ski chair lift operation).

[9] Psychologists describe the initial reaction to a traumatic event as the primary response. *Independent Tort, supra* note 1, at 1248-49. The primary response acts as a buffer to combat and protect the individual from the stress experienced from witnessing the offensive act, *id.*, but are often difficult to evaluate medically since they are instinctive and short in duration. *Id.*

[10] *Id.* at 1250. Any psychic reaction following the primary response is termed secondary or traumatic neurosis. *Id.* at 1250. The traumatic neurosis is caused by a continuing inability to adjust to the shock induced by the original trauma. *Id.* Although the symptoms of traumatic neurosis may intensify as time passes, *see* Smith, *supra* note 1, at 126, the secondary responses are usually temporary and frequently appear to be more severe than they actually are. Havard, *Reasonable Foresight of Nervous Shock*, 19 MOD. L. REV. 478, 482 (1956) [hereinafter cited as *Reasonable Foresight*]. Moreover, the reactions are often contingent on the prior mental history of the claimant. Comment, *Negligent Infliction of Emotional Harm to Bystanders—Should Recovery Be Denied?*, 7 ST. MARY'S L.J. 560, 563-64 (1975) [hereinafter cited as *Bystanders*].

[11] *See, e.g.*, Beaty v. Buckeye Fabric Finishing Co., 179 F. Supp. 688, 697 (E.D. Ark. 1959); Reed v. Ford, 129 Ky. 471, ___, 122 S.W. 600, 601 (1908); Black v. Atlantic Coast Line R. Co., 82 S.C. 478, ___, 64 S.E. 418, 419 (1909).

[12] 1 Dooley, *Modern Tort Law* § 15.05 (1977) [hereinafter cited as Dooley].

plying the impact test recognized the emotional distress claims.[13] The impact analysis, therefore, severely limited liability for emotional distress since it precluded recovery where the claimant incurred emotional distress without suffering the requisite physical impact.[14]

The majority of courts gradually departed from impact analysis and currently permit a cause of action for the negligent infliction of emotional distress if the claimant can establish that his position, at the time of the tortious injury to the third party victim, placed him in danger of physical impact resulting from the tortfeasor's actions.[15] Under this "zone of physical danger" test, impact is no longer required.[16] Many emotional distress claims, however, arise from situations which lack the potential for the claimant to experience any physical danger as a result of the tortfeasor's negligence.[17] Thus, although the absence of an impact requirement provides for greater recognition of distress claims, the zone of danger analysis is restrictive because emotional distress inflicted outside the zone of physical danger is not compensable.

The courts have justified their reluctance to recognize the negligent

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[13] *See, e.g.*, Israel v. Ulrich, 114 Conn. 599, 159 A. 634 (1932); Homans v. Boston Elevated Ry. Co., 180 Mass. 456, 62 N.E. 737 (1902). In *Israel*, the defendant negligently crashed into the plaintiff's parked truck, damaging the truck's brake system. 159 A. at 635. Unaware of the mechanical damage, the plaintiff proceeded to drive down a steep hill. *Id.* When the brakes malfunctioned, the plaintiff suffered severe mental distress and nervous shock. *Id.* The Connecticut court granted recovery for the emotional injuries by relying on the fact that the plaintiff had received a bruised knee and foot during the mishap. *Id.*

[14] *See, e.g.*, Ward v. West Jersey & S. R. Co., 65 N.J.L. 383, 47 A. 561 (1900); Knaub v. Gotwalt, 422 Pa. 267, 220 A.2d 646 (1966). The claimant in *Ward* suffered severe emotional distress and paralysis after driving onto an improperly maintained railroad crossing while a train approached. 47 A. at 561. The court refused to impose liability on the railroad, maintaining that the mere apprehension of physical injury did not justify recovery. *Id.* at 561-62.

In *Knaub*, the family of a boy negligently killed in an automobile accident sought compensation for mental shock incurred upon witnessing the defendant's tortious action. 220 A.2d at 646. The Pennsylvania Supreme Court maintained that recovery was not justified absent physical injury or impact upon the claimant. *Id.* at 647. *See generally* Dooley, *supra* note 12, at § 15.07.

[15] *See, e.g.*, Towns v. Anderson, ___ Colo. App. ___, 567 P.2d 814 (1977), *rev'd*, ___ Colo. ___, 579 P.2d 1163 (1978) (transition from impact to zone of physical danger standard). *See also Restatement (Second) of Torts* § 313, Comment d (1966).

