

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS: LIABILITY TO THE BYSTANDER

I. INTRODUCTION

The development of the tort of negligent infliction of emotional distress has been one of gradual, but continuous expansion of its scope of protection. Several distinct phases are discernible in this expansion, each marked by vigorous debate among the courts. The focal point of the controversy at present is the fear of exposing a defendant to unlimited liability. This Comment will discuss the evolution of the predominant approaches to this problem, concluding with a suggestion for modifying the present Washington rule.

II. HISTORICAL ANALYSIS

A. General Considerations

Courts have been reluctant to recognize mental tranquility as a legally protected interest¹ because of its intangible and elusive nature.² Due to the inherent difference between emotional and physical injury, courts have hesitated to extend the remedy of damages to negligently inflicted emotional distress.³

In two contexts, however, courts have deemed the circumstances of sufficient gravity to warrant a departure from the position of non-recovery for solely mental disturbances—negligent delay in delivering a death message,⁴ and negli-

1. See *Lessard v. Tarca*, 20 Conn. Supp. 295, 133 A.2d 625 (Super. Ct. Hartford County 1957); *Laplace v. Minks*, 174 So. 2d 895 (La. App.), *cert. denied*, 248 La. 123, 176 So. 2d 452 (1965); *Taylor v. Spokane, Portland & Seattle Ry.*, 72 Wash. 378, 130 P. 506 (1913); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936); McNiece, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S L. REV. 1, 9 (1949) [hereinafter cited as McNiece].

2. See *Perry v. Capital Traction Co.*, 32 F.2d 938 (D.C. Cir. 1929); *Lynch v. Knight*, 11 Eng. Rep. 854 (H.L. 1861); C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 88 (1935).

3. See, e.g., *Whitsel v. Watts*, 98 Kan. 508, —, 159 P. 401, 401 (1916); see also *Venske v. Johnson-Lieber Co.*, 47 Wn. 2d 511, 514, 288 P.2d 249, 252 (1955); J. FLEMING, THE LAW OF TORTS, 149 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 436A (1965).

4. See *Western Union Tel. Co. v. Cleveland*, 169 Ala. 131, 53 So. 80 (1910); *Mentzer v. Western Union Tel. Co.*, 93 Iowa 752, 62 N.W. 1 (1895).

gent mistreatment of a corpse.⁵ In addition, whenever the emotional distress has been *intentionally* inflicted, the tortfeasor's conduct has been considered sufficiently culpable to impose liability.⁶

Except for these situations, recovery of damages for negligently inflicted emotional distress has traditionally been limited to situations where the emotional distress has been accompanied by physical injury. This requirement evolved from an early English case⁷ and was subsequently engrafted into American law.⁸

In general, this requirement of physically manifested symptoms of the emotional disturbance⁹ has been retained.¹⁰ Consequently, despite a finding of sufficient impact, no recovery is allowed in the absence of actual physical injury caused by the mental distress, *i.e.*, compensation is not available for purely mental injury. While it has been submitted that mental injury merits independent protection,¹¹ this position has yet to gain wide acceptance.¹²

In those jurisdictions which recognize mental distress as a compensable injury, a presumed potential for fraudulent claims,¹³ the fear of unlimited liability,¹⁴ and the possibility of

5. See *Brown Funeral Homes & Ins. Co. v. Baughn*, 226 Ala. 661, 148 So. 154 (1933); *Lamm v. Shingleton*, 231 N.C. 10, 55 S.E.2d 810 (1949).

6. See, *e.g.*, *Browning v. Slenderella Systems*, 54 Wn. 2d 440, 341 P.2d 859 (1959); RESTATEMENT (SECOND) OF TORTS § 46 (1965); Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

7. *Victorian Rys. Comm'rs v. Coultas*, 13 App. Cas. 222 (P.C. 1888). A contrary position was later taken in *Dulieu v. White & Sons*, [1901] 2 K.B. 669.

8. See *Spade v. Lynn & Boston R.R.*, 168 Mass. 285, 47 N.E. 88 (1897); *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 354 (1896); *Ewing v. Pittsburgh, C., C. & St. L. Ry.*, 147 Pa. 40, 23 A. 340 (1892).

9. See cases cited note 3 *supra*.

10. See *Espinosa v. Beverly Hosp.*, 114 Cal. App. 2d 232, 249 P.2d 843 (Ct. App. 1952); *Robb v. Pennsylvania R.R.*, 58 Del. 454, 210 A.2d 709 (1965); *Gambill v. White*, 303 S.W.2d 41 (Mo. 1957); *Chiuchiolio v. New England Wholesale Tailors*, 84 N.H. 329, 150 A. 540 (1930); *Aragon v. Speelman*, 83 N.M. 285, 491 P.2d 173 (1971).

11. Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237 (1971); see also Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922) [hereinafter cited as Goodrich]; Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260 (1921) [hereinafter cited as Throckmorton].

12. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54, at 328-29 (4th ed. 1971) [hereinafter cited as PROSSER]; but see *Rodriguez v. State*, 52 Hawaii 156, 472 P.2d 509 (1970).

13. *Spade v. Lynn & Boston R.R.*, 168 Mass. 285, 47 N.E. 88 (1897); *Mitchell v.*

a deluge of suits¹⁵ have been of concern to the courts and have led them to allow recovery only sparingly.

Mere speculation about an increased burden to the judicial system is a questionable basis on which to foreclose legitimate complaints, however.¹⁶ In fact, the experience of jurisdictions which have rejected the impact rule has been that the anticipated avalanche of litigation has failed to materialize.¹⁷

More troublesome is the presumed likelihood of feigned claims,¹⁸ because of the difficulty encountered in recognizing emotional distress. Mental anguish is conceived of as being amorphous and intangible, and not susceptible to empirical analysis.¹⁹ However, medical advances clarifying the evaluation of emotional injury have largely neutralized this contention.²⁰ Expert medical testimony is now available to assist the jury in its consideration of the causal relationship between the defendant's conduct and the injury to plaintiff. In light of these developments, the continued refusal of the courts to provide relief for legitimate claims simply because of a mere possibility of fraud is indefensible.²¹

Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896); *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935); PROSSER, *supra* note 12, § 54, at 328.

14. *Dillon v. Legg*, 68 Cal. 2d 728, —, 441 P.2d 912, 926, 69 Cal. Rptr. 72, 86 (1968) (dissenting opinion); *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935).

15. *Ward v. West Jersey & S.R.R.*, 65 N.J.L. 383, 47 A. 561 (1900); *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 354 (1896).

16. PROSSER, *supra* note 12, § 54, at 328: "It is the business of the courts to make precedent where a wrong calls for redress, even if lawsuits must be multiplied . . ." (footnote omitted).

17. *Okrina v. Midwestern Corp.*, 282 Minn. 400, 405, 165 N.W.2d 259, 263 (1969); *Niederman v. Brodsky*, 436 Pa. 401, —, 261 A.2d 84, 88-89 (1970); *cf.* Goodhart, *The Shock Cases and Area of Risk*, 16 Mod. L. Rev. 14, 24 (1953) [hereinafter cited as Goodhart].

18. See note 13 *supra* and accompanying text.

19. *Huston v. Borough of Freemansburg*, 212 Pa. 548, 61 A. 1022 (1905); *but see* *Purcell v. St. Paul City Ry.*, 48 Minn. 134, 50 N.W. 1034 (1892).

20. *Niederman v. Brodsky*, 436 Pa. 401, —, 261 A.2d 84, 86 (1970); Cantor, *Psychosomatic Injury, Traumatic Psychoneurosis, and Law*, 6 CLEV.-MAR. L. REV. 428, 429-37 (1957); Goodrich, *supra* note 11; Smith & Solomon, *Traumatic Neurosis in Court*, 30 VA. L. REV. 87 (1943); Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1273 (1971).

21. [T]he fact that there may be greater opportunity for fraud or collusion in one class of cases than another does not warrant courts of law in closing the door to all cases of that class. Courts must depend upon the

The irrepressible fear that, in the absence of some form of objective standard, the courts would be unable to adequately define the limits of the tortfeasor's liability has proven to be the most resilient of the objections to the expansion of the tort.²² Against this fear is presented the countervailing responsibility of the courts to compensate the deserving plaintiff. The balancing of these respective policy considerations has resulted in the emergence of differing standards by which to measure the extent of liability. Predominant among these have been the impact rule²³ and the zone of danger test.²⁴

B. *The Impact Rule*

The early promulgation of the impact rule,²⁵ providing recovery in a narrowly defined class of cases where the plaintiff had suffered a sufficient physical impact, provided an interim resolution to the liability issue. As applied, however, the requirement of impact evolved into a mechanical standard of recovery which failed as a sound threshold prerequisite. Its arbitrariness has been evidenced by the courts' tendency to find sufficient contact in cases which strained the definition of impact. Illustrative is a Washington case in which the requisite impact was found in the percussion effect of an explosion.²⁶ Conversely, if a court was unable to find any impact whatsoever, the rule resulted in an automatic nonsuit.²⁷

In a variation of the impact rule, a number of courts have imposed liability where the defendant's conduct did not di-

efficacy of the judicial processes to ferret out the meritorious from the fraudulent in particular cases.

Borst v. Borst, 41 Wn. 2d 642, 653, 251 P.2d 149, 155 (1952).

22. Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, ___, 379 P.2d 513, 515, 29 Cal. Rptr. 33, 35 (1963); Tobin v. Grossman, 24 N.Y.2d 609, ___, 249 N.E.2d 419, 423, 301 N.Y.S.2d 554, 559 (1969); Guilmette v. Alexander, 128 Vt. 116, 259 A.2d 12 (1969); Waube v. Warrington, 216 Wis. 603, ___, 258 N.W. 497, 500 (1935); PROSSER, *supra* note 12, § 54, at 334.

