Valparaiso University Law Review

Volume 30
Number 3 *Summer 1996*

*pp.*913-964

Summer 1996

It's All Relative: A Graphical Reasoning Model for Liberalizing Recovery for Negligent Infliction of Emotional Distress Beyond the Immediate Family

Dennis G. Bassi

Notes

IT'S ALL RELATIVE: A GRAPHICAL REASONING MODEL FOR LIBERALIZING RECOVERY FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS BEYOND THE IMMEDIATE FAMILY*

I. INTRODUCTION

Richard Elden and Linda Ebeling, an engaged couple who lived together, were riding in a car when they were broadsided by a truck driven by Robert Sheldon.[1] Ebeling was thrown from the car and suffered massive injuries which resulted in her death a few hours later.[2] Elden sued Sheldon for negligent infliction of emotional distress (NIED).[3] In *Elden v. Sheldon*, the California Supreme Court denied her of any recovery, relying on policy considerations, primarily that of the states's interest in the marriage relationship.[4] The court held that to the extent that unmarried cohabitants are granted the same rights as married persons, the state's interest in promoting marriage is inhibited.[5]

In rejecting the cohabitant's claim in *Elden*, the California Supreme Court stressed the need for a "sufficiently definite and predictable test that could be consistently applied to similar fact patterns from case to case."[6] As courts address the outer reaches of bystander recovery, a lack of functional guidelines

---

* This note is written in honor of my father, the late Guy Bassi, who made the pursuit of perfection a routine procedure, and whose concept of the family relationship was broad enough to include any human being with heart and thought to share.

1. Elden v. Sheldon, 758 P.2d 582, 582 (Cal. 1988).

2. *Id.*

3. *Id.* at 583.

4. *Id.* at 586. This policy in favor of formal marriage was expressed in the abolition of common law marriage in 1895; *see* Estate of Abate, 333 P.2d 200 (Cal. 1958) and Norman v. Thomson, 54 P. 143 (Cal. 1898), and it has been reaffirmed in numerous cases since that time. *See, e.g.*, Ledger v. Tippitt, 164 Cal. App. 3d 625 (Cal. Ct. App. 1985); Norman v. Unemployment Ins. Appeals Bd., 663 P.2d 904 (Cal. 1983); Deyoe v. Superior Court, 74 P. 28 (Cal. 1903).

5. Elden v. Sheldon, 758 P.2d 582, 586 (Cal. 1988).

6. *Id.* at 582, 587 (holding that application of such factors as the sexual fidelity of the parties and their emotional and economic ties would require a court to undertake a massive intrusion into the private life of the partners, and application of these factors would not provide a sufficiently definite and predictable test).

results in a patchwork of rulings and inconsistent opinions concerning who shall recover. Consequentially, judicial efficiency suffers as each court responds to a claim for NIED in a different manner. Emotional distress has been recognized in the United States for over one hundred years as a distinct item of damage for which recovery may be obtained.[7] However, courts have historically allowed plaintiffs to maintain a cause of action for mental distress, either intentionally or negligently inflicted, only in the presence of special limiting or qualifying factors.[8] This Note will show that these factors are obstacles to recovery, artificial devices to guarantee the genuineness of the claim and, at times, may actually foreclose relief to a genuine claim.[9]

In general, if no independently protected right has been violated, mental distress alone has not been deemed sufficient to create a cause of action.[10] Invasion of an individual's right to peace of mind was first recognized as the result of intentional, rather than negligent, conduct.[11] Therefore, emotional distress as a basis for a negligence action can be placed in perspective by reviewing the development of the common law recognition of a protectable interest in individual peace of mind.[12]

Although courts have generally conceded that the interest in personal emotional stability is worthy of legal protection against unreasonable conduct, initially emotional distress was recognized as an item of damages and did not in

---

7. *See* Stuart v. Western Union Tel. Co., 18 S.W. 351 (Tex. 1885).

8. Joseph A. Strubbe, *Should Short-Term Mental Distress Damages Be Compensable? The Air Crash Case*, 60 CHI.-KENT L. REV. 971 (1984). Traditional obstacles to recovery for emotional distress are: 1) the requirement that the plaintiff suffer a physical injury or impact; 2) the requirement that the plaintiff be present in the zone of danger where the conduct causing the injury took place; 3) the requirement of a blood relationship between the plaintiff and the victim of the injury; 4) the requirement of a physical manifestation of the emotional distress; 5) the requirement of sensory and contemporaneous observance of the injury; and 6) the requirement that the emotional distress be an element of damage from a breach of other law, such as a breach of contract. *See generally* Leong v. Takasaki, 520 P.2d 758 (Haw. 1974).

9. *Leong*, 520 P.2d at 763.

10. Comment, *Negligently Inflicted Mental Distress: The Case For An Independent Tort*, 59 GEO. L.J. 1237, 1238 (1971). Mental suffering is recompensed only as one element of the damages awarded for the violation of a protected right. *Id.*

11. Thing v. La Chusa, 771 P.2d 814, 816 (Cal. 1989).

12. *Id.* The interest to be protected is the right to be free from socially unacceptable conduct that seriously affects another's peace of mind. *Id.* Express or implicit recognition that peace of mind warrants legal protection is found in recovery for emotional distress as an aggravation of damages sought under intentional tort theories. *Id.* (quoting 5 BERNARD E. WITKIN, SUMMARY OF CAL. LAW-TORTS § 402, at 483 (9th ed. 1988)). With few exceptions, causing mental distress did not itself create a right of action, and where mental distress alone exists the common law rarely permitted recovery of damages. *Id.*

itself create a right of action.[13] As the type of conduct that was actionable for a claim of emotional distress expanded from intentional acts to negligent acts, limitations on recovery were devised to prevent fraudulent claims. A doctrine known as the "Physical Impact Rule" limited recovery for NIED to cases where the injured party sustained a contemporaneous physical impact or injury.[14] Abuse of the impact rule, as well as advances in medical science permitting identification of psychic injury, led to abandonment of the rule by most of the courts that had once embraced it.[15] As use of the "physical impact rule" declined, the "zone of danger rule" came into widespread use.[16] The "zone of danger rule" allows a witness to recover for mental suffering without a contemporaneous physical impact.[17]

---

13. Stuart v. Western Union Tel. Co., 18 S.W. 351, 353 (Tex. 1885) (holding that damages for mental anguish may be recovered as an element growing out of a breach of contract action). *See generally* PROSSER, LAW OF TORTS § 12 (4th ed. 1971) (stating that historically emotional distress was treated as a "parasitic" item of damages, requiring a host cause of action as a basis for establishing a right to recovery). Recognition of emotional distress as a compensable injury resulted in the focus on the defendant's conduct, and development of the tort now known as intentional infliction of emotional distress. *Thing*, 771 P.2d at 817.

14. 1 MARILYN MINZER ET AL., DAMAGES IN TORT ACTIONS § 5.13, at 5-25 (1992 & Supp. May 1992).

15. *Id.* at 5-27. *See also* Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396 (1994) (stating that most jurisdictions have abandoned the physical impact test). For examples of cases from at least five states that continue to adhere to the physical impact test, see Ob-Gyn Assocs. of Albany v. Littleton, 386 S.E.2d 146 (Ga. 1989); Shuamber v. Henderson, 579 N.E.2d 452 (Ind. 1991); Anderson v. Scheffler, 752 P.2d 667 (Kan. 1988); Deutsch v. Schein, 597 S.W.2d 141 (Ky. 1980); Hammond v. Central Lane Communications Ctr., 816 P.2d 593 (Ore. 1991).

16. 1 MINZER ET AL., *supra* note 14, § 5.14, at 5-50. The "zone of danger test" currently is followed in 14 jurisdictions. *See* Keck v. Jackson, 593 P.2d 668 (Ariz. 1979); Towns v. Anderson, 579 P.2d 1163 (Colo. 1978); Robb v. Pennsylvania R. Co., 210 A.2d 709 (Del. 1965); Williams v. Baker, 572 A.2d 1062 (D.C. 1990); Rickey v. Chicago Transit Auth., 457 N.E.2d 1, (Ill. 1983); Resavage v. Davies, 86 A.2d 879 (Md. 1952); Stadler v. Cross, 295 N.W.2d 552 (Minn. 1980); Asaro v. Cardinal Glennon Memorial Hosp., 799 S.W.2d 595 (Mo. 1990); Bovsun v. Sanperi, 461 N.E.2d 843 (N.Y. 1984); Whetham v. Bismarck Hosp., 197 N.W.2d 678 (N.D. 1972); Shelton v. Russell Pipe & Foundry Co., 570 S.W.2d 861 (Tenn. 1978); Boucher v. Dixie Medical Ctr., 850 P.2d 1179 (Utah 1992); Jobin v. McQuillen, 609 A.2d 990 (Vt. 1992); Garrett v. New Berlin, 362 N.W.2d 137 (Wis. 1985). *See Consolidated Rail Corp.*, 114 S. Ct. at 2396 n.9.

17. 1 MINZER ET AL., *supra* note 14, § 5.14, at 5-48 to 5-49. The "zone of danger rule" avoids the contemporaneous physical impact requirement, instead permitting plaintiffs to recover for their own mental suffering with resultant physical injury, provided they were within the zone of danger to their physical well-being at the time they sustained the fright, shock, or emotional distress giving rise to their claim. *Id.* The "zone of danger rule" has been adopted by many jurisdictions, including many which abandoned the impact rule, as well as those that rejected the impact rule from the outset. *Id.* at 5-50. Many jurisdictions have done so by adopting the Second Restatement of Torts § 436 (b) which is the essence of the zone of danger rule. *Id.*

However, as expansion of the cause of action for NIED continued, subsequent decisions of the courts created more uncertainty.[18] As this Note will point out, the "zone of danger" rule was abandoned as an arbitrary restriction on recovery, giving rise to the "zone of psychic risk," which assesses criteria of foreseeability under the circumstances of time, place, and relationship.[19] As the "zone of psychic risk" has been more widely applied, the class of individuals worthy of protection of personal emotional stability has expanded from the direct victim of unreasonable conduct, to the witness, or bystander, of such conduct.[20] An analysis of the relationship between bystander and victim creates the problem of assessing who should recover in a bystander NIED claim.[21]

---

18. *See infra* section III.B, notes 173-200 and accompanying text for an illustration of decisions inconsistent with the Dillon v. Legg, 441 P.2d 912 (Cal. 1968) guidelines.