[16] *See, e.g.*, Robb v. Pennsylvania R.R. Co., 58 Del. 454, 210 A.2d 709 (1965). In *Robb*, the plaintiff's car stalled on a railroad crossing and the vehicle's rear wheels lodged in a rut that the defendant-railroad negligently had permitted to form. *Id.* at 710. The plaintiff unsuccessfully attempted to move the vehicle and, upon observing an approaching train, quickly jumped out of the car within seconds of the collision. *Id.* Although the plaintiff did not suffer any bodily impact, the Delaware court recognized her cause of action for emotional distress since she suffered from a severe nervous condition resulting from her fear of the physical danger. *Id.* at 715.

[17] *See, e.g.*, Whetham v. Bismarck Hosp., 197 N.W.2d 678 (N.D. 1972). A hospital employee, in *Whetham*, dropped a baby onto the floor as its mother looked on. *Id.* at 679. The court held that the mother could recover damages for emotional distress only if she was located in the zone of physical danger. *Id.* at 684. Accordingly, the court rejected the mother's claim since she could not possibly show any threat to her own safety under the circumstances surrounding the accident. *Id.*

infliction of emotional distress as a viable tort action by emphasizing problems relating to the administration of claims.[18] One of the primary considerations involved the judiciary's concern over the genuineness of emotional distress claims.[19] Historically, the lack of understanding of mental disorders accentuated these concerns.[20] Without scientific support for distress claims, the courts were unwilling to accept evidence relating to a claimant's injuries which could not be measured or proven empirically.[21] Courts, therefore, relied on the impact and zone of danger tests to help screen legitimate claims for relief since the tests effectively rejected many claims that were difficult to substantiate by limiting recovery to situations involving physical contact or danger.[22] Moreover, by limiting recovery under the traditional tests, the courts allayed fears that the implementation of more liberal recovery standards would result in a flood of claims reaching the dockets, many of which would be fraudulent in nature.[23]

Although one of the policy goals of tort law is to deter intrusions upon personal interests,[24] the law aims to impose liability on the

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[18] *See* notes 19, 21, 23 *supra; Independent Tort, supra* note 1, at 1244-45. *See generally* Green, *The Duty Problem in Negligence Cases*, 28 COL. L. REV. 1014, 1035-45 (1928).

[19] *See* Braun v. Craven, 175 Ill. 401, ___, 51 N.E. 657, 664 (1898); Spade v. Lynn & B.R. Co., 168 Mass. 285, ___, 47 N.E. 88, 89 (1897); W. Prosser, *Law of Torts* 331 (4th ed. 1971) [hereinafter cited as Prosser].

[20] Cantor, *Psychosomatic Injury, Traumatic Psychoneurosis, and Law*, 6 CLEV.-MAR. L. REV. 428, 439 (1957) [hereinafter cited as Cantor]. Traditionally, society perceived emotional disorders to be the consequences of an individual's sins, and thus, viewed the claims as unworthy of legal protection. *Id.* The first *Restatement of Torts* stated that:

> [T]he interest in mental and emotional tranquility, and therefore, in freedom from mental and emotional disturbances is not, as a thing in itself, regarded as of sufficient importance to require others to refrain from conduct intended or recognizably likely to cause such a disturbance.

Restatement of Torts § 46, Comment c (1933).

[21] *See, e.g., Keys v. Minneapolis & St. Louis Ry. Co.*, 36 Minn. 290, ___, 30 N.W. 888, 889 (1886); *Huston v. Freemansburg*, 212 Pa. 548, 550, 61 A. 1022, 1023 (1905). *See also* Knaub v. Gotwalt, 422 Pa. 267, ___, 220 A.2d 646, 647 (1966). The Knaub court maintained that the causal relationship between the tortfeasor's negligence and a claimant's emotional disorder cannot be medically determined. *Id.* at 647.

[22] *See* text accompanying notes 13 & 16 *supra.*

[23] *See* Braun v. Craven, 175 Ill. 401, ___, 51 N.E. 657, 664 (1898); Kalen v. Terre Haute & I.R. Co., 18 Ind. App. 202, ___, 47 N.E. 694, 698 (1897); Ewing v. Pittsburgh, C., C. & St. Louis Ry. Co., 147 Pa. 40, ___, 23 A. 340, 340 (1892). Due to the subjective nature of mental disabilities and psychiatric testing, many commentators have noted the danger of fictitious claims. *See* Prosser, *supra* note 19, at 328; McNiece, *Psychic Injury and Liability in New York*, 24 ST. JOHN'S L. REV. 1, 81 (1949); Note, *Expanding the Concept of Recovery for Mental and Emotional Injury*, 76 W. VA. L. REV. 176, 190-91 (1973) [hereinafter cited as *Expanding the Concept*].