23. Louisville & N.R.R. v. Brown, 127 Ky. 732, 106 S.W. 795 (1908).

24. See cases cited note 30 *infra*.

25. See, e.g., Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897).

26. Kasey v. Suburban Gas Heat of Kennewick, Inc., 60 Wn. 2d 468, 374 P.2d 549 (1962); cf. Kentucky Traction & Terminal Co. v. Roman's Guardian, 232 Ky. 285, 23 S.W.2d 272 (1929) (slight burn from contact with electrified wire); Porter v. Delaware, L. & W.R.R., 73 N.J.L. 405, 63 A. 860 (1906) (dust in eyes); Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930) (smoke inhalation).

27. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 18.4, at 1031-33 (1956).

rectly cause physical injury to the plaintiff but caused the plaintiff to physically injure himself and suffer emotional distress as a result.²⁸

A growing dissatisfaction with the impact rule has increasingly led to its abandonment in jurisdictions having previously adhered to it while inhibiting its adoption in cases of first impression.²⁹ As a result, the impact rule has been substantially supplanted by what is commonly referred to as the zone of danger test.³⁰ A series of 1970 cases repudiating the impact rule³¹ prompted Dean Prosser to speculate that "the impact rule is destined for rapid extinction, and might perhaps even never be applied again."³²

C. *The Zone of Danger Standard*

As first enunciated, the zone of danger standard imposed a duty of due care toward persons who suffered emotional distress because their physical safety was directly threatened by the defendant's negligence.³³ The early decisions refused, as a matter of social policy, to extend the duty of due care to those who themselves were not within the immediate area of physical danger but who suffered emotional distress because they witnessed an injury to another who was. This position was set forth in the widely cited 1935 Wisconsin decision of *Waube v. Warrington*.³⁴

28. See, e.g., *Comstock v. Wilson*, 257 N.Y. 231, 177 N.E. 431 (1931).

29. See *Alabama Fuel & Iron Co. v. Baladoni*, 15 Ala. App. 316, 73 So. 205 (1916); *Purcell v. Saint Paul City Ry.*, 48 Minn. 134, 50 N.W. 1034 (1892); *Chiuchiolo v. New England Wholesale Tailors*, 84 N.H. 329, 150 A. 540 (1930); *Simone v. Rhode Island Co.*, 28 R.I. 186, 66 A. 202 (1907).

30. See *Orlo v. Connecticut Co.*, 128 Conn. 231, 21 A.2d 402 (1941); *Robb v. Pennsylvania R.R.*, 58 Del. 454, 210 A.2d 709 (1965); *Bowman v. Williams*, 164 Md. 397, 165 A. 182 (1933); *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935); 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 18.4, at 1034 (1956).

31. *Wallace v. Coca-Cola Bottling Plants, Inc.*, 269 A.2d 117 (Me. 1970); *Daley v. LaCroix*, 384 Mich. 4, 179 N.W.2d 390 (1970); *Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84 (1970).

32. PROSSER, *supra* note 12, § 54, at 332; but see *Gilliam v. Stewart*, 291 So. 2d 593 (Fla. 1974).

33. *Robb v. Pennsylvania R.R.*, 58 Del. 454, 210 A.2d 709 (1965). See also *Murphy v. Tacoma*, 60 Wn. 2d 603, 620-21, 374 P.2d 976, 987-88 (1962); Brody, *Negligently Inflicted Psychic Injuries: A Return to Reason*, 7 VILL. L. REV. 232, 238-39 (1961).

34. 216 Wis. 603, 258 N.W. 497 (1935).

In contrast to this restrictive American approach is a line of English cases³⁵ beginning with the decision of *Hambrook v. Stokes Brothers*,³⁶ which has extended the duty of due care to all persons whom the defendant should reasonably have anticipated to be within the zone of danger. The court in *Hambrook* allowed recovery by a mother who suffered severe shock resulting in death upon learning that her child had been injured a few moments earlier.

Eighteen years later, recovery was denied in *Bourhill v. Young*³⁷ where emotional injury had resulted in a stillbirth 1 month after the incident which had caused the original fright. As indicated by the subsequent decision of *King v. Phillips*,³⁸ the legal effect was not an overruling of *Hambrook*, however. Rather, the emotional injury in *Bourhill* had not been shown to be foreseeable.