19. Dillon v. Legg, 441 P.2d 912, 920 (Cal. 1968) (abandoning the zone of physical danger as an articulable means of assuring the genuineness of a bystander's claim, and replacing it with a proximity test geared to the psychic risk). The court held that the bystander must be in close physical proximity to the accident scene at the time of the occurrence of the accident underlying the claim for recovery. *Id.* The *Dillon* court intended that its requirement that the plaintiff-bystander's shock must have resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the accident serves as a means to deny recovery to persons who learn of the accident from others after its occurrence. *Id.* Portee v. Jaffee, 417 A.2d 521, 526 (N.J. 1980) (adopting a broadened rule of bystander recovery by concluding that the relationship-to-victim criteria is the most important of those designed to determine liability). "The law should find more than pity for one who is stricken by seeing that a loved one has been critically injured or killed." *Id.*

20. *See generally* 1 MINZER ET AL., *supra* note 14, § 5.21, at 5-59. Nearly half of the states now allow bystanders outside of the zone of danger to obtain recovery in certain circumstances for emotional distress brought on by witnessing the injury or death of a third party that is caused by the defendant's negligence. *See* Croft v. Wicker, 737 P.2d 789 (Alaska 1987); Thing v. La Chusa, 771 P.2d 814 (Cal. 1989); Champion v. Gray, 478 So. 2d 17 (Fla. 1985); Fineran v. Pickett, 465 N.W.2d 662 (Iowa 1991); Lejeune v. Rayne Branch Hosp., 556 So. 2d 559 (La. 1990); Cameron v. Pepin, 610 A.2d 279 (Me. 1992); Stockdale v. Bird & Son, Inc. 503 N.E.2d 951 (Mass. 1987); Nugent v. Bauermeister, 489 N.W.2d 148 (1992), *appeal denied*, 503 N.W.2d 904 (Mich. 1993); Entex, Inc. v. McGuire, 414 So. 2d 437 (Miss. 1982); Maguire v. State, 835 P.2d 755 (Mont. 1992); James v. Lieb, 375 N.W.2d 109 (Neb. 1985); Buck v. Greyhound Lines, Inc., 783 P.2d 437 (Nev. 1989); Wilder v. City of Keene, 557 A.2d 636 (N.H. 1989); Frame v. Kothari, 560 A.2d 675 (N.J. 1989); Folz v. State, 797 P.2d 246 (N.M. 1990); Johnson v. Ruark Obstetrics & Gynecology Assoc., 395 S.E.2d 85 (N.C. 1990); Paugh v. Hanks, 451 N.E.2d 759 (Ohio 1983); Sinn v. Burd, 404 A.2d 672 (Pa. 1979); Reilly v. United States, 547 A.2d 894 (R.I. 1988); Kinard v. Augusta Sash & Door Co., 336 S.E.2d 465 (S.C. 1985); Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993); Gain v. Carroll Mill Co., 787 P.2d 553 (Wash. 1990); Heldreth v. Marrs, 425 S.E.2d 157 (W.Va. 1992); Contreras v. Carbon County School District No. 1, 843 P.2d 589 (Wyo. 1992).

21. *See* 1 MINZER ET AL., *supra* note 14, § 5.24, at 5-95 (describing whether a particular bystander-victim relationship will, with the other *Dillon* criteria, give rise to a bystander cause of action depending primarily on the receptivity of a given court to recognize the relationship involved as one meriting legal support). "To date, unanswered is whether the relationship analysis might be extended to include non-family friends or even strangers under appropriate circumstances." *Id.*

This Note examines the responses of courts beyond the strict limitations of the immediate family to the right of a bystander to recover, and exposes the limitations inherent in requiring a blood, spousal or adoptive relationship. Further, this Note proposes an alternative approach for the legal recognition of a non-family bystander as a plaintiff worthy of recovery for NIED. In considering such an expansion, this Note advocates that the protection of one's emotional interests outweighs the burdens of imposing a new species of negligence liability.[22] The requirement that the plaintiff must be related to the victim by blood, marriage, or adoption in order to recover for NIED is overinclusive because it permits recovery when the suffering accompanies a legal or biological link between bystander and victim, regardless of whether the relationship between the two is estranged, alienated, or in some other way removed. Conversely, the requirement is underinclusive because it arbitrarily denies court access to persons with valid claims that they could prove if permitted to do so.[23] Development of new rules to determine the right of a bystander to recover raises the concern that if recovery for NIED is extended to a new class of bystanders, several problems will arise.[24]

This Note will show that traditional arguments against expanding the class of plaintiffs who may recover for the negligent infliction of mental harm beyond the immediate family are rarely justified. Just as parasitic damages and physical injury obscured the principles that best explained the holdings of the courts in non-bystander actions for NIED,[25] the requirement for a blood relationship obscures who is worthy of recovery in a bystander action. With a more general willingness to provide for liability, the character of the defendant's behavior, as well as the relationship between the victim and the bystander, become of prime importance and will serve to guarantee the genuineness of the claim.[26] An

---

22. Portee v. Jaffee, 417 A.2d 521, 528 (N.J. 1980). The court in *Jaffe* held that the interest in personal emotional stability is worthy of legal protection against unreasonable conduct, and that emotional stability is sufficiently important to warrant protection. *Id.* Further, limiting judicial redress to harm inflicted on intimate emotional bonds by the death or serious injury of a loved one serves to prevent liability from exceeding the culpability of defendant's conduct. *Id.*

23. St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 652 (Tex. 1987).

24. Leong v. Takasaki, 520 P.2d 758, 761 (Haw. 1974). The specific problems that courts have been concerned with are: 1) a fear of fraudulent claims; 2) the potential of unlimited and indefinite liability for every type of mental disturbance; 3) unforeseeability of the injury; and 4) the imposition of burdensome and disproportionate liability on the tortfeasor in relation to his culpability. *Id.*

25. Thing v. La Chusa, 771 P.2d 814, 817 n.2 (Cal. 1989). In many instances where the only substantial harm was emotional, recovery was allowed by finding some traditional legal peg on which to hang it. 2 HARPER ET AL., THE LAW OF TORTS 606-07 (2d ed. 1986). Thus, if the court could find a battery or trespass, however technical, it was much less reluctant to uphold a plaintiff's claim for mental suffering. *Id.* Gradually, however, the understanding grew that resort to such devices obscured the principle that best explained the holdings of the courts. *Id.*

26. *See supra* notes 8-9 and accompanying text.

expansion of the bystander recovery rule with a focus on the emotional ties between the bystander and victim, taken in context with the circumstances under which the bystander witnessed the negligent act, will protect the interest to be free of emotional distress.

Determining the genuineness of a claim of mental distress requires the development of general standards in a case-by-case analysis by focusing on the duty between the bystander and victim, rather than the tortfeasor and victim.[27] The definition of what constitutes a "family" has been rapidly changing in the last several years, with the rise of single parent households, foster parents, and relationships within the gay community.[28] The concerns of excessive litigation must be balanced against the rights of close family members, but the question of who qualifies as an individual who may recover under a tort action for NIED has been left up to the judge to decide. This Note will provide a set of rules that will employ "objective factors" other than the bystander-victim relationship itself, to assist courts in identifying those parties worthy of recovery.[29] Such

---

27. Such an analysis serves to validate those relationships that are sufficient to trigger a compensable level of emotional distress but which do not involve members of the "immediate family," thereby preventing worthy non-family members from being summarily precluded from recovery. *See* Sheila A. Hallahan, *The Survey Of New York Practice: Developments In The Law: The Appellate Division, Fourth Department, Declines To Expand The Scope Of The "Immediate Family" Requirement For Bystander Recovery Under The Negligent Infliction Of Emotional Distress Doctrine*, 67 ST. JOHN'S L. REV. 439, 445 (1993).

28. Note, *Looking For A Family Resemblance: The Limits Of The Functional Approach To The Legal Definition Of Family*, 104 HARV. L. REV. 1640, 1640 (1991). According to Census Bureau figures, the proportion of American households consisting of a married couple and their own minor children has declined from 44.2% in 1960 to 27.0% in 1988. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDIES SERIES P-23 No. 163, CHANGES IN AMERICAN FAMILY LIFE 10 (1989). In 1988, single parents with their own minor children constituted 27.3% of American households, more than double the number of single-parent families in 1970. *Id.* at 13. Between 1980 and 1985, the number of children living with a stepparent increased 11.6% from 6,082,000 to 6,789,000. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDIES SERIES, P-23 No. 162, STUDIES IN MARRIAGE AND THE FAMILY 28-29 (June 1989). The number of unmarried couple households consisting of two unrelated adults of the opposite sex (with or without children under 15 years old) rose from 523,000 in 1970 to 2,764,000 in 1989. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS SERIES P-20, No. 445, MARITAL STATUS AND LIVING ARRANGEMENTS 6 (March 1989). The actual number of heterosexual cohabitants may be higher because this estimate does not include households with more than two unrelated adults. *Id.* at 6 n.4. In the past, government population surveys have not included homosexual cohabitants. Reliable figures on the number of gays and lesbians living together are difficult to obtain, but many sources indicate that this number is clearly increasing. *See, e.g.*, Anne Strook, *Gay "Divorces" Complicated by Lack Of Laws*, SAN FRANCISCO CHRON., May 14, 1990, at A4 (noting that there are an increasing number of homosexuals involved in long-term relationships).

29. For a complete discussion of the "objective factors" see *infra* note 258 and accompanying text.

a reasoning model will bring consistency to future bystander recovery decisions in a judicially efficient manner.

In Section II, this Note explores the historical background of NIED as an independent tort.[30] Section III provides an overview of landmark decisions, from the seminal case of *Dillon v. Legg*,[31] which established the right of a plaintiff other than a direct victim of a negligent act to recover for NIED, to *Thing v. La Chusa*,[32] which imposed stricter standards on the *Dillon* guidelines in order to prevent further expansion beyond bystanders that had contemporaneously viewed the accident.[33] Section IV of this Note reviews the most recent expansion of the bystander recovery rule in *Dunphy v. Gregor*,[34] which further extended bystander recovery to include parties that are not immediate family members of the third party. Section IV also provides a summary of the various judicial opinions that set forth assorted judicial guideline provisions that influenced the *Dunphy* court to arrive at its decision.[35] Section IV concludes by analyzing the arguments used by the courts to grant recovery to bystanders that were not traditionally allowed relief.[36] Finally, Section V of this Note will survey policy considerations surrounding bystander claims in order to devise a model that provides various factors to be used in a case-by-case determination.[37] Section V will furnish a procedure that will reduce the use of a bright line rule to determine liability and will offer a more equitable solution to bystander recovery.[38] Further, by balancing the concerns of excessive litigation against the rights of bystanders in a close relationship that is not linked by blood, marriage, or adoption, this model will solve the problem of a lack of criteria for expanding bystander recovery, and will serve to achieve a cohesive policy regarding the desirability of recovery for certain classes of plaintiffs, instead of a patchwork of rulings on individual causes of action.

---

30. *See infra* section II, notes 39-103 and accompanying text.

31. 441 P.2d 912 (Cal. 1968). *See infra* section III.A.1, notes 110-23 and accompanying text.

32. 771 P.2d 814 (Cal. 1989). *See infra* section III.B, notes 173-200 and accompanying text.

33. *See infra* section III, notes 104-200 and accompanying text. The scope of section III begins with an analysis of *Dillon* because it was the first case to set out standards for bystander recovery. Section III ends with *Thing* because it was the first case from the same court to restrict the *Dillon* guidelines, indicating a pause in the trend of constant expansion of bystander recovery for NIED.