[24] Prosser, *supra* note 19, at 23. The law attempts to balance the injured party's right to be protected from exposure to harm against the tortfeasor's interest in freedom of activity. *See* Amdursky, *The Interest in Mental Tranquility*, 13 BUFFALO L. REV. 339, 349-53 (1964); Smith, *supra* note 1, at 276; Note, *Damages For Physical Injury Caused By Mental Anguish*, 38 U. CIN. L. REV. 185, 191 (1969). Thus, the ultimate goal of tort law is to diminish frictions and equitably distribute losses among individuals. *See* Prosser, *supra* note 19,

tortfeasor corresponding to the degree of culpability involved in the commission of the tortious act.[25] The policy, as applied to emotional distress cases, mandates that one who negligently inflicts emotional distress will not be held liable for the consequences of his negligent actions to the same extent recognized where the tortious harm is intentionally inflicted.[26] Accordingly, the potential for the courts to impose disproportionate liability on the negligent tortfeasor is reduced through the application of the traditional tests since they restrict recovery to persons who suffer physical impact or fear of physical danger.[27]

In recent years, some courts have broadened their recognition of emotional distress claims meriting recovery.[28] The greater recognition of distress claims is traceable to the *Dillon v. Legg* decision,[29] which rejected the traditional tests and policy arguments used to justify judicial reluctance towards the recognition of negligent infliction of emotional distress claims.[30] In *Dillon,* the California Court concluded that a negligent tortfeasor may owe a duty of care to one located outside the zone of physical danger.[31]

In *Dillon,* the mother and sister of an infant struck and killed by an automobile claimed damages for the negligently inflicted emotional distress that they suffered as a consequence of witnessing the tortious event.[32] Both plaintiffs personally observed the accident from different vantage points. Although the precise location of each plaintiff is unclear, the sister was conceivably within the zone of physical danger since she was positioned near the edge of the street where the impact occurred.[33] The mother, however, was admittedly not within the zone of danger al-

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at 15; Campbell, *Injury Without Impact,* 1951 INS. L.J. 654, 654.

[25] Prosser, *supra* note 19, at 16-19.

[26] Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, ___, 379 P.2d 513, 525, 29 Cal. Rptr. 33, 45 (1963); *see* note 37 *infra.*

[27] *See* notes 10-17 *supra* and accompanying text; *see, e.g.,* Tobin v. Grossman, 24 N.Y.2d 609, 618, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969) (no rational way to limit liability if recovery extended to persons outside zone of danger); Scarf v. Koltoff, 242 Pa. Super Ct. 294, 363 A.2d 1276, 1279 (1976); Waube v. Warrington, 216 Wisc. 603, 258 N.W. 497 (1935). In *Waube,* a husband sought to recover damages for the death of his wife resulting from shock-induced injuries incurred by witnessing, from the window of their home, the defendant's negligently driven automobile strike and kill their child. *Id.* at 497. The Wisconsin court denied recovery, maintaining that a finding of liability would place an unreasonable burden of responsibility on highway users. *Id.* at 501. *See also* Smith, *supra* note 1, at 234; Note, *Negligent Infliction of Emotional Distress: Reaction to* Dillon v. Legg *in California and Other States,* 25 HASTINGS L.J. 1248, 1250 (1974) [hereinafter cited as *Reaction to* Dillon].

[28] *See* text accompanying notes 48-68 *infra. See generally* Comment, *Negligent Infliction of Emotional Distress: Liability to the Bystander-Recent Developments,* 30 MERCER L. REV. 735 (1979) [hereinafter cited as *Recent Developments].*

[29] 68 Cal. 2d 208, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

[30] *See* text accompanying notes 18-28 *supra.*

[31] 441 P.2d at 920-21.

[32] *Id.* at 914.

[33] *Id.* at 915.

though she was positioned in close proximity to the automobile accident.[34]

The *Dillon* court noted that under a zone of physical danger analysis, the mother's claim would not have been recognized since she was positioned outside the area of danger, but the sister could have recovered if she were located within the zone.[35] This disparity in recovery demonstrated the inequities of limiting liability to those claimants located in the physical danger zone, since both mother and sister experienced similar shock and resulting emotional injuries.[36] Moreover, the *Dillon* court rejected the administrative arguments against the extension of liability since courts had been willing to process emotional distress claims in other types of tort actions.[37] Accordingly, the California Court permitted the mother and sister to recover damages, declaring that the negligent driver owed a duty of care to both plaintiffs.[38]

In imposing liability on the tortfeasor for the consequences of his negligent acts to persons outside the zone of physical danger, the court maintained that foreseeability was the prime element of duty.[39] Under *Dillon*'s foreseeability analysis, a plaintiff may recover where his shock-induced injuries are the reasonably foreseeable consequence of the tortfeasor's actions.[40] The *Dillon* court, however, declined to formulate an absolute rule