III. REJECTION OF THE ZONE OF DANGER STANDARD:

Dillon v. Legg

A 1968 decision by the California Supreme Court, *Dillon v. Legg*,³⁹ represents the first acceptance by an American court of the liberal English approach. In *Dillon*, the negligent driving of the defendant resulted in the death of the plaintiff's daughter, but the plaintiff mother had not been physically endangered by the defendant.⁴⁰ However, a second daughter was arguably within the zone of danger created by the defendant's conduct. Both the mother and the second daughter sought to recover for shock and injury to their nervous systems. The trial court, relying on an earlier California case, *Amaya v. Home Ice, Fuel & Supply Co.*,⁴¹ invoked the zone of danger rule to dismiss the mother's claim for failure to state a cause of action, but

35. *Hambrook v. Stokes Brothers*, [1925] 1 K.B. 141 (C.A. 1924); *Bourhill v. Young*, [1943] A.C. 92 (Scot. 1942); *King v. Phillips*, [1953] 1 Q.B. 429 (C.A.); *Boardman v. Sanderson*, [1964] 1 W.L.R. 1317 (C.A. 1961); *Chadwick v. British Rys. Bd.*, 1 W.L.R. 912 (1967).

36. [1925] 1 K.B. 141 (C.A. 1924).

37. [1943] A.C. 92 (Scot. 1942).

38. [1953] 1 Q.B. 429 (C.A.).

39. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

40. *Id.* at —, 441 P.2d at 915, 69 Cal. Rptr. at 75.

41. 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

allowed the sister's claim because she had allegedly been within the danger zone. Noting the strikingly disparate treatment which would have been accorded two similarly situated plaintiffs if the zone of danger rule were applied, the *Dillon* court overturned the zone of danger test.⁴²

In response to the contention that some form of objective standard was needed by the court to effectively prevent exposing the defendant to potentially unlimited liability, the *Dillon* court stressed that

*[t]he alleged inability to fix definitions for recovery on the different facts of future cases does not justify the denial of recovery on the specific facts of the instant case; in any event, proper guidelines can indicate the extent of liability for such future cases.*⁴³

The court was satisfied that the general tort test of foreseeability of injury represented a viable alternative to the inflexible zone of danger standard.⁴⁴ In order to insure that the defendant's liability would be confined within reasonable dimensions, however, the court proceeded to supplement the foreseeability test with certain stipulated factors to be considered by a trial court in its determination of whether the injury was foreseeable:

- (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 the 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.⁴⁵

It was clear that the court did not intend merely to replace one

42. 68 Cal. 2d at ____, 441 P.2d at 915, 69 Cal. Rptr. at 75:

[W]e can hardly justify relief to the sister for trauma which she suffered upon apprehension of the child's death and yet deny it to the mother merely because of a happenstance that the sister was some few yards closer to the accident. The instant case exposes the hopeless artificiality of the zone-of-danger rule.

43. *Id.* at ____, 441 P.2d at 919, 69 Cal. Rptr. at 79 (italics in original).

44. *Id.* at ____, 441 P.2d at 924, 69 Cal. Rptr. at 84.

45. *Id.* at ____, 441 P.2d at 920, 69 Cal. Rptr. at 80.

inflexible rule with another of equal rigidity.⁴⁶ A trial court would address, but not limit the inquiry to the enumerated factors. The totality of the circumstances in each individual case would be taken into consideration to determine whether the harm had been reasonably foreseeable.⁴⁷

Actual manifestation of physical injury caused by the distress was not included among the factors listed by the *Dillon* court. However, the fact of physical injury to the plaintiff in *Dillon* was noted, and the court expressly restricted its decision to cases involving that characteristic.⁴⁸

IV. THE PROGENY OF *Dillon*

A. *Other Jurisdictions*

The reaction to the approach taken in the *Dillon* case has been varied. Its approach was promptly rejected by three states,⁴⁹ although a number of later decisions have followed *Dillon* and replaced the zone of danger standard.⁵⁰ The *Dillon* rationale was unqualifiedly rejected by the New York Court of Appeals in *Tobin v. Grossman*.⁵¹ Factually, the two cases were substantially similar. However, in contrast to the contemporaneous witnessing of the injury by the plaintiff in *Dillon*, the plaintiff in *Tobin* only observed her child's condition immediately following the accident. Emerging as the dominant concern of the New York Court of Appeals was subjection of the defendant to potentially unrestricted liability. The court was unpersuaded that the *Dillon* test of foreseeability represented

46. "[N]o immutable rule can establish the extent of that obligation for every circumstance of the future. We can, however, define guidelines which will aid in the resolution of such an issue as the instant one." *Id.*

47. "[I]t contemplates that courts, on a case-to-case basis, analyzing all the circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen." *Id.* at ___, 441 P.2d at 921, 69 Cal. Rptr. at 81.

48. *Id.* at ___, 441 P.2d at 920, 69 Cal. Rptr. at 80.

49. *Jelley v. LaFlame*, 108 N.H. 471, 238 A.2d 728 (1968); *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969); *Guilmette v. Alexander*, 128 Vt. 116, 259 A.2d 12 (1969). *See also* *White v. Diamond*, 390 F. Supp. 867 (D. Md. 1974) (invoking the zone of danger rule under Maryland law to deny recovery to the parents of a child who died as a consequence of the alleged combined negligence of a physician and nursing home); *Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84 (1970) (reaffirming the zone of danger rule without reference to *Dillon*).