34. *See infra* section IV.A, notes 206-15 and accompanying text.

35. *Id.*

36. *See infra* section IV.B-C, notes 216-53 and accompanying text.

37. *See infra* section V, notes 254-96 and accompanying text.

38. *See infra* section V.B, notes 275-96 and accompanying text.

II. BACKGROUND OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

A. *History and Development of Negligent Infliction of Emotional Distress*

Damages for emotional distress have been recognized by the courts for years.[39] The types of mental or emotional injuries for which damages are presently recoverable include fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, and indignity, as well as physical pain.[40] As early as 1885, the Texas Supreme Court, in *Stuart v. Western Union Telegraph Company*,[41] recognized that mental suffering resulting from indignity was a compensable injury.[42] In *Stuart*, a telegraph office failed to deliver a message concerning the death of the plaintiff's brother, despite the plaintiff having informed Western Union of the status of his brother's health and his anxiety to hear the latest news.[43] The court, following an earlier decision in *Hays v. Railroad Company*,[44] held that mental distress could be an element of damages in a suit for negligence.[45] Even though the action in *Stuart* was one for a breach of contract, the decision recognized mental distress as a form of injury.[46] However, the emotional distress was viewed as the damage element to a breach of contract action, and not as an independent tort.[47] This stage in the development of NIED is viewed as significant because the action was authorized as an alternate dispute resolution mechanism, rather than a recognition of a right to mental tranquility.[48]

The Texas courts further liberalized the view on damages for emotional distress five years later in *Hill v. Kimball*.[49] In *Hill*, the plaintiff had a miscarriage upon witnessing the defendant assault two black men on her

---

39. *See* Stuart v. Western Union Tel. Co., 18 S.W. 351, 353 (Tex. 1885); Consolidated Traction Co. v. Lambertson, 36 A. 100 (N.J. 1896); Kentucky Traction & Terminal Co. v. Roman's Guardian, 23 S.W.2d 272 (Ky. 1929).

40. Deevy v. Tassi, 130 P.2d 389, 389 (Cal. 1942).

41. 18 S.W. 351, 353 (Tex. 1885).

42. *Id.*

43. *Id.* at 351.

44. *Id.* at 353.

45. The court stated that "pain of mind, anxiety, and all forms of distress peculiar to a sentient being have been held elements of actual damage in suits for injuries to the person through the negligence of others." Stuart v. Western Union Tel. Co., 18 S.W. 351, 353 (Tex. 1885).

46. *Id.*

47. *Id.* at 354 (holding that where mental distress alone exists, recovery for damages was not permitted pursuant to the "parasitic damages" doctrine, which has stood the test of time, and noting that courts in modern times still hesitate to award damages in the absence of a breach of another legal duty).

48. *See* Richard N. Pearson, *Liability to Bystanders For Negligently Inflicted Emotional Harm —A Comment On The Nature Of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 486 (1982).

49. 13 S.W. 59 (Tex. 1890).

property.[50] The Supreme Court of Texas held that no distinction existed between an injury resulting from intentional violence and one resulting from negligence.[51] Further, the plaintiff sustained a bodily injury by means of the operation of the mind and the suffering of the fright itself.[52] The *Hill* court moved closer to modern law by recognizing the infliction of emotional distress as an independent cause of action, rather than as a result of a violation of other laws.[53] This Section has discussed the early recognition of emotional distress as a compensable item of damage. Section II.B will present the means by which recovery for emotional distress was granted as courts continued to acknowledge NIED as an independent tort.

B. Traditional Mechanisms for Recovery

Acknowledgment by the courts that emotional injury by itself resulting from negligence merits compensation brought with it the notion that limits on such recovery must be devised to avoid fraudulent claims.[54] The first limitation placed on the right to recover for NIED was the "Physical Impact Rule" ("Impact Rule").[55] Under the impact rule, which originated in England, in order to recover for emotional distress, the plaintiff had to suffer physical

---

50. *Id.*

51. *Id.* at 59-60. The court considered such a distinction to be significant because under Texas law, a lawsuit concerning an injury resulting from negligence must be brought in the plaintiff's county of residence. *Id.* at 60. The court held that making no distinction was in the plaintiff's best interest as the injured party. *Id.*

52. *Id.* at 60. The court recognized that it may be more difficult to prove the connection between the alleged cause and the injury but held that, if the connection is proved and the injury is the proximate result of the cause, the court would not deny the action. *Id.* at 59. Further, the fact that it is more difficult to produce such an injury through operation of the mind affords no grounds for refusal of compensation. *Id.* Significantly, the court indicated that "probably" no action would lie when there was no injury except the suffering of the fright itself. *Id.*

53. Hill v. Kimball, 13 S.W. 59, 59 (Tex. 1890). This is in contrast to the *Stuart* court, which required a breach of contract as a host claim to a parasitic action for emotional distress. *See supra* notes 41-48. The *Hill* court declined to distinguish between an injury resulting from intentional violence and one resulting from negligence. *Hill*, 13 S.W. at 59.

54. Julie A. Davies, *Direct Actions For Emotional Harm: Is Compromise Possible?*, 67 WASH. L. REV. 1, 1 (1992).

55. Victorian Rys. Comm'rs v. Coultas, 13 App. Cas. 222 (Eng. 1888). In *Coultas*, a gatekeeper negligently allowed Mr. Coultas and his wife to drive their buggy across a railroad crossing as a locomotive came towards them. There was no collision; however, the plaintiffs suffered shock and other physical manifestations as a result of the occurrence. The court determined that the plaintiff's injuries normally would not occur as a result of the gatekeeper's negligent act, and concluded that an award of damages would extend liability for the act beyond the fault of the defendant. Shortly thereafter, American courts applied the reasoning of the *Coultas* court to similar claims. *See* Braun v. Craven, 51 N.E. 657 (Ill. 1898); Cleveland C.C. & St. L. Ry. Co. v. Stewart, 56 N.E. 917 (Ind. Ct. App. 1900); Spade v. Lynn & Boston R. Co., 47 N.E. 88 (Mass. 1897).

impact or injury which, in turn, produced the emotional distress.[56] Without any physical contact, no recovery was allowed for the mental pain and suffering.[57] The primary purpose for requiring physical contact has been to deter plaintiffs from fabricating claims for emotional distress.[58] However, because the impact rule is interpreted broadly, it has failed to prevent fraudulent claims.[59] The requirement has been satisfied by a host of impacts, ranging from the substantial to the trivial and ludicrous.[60]

Courts have also required physical impact because emotional injuries suffered in the absence of physical impact were not seen to be as foreseeable as the proximate consequences of the defendant's negligent conduct.[61] Further, since emotional injuries were often difficult to validate, the absence of physical impact could hinder the plaintiff's ability to prove that mental anguish was the consequence of the defendant's negligence.[62] However, recent medical studies have correlated emotional distress with various types of health problems, such as cancer, cardiovascular disease, diabetes and other illnesses.[63] These studies indicate that claims based on physical impact or injury should no longer be considered more valid than claims based on emotional injuries unaccompanied by impact.[64]

Another reason for perpetuating the impact rule was the belief that without a requirement of physical impact, a flood of litigation in bystander cases would occur.[65] However, according to the Florida District Court of Appeals in *Stuart*

---

56. *See, e.g.*, Beatty v. Buckeye Fabric Finishing Co., 179 F. Supp. 688, 697 (E.D. Ark. 1959); Morse v. Chesapeake & O Ry. Co., 77 S.W. 361, 362 (Ky. Ct. App. 1903).

57. *Beatty*, 179 F. Supp. at 697; *Morse*, 77 S.W. at 362.

58. *Stewart*, 56 N.E. at 920-21; *Spade*, 47 N.E. at 88-89; Mitchell v. Rochester Ry. Co., 45 N.E. 354, 354-55 (N.Y. 1896); Huston v. Borough of Freemansburg, 61 A. 1022, 1023 (Pa. 1905).

59. Courts have found the impact rule satisfied in minor contacts with the person which play no part in causing physical harm. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 331 (4th ed. 1971). *See, e.g.*, Kenney v. Wong Len, 128 A. 343 (N.H. 1925) (mouse hair in stew touched plaintiff's mouth); Zelinsky v. Chimics, 175 A.2d 351 (Pa. 1961) (jostling of occupants in automobile).

60. *See supra* note 59.

61. *See* Braun v. Craven, 51 N.E. 657 (Ill. 1898).

62. Keith J. Wenk, *Negligent Infliction Of Emotional Distress: Liberalizing Recovery Beyond The Zone Of Danger Rule,* Rickey v. Chicago Transit Authority, 60 CHI.-KENT L. REV. 735, 738 (1984).

63. *See* Bahnson, *Stress and Cancer: The State of the Art*, 21 PSYCHOSOMATICS 975 (1980); Buell & Elliot, *Stress and Cardiovascular Disease*, 75 J.S.C. MED. A. 494 (1979); Bradely, *Life Events and the Control of Diabetes Mellitus*, 23 J. PSYCHOSOMATIC RESEARCH 159 (1979); Rabkin & Struening, *Life Events, Stress and Illness*, 194 SCIENCE 1013 (1976).

64. *See generally*, Bahnson, *supra* note 63; Buell & Elliot, *supra* note 63, Bradely, *supra* note 63; Rabkin & Struening, *supra* note 63.

65. Falzone v. Busch, 214 A.2d 12, 14-16 (N.J. 1965); Ward v. West Jersey & Seashore R.R. Co., 47 A. 561, 562 (N.J. 1900).

v. Gilliam,[66] the feared onslaught of litigation has not appeared in those states allowing recovery for injuries without impact.[67] The court also noted that the fear of an increase in litigation should not outweigh a plaintiff's right to recover for emotional distress.[68]

Abuses of the impact rule, as well as the inability to grant recovery to deserving plaintiffs, prompted the majority of American jurisdictions to reject it and to adopt emerging standards regarding bystander recovery.[69] The two rules most frequently applied by the courts to effectuate limitations on recovery have been the "zone of danger rule" and the "foreseeability-plus-serious-injury rule," also known as the "Dillon Expansion."[70]

The "zone of danger rule" avoids the requirement of contemporaneous physical impact or injury and allows a plaintiff to recover for mental distress in those cases in which the "impact rule" would deny recovery.[71] This rule limits claims for emotional distress in a consistent manner by substituting the requirement of actual impact with the requirement of being near the danger.[72] The "zone of danger rule" permits plaintiffs to recover for mental suffering manifested in physical injury provided that they were within the zone of danger to their physical well-being at the time that they sustained the fright, shock, or mental distress giving rise to their claim.[73] The basic premise of the "zone of danger rule" is to liberalize the foreseeability boundaries of the "impact rule," substituting "actual impact" with a "reasonable fear of impact" as a prerequisite

---

66. 271 So. 2d 466, 475 (Fla. Dist. Ct. App. 1972). Every court that has been confronted with a challenge to its impact rule has been threatened with the specter of an avalanche of unmeritorious claims. Niederman v. Brodsky, 261 A.2d 84, 87 (Pa. 1970). The virtually unanimous response of the courts that have abrogated the impact rule has been that 1) the danger of illusory claims in this area is no greater than in cases where impact occurs and that 2) courts have proven that any protection against such fraudulent claims is contained within the integrity of the judicial process itself, by way of expert witnesses and the safeguards of evidentiary standards. *Niederman*, 261 A.2d at 88.