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[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 919. Where emotional distress is intentionally inflicted, administrative arguments are not employed to defeat emotional distress claims. *See* State Rubbish Collectors Ass'n. v. Siliznoff, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952). In *Siliznoff*, the claimant, a garbage collector, incurred emotional distress as a consequence of having been forced to meet the demands of a trade association under threats of physical injury. 240 P.2d at 283-84. The California court maintained that the tortfeasor who intentionally inflicts emotional distress may be held liable for the mental suffering naturally ensuing from the tortious conduct. *Id.* at 286.

[38] 441 P.2d at 921. The *Dillon* court concluded that the possibility of fraudulent claims did not justify barring plaintiffs with serious shock-induced injuries from presenting their claims before the courts. *Id.* at 917. Moreover, the court rejected docket overcrowding as a legitimate argument against broad recognition of emotional distress claims. *Id.* at 917 n.3. The court stated that the judiciary has a responsibility to hear valid claims and that the frequency of actions merely reflects the need to adjudicate the disputes. *Id.* In addition, the *Dillon* court declared that the inability to fix an absolute rule for deciding emotional distress cases should not preclude recovery since guidelines can be formulated to set the boundaries of liability. *Id.* at 919; *see* text accompanying note 42 *infra.*

[39] 441 P.2d at 919. The utilization of a foreseeability standard enables the courts to limit the liability imposed upon negligent tortfeasors who could otherwise be held legally liable for even the most remote consequences of their negligence. Note, *Psychic Injury and the Bystander: The Transcontinental Dispute Between California and New York,* 51 ST. JOHN'S L. REV. 1, 14, 39 (1976) [hereinafter cited as *Transcontinental Dispute*]; *see* text accompanying notes 24-28 *supra.*

[40] 441 P.2d at 921. The *Dillon* court maintained that the tortfeasor should have foreseen that his negligent act would cause injuries to the mother who could be presumed to be positioned close to the accident scene. *Id.* Some authorities, concerned with limiting liability imposed on the tortfeasor, maintain that the presence of the claimant-mother should not be

for determining the foreseeability of injury.[41] Instead, the *Dillon* court proposed guidelines for analyzing the foreseeability issue which focus on the proximity of the claimant to the accident scene, the relationship between the claimant and the third party victim, and whether the claimant's mental distress resulted from the "sensory and contemporaneous observance" of the accident.[42] The California court intended the proposed guidelines to aid in the evaluation of mental distress claims on a case-by-case basis, maintaining that future adjudications would delineate the exact boundaries of recovery.[43]

Although *Dillon* did not fix the exact boundaries of recovery, the California court limited the types of injuries meriting compensation to those mental disabilities manifested by physical symptoms.[44] The court imposed the physical manifestation requirement to better ensure the genuineness of claims since the existence of physical injuries may be easier to substantiate.[45] Accordingly, absent physical injury, a claimant who merely alleges an emotional disorder as a result of the tortfeasor's negligence will

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presumed under the foreseeability analysis and, thus, contend that an additional factor, the foreseeability of the claimant's presence, should be incorporated into the foreseeability of injury inquiry. D'Ambra v. United States, 354 F. Supp. 810, 819-22 (D.R.I. 1973); *Reaction to* Dillon, *supra* note 27 at 1263-64. However, an inquiry into the foreseeability of the claimant's presence at the accident scene is unnecessary since the determination is made implicitly in the foreseeability of injury analysis, where the focus of the inquiry is directly at whether the tortfeasor should have reasonably foreseen the injuries suffered by the claimant. Sinn v. Burd, 404 A.2d 672, 684-85 n.18 (Pa. 1979); Comment, *Negligent Infliction of Emotional Distress: Liability to the Bystander*, 11 GONZ. L. REV. 203, 212 n.60 (1975).

[41] 441 P.2d at 921.

