Washington and Lee Law Review

Volume 26 | Issue 1 Article 6

Spring 3-1-1969

# Liability To Bystanders At Accidents For Mental Distress

# CASE COMMENTS

## LIABILITY TO BYSTANDERS AT ACCIDENTS FOR MENTAL DISTRESS

Traditionally, in negligence actions the unforeseen plaintiff[1] has had very little success in American and English courts. This is particularly true of the bystander who witnesses a vehicular accident and experiences severe emotional shock and mental distress from seeing the sudden injury and, perhaps, violent deaths of the accident victims.[2] In refusing to permit recovery for the physical injuries resulting from the strain to his nervous system, the courts are in general agreement that there is no duty of care owed by the tort-feasor to the bystander.[3]

Only limited exceptions have been made to this traditional rule. Recovery has been permitted when the plaintiff has been able to demonstrate that his injury was the result of some actual physical impact.[4] Other more liberal courts have held the defendant liable

---

[1]The unforeseen plaintiff is a person who could not have been reasonably expected to be injured by a particular act. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

[2]*See* Southern Ry. v. Jackson, 146 Ga. 243, 91 S.E. 28 (1916); Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Jelley v. Laflame, — N.H. —, 238 A.2d 728 (1968); Knaub v. Gotwalt, 422 Pa. 267, 220 A.2d 646 (1966); Nuckles v. Tennessee Elec. Power Co., 155 Tenn. 611, 299 S.W. 775 (1927); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935); Bourhill v. Young, [1943] A.C. 92 (1942); RESTATEMENT (SECOND) OF TORTS § 313(2) (1965). *Contra,* Haight v. McEwen, 43 Misc. 2d 582, 251 N.Y.S.2d 839 (Sup. Ct. 1964); *see* Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (1912); Hambrook v. Stokes Bros., [1925] 1 K.B. 141 (C.A. 1924).

[3]Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497, 501 (1935); King v. Phillips, [1953] 1 Q.B. 429, 435 (C.A.).

This comment is not concerned with the situation where there is no resulting physical injury, and damage is claimed only for mental distress or shock.

[4]The "impact" exception came about as the result of leaving it an open question in Victorian Rys. Comm'rs v. Coultas, 13 App. Cas. 222, 226 (P.C. 1888). There must be some physical contact with the plaintiff before he can recover damages for mental distress injuries in jurisdictions following the impact exception. Spade v. Lynn & B.R.R., 168 Mass. 285, 47 N.E. 88 (1897). Mr. Chief Justice Holmes, although characterizing the limits of the exception as arbitrary, felt that such definite limits on recoverable mental distress claims were necessary. Homans v. Boston El. Ry., 180 Mass. 456, 62 N.E. 737 (1902). When the exception became diluted to the point that otherwise unnoticed or insignificant touchings were termed "impact," most courts chose to lay aside the exception altogether and to base recovery on the zone-of-danger exception. Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941); Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329,

for the plaintiff's resultant injuries when the plaintiff was found to be in the zone of danger at the scene of the accident.[5]

In the recent case of *Dillon v. Legg*[6] the Supreme Court of California reevaluated the traditional rule of no recovery and chose to disregard it in order to permit recovery by a plaintiff who did not fall within the scope of the zone-of-danger exception. The facts of *Dillon* were not extraordinary. Under the watchful eye of their mother, Erin and Cheryl Dillon, minor sisters, were crossing a street at an intersection. Erin, who was in the lead, was run over by an automobile driven by the defendant. Mrs. Dillon was in close proximity to the accident, but she was not in the path of the automobile and not in danger of being struck by the vehicle.

The emotional shock arising from seeing Erin killed resulted in physical injuries to the nervous systems of both the surviving sister and the mother. Mrs. Dillon brought an action against the driver of the vehicle to recover damages for the physical injuries to her nervous system.[7] Defendant's motion for a summary judgment on the pleadings was granted on the ground that Mrs. Dillon was clearly not within the zone of danger.

The Supreme Court of California in a four-to-three decision reversed the trial court. The majority found that the chance of fraud in mental distress claims and the possible inability to fix definite limits of liability for the courts to follow in the future should not prevent a deserving plaintiff from seeking compensation for his injuries. The

---

150 A. 540 (1930); Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961). *Contra,* Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958).

[5]The "zone-of-danger" exception is generally followed in the United States. *See* Hopper v. United States, 244 F. Supp. 314 (D. Colo. 1965); Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); Savard v. Cody Chevrolet, Inc., — Vt. —, 234 A.2d 656 (1967); Klassa v. Milwaukee Gas Light Co., 273 Wis. 176, 77 N.W.2d 397 (1956). *See generally* Magruder, *Mental and Emotional Disturbance in the Law of Torts,* 49 HARV. L. REV. 1033 (1936); 10 WASH. & LEE L. REV. 267 (1953). The basis of the exception is that the plaintiff may recover for resultant injuries from mental distress when they are caused by fears for his own safety while endangered by the defendant's negligent act. Some jurisdictions permit the plaintiff to recover for resultant injuries which have been caused by concern for others who were also in the zone. Currie v. Wordrop, [1927] Sess. Cas. 538, 550-51 (Scot.); *see* Lindley v. Knowlton, 179 Cal. 298, 176 P. 440 (1918); Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933). Other states, however, confine recovery to that part of the total injury which was brought on by fears for personal safety only. Strazza v. McKittrick, 146 Conn. 714, 156 A.2d 149, 152 (1959); *see* Duet v. Cheramie, 176 So.2d 667 (La. Ct. App. 1965).