67. *Niederman*, 261 A.2d at 88.

68. *Stuart*, 271 So. 2d at 475. *See also* Okrina v. Midwestern Corp., 165 N.W.2d 259, 263 (Minn. 1969); Sinn v. Burd, 404 A.2d 672, 680 (Pa. 1979); Niederman v. Brodsky, 261 A.2d 84, 89 (Pa. 1970).

69. Wenk, *supra* note 62, at 738-39; *See also* Bowman v. Williams, 165 A. 182, 184 (Md. 1933) (holding that even though giving a cause of action to everyone sustaining injury from negligent conduct tends to multiply fictitious claims, the difficulty is common and surmountable, and should not prevent the operation of the theory of the common law that there is a remedy for every substantial wrong).

70. Davies, *supra* note 54, at 1.

71. Strubbe, *supra* note 8, at 974.

72. Davies, *supra* note 54, at 8 n.32.

73. 1 MINZER ET AL., *supra* note 14, at § 5. Thus, a negligent actor will be liable to a plaintiff for NIED where the actor's negligence, in addition to harm or peril to a third person, has otherwise created an unreasonable risk of bodily harm to the plaintiff. *Id.* § 5.23 at 5-64.

for recovery.[74] The rule provides that the parameters of the duty to avoid the negligent infliction of emotional harm ought to be commensurate with the duty to avoid the creation of unreasonable risks of physical harm.[75]

The "zone of danger rule" is now adhered to by a majority of jurisdictions.[76] Although allowing recovery in a much broader range of fact patterns than the "impact rule," courts using the "zone of danger rule" employ limiting elements in an attempt to prevent frivolous or fraudulent claims.[77] The most common limitation requires that the mental distress result, or be manifested in, either physical illness or injury.[78]

The zone of danger rule has been criticized for excluding persons who suffer a threat of physical harm.[79] Like the "impact rule," the "zone of danger rule" does not allow recovery for purely mental distress alone.[80] A physical injury or symptom is required.[81] However, the "zone of danger rule" alters the sequence of events under which recovery may be allowed.[82] While the "impact rule" demands that the physical injury or impact occur prior to, or contemporaneously with, the alleged wrong giving rise to the mental distress,[83] mental distress under the "zone of danger rule" must precede the physical manifestations and must cause the illness or injury.[84]

---

74. Plummer v. United States, 580 F.2d 72 (3d Cir. 1978) (stating that the focal point of the "zone of danger" test is the foreseeability of injury to the plaintiff).

75. Davies, *supra* note 54, at 3. Ms. Davies concludes that liability for negligence will not be "disproportionate to fault." *Id.* at 6-7 nn.21-30.

76. 1 MINZER ET AL., *supra* note 14, § 5.13, at 5-27. *See id.* § 5.14(1), at 5-50 nn.3-4. See *supra* note 20 for a list of less than half of the 50 states that allow recovery to bystanders outside of the zone of danger. *See supra* notes 15-16 for a list of the remaining states that require the zone of danger, or physical impact test, which requires the plaintiff to be in the zone of danger.

77. Daley v. LaCroix, 179 N.W.2d 390 (Mich. 1970); Stadler v. Cross, 295 N.W.2d 552 (Minn. 1980); Fournell v. Usher Pest Control Co., 305 N.W.2d 605 (Neb. 1981). These cases illustrate the physical illness or injury requirement as expressed by courts of different jurisdictions that employ the zone of danger rule.

78. *LaCroix*, 179 N.W.2d at 390-91; *Stadler*, 295 N.W.2d at 552; *Fournell*, 305 N.W.2d at 605.

79. Davies, *supra* note 54, at 22. Noted authorities on the rule have observed that the "zone of psychic danger is more extensive than the zone of the foreseeable hazard of physical impact." *Id.*

80. 1 MINZER ET AL., *supra* note 14, § 5. *See also* Towns v. Anderson, 579 P.2d 1163 (Colo. 1978); *Daley*, 179 N.W.2d 390; Orlo v. Connecticut Co., 21 A.2d 402 (Conn. 1941).

81. 1 MINZER ET AL., *supra* note 14, § 5.

82. *Id.*

83. *Id.*

84. *Id.*

Rickey v. Chicago Transit Authority[85] provides an excellent illustration of the difference between the "impact rule" and the "zone of danger rule." In *Rickey*, an eight-year-old witnessed the strangulation of his five-year-old brother when the younger boy's clothing became entangled in an escalator.[86] As a result of witnessing the accident, the eight-year-old sustained severe mental and emotional distress, which was manifested in physical injuries, including definite functional, emotional, psychiatric, and behavioral disorders.[87] Initially, the Circuit Court of Cook County, Illinois, dismissed the complaint, holding that no action for emotional distress caused by another's negligence could exist without contemporaneous physical impact.[88] The court reasoned that the "impact rule" denies recovery to a bystander plaintiff who suffers from mental distress, but does not suffer the requisite physical impact or injury prior to, or contemporaneous with, the distress-inducing event.[89]

On appeal, the Illinois Supreme Court abandoned the "impact rule" and adopted the "zone of danger test."[90] The court stated that a plaintiff bystander, like the eight-year-old in *Rickey*, could now recover for mental distress where the bystander is in the zone of physical danger, and when, as a result of the defendant's negligence, the plaintiff feared for his or her own safety and experienced physical illness or injury as a result of the mental distress.[91] Although the adoption of the "zone of danger test" did not raise the issue of foreseeability in future bystander claims for NIED in the state of Illinois, the *Rickey* decision contained factors similar to those already set out in *Dillon v. Legg* that had given rise to the foreseeability of bystander injury.[92] Inconsistency in the application of the *Dillon* guidelines by courts in various

---

85. 457 N.E.2d 1 (Ill. 1983).

86. *Id.* at 2.

87. *Id.* The plaintiff suffered from extreme depression, an inability to attend school or to engage in gainful employment, and an inability to engage in his usual customary affairs. *Id.*

88. *Id.* at 1. The trial court, in denying the claim for mental distress, relied on the "impact rule." *Id.* at 548-49.

89. Rickey v. Chicago Transit Auth., 457 N.E.2d 1, 3 (Ill. 1983).

90. *Id.* at 5.

91. *Id.* The conclusion of the court was grounded on the fact that the plaintiff and the victim were close relatives. *Id.* at 4. However, the degree of closeness of their relationship was not specifically addressed, leaving the question of recovery by nontraditional family members, or other intimately related plaintiffs, open. *Id.*

92. *Id.* at 5. A bystander who is in a zone of physical danger, and who, because of the defendant's negligence, has reasonable fear for his own safety, is given a right of action for physical injury or illness resulting from emotional distress. *Id.* The court refused to allow recovery for emotional distress alone, holding that such a standard is too vaguely defined and excessively broad, possibly opening the door to fraudulent claims. *Id.* Further, using such a standard results in damages that are difficult to ascertain, since emotional injuries are not foreseeable, and would encourage frivolous litigation. *Id.* See *infra* notes 110-23 and accompanying text for a comparison to the *Dillon* factors.

jurisdictions created the problem of a lack of uniformity in deciding which bystander may recover, and is the problem which this Note will address.

C. Recent Mechanisms of Recovery Preceding the Bystander Recovery Rule

Traditionally, courts have denied recovery for NIED when the plaintiff has incurred no physical injury.[93] However, in the last twenty years a growing number of states have recognized NIED as an independent tort, yet a great deal of inconsistency exists among state courts in deciding how a plaintiff may recover for their emotional distress.[94] Three main types of emotional injuries have been recognized by the courts.[95] The first type includes emotional injuries resulting from physical impact sustained by the plaintiff.[96] An example of this type would be a plaintiff that is struck by a defendant and experiences uneasiness and sleeplessness along with the physical injuries suffered from the blow.[97] The second type of compensable emotional injury is a physical manifestation of an emotional injury.[98] In these cases, although the plaintiff never comes into actual contact with the defendant, the plaintiff suffers emotional distress which manifests itself in physical injury.[99] An example of

---

93. *See* Rickey v. Chicago Transit Auth., 457 N.E.2d 1, 3 (Ill. 1983) (stating that Illinois law barred recovery absent contemporaneous injury or impact); Weissman v. Wells, 267 S.W. 400, 406 (Mo. 1924) (denying plaintiff recovery for nervous shock absent any physical injury from a collision of the defendant's streetcar in which the plaintiff was riding); *see also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54, at 328-29 (4th ed. 1971) (noting the general consensus that recovery for negligent infliction of emotional distress cannot be obtained without an independent tort liability or accompanying physical injury).

94. Three major limiting tests are used for evaluating claims, depending on the jurisdiction involved. In at least five remaining states, the so-called "impact rule" still governs the questions of recovery for emotional distress and is still viable law. In those jurisdictions, a contemporaneous physical injury or impact must have occurred in order to permit recovery by a bystander. Georgia: *see* OB-GYN Assocs. of Albany v. Littleton, 386 S.E.2d 146 (Ga. 1989). Indiana: *see* Shuamber v. Henderson, 579 N.E.2d 452 (Ind. 1991). Kansas: *see* Anderson v. Scheffler, 752 P.2d 667 (Kan. 1988). Kentucky: *see* Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980). Oregon: *see* Hammond v. Central Lane Communications Ctr., 816 P.2d 593 (Ore. 1991).

The second test that is applied to NIED claims in some jurisdictions is the "zone of danger" test which is currently followed by 14 jurisdictions. See *supra* note 16, for a list of the jurisdictions following the "zone of danger" rule.

As a third test, nearly half of the states now allow bystanders outside of the zone of danger to obtain recovery in certain circumstances for emotional distress brought on by witnessing the injury or death of a third party that is caused by the defendant's negligence. See *supra* note 20 for a list of the jurisdictions following this "relative bystander test." The fact that three different rules are followed by different states shows the inconsistency of the states in dealing with NIED claims.

95. Richard A. Chesley, Comment, *The Increasingly Disparate Standards Of Recovery For Negligently Inflicted Emotional Injuries*, 52 U. CIN. L. REV. 1017, 1017 n.1 (1983).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

this would be a situation in which a pregnant woman suffered severe fright because of the defendant's action and subsequently miscarried.[100] Finally, the last type of recognized emotional injury consists of severe fright, horror, grief, shame, humiliation, anger, embarrassment, and worry, which may constitute medically cognizable mental disturbances by the plaintiff without any accompanying impact or physical injury.[101] Emotional injury without impact or physical injury is the focus of the Bystander Recovery Rule, and is the type which the law has been addressing with increasing frequency.[102] Development of the Bystander Recovery Rule has set the stage for the liberalization of mechanisms of recovery by defining the scope of liability for bystander harm.[103] This Section has discussed early modes of recovery that preceded

---

100. *See* Hill v. Kimball, 13 S.W. 59 (Tex. 1890).