50. *See* note 55 *infra*.

51. 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

a viable standard for determining whether to compensate the plaintiff while simultaneously preventing excessive liability for the defendant. Underscoring its dissatisfaction with the general negligence test, the *Tobin* court stated:

If foreseeability be the sole test, then once liability is extended the logic of the principle would not and could not remain confined. It would extend to older children, fathers, grandparents, relatives, or others *in loco parentis*, and even to sensitive caretakers, or even any other affected bystanders.⁵²

Paralleling the *Tobin* case was the Vermont decision of *Guilmette v. Alexander*.⁵³ In *Guilmette* the plaintiff was present and actually observed her child being struck by the defendant's vehicle. The decision emphasized the lack of any duty owing to a bystander unless he had been personally imperiled by the defendant's negligence. If the observance of harm to another is from a secure vantage point, no duty has been breached. By 1975, North Dakota and Washington,⁵⁴ upon reconsideration of the danger zone rule, had aligned themselves with New York in rejecting the California position.

In the 1970 case of *Rodrigues v. State*,⁵⁵ Hawaii became the

52. *Id.* at 616, 249 N.E.2d at 423, 301 N.Y.S.2d at 559.

53. 128 Vt. 116, 259 A.2d 12 (1969).

54. *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678, 684 (N.D. 1972); *Grimsby v. Samson*, 85 Wn. 2d 52, 57, 530 P.2d 291, 294 (1975).

55. 52 Hawaii 156, 472 P.2d 509 (1970). Subsequent decisions expanding recovery beyond that permitted under the zone of danger test are: *D'Amical v. Alvarez Shipping Co.*, 31 Conn. Supp. 164, 326 A.2d 129 (Super. Ct. Fairfield County 1973); *Toms v. McConnell*, 45 Mich. App. 647, 207 N.W.2d 140 (1973); *D'Ambra v. United States*, ___ R.I. ___, 338 A.2d 524 (1975); *Hughes v. Moore*, 214 Va. 27, 197 S.E.2d 214 (1973).

See also *Wallace v. Coca-Cola Bottling Plants, Inc.*, 269 A.2d 117 (Me. 1970). No issue of a danger zone was presented in *Wallace*, but recovery was allowed because the plaintiff became ill from the emotional effect of discovering a prophylactic in a bottled soft drink which he had been drinking. The court adopted the general test of foreseeability:

We adopt the rule that in those cases where it is established by a fair preponderance of the evidence there is a proximate causal relationship between an act of negligence and reasonably foreseeable mental and emotional suffering by a reasonably foreseeable plaintiff, such proven damages are compensable

Id. at 121. However, the adoption of negligence principles was qualified by the warning: "In applying this rule, however, we recognize that it must be so limited within the bounds of foreseeability as to preclude a host of false and groundless claims." *Id.* Accordingly, it is uncertain under this decision whether a plaintiff bystander would recover for the emotional distress of observing physical injury to another.

first state to follow *Dillon* when the supreme court adopted the reasonable man standard⁵⁶ and applied it to determine liability for mental distress. The plaintiff had alleged that due to the state's negligence, a culvert had overflowed and flooded his recently constructed home. Representing a substantial liberalization of *Dillon*, damage to property was equated with physical injury to a closely related person as a cause of emotional distress.⁵⁷ Also, the guiding factors of *Dillon* were not referred to. It was the unqualified opinion of the *Rodrigues* court that the "interest in freedom from negligent infliction of serious mental distress [was] entitled to independent legal protection."⁵⁸ And, significantly, the court did not require any threshold showing of physical effects resulting from the distress.⁵⁹ Thus, Hawaii became the sole jurisdiction to allow recovery without a showing of physically manifested harm.

A different approach was taken by the Federal District Court of Rhode Island in the case of *D'Ambra v. United States*.⁶⁰ Factually, *D'Ambra* was more akin to the *Dillon* case than to *Tobin*, in that the plaintiff contemporaneously ob-

In *Dave Snelling Lincoln-Mercury v. Simon*, 508 S.W.2d 923 (Tex. Civ. App. 1974), the court was of the view that the zone of danger standard was not applicable on the facts. Reviewing Texas decisions, the court noted that while the existence of the "arbitrary limitation" (zone of danger) test had been recognized in a prior case, it had not been endorsed by the Texas Supreme Court, and other jurisdictions had rejected it. *Id.* at 925.

56. 52 Hawaii at ____, 472 P.2d at 520. Applying the reasonable man test and the concomitant requirement of foreseeability in a negligence suit, recovery was denied in *Kelley v. Kokua Sales & Supply, Ltd.*, ____, Hawaii ____, 532 P.2d 673 (1975), where the court ruled that emotional harm was not reasonably foreseeable. In that case, the plaintiff's decedent, upon learning in California of the death of two relatives in a Hawaiian auto collision, died of a heart attack. It was held that the affected party must be located within a reasonable distance of the accident site.