[6]— Cal. 2d —, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

[7]A second count brought by Mrs. Dillon for the wrongful death of Erin and a third count brought by Cheryl for mental distress injuries to her nervous system were not the subject of this appeal.

court advanced three criteria to be used as a basis for weighing the merits of future claims. The factors to be looked at are:

> (1) Whether plaintiff was located near the scene of the accident .... (2) Whether the shock resulted ... from the sensory and contemporaneous observance of the accident .... (3) Whether plaintiff and the victim were closely related ....[8]

The dissenting opinion stressed the "injustice to California defendants flowing from such a disproportionate extension of their liability ...."[9] It also said that the criteria suggested for the use of future courts are of little value. "Upon analysis, their seeming certainty evaporates into arbitrariness, an [sic] inexplicable distinctions appear."[10]

*Dillon* represents the first time that the highest court of a state has found a duty owing to a bystander who could not have recovered under either the impact or zone-of-danger exceptions. The conclusion reached by earlier courts that no duty was owed to the bystander was based on grounds of either foreseeability[11] or public policy[12] or of both.[13]

Duty is often expressed in terms of foreseeability.[14] To determine whether the defendant owes a duty of care to the plaintiff, it is necessary to find that the defendant must have reasonably foreseen a risk of some harm to this particular plaintiff or to others in the same class of persons.[15]

When the relationship between the defendant and the plaintiff is more than that of merely tort-feasor to bystander, a few jurisdictions

---

[8]441 P.2d at 920, 69 Cal. Rptr. at 80.

While sitting on the District Court of Appeals of California, Justice Tobriner had decided Amaya v. Home Ice, Fuel & Supply Co., — Cal. App. —, 23 Cal. Rptr. 131 (Dist. Ct. App. 1962) for the plaintiff on almost identical facts as *Dillon*. The *Amaya* case, however, when it reached the supreme court, was reversed. Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963). Justice Tobriner in *Dillon* is now in the unique position of being able to overrule the case which had reversed his landmark decision of six years before.

[9]441 P.2d at 928, 69 Cal. Rptr. at 88.

[10]*Id.* at 926, 69 Cal. Rptr. at 86.

[11]*E.g.*, Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497, 501 (1935); King v. Phillips, [1953] 1 Q.B. 429 (C.A.).

[12]*E.g.*, Rogers v. Hexol, Inc., 218 F. Supp. 453, 458 (D. Ore. 1962); Jelley v. Laflame, — N.H. —, 238 A.2d 728, 729-30 (1968).

[13]Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).

[14]*See* cases cited note 11 *supra*, and note 14 *infra*.

[15]Angst v. Great Northern Ry., 131 F. Supp. 156, 159 (D. Minn. 1955); Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99, 100 (1928); Bourhill v. Young, [1943] A.C. 92, 98 (1942).

have found the physical injuries emanating from the shock of seeing another harmed to be foreseeable.[16] The facts common to these cases are that the plaintiff and victim were close relatives, and that the defendant had *actual knowledge* of their presence and of their close relationship before the accident occurred. In addition to the actual knowledge, a special duty to take care may have been imposed as the result of a contract between the defendant on the one hand and the plaintiff and victim on the other.[17] Thus, when hospital attendants kept a patient in a room with a defective window which permitted the rain to beat in during a storm and the patient thereafter contracted and died of pneumonia, the patient's husband was permitted to recover damages from the hospital for the mental distress injury he suffered from seeing his wife's health fail.[18]

Harm to automobile accident spectators resulting from mental distress has not been deemed foreseeable in the past because mental distress from the visual observation of accidents is not usually severe enough to result in physical injuries.[19]

> The driver of a car or vehicle, even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent towards one who does not possess the customary phlegm.[20]

Although the plaintiff's particular injury may not have been foreseen, his claim would not have been defeated in American courts if some other harm were also threatened.[21] However, as a practical matter, the plaintiff could not say some other harm was threatened where he was not in direct danger of being struck, and he was left with only an unforeseeable injury caused by the shock of seeing some-

---

[16]Bailey v. Long, 172 N.C. 661, 90 S.E. 809 (1916); Gulf, C. & S.F. Ry. v. Coopwood, 96 S.W. 102 (Tex. Civ. App. 1906); Boardman v. Sanderson, [1964] 1 W.L.R. 1317 (C.A. 1961); Cohn v. Ansonia Realty Co., 162 App. Div. 791, 148 N.Y.S. 39 (1914).