101. Chesley, *supra* note 95, at 1017 n.1.

102. *See* Molien v. Kaiser Found. Hosps., 616 P.2d 813, 821 (Cal. 1980). See *infra* section III.A.2, notes 124-40 and accompanying text.

103. John David Burley, Dillon *Revisited: Toward A Better Paradigm For Bystander Cases,* 43 OHIO ST. L.J. 931, 936 (1982). This note focuses only on the treatment of "bystander" claims—claims that arise after the plaintiff witnessed the harm caused to a third person by the defendant. Although the *Dillon v. Legg* decision and its progeny only deal with NIED to a bystander, while the "impact rule" and "zone of danger rule" can be applied to the direct victim of a negligent act, these modern theories illustrate the ever expanding reach of recovery for mental distress. Strubbe, *supra* note 8, at 978.

An illustration of a direct victim case for recovery of NIED that addressed the recent expansions for recovery can be found in Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993). Dan Boyles, Jr., engaged in sexual intercourse with Susan Leigh Kerr, videotaped the intimate act, and then showed the tape to 10 friends. *Id.* at 594. Gossip about the event soon spread, and Kerr got a reputation of a "porno queen." *Id.* After being confronted by Kerr, Boyles surrendered the only copy of the tape. *Id.* Kerr then filed suit, alleging that she suffered humiliation and severe emotional distress from the videotape and the gossip surrounding it. *Id.* Overruling St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649 (Tex. 1987), the Texas Supreme Court rejected a cause of action for the general negligent infliction of emotional distress. Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993). However, the court did not disturb the status of damages for emotional distress, holding that such damages for mental anguish are still recoverable in Texas for the commission of many torts. *Id.* at 603. Further, the court held that such damages need not be proven by physical manifestation. *Id.*

In diverting from the national trend and adopting a more narrow scope of liability, the Texas Supreme Court retreated from the notion that a general duty exists not to negligently inflict emotional distress. *Id.* at 593-98. However, the court held that a claimant may recover mental anguish damages in connection with the breach of some other legal duty. *Id.* at 594.

In *Boyles*, the Texas Supreme Court categorically denied the imposition of the requirement that emotional distress manifest itself physically in order to be compensable. *Id.* at 598. Following the reasoning in *Garrard*, the court held that the sole purpose of the physical manifestation rule is to ensure the genuineness of the claim, which makes it both under and overinclusive, with no obvious relation to emotional harm. *Id.* The *Garrard* court granted recovery without imposing a physical manifestation requirement on the plaintiff specifically stating that a claimant may recover without demonstrating physical manifestation of emotional distress. *Id.* However, the dissenting opinion in *Boyles* accused the majority of diverting Texas from the national trend recognizing the physical manifestation rule as being outmoded when the court overruled St. Elizabeth Hosp. v. Garrard. *Id.*

at 612. However, the dissenting opinion held that the rejection of the physical manifestation requirement and the ruling in *Garrard* were inseparable. *Id.* The majority clearly demonstrated that this was not the case, as recovery by the claimant without demonstration of physical manifestation of emotional distress has long been the rule, even before *Garrard*. *Id.* at 598 (citing Leyendecker & Associates, Inc., v. Wechter, 683 S.W.2d 369, 374 (Tex. 1984)).

In *Boyles*, the court agreed with the holding in Thing v. La Chusa, 771 P.2d 814 (Cal. 1989) that foreseeability of injury alone is not a useful guideline or restriction on the scope of a NIED claim. Boyles v. Kerr, 855 S.W.2d 593, 599 (Tex. 1993). Further, reliance on foreseeability of injury alone in finding a duty, and thus a right to recover, is not adequate when the damages sought are for an intangible injury. *Id.* Even the dissent in *Boyles* recognized that foreseeability of injury was not adequate to impose liability for unintentionally inflicted emotional distress, and instead proposed a test that would assess certain restrictions that could be imposed without destroying all protection against emotional injury. *Id.* at 600, 615. The restrictions included: 1) The existence of a legal duty not to cause harm to another beyond that created by foreseeability of injury, such as that arising from a special relationship, a statutory duty, or from the voluntary undertaking of an affirmative action that puts another at risk, 2) a breach of the duty by conduct that is reckless, extreme or outrageous; 3) severe psychic harm; and 4) the foreseeability of a likelihood of such an injury by a reasonably prudent person. *Id.* at 615.

The majority in *Boyles* saw the dissent's "Boyles Rules" as simply another way of saying that emotional distress is foreseeable, and thus was not an adequate basis on which to impose liability. *Id.* at 600. Since the majority and the dissenting judges agreed that foreseeability was not adequate by itself to recover, an alternative method of defining foreseeability through the "Boyles Rules" was also inadequate. *Id.* at 600. Among the duties recognized by the court that Boyles owed to Kerr were the general duty not to willfully invade another's privacy, and the duty not to intentionally inflict emotional distress by outrageous conduct. *Id.* at 600. The court held it unnecessary to recognize some other "special duty" based on the parties' intimate relationship to provide a basis for recovery. *Id.*

In *Boyles v. Kerr*, it may have been reasonably inferred that the plaintiff intended to plead an independent cause of action for the willful, malicious, or grossly negligent infliction of emotional distress. *Id.* at 601. Kerr's petition asserted that Boyles' conduct was "willful," "malicious," and "grossly negligent," but these allegations were made only in support of the punitive damages claim, and not as a separate cause of action. *Id.* However, the defendants' counsel abandoned her actions for intentional torts, and brought an action sounding strictly in negligence, for emotional distress and anguish. *Id.* Thus, the majority denied recovery, not because Boyles did not breach any duty toward Kerr, but because the only theory which she chose to assert, that of NIED, was overly broad and would encompass other cases involving merely rude or insensitive behavior. *Id.* at 602.
Insurance may also have played a role in *Boyles*. *Id.* at 603-04. The court noted that the strategy taken by the plaintiff to recover damages would be paid by insurance companies for her cause of action, and therefore the court took action to avoid such an outcome. *Id.* at 603-04. In Texas, a homeowner's policy covers only accidents or careless conduct, and excludes intentional acts. *Id.* All of the offenses committed by the defendant, such as the positioning of the camera to capture the event on film, and the showing of the videotape to friends, were intentional acts. *Id.* at 603-04. As the defendant's conduct was neither accidental or careless, the plaintiff had a cause of action for the willful invasion of privacy and the intentional infliction of emotional distress. *Id.* at 603. However, Ms. Kerr intentionally gave up her right to receive redress under these theories and proceeded solely on the tort of the NIED. *Id.* at 604.

In *Boyles v. Kerr*, the Texas Supreme Court diverted from the current national trend moving toward relaxed restrictions for recovery for the NIED. Donna L. Shumate, *Tort Law: The Negligent Infliction of Emotional Distress—Reopening Pandora's Box*— Johnson v. Ruark Obstetrics, 14 CAMPBELL L. REV. 247, 254 n.57 (1992). However, this diversion does not overrule a century of national and Texas case law, as it leaves intact many of the more recent expansions of tort law

recognition of emotional distress by a bystander that witnessed peril or injury to another. Section III will examine recovery by a bystander-plaintiff, and the guidelines used by courts to prevent frivolous claims.

III. BEYOND THE ZONE OF DANGER: EXTENSION OF RECOVERY TO BYSTANDERS

After the courts recognized the right of a bystander outside of the zone of danger to recover for NIED, the standards by which a plaintiff could recover were liberalized.[104] However, after several years of expansion, some courts returned to a strict interpretation of the original guidelines. Section A explores the expansion from *Dillon v. Legg*[105] which made the first rules for bystander recovery, to *Molien v. Kaiser Foundation Hospitals*[106] and *Portee v. Jaffee*[107] which dispensed with the physical manifestation requirement. Section A concludes with an analysis of *Gates v. Richardson*[108] which extended bystander recovery to a larger class of plaintiffs. Section B shows the courts' response to the expansion in *Thing v. La Chusa*,[109] with a return to a strict interpretation of the *Dillon* rules.

A. Rise of the Bystander Recovery Rule as a Basis of Recovery for NIED.

1. The *Dillon* Test - Foreseeability Plus Serious Injury

The landmark case that expanded liability beyond the zone of danger rule was the 1968 case of *Dillon v. Legg*.[110] In *Dillon*, the mother and sister of a deceased infant each sought damages for emotional distress absent any physical injury.[111] The evidence showed that the mother was positioned farther from

---

concerning NIED. Among such expansions are the possibility of a victim to recover for emotional anguish in the absence of a physical manifestation, the right of the plaintiff to recover mental anguish damages caused by the defendant's breach of some other legal duty, or the right of bystanders to recover emotional distress damages suffered as a result of witnessing a serious or fatal accident. *See supra* notes 70-92 and accompanying text.

Even though many of the factors used to determine recovery in bystander cases apply to direct victim cases as well, the proposed model for recovery in this note utilizes the unique aspects of a bystander-victim relationship in order to determine recovery. *See infra* section V, notes 254-96 and accompanying text. *See also infra* section III, notes 187-99 for an explanation of the difference in the treatment of bystanders vs. direct victims by the courts in recent times.

104. *See infra* sections III.A.1-4.

105. *See infra* section III.A.1, notes 110-23 and accompanying text.

106. *See infra* section III.A.2, notes 124-40 and accompanying text.

107. *See infra* section III.A.3, notes 141-53 and accompanying text.

108. *See infra* section III.A.4, notes 154-72 and accompanying text.

109. *See infra* section III.B, notes 173-200 and accompanying text.

110. 441 P.2d 912 (Cal. 1968).

111. *Id.* at 912.

the deceased infant than was the daughter.[112] Thus, the sister of the deceased was within the zone of danger, while the mother was not.[113] The California Supreme Court allowed both plaintiffs to recover damages on the basis that a duty was owed to the plaintiffs solely because it was foreseeable that they could suffer emotional distress upon learning of an injury to a close relative.[114] The court held that even though the mother was not in the zone of danger, her close proximity to the accident allowed recovery.[115] The court considered three factors in determining whether an innocent bystander could recover for NIED: 1) whether the plaintiff was located near the scene of the accident, as contrasted with a plaintiff who was a distance away from the scene; 2) whether the shock resulted from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence; and 3) whether the plaintiff and the victim were closely related, as contrasted to the absence of any such intimate relationship.[116]

These factors became known as the "Dillon Expansion" to the Bystander Recovery Rule and had a limiting effect on the ability of future plaintiffs to recover for emotional distress.[117] As the class of plaintiffs expands, more

---

112. *Id.* at 915. Plaintiff's daughter was lawfully crossing a road when defendant's automobile collided with her, resulting in injuries which proximately caused her death. *Id.* at 914. The plaintiff witnessed the accident from a vantage point a few yards farther away than her other daughter, who witnessed it from the curb. *Id.* at 915.