[42] *Id.* at 920. The California court intended the *Dillon* guidelines to aid in evaluating the degree of foreseeability involved in the tortfeasor's negligence and to preclude compensation for any remote or unexpected consequences of his act. *Id.* at 920-21. Accordingly, the guidelines provide a broadly based rule for adjudicating emotional distress claims. *A Mother Witnessing, supra* note 2, at 521-22. Commentators, however, have criticized the guidelines for not sufficiently limiting the liability imposed on the tortfeasor and for failing to provide an absolute rule for adjudicating distress claims. *See* Comment, *Negligently Inflicted Emotional Shock From Witnessing the Death or Injury of Another*, 10 ARIZ. L. REV. 508, 520 (1968); Note, *Damages for Physical Injury Caused By Mental Anguish*, 38 U. CIN. L. REV. 185, 189 (1969); Note, *Negligent Infliction of Emotional Distress—Recovery Allowed to One Outside the Physical Zone of Danger*, 41 U. COLO. L. REV. 163, 166 (1969) [hereinafter cited as *Recovery Allowed*]. Nevertheless, by failing to provide a rigid standard, the guidelines enable a greater number of claimants to seek relief for emotional distress injuries. *Recent Developments, supra* note 28 , at 743; *A Mother Witnessing, supra* note 2, at 521-22; Dooley, *supra* note 12, at 326.

[43] 441 P.2d at 921.

[44] *Id.* at 920. In addition to *Dillon*'s physical injury limitation on recovery, liability is only recognized under foreseeability analysis where a normally constituted person would suffer an adverse reaction as a consequence of the tortfeasor's conduct. Rodrigues v. State, 52 Hawaii 156, ___, 472 P.2d 509, 520 (1970); Hunsley v. Giard, 87 Wash. 2d 424, ___, 553 P.2d 1096, 1103 (1976). From a medical viewpoint, however, psychiatrists maintain that no two individuals have the same susceptibility to mental disabilities and thus, contend that courts should extend recovery to claimants notwithstanding their pre-existing mental weaknesses. Cantor, *supra* note 20, at 432; *Transcontinental Dispute, supra* note 39, at 27.

[45] Sinn v. Burd, 404 A.2d 672, 679 (Pa. 1979).

be denied recovery under *Dillon.*

By establishing that a negligent tortfeasor owes a duty of care to persons beyond the zone of physical danger, *Dillon* paved the way for broader recognition of emotional distress claims.[46] The extension of the tortfeasor's duty of care, however, did not result in the wholesale recognition of negligent infliction of emotional distress claims pursued by persons witnessing the tortfeasor's actions from outside the zone of danger.[47] California decisions subsequent to *Dillon* generally have not extended the *Dillon* decision significantly beyond its original scope.[48] Nevertheless, a few decisions in California[49] and other jurisdictions have adopted and extended the *Dillon* analysis as originally presented.[50] These courts have modified the *Dillon* doctrine by altering the emphasis on the foreseeability concept in the duty analysis[51] and by broadly interpreting the California Supreme Court's contemporaneous observance guideline for establishing liability.[52] Furthermore, some courts have departed from *Dillon*'s requirement that emotional distress be manifested by physical symptoms.[53]

Subsequent to the *Dillon* decision, several courts have deemphasized the significance of foreseeability of injury as the primary determinant of duty in emotional distress cases since the concept does not contribute much to the analysis of emotional distress claims.[54] Foreseeability of in-

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[46] Note, *Mental Distress—Liability for Negligently Inflicted Mental Distress Extended to Apply to Mother Who Witnesses Death of Her Child,* 43 N.Y.U. L. REV. 1252, 1252 (1968).

[47] Just as the transition from impact to physical zone analysis did not generate a flood of litigation, *see* Lambert, *Tort Liability for Physic Injuries,* 41 B.U. L. REV. 584, 592 (1961), the *Dillon* decision has brought about little change in the number of adjudicated distress claims. *Recent Developments, supra* note 28, at 742.

[48] *Recent Developments, supra* note 28, at 742; *see, e.g.,* Justus v. Atchison, 19 Cal. 3d 564, 582-85, 565 P.2d 122, 134-36, 139 Cal Rptr. 97, 109-11 (1977); Arauz v. Gerhardt, 68 Cal. App.3d 937, 947-49, 137 Cal. Rptr. 619, 626-27 (1977); Jansen v. Children's Hosp. Med. Center, 31 Cal. App. 3d 22, 23-25, 106 Cal. Rptr. 883, 884-85 (1973).

[49] Nazaroff v. Superior Court, 80 Cal. App. 3d 553, 145 Cal. Rptr. 657 (1978); Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977); Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969).

[50] Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974); Dzionkonski v. Babineau, 380 N.E.2d 1295 (Mass. 1978); Toms v. McConnell, 45 Mich. App. 647, 207 N.W.2d 140 (1973); Corso v. Merrill, 406 A.2d 300 (N.H. 1979); Sinn v. Burd, 404 A.2d 672 (Pa. 1979); D'Ambra v. United States, 114 R.I. 643, 338 A.2d 524 (1975); Landreth v. Reed, 570 S.W.2d 486 (Tex. Civ. App. 1978).