[17]Bailey v. Long, 172 N.C. 661, 90 S.E. 809 (1916); Gulf, C. & S.F. Ry. v. Coopwood, 96 S.W. 102 (Tex. Civ. App. 1906); *cf.* Rasmussen v. Benson, 135 Neb. 251, 280 N.W. 890 (1938); Cohn v. Ansonia Realty Co., 162 App. Div. 791, 148 N.Y.S. 39 (1914).

[18]Bailey v. Long, 172 N.C. 661, 90 S.E. 809 (1916).

[19]Angst v. Great Northern Ry., 131 F. Supp. 156 (D. Minn. 1955).

[20]Bourhill v. Young, [1943] A.C. 92, 117 (1942).

[21]*See* Parris v. M.A. Bruder & Sons, 261 F. Supp. 406 (E.D. Pa. 1966); Shipley v. City of Pittsburgh, 321 Pa. 494, 184 A. 671 (1936); *cf.* Cohn v. Ansonia Realty Co., 162 App. Div. 791, 148 N.Y.S. 39 (1914).

one else in danger; therefore, the general rule of no recovery was applied.[22]

Foreseeability is not the only obstruction the bystander has to overcome in order to recover. Strong public policy considerations have made it difficult for many courts to acknowledge that a duty of care is owed to a plaintiff who claims injuries resulting from mental distress.[23] These courts have focused attention both on the problems of proper administration of justice and on the utility or social value of the interests involved.

From an administrative point of view, there is caution when dealing with mental distress claims because the chance of fraud or fabrication may be high.[24] However, *Dillon* makes it clear that although the possibility of fraud exists in some cases, it is not a valid basis for denying or preventing recovery by plaintiffs who have suffered real and provable injury.[25]

In balancing the rights of an injured bystander against the burden that defending such claims of mental distress would have on the users of highways, it is felt that the hardship would be too great for the driver if liability were extended to those beyond the zone of anticipated, direct physical danger.[26] The driver's act was not culpable enough for the spectator to recover.[27] Furthermore, it is felt that recovery should be withheld from all bystanders with mental distress claims because once recovery is granted to one such member of this class of persons there is no apparent or logical stopping place, and courts will be unable to prevent recovery on more remote claims in the future.[28]

The *Dillon* court recognized the difficulties that the earlier courts

---

[22]The courts deal with this as not being in the zone of danger. *E.g.*, Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).

[23]Cases cited note 12 *supra*.

[24]*E.g.*, Knaub v. Gotwalt, 422 Pa. 267, 220 A.2d 646, 647 (1966); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497, 501 (1935).

[25]"[T]he possibility that fraudulent assertions may prompt recovery in isolated cases does not justify a wholesale rejection of the entire class of claims in which that potentiality arises." 441 P.2d at 917-18, 69 Cal. Rptr. at 77-78.

[26]Resavage v. Davies, 199 Md. 479, 86 A.2d 879, 883 (1952); Cote v. Litawa, 96 N.H. 174, 71 A.2d 792, 795 (1950).

[27]*E.g.*, Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 525, 29 Cal. Rptr. 33, 45 (1963); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497, 501 (1935).

[28]Angst v. Great Northern Ry., 131 F. Supp. 156, 159-60 (D. Minn. 1955); Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 523-24, 29 Cal. Rptr. 33, 43-44 (1963); Hambrook v. Stokes Bros., [1925] 1 K.B. 141, 163-64 (C.A. 1924) (dissenting opinion).

had in finding a duty to the bystander under the foreseeability test and on public policy grounds. It, therefore, advanced three factors to determine if the defendant would be liable to the bystander: (1) the nearness of the bystander to the accident, (2) the extent of the bystander's sensory involvement with the accident, and (3) the closeness of the relationship between the victim and the bystander.[29] To recover under these criteria, Mrs. Dillon did not have to show that she had been threatened by some other injury. But the court did not extend liability for mental distress injuries to all bystanders at automobile accidents. Rather, it recognized that the chances of any two bystanders suffering from mental distress are not equal. With respect to some members of the class of bystanders, the chance of injury was found to be high enough to say that it was foreseeable.[30] By limiting the number of foreseeable plaintiffs under these three criteria, the court has also answered the public policy considerations which barred recovery in the earlier cases. If the injury resulting from the defendant's act is foreseeable, then his act is sufficiently culpable for him to pay for the damage caused. In addition, if liability is to be extended no further than to the persons covered by the criteria, the fear of unlimited claims in the future may be assuaged.

The relative weight of each of these three factors will be determined by the fact situation of each new case. Once the weight of each factor is determined, the court must balance them all to see if the plaintiff's claim is foreseeable. For example, the claim of a physical injury from shock by the mother of the accident victim is more probable than the same claim from a distant relative. When weighing each of these claims, the mother's claim would be given greater weight, and if all other factors were equal, her claim might prevail where that of the distant relative might not. The *Dillon* court made no attempt to find where the balance should be struck. Instead, it suggested the three tests to be made and specifically left it to future courts to determine

---

[29]The specific language of the court was:

(1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

441 P.2d at 920, 69 Cal. Rptr. at 80.

[30]*Id.*