113. *Id.* The facts illustrate the harshness resulting from the artificiality of the zone of danger rule. If the rule had been applied, the daughter could maintain a cause of action, while the mother would have been denied recovery. *See* John David Burley, Dillon *Revisited: Toward A Better Paradigm For Bystander Cases*, 43 OHIO ST. L.J. 931, 936 (1982).

114. Thing v. La Chusa, 771 P.2d 814, 819 (Cal. 1989) (analyzing the holding in *Dillon v. Legg* based on the foreseeability of mental distress).

115. Dillon v. Legg, 441 P.2d 912, 912 (Cal. 1968).

116. Davies, *supra* note 54, at 12 (referring to the foreseeability factors identified in Dillon v. Legg, 441 P.2d 912, 920 (Cal. 1968)). The *Dillon* court avoided the fear of fraudulent claims by noting that emotional distress was a proper element of tort damages in traditional negligence actions and recently had become an interest protected from intentional wrongs. *Dillon*, 441 P.2d at 917. The court found no satisfactory difference between the possibilities for fraud in those cases and in bystander actions, and proposed limiting liability by examining all of the circumstances of the event, and setting limits by the reasonably foreseeable consequences of the defendant's act. *Id.* at 921. The court followed William Prosser's guidelines, W. PROSSER, HANDBOOK OF THE LAW OF TORTS 182 (2d ed. 1955), in developing its three pronged test. *Dillon*, 441 P.2d at 921.

117. Davies, *supra* note 54, at 12. Despite the court's expansive opinion, the *Dillon* rule has a restrictive dimension. Robert L. Rabin, *Tort Recovery For Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1521 (1985). Professor Rabin noted that the zone of danger rule reduces the likelihood that certain "collateral" plaintiffs will be permitted to sue. *Id.* The other *Dillon* guidelines, requiring contemporaneous viewing of the negligent act and the presence at the scene of the accident, further limit recovery because, although many people experience distress because of an injury to a family member, very few actually view such injuries as they occur. Davies, *supra* note 54, at 12. The proposed reasoning model to be discussed in section V of this note will have a similarly restrictive effect. While the model will expand the class

limitations are placed on the mechanism of recovery and the plaintiff's ability to qualify for relief.[118] This rule was considerably more expansive than the "zone of danger test," and several other jurisdictions have made use of the "Dillon expansion" since it was first formulated by the California Supreme Court.[119]

Massachusetts, however, went one step further than the *Dillon* court. In *Dziokonski v. Babineau*,[120] the Supreme Court of Massachusetts allowed a cause of action for mental distress without any sensory perception of the event, as required by *Dillon*.[121] The *Dziokonski* decision represented the most liberal interpretation of *Dillon* to date in terms of the contemporaneous observance requirement, however the bystanders in *Dziokonski* had the contributing factor of strong physical manifestations that resulted in their death.[122] Although *Dillon v. Legg* may seem more restrictive than subsequent cases such as *Dziokonski*, it stands as a major step in the long search for a better rule with which to govern bystander liability.[123] Section III.A.2 presents a further

---

of plaintiffs eligible to recover, it will require more qualifying factors as the plaintiff-victim relationship becomes more distant. *See infra* section V, notes 254-96 and accompanying text.

118. *See generally* Rabin, *supra* note 117.

119. Rhode Island: *see* D'Ambra v. United States, 338 A.2d 524 (R.I. 1975); Hawaii: *see* Leong v. Takasaki, 520 P.2d 758 (Haw. 1974); Michigan: *see* Toms v. McConnell, 207 N.W.2d 140 (Mich. Ct. App. 1973). *See infra* note 179 for a more complete listing of cases that followed or expanded upon the *Dillon* guidelines. The *Dillon* rule is more expansive in that it allows a bystander to recover as an entirely new class of plaintiff, however it is restrictive to all classes by requiring contemporaneous viewing of the accident and presence on the scene. *See supra* note 117.

120. 380 N.E.2d 1295 (Mass. 1978).

121. *Id.* at 1302. In *Dziokonski*, the administratrix of the estates of a husband and wife brought an action alleging that the deaths of husband and wife were the result of physical injuries caused by emotional distress which was brought on by injuries to the child of the couple. *Id.* at 1296. The child was struck by the defendant's school bus. *Id.* The mother went to the scene of the accident and witnessed her daughter lying injured on the ground. *Id.* The mother died while riding with her child in an ambulance, allegedly as a result of physical and emotional shock brought about by the injuries to her daughter. *Id.* The father, upon learning of the death of his wife, also died, allegedly from an aggravated ulcer, coronary occlusion, and emotional shock. *Id.* The court held that the action was valid. *Id.*

122. *See supra* note 121 and accompanying text. The facts of *Dziokonski* illustrate the *Dillon* view of examining "all the circumstances." Dillon v. Legg, 441 P.2d 912, 921 (Cal. 1968). As one element of damage (physical manifestation) becomes more important, other elements (contemporaneous observance) become less significant. *See infra* section V, notes 254-96 and accompanying text. The proposed model solution of this note uses a similar balancing approach, by applying criteria that different courts have deemed important in the past to determine who should recover. *See infra* note 258.

123. "In short, the history of the cases does not show the development of a logical rule but rather a series of changes and abandonments." *Dillon*, 441 P.2d at 924. *Dillon* remains the seminal case cited in most jurisdictions that have expanded the scope of bystander recovery. *See, e.g.*, Barnhill v. Davis, 300 N.W.2d 104, 106 (Iowa 1981).

liberalization of the *Dillon* guidelines by retraction of the physical manifestation requirement.

2. *Molien* Abrogates the Physical Manifestation Requirement

Originally, *Dillon* required some physical manifestation of the plaintiff's emotional distress; however, the courts were eventually confronted with arguments for the abandonment of the physical manifestation requirement as a limitation on recovery for mental anguish damages.[124] In *Molien v. Kaiser Foundation Hospitals*,[125] a physician erroneously diagnosed a woman's condition as syphilis and advised her to have her husband examined for the disease.[126] The tests revealed that the husband did not have the disease.[127] As a result of the erroneous diagnosis, the wife suspected her husband of engaging in extramarital sexual activities, which led to the break-up of their marriage and the initiation of divorce proceedings.[128] The husband brought an action against the hospital for NIED due to the misdiagnosis of his wife by the hospital.[129] Faced with the question of whether the plaintiff was barred from recovery by the fact that he had suffered no physical injury, the Supreme Court of California held that the risk of harm to the plaintiff was reasonably foreseeable.[130] The court reasoned that he was a foreseeable victim of the

---

124. St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 652 (Tex. 1987). The following jurisdictions have rejected the physical manifestation requirement as a limitation on recovery for mental anguish damages: Taylor v. Baptist Medical Ctr., Inc., 400 So. 2d 369, 374 (Ala. 1981); Molien v. Kaiser Found. Hosps., 616 P.2d 813, 817 (Cal. 1980); Montinieri v. Southern New England Tel. Co., 398 A.2d 1180, 1184 (Conn. 1978); Rodrigues v. State, 472 P.2d 509, 519 (Haw. 1970); Barnhill v. Davis, 300 N.W.2d 104, 108 (Iowa 1981); Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433, 438 (Me. 1982); Bass v. Nooney Co., 646 S.W.2d 765, 772 (Mo. 1983); Johnson v. Supersave Markets, Inc., 686 P.2d 209, 213 (Mont. 1984); James v. Lieb, 375 N.W.2d 109, 116 (Neb. 1985); Portee v. Jaffee, 417 A.2d 521, 526 (N.J. 1980); Schultz v. Barberton Glass Co., 447 N.E.2d 109, 113 (Ohio 1983); Sinn v. Burd, 404 A.2d 672, 679 (Pa. 1979); Chappetta v. Bowman Transp., Inc., 415 So. 2d 1019, 1022-23 (La. Ct. App. 1982).

Writers on the subject indicate that the physical manifestation requirement is destined for extinction. *See generally* Edward A. McCarthy, *Illinois Law in Distress: The "Zone Of Danger" And "Physical Injury" Rules in Emotional Distress Litigation*, 19 J. MARSHALL L. REV. 17 (1985); John E. Flanagan, Comment, *Negligent Infliction Of Emotional Distress: A Proposal For A Recognized Tort Action*, 67 MARQ. L. REV. 557 (1984). However, this note advocates the use of the physical manifestation requirement as a contributing factor to qualify for bystander recovery in the absence of a spousal, blood or adoptive relationship. *See infra* section V, notes 254-96 and accompanying text.

125. 616 P.2d 813 (Cal. 1980).

126. *Id.* at 814.

127. *Id.*

128. *Id.* at 814-15.

129. Molien v. Kaiser Found. Hosps., 616 P.2d 813, 814-15 (Cal. 1980).

130. *Id.* at 817.

negligent diagnosis of his spouse.[131] Further, the court held the plaintiff to be a direct victim of the defendant's negligent diagnosis.[132] With regard to the seriousness of the plaintiff's injury, the court agreed with the standard adopted by the court in *Rodrigues v. State*,[133] which limited recovery to claims of serious mental distress based upon the reaction of the reasonable person, thereby avoiding potentially unlimited liability for invasions of emotional tranquility that are trivial and transient.[134]

The court in *Molien* stated that the seriousness of the mental distress was a question of proof to be presented to the trier of fact, and that it would usurp the jury's function to screen claims on that basis at the pleading stage.[135] By leaving the question of serious emotional distress, and thus injury, to the jury, the court in *Molien* condemned the physical manifestation requirement as an artificial device, the sole purpose of which was to guarantee the genuineness of the claim for mental injury.[136] Therefore, the *Molien* court eliminated the physical manifestation requirement, reasoning that no valid line could be drawn between the physical and the psychological.[137] Thus, the plaintiff need only prove the severity of his or her distress.[138] Though the *Molien* decision was applied to a direct victim, rather than to a bystander, it showed the court's willingness to apply the general principal of foreseeability from *Dillon* to the facts at hand, just as in other cases presenting complex questions of tort liability.[139] Significantly, Section III.A.3 shows the similar approach taken by

---

131. *Id.*

132. *Id.* (holding that the tortious conduct of the defendant was directed to the plaintiff-husband as well as to his wife, and that the defendant owed the plaintiff a duty to exercise due care in diagnosing the physical condition of his wife).

133. 472 P.2d 509, 520 (Haw. 1970).

134. Molien v. Kaiser Found. Hosps., 616 P.2d 813, 819 (Cal. 1980) (citing Rodrigues v. State, 472 P.2d 509, 520 (Haw. 1970)). The *Molien* court adopted as its standard that "serious mental distress may be found where a reasonable [person], normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Molien*, 616 P.2d at 819-20. (quoting Rodrigues v. State, 472 P.2d 509, 520 (Haw. 1970)). The court in *Rodrigues* reasoned that liability of a defendant to the plaintiff for serious mental distress is best determined by application of general tort principles. *Rodrigues*, 472 P.2d at 519. The fact that a California court relied on Hawaiian law shows the need for a consistent set of guidelines that can be used from state to state which is provided in section V of this note.