[51] *See* text accompanying notes 54-58 *infra.*

[52] *See* text accompanying notes 58-67 *infra.*

[53] *See* text accompanying notes 68-73 *infra.*

[54] *See, e.g.,* Leong v. Takasaki, 520 P.2d at 765; Dzionkonski v. Babineau, 380 N.E.2d at 1295 (Mass. 1978); D'Ambra v. United States, 338 A.2d at 524. The *Leong* court maintained that *Dillon*'s foreseeability guidelines should not be implemented to deny recovery and are useful only to substantiate the severity of the emotional distress suffered. 520 P.2d at 766. In *Dzionkowski,* the court contended that foreseeability is too conclusory in nature and, thus, is not very beneficial for analyzing emotional distress cases. 380 N.E.2d at 1302. The *Dzionkowski* court proposed, however, that reasonable foreseeability does serve as a proper

jury is merely a conclusion derived from an after-the-fact examination of the tortfeasor's negligent act and, thus, can be found to exist in virtually any given situation.[55] Moreover, foreseeability is merely one factor relevant to the duty determination. The inquiry centers on the question of whether the tortfeasor reasonably should have anticipated the harmful effects of his conduct and, therefore, is controlling only in respect to whether he should be held morally responsible for his actions.[56] The duty determination, however, involves a more extensive analysis. The determination represents a value judgment based on many policy factors, including difficulties in administering claims and economic considerations.[57] Consequently, the recent decisions extending *Dillon* have employed a broader-based notion of duty through a balancing of the various factors, in addition to foreseeability, involved in the duty analysis.[58]

The rationale underlying *Dillon*'s sensory and contemporaneous observance factor is that the degree of foreseeable injury to the claimant is greater if he or she observes the tortious injury to the third party firsthand, rather than later learning of the occurrence from another source.[59] Nevertheless, courts have liberally construed the observance guideline in subsequent negligent infliction of emotional distress decisions.[60] Although *Dillon* involved the visual observance of the tortfeasor's actions,[61] some courts have applied the guideline in cases where the claimant senses the tortious event without any visual perceptions.[62] Other

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starting point in determining liability. *Id.* In *D'Ambra*, the court stated that the foreseeability analysis is of minimal utility in distinguishing close factual situations since courts will differ as to what constitues a foreseeable consequence of a tortfeasor's negligence. 338 A.2d at 528.

[55] Dzionkowski v. Babineau, 380 N.E. 2d 1295, 1302 (Mass. 1978).

[56] D'Ambra v. United States, 114 R.I. 643, ___, 338 A.2d 524, 528 (R.I. 1975).

[57] Note, *Negligently Inflicted Emotional Shock From Witnessing the Death or Injury of Another*, 10 ARIZ. L. REV. 508, 517 (1968). *See generally* Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928); Green, *The Duty Problem in Negligence Cases: II*, 29 COLUM.L. REV. 255 (1929).

[58] *See* note 54 *supra*.

[59] 441 P.2d at 920; *see* Kelley v. Kokua Sales & Supply Ltd., 56 Hawaii 204, 532 P.2d 673 (1975). *Kelley* involved a claim for emotional distress incurred as a consequence of the claimant's notification by telephone of the deaths of his daughter and granddaughter resulting from the tortfeasor's negligent act. *Id.* at 674-75. In denying recovery, the Hawaiian court maintained that the claimant's shock-induced injuries could not be considered the reasonably foreseeable consequences of the tortfeasor's negligence. *Id.* at 676.

[60] Nazaroff v. Superior Court, 80 Cal. App. 3d 553, 145 Cal. Rptr. 657 (1978); Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977); Landreth v. Reed, 570 S.W.2d 486 (Tex. Civ. App. 1978); Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969); Dzionkonski v. Babineau, 380 N.E.2d 1295 (Mass. 1978); Corso v. Merrill, 406 A.2d 300 (N.H. 1979).

[61] 441 P.2d at 915.

[62] *See* Nazaroff v. Superior Court, 80 Cal. App. 3d 553, 145 Cal. Rptr. 657 (1978); Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977); Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969); Landreth v. Reed, 570 S.W.2d 486 (Tex. Civ. App. 1978).