57. Hawaii has also held that the lack of a blood relationship between the witnessing plaintiff and the victim would not preclude recovery. *Leong v. Takasaki*, 55 Hawaii 398, 520 P.2d 758 (1974).

58. 52 Hawaii at ____, 472 P.2d at 520.

59. *Id.* at ____, 472 P.2d at 519.

60. 354 F. Supp. 810 (D.R.I. 1973). The decision of the district court was appealed to the Court of Appeals for the First Circuit, which certified the question of bystander recovery to the Rhode Island Supreme Court. *D'Ambra v. United States*, 481 F.2d 14 (1st Cir.), *cert. denied*, 414 U.S. 1075 (1973). The Rhode Island Supreme Court held that the plaintiff had stated a cause of action. While affirming the zone of danger test, an exception was engrafted where a mother had observed the death of her child caused by the defendant's negligence. *D'Ambra v. United States*, ____, R.I. ____, 338 A.2d 524 (1975).

served the injury to her infant child.⁶¹ While endorsing the essence of *Dillon*, the court was troubled by its analysis of foreseeability. Reflecting its dissatisfaction with the sufficiency of predicating recovery on foreseeability of injury alone, the court supplemented the *Dillon* criteria by requiring an evaluation of foreseeability of presence.⁶² The court's objective was to more definitively establish the limits of the defendant's liability.⁶³ Feeling that the issue of presence merited independent consideration, the court proceeded to set out a series of factors which would serve to aid that evaluation.⁶⁴

In requiring an independent analysis of the foreseeability of presence, the *D'Ambra* court reasoned that the presumption of parental presence indulged in by *Dillon*⁶⁵ was unjustified and that the issue of presence should be addressed separately. Accordingly, as was stated by the court:

Such restrictions [the *Dillon* criteria] are necessary in order to avoid unlimited liability for it is foreseeable that the injury or death of a child will have an impact on a parent However, . . . the

61. Plaintiff had been talking with a neighbor when she heard the sound of a collision and turned to see defendant's mail truck run over her child. However, contemporaneous observation of the accident was not considered to be critical because "it is foreseeable that the injury or death of a child will have an impact on a parent, whether or not he or she contemporaneously experiences the accident." 354 F. Supp. at 819.

62. *Id.* See also *Leong v. Takasaki*, 55 Hawaii 398, 520 P.2d 758 (1974), where the separate consideration of the question of presence was incorporated into Hawaii's general test of foreseeability.

63. The court concluded:

Where the cause of action is circumscribed by the *Dillon* criteria and the requirement of the foreseeability of plaintiff's presence, unlimited liability, and therefore burdensome and disproportionate liability, is unlikely.

354 F. Supp. at 820.

64. (1) The age of the child;

(2) The type of neighborhood in which the accident occurred;

(3) The familiarity of the tortfeasor with the neighborhood;

(4) The time of day; and

(5) All other circumstances which would have put the tortfeasor on notice of the likely presence of a parent.

Id.

65. That presumption was implicit in the statement of the court that: "Surely the negligent driver who causes the death of a young child may reasonably expect that the mother will not be far distant and will upon witnessing the accident suffer emotional trauma." 68 Cal. 2d at ____, 441 P.2d at 921, 69 Cal. Rptr. at 81, citing 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 16.15, at 1039 (1956); PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 55, at 353 (3d ed. 1964).

indispensable further prerequisite for the creation of a cause of action is the foreseeability of the presence of the parent.⁶⁶

It is submitted, however, that it is preferable to view the foreseeability of presence as integrated into the overall analysis of foreseeability of injury, rather than framing it as a prerequisite to finding the latter. The third *Dillon* criterion, closeness of family relationship, assures that foreseeability of presence will be addressed in the course of the broader determination of foreseeability of injury. Accordingly, a finding of substantial remoteness of family relationship would indirectly serve to deny recovery on the grounds that the presence of the plaintiff was unforeseeable.

The California court's presumption of presence in *Dillon* was limited to that of a parent⁶⁷ and would not encompass a more distant relative. But actual foreseeability would remain as a variable to be analyzed in each case, under the *Dillon* test. No distinction is drawn between the two classes of plaintiffs on the issue of the foreseeability of presence. The issue is indirectly confronted for a member of either class in the consideration of the plaintiff's relationship to the victim. However, under the *D'Ambra* rationale, a suit involving a non-parent plaintiff would constrain *a fortiori* a separate evaluation of the foreseeability of presence.

By concentrating on the parental relationship, the *D'Ambra* decision could potentially limit the scope of a defendant's liability in future cases to parents of an injured child. In setting out the standard for the analysis of presence, the court indicated:

Once presence of the *parent* at the accident or within the immediate vicinity is established, the shock and trauma of a *parent* who sees his child killed or injured is easily foreseeable. It is the presence of the *parent* that may or may not be foreseeable⁶⁸

66. 354 F. Supp. at 819.