135. *Molien*, 616 P.2d at 821.

136. *Id.* at 819-21.

137. *Id.* at 820-21.

138. Molien v. Kaiser, 616 P.2d 813, 820-21 (Cal. 1980) (holding that the essential question is one of proof; whether the plaintiff has suffered a serious and compensable injury should not turn on the artificial and often arbitrary classification scheme of whether an injury is physical or psychological).

139. *See, e.g.*, Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976) (holding that the significance of *Dillon* for the present action lies not in its delineation of guidelines fashioned for the resolution of the precise issue before them, but in the application of its general principle of

the Supreme Court of New Jersey to a true bystander case resulting in the further expansion of Bystander Recovery for NIED.[140]

3. *Portee v. Jaffee*: Bystander Recovery without Physical Manifestation

Although *Molien* is most often used to illustrate the express elimination of the physical manifestation requirement in recovery for NIED, in *Portee v. Jaffee*[141] the Supreme Court of New Jersey also abrogated the physical manifestation requirement.[142] The decision, made shortly before *Molien*, was a case in which the plaintiff's injuries were even less obvious.[143] In *Portee*, a mother suffered emotional trauma as a result of watching her seven-year-old son suffer a slow and agonizing death after becoming trapped in an elevator.[144] The court upheld the mother's right to bring a negligence action for the infliction of emotional injury against the landlord and the elevator company, even though she had not been subjected to any risk of physical harm.[145] Unlike the plaintiff in *Molien*, the plaintiff in *Portee* was more of a witness to an act of negligence, rather than a direct victim.[146] The court in *Portee* adopted a standard similar to that in *Dillon*.[147] The court set out a four-factor test for determining a cause of action for NIED.[148] For a bystander-claimant to prevail under *Portee*, the claimant must demonstrate: (1) the death or serious physical injury of another caused by defendant's negligence; (2) a marital or intimate, familial relationship between the plaintiff and the injured person; (3) observation of the death or injury at the scene of the accident; and (4) "resulting severe emotional distress."[149]

The court in *Portee* emphasized the existence of an intimate familial relationship between the plaintiff and the victim as the basis for recovery.[150]

---

foreseeability to the facts at hand).

140. Portee v. Jaffee, 417 A.2d 521 (N.J. 1980). *See infra* section III.A.3, notes 141-53 and accompanying text.

141. 417 A.2d 521 (N.J. 1980).

142. *Id.* at 524-27. The question was whether liability should exist where there was no potential for personal injury, except for the distress resulting from perceiving the negligently inflicted injuries of another. *Id.*

143. *Id.* at 526-27 (holding that the instinctive affection of a mother for her seven-year-old son would be a sufficiently intimate bond on which to predicate liability).

144. *Id.* at 522-23.

145. Portee v. Jaffee, 417 A.2d 521, 528 (N.J. 1980).

146. *Id.* at 522-23.

147. *Id.* at 527-28.

148. *Id.* at 528.

149. Portee v. Jaffe, 417 A.2d 521, 528 (N.J. 1980).

150. *Id.* at 526-28. In requiring that the plaintiff be closely related to the injured person, the court found the existence of a close relationship to be the most crucial element of its four factor test. *Id.*

The court recognized that the presence of deep intimate familial ties between the plaintiff and the physically injured person renders the harm to emotional tranquility serious and compelling.[151] The court reasoned that the suffering that arises from such harm contrasts greatly with the average setbacks of everyday life as well as with the apprehension of harm to another, less intimate person.[152] The court concluded that the existence of a marital or intimate familial relationship is an essential element of a cause of action for NIED.[153] Thus, the significance of *Dillon* and its progeny is that while the "impact rule" and "zone of danger rule" typically allow damages only to the direct victim of a negligent act, the foreseeability factors of *Dillon* and *Portee* allow damages for NIED to bystanders, illustrating the ever expanding reach of recovery for mental distress. Accordingly, as the scope of bystander recovery enlarged, it encompassed a larger class of plaintiffs.

4. *Gates v. Richardson*: Expansion of the Class of Plaintiffs

The passage of time and several "bystander" type actions led at least one court to go one step further in the case of *Gates v. Richardson*.[154] In *Gates*,

---

151. *Id.* at 526-27.

152. *Id.* at 527.

153. Portee v. Jaffe, 417 A.2d 521, 526-27 (N.J. 1980). The analysis of the interest in emotional tranquility founded on parental love indicates where the court's limits of liability lie. *Id.*

154. 719 P.2d 193 (Wyo. 1986). In the 18 years from *Dillon v. Legg* to the *Gates* decision, many state courts had accepted the proposition that a defendant's duty of care should extend to, at least, to some plaintiffs who suffer purely mental injuries. Through 1986, the impact rule had been abolished in the following states: Alabama: *see* Alabama Fuel & Iron Co. v. Baladoni, 73 So. 205 (Ala. Ct. App. 1916); Arizona: *see* City of Tucson v. Wondergem, 466 P.2d 383 (Ariz. 1970); California: *see* Dillon v. Legg, 441 P.2d 912 (Cal. 1968); Colorado: *see* Towns v. Anderson, 579 P.2d 1163 (Colo. 1978); Connecticut: *see* Orlo v. Connecticut Co., 21 A.2d 402 (Conn. 1941); Delaware: *see* Robb v. Pennsylvania R.R., 210 A.2d 709 (Del. 1965); Georgia: *see* Goddard v. Watters, 82 S.E. 304 (Ga. Ct. App. 1914); Hawaii: *see* Rodrigues v. State, 472 P.2d 509 (Haw. 1970); Illinois: *see* Rickey v. Chicago Transit Auth., 457 N.E.2d 1 (Ill. 1983); Iowa: *see* Watson v. Dilts, 89 N.W. 1068 (Iowa 1902); Kansas: *see* Clemm v. Atchison, Topeka & S.F. Ry., 268 P. 103 (Kan. 1928); Louisiana: Stewart v. Arkansas S.R.R., 36 So. 676 (La. 1904); Maine: Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970), *overruled on other grounds*, Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433 (Me. 1982); Maryland: Green v. T.A. Shoemaker & Co., 73 A. 688 (Md. 1909); Massachusetts: Dziokonski v. Babineau, 380 N.E.2d 1295 (Mass. 1978); Michigan: Daley v. LaCroix, 179 N.W.2d 390 (Mich. 1970); Minnesota: Purcell v. St. Paul City Ry., 50 N.W. 1034 (Minn. 1892); Mississippi: First Nat'l Bank v. Langley, 314 So. 2d 324 (Miss. 1975); Missouri: Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983); Nebraska: Rasmussen v. Benson, 280 N.W. 890 (Neb. 1938); New Hampshire: Chiuchiolo v. New England Wholesale Tailors, 150 A. 540 (N.H. 1930); New Jersey: Falzone v. Busch, 214 A.2d 12 (N.J. 1965); New York: Battalla v. State, 176 N.E.2d 729 (N.Y. 1961); North Carolina: Kimberly v. Howland, 55 S.E. 778 (N.C. 1906); North Dakota: Whetham v. Bismarck Hosp., 197 N.W.2d 678 (N.D. 1972); Ohio: Schultz v. Barberton Glass Co., 447 N.E.2d 109 (Ohio 1983); Oklahoma: St. Louis & S.F. Ry. v. Keiffer, 150 P. 1026 (Okla. 1915); Oregon: Salmi v. Columbia & N.R.R., 146 P. 819 (Or. 1915); Pennsylvania: Niederman v. Brodsky, 261 A.2d 84

the plaintiff brought an action for the negligent infliction of emotional distress following an accident where the defendant's automobile collided with a bicycle ridden by the plaintiff's child.[155] While the plaintiff did not actually see the accident, she arrived moments after it occurred and found her child injured and bleeding.[156] While the plaintiff was never in the zone of danger, her presence at the scene following the accident resulted in profound emotional shock.[157] Rejecting the impact rule, the Supreme Court of Wyoming held that there was a duty imposed on a defendant to avoid negligent impacts and threats of an impact on another.[158] Furthermore, if this duty was breached, then the defendant was liable for both mental and physical harm.[159]

In the case of the "impact rule," there was no duty regarding negligent acts which caused purely mental harm where there was no impact or threat of impact upon someone in the zone of danger.[160] Instead, the *Gates* court held that the tort of NIED was actionable under the following limitations: 1) the class of plaintiffs who may bring action for NIED consists of those who could bring an action for wrongful death of the primary victim; 2) the primary victim must die or suffer serious bodily injury, as that term is defined in the Wyoming Criminal Code;[161] 3) the plaintiff must observe either the infliction of the fatal or harmful blow or observe the aftermath of the occurrence without material change in the condition and location of the victim; and 4) once the previous three conditions are satisfied, the case can go forward under normal negligence principles which will compensate the plaintiff for his entire damage so that the plaintiff is made whole.[162] The *Gates* decision stressed the nature of the relationship between the plaintiff and the victim, rather than the requirement of

---

(Pa. 1970); Rhode Island: Simone v. Rhode Island Co., 66 A. 202 (R.I. 1907); South Carolina: Mack v. South-Bound R. Co., 29 S.E. 905 (S.C. 1898); South Dakota: Sternhagen v. Kozel, 167 N.W. 398 (S.D. 1918); Tennessee: Memphis St. Ry. Co. v. Bernstein, 194 S.W. 902 (Tenn. 1917); Texas: Hill v. Kimball, 13 S.W. 59 (Tex. 1890); Vermont: Savard v. Cody Chevrolet, Inc., 234 A.2d 656 (Vt. 1963); Virginia: Hughes v. Moore, 197 S.E.2d 214 (Va. 1973); Washington: Frazee v. Western Dairy Products, 47 P.2d 1037 (Wash. 1935); West Virginia: Lambert v. Brewster, 125 S.E. 244 (W.Va. 1924); Wisconsin: Pankopf v. Hinkley, 123 N.W. 625 (Wis. 1909). For a listing of states that are still clinging to the impact rule, see *supra* note 94.

155. *Gates*, 719 P.2d at 194.

156. *Id.*

157. *Id.*

158. Gates v. Richardson, 719 P.2d 193 (Wyo. 1986).

159. *Id.* at 195. *See also* Amaya v. Home Ice, Fuel & Supply Co., 379 P.2d 513 (Cal. 1963) (rejecting the "impact test" in favor of the "zone-of-danger" rule).

160. *Gates*, 719 P.2d at 195.

161. WYO. STAT. §§ 1-38-102, 2-4-101 (1977 & Supp. 1995). The legislature has expressed the policy that spouses, children, parents, and siblings may recover for wrongful death. *Id.* Sibling recovery had not been specifically addressed by the Wyoming courts, thus the decision that the wrongful death statute defined the class of plaintiffs who may recover could be viewed as an expansion of the bystander recovery rule. Gates v. Richardson, 719 P.2d 193, 195 (Wyo. 1986).