Nazaroff involved a mother's claim for emotional distress resulting from the near

courts have found the foreseeability requirement satisfied where the claimant arrived on the scene soon after the accident had occurred and merely observed the already injured third party victim.[63]

The liberal construction of *Dillon*'s sensory and contemporaneous observance guideline has evolved in reaction to the artificial distinctions involved in the guideline's application to claims for shock-induced injuries.[64] Logic mandates recognition of emotional distress claims where the claimant arrives at the accident scene shortly after the initial injury producing negligence has occurred, since the emotional impact resulting from the after-the-fact observation of the injured third-party victim may be as

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drowning and death of her three year old child. 145 Cal. Rptr. at 658. Although the claimant did not actually witness the near drowning, the court maintained that a shout coming from the accident scene could have enabled the plaintiff to mentally reconstruct the occurrence of the tortious events. *Id.* at 664. The *Nazaroff* court recognized the mother's cause of action since her knowledge of the occurrence resulted from her own sensory perceptions. *Id.*

In *Krouse*, the court recognized a husband's emotional distress claim even though he did not actually see his wife being struck by the defendant's automobile. 562 P.2d at 1031. The claimant was sitting in the driver's seat of his parked car as his wife unloaded the groceries and knew the exact position of his wife and saw the approaching automobile prior to the impact. *Id.* Accordingly, the court found that sufficient justification existed for recognition of the cause of action since the husband had perceived the occurrence of the impact. *Id.*

The *Landreth* decision involved a child's emotional distress incurred as a result of witnessing her sister being pulled out of a swimming pool and the subsequent attempt to revive her from unconsciousness. 570 S.W.2d at 488-89. The court maintained that the life or death drama brought the plaintiff sufficiently within the reality of the accident to justify the action for compensation. *Id.* at 490. The *Landreth* court contended that actual observation of the accident is not required to establish a cause of action if the plaintiff has "experiential perceptions" of its occurrence. *Id.*

Although the plaintiff-mother in *Archibald* did not witness the defendant's tortious acts upon her son involving a gunpower-related explosion, she did arrive at the accident scene within moments of the accident and observed her son's resulting injuries. 79 Cal. Rptr. at 724. The *Archibald* court permitted the mother's claim for emotional distress, reasoning that witnessing the consequences of the accident immediately after its occurrence could inflict injuries as serious as those resulting from the visual observance of the act. *Id.* at 725.

[63] *See, e.g.*, Dzionkonski v. Babineau, 380 N.E.2d 1295, 1302 (Mass. 1978); Corso v. Merrill, 406 A.2d 300, 303 (N.H. 1979). In *Dzionkonski*, the plaintiff-parent did not witness her child's accident, but rather, observed her child lying injured on the ground after the negligent act had occurred. 380 N.E.2d at 1296. The court recognized the cause of action, maintaining that recovery should not be precluded simply because the claimant does not witness the accident's occurrence. *Id.* at 1302. Instead, the *Dzionkonski* court held that the determination of liability should be made on a case-by-case basis focusing on the circumstances surrounding the claimant's conscious perception of the tortfeasor's negligent act upon the injured third party. *Id.*

In *Corso*, both parents of a child struck by a negligently driven automobile brought an action to recover for negligently inflicted emotional distress. 406 A.2d at 302. After hearing a "thud," the mother, situated inside the Corso home, looked out and saw her child lying injured in the street. *Id.* The father heard the mother scream and immediately went outside and observed his injured daughter. *Id.* Although the parents did not see the accident, the *Corso* court recognized their claims since they had been close enough to the scene to become immediately aware of and observe the injured child. *Id.* at 306.

[64] *Recent Developments, supra* note 28, at 745.

severe as where the initial negligence is witnessed.[65] Moreover, courts should permit recovery where the claimant perceives the tortfeasor's negligent act upon the third party victim through senses other than sight, since the emotional distress incurred through the claimant's non-visual sensory perceptions may be reasonably foreseeable and as severe as those resulting from visual observation.[66] Accordingly, once the claimant proves the causal link between the tortious event and any resultant shock-induced injuries, jurisdictions liberally interpreting *Dillon*'s observance guideline will not automatically reject claims for relief.[67]

A few jurisdictions have departed from *Dillon*'s physically manifested injury requirement and have recognized claims where no physical injury exists.[68] The courts recognizing solely emotional injury claims maintain that the physical-emotional distinction is artificial and unjustified in view of the increasing competency of the medical sciences in analyzing emotional injuries.[69] Moreover, liablity should not be limited according to the type of injury incurred since it is often difficult to distinguish the emotional and physical aspects of shock-induced injuries.[70] Although emotional distress claims are often difficult to substantiate, claimants must be afforded the opportunity to prove the extent of their injuries since the

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[65] *See* note 63 *supra*. *But see* Dzionkonski v. Babineau, 380 N.E.2d 1295, 1303 (Mass. 1978) (Quirico, J., dissenting). Justice Quirico's *Dzionkonski* dissent criticized the recognition of emotional distress claims where the claimant observes the third-party's injuries immediately after the accident occurred. 380 N.E. 2d at 1303. Quirico maintained that the adoption of an 'immediate observation' factor is artibrary since recovery would hinge on how soon after the accident the parent arrived on the accident scene or on the speed of the ambulance service in removing the victim. *Id.* at 1304.