67. 68 Cal. 2d at ____, 441 P.2d at 921, 69 Cal. Rptr. at 81: [O]bviously defendant is more likely to foresee that a mother who observes an accident affecting her child will suffer harm than to foretell that a stranger witness will do so

Surely the negligent driver who causes the death of a young child may reasonably expect that the mother will not be far distant and will upon witnessing the accident suffer emotional trauma.

68. 354 F. Supp. at 819 (emphasis added).

In contrast, the criteria enumerated by *Dillon* contain no reference to a parental relationship. Accordingly, the prospect of a finding of foreseeability based on another type of family relationship, *e.g.*, brother-sister, is left open for future deliberation, and recovery by a non-parent relative is not foreclosed.

The fear of potentially unlimited liability motivated the *D'Ambra* court to qualify its adoption of the *Dillon* standard. In its view, only with this qualification could liability be contained within reasonable dimensions. However, that contention is belied by the restraint which has been exercised in jurisdictions adhering to the negligence standard. Indeed, the *D'Ambra* court itself remarked⁶⁹ that the effect has not been the imposition of undue liability either in England⁷⁰ under the foreseeability standard or by the lower California courts⁷¹ in the wake of *Dillon*.

B. California Cases

In California, during the 7 years following *Dillon*, seven cases have been considered involving claims seeking recovery for emotional distress. Six failed to come within the *Dillon* criteria,⁷² while the seventh, *Archibald v. Braverman*,⁷³ permitted recovery by a liberalization of the requirement of contemporaneous observance of the accident.

In *Archibald*, the plaintiff did not actually witness the injury to her son but was attracted to the scene of the accident

69. "[T]he spectre of burdensome and unlimited liability has not been borne out in the two jurisdictions that have utilized the negligence approach in assessing these mental distress claims—England and California." *Id.* at 820.

70. See cases cited note 35 *supra*.

71. See notes 72 and 73 *infra*.

72. *Capelouto v. Kaiser Foundation Hosp.*, 7 Cal. 3d 889, 500 P.2d 880, 103 Cal. Rptr. 856 (1972) (gradually developing condition rather than a sudden, traumatic accident); *Hair v. County of Monterey*, 45 Cal. App. 3d 538, 119 Cal. Rptr. 639 (Ct. App. 1975); *Powers v. Sissoev*, 39 Cal. App. 3d 865, 114 Cal. Rptr. 868 (Ct. App. 1974) (no contemporaneous observation); *Jansen v. Children's Hosp. Medical Center*, 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (Ct. App. 1973) (gradually developing condition rather than a sudden, traumatic accident); *Wynne v. Orcutt Union School Dist.*, 17 Cal. App. 3d 1108, 95 Cal. Rptr. 458 (Ct. App. 1971) (absence of an accident); *Deboe v. Horn*, 16 Cal. App. 3d 221, 94 Cal. Rptr. 77 (Ct. App. 1971) (no contemporaneous observation).

73. 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (Ct. App. 1969).

by the sound of an explosion. The court felt that the time lapse was short enough to bring the case within the *Dillon* rule.⁷⁴

While the requirement of a contemporaneous witnessing was liberalized, it is evident that the court's conclusion demonstrates the continued reliance on proximity in time as a critical consideration. The emphasis on the observation coinciding closely with the injury emphasizes the importance of the second *Dillon* factor. Had the time element been strictly applied in *Archibald*, an arbitrary denial of relief would have resulted. It is the desire to prevent just such inequity that has been the catalyst for the movement away from excessively rigid standards such as the zone of danger test.

The apprehension expressed by the New York court in *Tobin*—that “[a]ny rule based solely on eyewitnessing the accident could stand only until the first case comes along in which the parent is in the immediate vicinity but did not see the accident”⁷⁵—was realized in the *Archibald* decision. However, the feared domino effect, whereby a progressively greater time lag would be tolerated, with the factor of timing eventually becoming irrelevant, has not materialized.

V. THE WASHINGTON POSITION

The Supreme Court of Washington first adopted the zone of danger rule in the 1916 decision of *O'Meara v. Russell*⁷⁶ and has refused to adopt a more liberal approach on every subsequent occasion. The latest reaffirmation of the rule was in the 1975 decision of *Grimsby v. Samson*.⁷⁷ In *Grimsby*, the plaintiff alleged that his wife died as a result of the negligent and reckless failure by a doctor and a hospital to provide needed medical care, and that he consequently suffered severe mental anguish with accompanying physical injury.⁷⁸

In its discussion of negligent infliction of mental distress, the *Grimsby* court focused on the issue of unlimited liability and reviewed the opposing positions of the *Tobin* and *Dillon*

74. *Id.* at ___, 79 Cal. Rptr. at 725.

75. 24 N.Y.2d at 617, 249 N.E.2d at 423, 301 N.Y.S.2d at 560.