[66] Archibald v. Braverman, 275 Cal. App. 2d 253, 256, 79 Cal. Rptr. 723, 725 (1969); *see* note 63 *supra*. *But see* McGovern v. Piccolo, 33 Conn. Supp. 225, 372 A.2d 989 (1976). The *McGovern* court maintained that *Archibald* reinforced fears concerning the potential for the imposition of unlimited liability under the *Dillon* doctrine because the *Archibald* court recognized a cause of action where the claimant did not visually observe the tortfeasor's negligence and could not reasonably be presumed to be positioned near the tortious occurrence. 372 A.2d at 991.

[67] Dzionkonski v. Babineau, 380 N.E.2d 1295, 1302 (Mass. 1978).

[68] *See, e.g.* Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974); Sinn v. Burd, 404 A.2d 672 (Pa. 1979). The physical manifestation of emotional distress requirement still persists, however, in some of the most liberal jurisdictions. *See, e.g.,* Krouse v. Graham, 19 Cal. 3d 59, 75, 562 P.2d 1022, 1030, 137 Cal. Rptr. 863, 871 (1977); Corso v. Merrill, 406 A.2d 300, 306 (N.H. 1979).

[69] Leong v. Takasaki, 520 P.2d at 762; Sinn v. Burd, 404 A.2d at 679. Since 1945, the medical community has made significant advancements in the understanding of emotional distress, finding a link between shock-induced injuries and the type and quantity of hormones and white blood cells found in the circulatory and nervous systems. *See* Wasmuth, *Medical Evaluation of Mental Pain and Suffering*, 6 CLEV.-MAR. L. REV. 7, 11-13 (1957). The documentation of claims may also be facilitated by studying any alterations in electrocardiogram patterns since evidence exists that stress may affect the functioning of the heart. *See* Olender, *Proof and Evaluation of Pain and Suffering in Personal Injury Litigation*, 1962 DUKE L.J. 344, 361.

[70] Landreth v. Reed, 570 S.W.2d 486, 489 (Tex. Civ. App. 1978); *see Independent Tort*, *supra* note 1, at 1259 n.128.

law protects both physical and emotional well-being.[71] The recent trend away from the physical-emotional distinction reflects this policy by eliminating impediments to the imposition of liability for shock-induced injuries. Furthermore, any distinction made on administrative grounds between emotional disabilities incurred with and without accompanying physical injury cannot be justified.[72] Even if the number of fictitious claims increases by the removal of the physical manifestation requirement, an outright bar to recovery is not acceptable since claimants with legitimate claims must have access to the courts.[73]

Those jurisdictions extending *Dillon* beyond its original presentation indicate that further broadening of the right to recovery is forthcoming. Just as the zone of physical danger standard replaced the impact doctrine, *Dillon* should eventually evolve as the majority rule for the adjudication of distress claims. Central to the extension of liability is the increased priority that mental health has taken as a community concern.[74] Greater awareness of the debilitating effects of mental illness will stimulate judicial responsiveness to emotional distress claims by continuing the extension of the duty of care owed to claimants for the consequences of negligent behavior.[75] Accordingly, tortfeasors causing emotional distress will be held liable for more remote consequences of their negligence than under the traditional tests.[76]

Advances in medical science, leading to a greater understanding of the nature of emotional distress injuries, will accompany the shift in societal priorities and lend support to the increased recognition of the claims. These advances will play a major role in negligence analysis by gradually eliminating problems of proof involved in the substantiation of the causal link between the tortious events and subsequent shock-induced injuries. Courts must take care, however, not to impose liability for injuries that cannot, as yet, be substantiated scientifically.[77] Nevertheless, the debilitating effects of emotional distress are often severe, and, therefore, the courts should no longer refuse to recognize and protect the substantial individual mental health interests involved in the adjudication of claims for the negligent infliction of emotional distress.

CHARLES JUSTER

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[71] Vance v. Vance, 41 Md. App. 130, ___, 396 A.2d 296, 301 (1979).

[72] 441 P.2d at 918.

[73] Sinn v. Burd, 404 A.2d 672, 678-79 (Pa. 1979).

[74]. *See* Comment, *The Development of Recovery for Negligently Inflicted Mental Distress Arising from Peril or Injury to Another*, 26 EMORY L. REV. 647, 654 (1977).

[75] Comment, *Bystander Recovery for Mental Distress*, 37 FORDHAM L. REV. 429, 449 (1969).

[76] *Id.*

[77] *Expanding the Concept*, *supra* note 23, at 193.