76. 90 Wash. 557, 156 P. 550 (1916).

77. 85 Wn. 2d 52, 530 P.2d 291 (1975).

78. *Id.* at 53, 530 P.2d at 292.

courts. It concluded that the more conservative *Tobin* case represented the preferred view and that *Dillon* did not provide a viable or effective means of restricting liability.⁷⁹

The *Grimsby* court did, however, recognize⁸⁰ the tort of outrage, as outlined in Restatement (Second) of Torts.⁸¹ In accordance therewith, a cause of action was deemed stated where the complaint was of mental anguish accompanied by physical injury suffered by reason of the defendant's reckless and outrageous conduct.⁸²

Concurrently holding on the same facts that intentional conduct justifies liability, while negligent action does not, illustrates the weakness of the rationale underlying the zone of danger standard. The potential for unlimited liability and feigned claims is of equal gravity in both situations. As stated by the dissenting opinion of *Amaya v. Home Ice, Fuel & Supply Co.*,⁸³ in its criticism of the then existing zone of danger standard in California:

The line between liability and nonliability in the intentional tort cases, that is who may sue for shock because they saw injuries to whom, is precisely the same as it is in the negligent tort cases. It is no more difficult to draw that line in the negligent tort cases than it is in the intentional tort cases.⁸⁴

The Washington court's contention in *Grimsby* that the Restatement elements of the tort of outrage allay the fear of infinite liability⁸⁵ cannot be supported. Requiring intentional and outrageous conduct and severe emotional distress will certainly limit the circumstances under which a tortfeasor may be liable; however, the *extent* of that liability is unrelated to those elements.

It is significant that the fact pattern of *Grimsby* differed substantially from the usual situation encountered in mental

79. *Id.* at 57, 530 P.2d at 294.

80. *Id.* at 60, 530 P.2d at 296.

81. RESTATEMENT (SECOND) OF TORTS §§ 46(1), (2), (2)(a) (1965).

82. 85 Wn. 2d at 60, 530 P.2d at 295.

83. 59 Cal. 2d 295, —, 379 P.2d 513, 525, 29 Cal. Rptr. 33, 45 (1963) (dissenting opinion). The reasoning of the dissent foreshadowed the rejection of the zone of danger standard in *Dillon* 5 years later.

84. *Id.* at —, 379 P.2d at 528, 29 Cal. Rptr. at 48.

85. 85 Wn. 2d at 59-60, 530 P.2d at 295.

distress cases, that of contemporaneous observation of physical injury to another. As underscored by the dissenting opinion, the passive nature of defendant's conduct in *Grimsby* was in sharp contrast to the active misconduct in the *Dillon* case. That distinction had served as the basis for the disposition of the predecessor Washington case of *Schurk v. Christensen*,⁸⁶ where the cause of action against passively acting defendants was dismissed, while the motion to dismiss was denied as to the other defendant, whose conduct had been active.

In view of the fact that the doctor and hospital in *Grimsby* had only passively withheld medical care, a future Washington case where a fact pattern in the mold of *Dillon* is presented could serve as the basis for a reconsideration of the *Grimsby* holding. The court would be able to effectively distinguish *Grimsby* on its facts. The compelling nature of direct, active negligence resulting in contemporaneous injury would serve as a more substantive basis for the evaluation of the *Dillon* standard which was prematurely rejected in the *Grimsby* case.

VI. CONCLUSION

It can no longer be ignored or denied that grief induced by injury to a close relative may have a crippling effect. This is no less true where the party observing or learning of the injury was unconcerned for his own security. The belief that requiring one to have been physically within the danger zone created by the tortfeasor's conduct will result in compensation to the deserving plaintiff is a fiction. Indulging this fiction impedes, rather than furthers, the pursuit of equity.

In fact, courts are cognizant of the arbitrary effect of the zone of danger test. Its continued existence stems from a fear of imposing an intolerable burden of liability upon the tortfeasor. The effect is that the tortfeasor enjoys a disproportionate degree of protection when weighed against the interests of the unredressed victim.

Upon review of the cases decided in those jurisdictions which have eliminated the danger zone constraint, it is evident

86. 80 Wn. 2d 652, 497 P.2d 937 (1972). The opinion expressed a willingness to reassess, in a future case, the zone of danger rule and the related policy issues of fraudulent claims and the potential for unlimited liability.

that the journey into the "fantastic realm of infinite liability"⁸⁷ has failed to materialize. Rather, the decisions in both England and the United States rejecting the zone of danger rule reflect a deliberate, case by case approach to the determination of whether a duty exists toward the plaintiff. Thus, the door has been properly opened to the meritorious plaintiff, and to persist in invoking the zone of danger test to foreclose redress is unjustifiable.

Robert Burley, Jr.

87. *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, ___, 379 P.2d 513, 525, 29 Cal. Rptr. 33, 45 (1963).