162. *Gates*, 719 P.2d at 200-01.

a physical injury to justify an award of damages for the NIED. Further, the *Gates* court expanded bystander recovery to a broader class of plaintiffs and no longer required contemporaneous sensory perception of the accident.[163]

Recently, the Supreme Court of Texas applied the courts' reasoning from *Dillon*, *Molien*, and *Gates*, and allowed recovery absent physical manifestations of injury, as well as when the plaintiff did not actually witness the event causing the mental distress.[164] In *Saint Elizabeth Hospital v. Garrard*,[165] a patient and her husband sought damages for mental anguish after their stillborn daughter's body was disposed of in an unmarked, common grave without their knowledge or consent.[166] The Garrards sought damages only for their mental anguish, and did not plead any facts suggesting that their mental anguish manifested itself physically.[167] Expanding on prior decisions such as *Gates*, the Supreme Court of Texas held that proof of physical injury was no longer required in order to recover for the NIED.[168] By eliminating the physical manifestation requirement, Texas joined a growing number of states which recognize the tort of negligent infliction of mental anguish without imposing arbitrary restrictions.[169] The court concluded that the distinction between physical injury and emotional distress was no longer defensible.[170] The court

---

163. *Id.* at 198-99 (following the Wyoming wrongful death statute which expanded the plaintiff class beyond parent-child relationships, and allowing the plaintiff to recover for observance of the accident scene shortly after its occurrence, but without material change in the condition and location of the victim).

164. *See supra* notes 110-40 and accompanying text (discussing the holdings in *Dillon* and *Molien*) and notes 154-63 and accompanying text (discussing the holding in *Gates*).

165. 730 S.W.2d 649 (Tex. 1987).

166. *Id.* at 649. Recovery for the mishandling of a corpse shows that even the *Dillon* guideline of death or serious injury to the victim is not always necessary. Section V of this note will provide a grading system that will allow for instances where any one of the "Dillon factors" can be absent, but recovery may still be had by the plaintiff.

167. *Id.* at 650.

168. *Id.*

169. Saint Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 654 n.6 (Tex. 1987). For a listing of other states that have rejected the physical impact requirement, see *supra* note 154.

170. *Id.* at 653-54 (defending peace of mind when the facts are deemed sufficient to guarantee the genuineness of the claim in the absence of physical manifestations of the mental injury). *See* Moore v. Lillebo, 722 S.W.2d 683, 685 (Tex. 1986) ("Mental anguish inheres in the nature of certain torts . . . ."); Billings v. Atkinson, 489 S.W.2d 858 (Tex. 1973) (mental suffering damages recoverable for the willful invasion of privacy); Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967) (mental suffering damages recoverable for intentional battery); Farmers & Merchants State Bank of Krum v. Ferguson, 617 S.W.2d 918 (Tex. 1981) (mental anguish damages allowed for the wrongful dishonor of checks with malicious intent); Stuart v. Western Union Tel. Co., 18 S.W. 351 (Tex. 1885) (allowing recovery for mental anguish damages for a negligently delivered death message); Classen v. Benfer, 144 S.W.2d 633 (Tex. Civ. App. 1940) (holding mental anguish damages recoverable after the mishandling of a corpse). The *Garrard* court held the physical manifestation requirement as an unwarranted restriction on the right to seek redress for NIED, and thereby joined an established trend in American jurisprudence. *Garrard*, 730 S.W.2d

reasoned that the problem was one of proof, and that the best interests of the public would not be served by denying a remedy in all cases simply because some claims might be false, as such a policy would lead to arbitrary results.[171] As Section III.B will show, while some courts removed barriers to recovery such as the physical manifestation and contemporaneous observation requirements, other courts, such as the California Supreme Court in *Thing v. La Chusa*[172] reinforced them, resulting in the lack of consistency which this Note endeavors to resolve.

B. Thing v. La Chusa: A Restriction On The Dillon Expansion

As expansion of the cause of action for NIED continued, subsequent court decisions have created more uncertainty.[173] Just as the "zone of danger" limitation was abandoned in *Dillon* as an arbitrary restriction on recovery, the *Dillon* factors have been relaxed on grounds that they too have created arbitrary limits on recovery.[174] Recognizing that the physical manifestation requirement had also been abandoned, the Supreme Court of California, in *Thing v. La Chusa*,[175] gave consideration to the importance of avoiding the limitless exposure to liability of the pure foreseeability test, which had been adopted by a number of other jurisdictions.[176] In *Thing*, a child was struck by an automobile while his mother was nearby, but the mother neither saw nor heard the accident.[177] The mother became aware of her son's injury through her daughter.[178]

A series of California decisions had held that visual perception of an accident was not required to recover for NIED.[179] Thus, California courts

---

at 654.

171. *Garrard*, 730 S.W.2d at 654.

172. 771 P.2d 814, 821 (Cal. 1989).

173. *See infra* note 179, for a discussion of the recent inconsistent court decisions regarding NIED.

174. Thing v. La Chusa, 771 P.2d 814, 821 (Cal. 1989).

175. *Id.* at 817.

176. *Id.* at 817-21.

177. *Id.* at 815.

178. Thing v. La Chusa, 771 P.2d 814, 815 (Cal. 1989). The plaintiff was told by her daughter that her son had just been struck by a car. *Id.* "She rushed to the scene where she saw her bloody and unconscious child, whom she believed was dead, lying in the roadway." *Id.*

179. *See* Krouse v. Graham, 562 P.2d 1022, 1030 (Cal. 1977) (holding that the plaintiff in a negligent infliction of emotional distress case need not "visually" perceive the third party injury to satisfy the *Dillon* guideline suggesting that the plaintiff suffer shock from "'the sensory and contemporaneous observance of the accident, . . .'"); Archibald v. Braverman, 79 Cal. Rptr. 723, 724 (Cal. Ct. App. 1969) (holding that visual perception of the accident was not required, and recovery was allowed by a mother who "did not actually witness the tort but viewed the child's injuries within moments after the occurrence of the injury-producing event"). *Cf.* Hoyem v.

concluded that persons who were not present at the accident scene could recover damages for the emotional distress they later suffered when informed by others of the injury to their loved ones or upon their arrival at the scene.[180] The *Thing* court sought to rectify the conflicting and sometimes arbitrary attempts by the lower courts to apply *Dillon* and *Molien*, and concluded that bystander recovery of damages for NIED are limited by traditional concepts of tort law, as well as by the societal benefits of certainty in the law.[181]

The court in *Thing* devised a three element test for recovery of damages for emotional distress caused by observing the negligent infliction of injury upon a third party.[182] Under *Thing*, the plaintiff may recover if: 1) the plaintiff is closely related to the injured victim;[183] 2) the plaintiff is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and 3) the plaintiff suffers serious emotional distress beyond that which would be anticipated in a disinterested witness, and which is not an abnormal response under the circumstances.[184] An examination of the holding in *Thing* indicates that a merely negligent actor will not owe a legally recognized duty to make monetary amends to all persons who may have suffered emotional distress on viewing or learning about the injurious

---

Manhattan Beach City Sch. Dist., 585 P.2d 851 (Cal. 1978) (reaffirming the requirement that the shock or emotional distress necessary to a cause of action for NIED under *Dillon* must result from a direct emotional impact on the plaintiff caused by the sensory and contemporaneous observance of the accident); *But see* Nazaroff v. Superior Court, 145 Cal Rptr. 657 (Cal. Ct. App. 1978) (broadening the concept of contemporaneous observance). The California Court of Appeals noted that a mother who, while searching for her missing three-year-old child, heard a neighbor scream his name and realized that the child must have fallen into the neighbor's pool. *Id.* at 662. The mother saw the child being pulled from the pool and given cardiopulmonary resuscitation as she ran up. *Id.* at 659. The court held that she could state a cause of action under *Dillon*. *Id.* at 663. The court reasoned that it was not necessary that the plaintiff perceive the accident if she suffered physical harm that resulted from the "direct emotional impact from the contemporaneous observation of the immediate consequences of the defendants' negligent act, which was the proximate cause of the injury and death of her son." *Id.* at 664. The *Nazaroff* decision no longer considered sensory perception of an accident to be a prerequisite to recovery, however, ". . . the plaintiff who had witnessed the immediate consequences of an injury producing incident [must] suffer emotional distress sufficient to result in physical injury." Thing v. La Chusa, 771 P.2d 814, 822 (Cal. 1989).

180. *See supra* note 179.

181. *Thing*, 771 P.2d at 815. The court resolved some of the uncertainty over the parameters of the NIED action by devising a three element test. *Id.* *See infra* notes 182-83 and accompanying text.

182. *Thing*, 771 P.2d at 829-30.

183. *Id.* at 829. This requirement is significantly broader than the "familial relationship" requirement specified by other courts and includes relatives residing in the same household, or parents, siblings, children and grandparents. *Id.* at 829 n.10. See *infra* section V, notes 254-96 and accompanying text for the proposed solution to the dilemma of determining how closely related a bystander-plaintiff must be to recover for emotional damages.

184. Thing v. La Chusa, 771 P.2d 814, 829-30 (Cal. 1989).

consequences of the tortfeasor's conduct.[185] The significance of the court's decision in *Thing* is that it refined the guidelines enunciated by the same court in *Dillon v. Legg* to create greater certainty in bystander recovery actions.[186] The court refused to distinguish between bystander and direct victim NIED actions, holding bystanders to the same contemporaneous standard as direct victims, and leaving any distinctions for future courts.[187]

"The distinction between the 'bystander' and 'direct victim' cases is found in the source of the duty owed by the defendant to the plaintiff."[188] Since bystander liability is premised upon the defendant's violation of a duty not to negligently cause emotional distress to people who observe conduct which causes harm to another, the limits set forth in *Thing* for bystander liability have no application in "direct victim" cases.[189] In *Burgess v. Superior Court*,[190] the California Supreme Court carved out a distinction between bystanders and direct victims in NIED cases.[191] In *Burgess*, the plaintiff's newborn infant was deprived of oxygen for forty-four minutes during delivery while the doctor arranged for emergency surgery.[192] The plaintiff sued for recovery of damages for NIED.[193] The defendant was granted summary judgment by the trial court which relied on the bystander theory of *Thing*.[194] The appellate court held that *Thing* was not controlling under the facts of the case because

185. *Id.* at 830.

186. *Id.* at 815. Significantly, the *Thing* court viewed the post-*Dillon* decisions, which allowed recovery without the plaintiff present at the scene of the injury, as creating limitless liability through the use of a pure foreseeability test of "duty," and instead chose to follow a stricter standard requiring contemporaneous observance of the accident. *Id.* at 821. Thus, the *Thing* case reaffirms the need for a recovery model that will fulfill the promise of *Dillon*, and further define the parameters of the tort of NIED.

187. *Id.* at 825. (holding that recovery is permitted if the plaintiff observes both the defendant's conduct and the resultant injury, and is aware at that time that the conduct is causing the injury). *Id.* (referring to the decision in Ochoa v. Superior Court, 703 P.2d 1 (Cal. 1985)).

188. Burgess v. Superior Court, 831 P.2d 1197, 1200 (Cal. 1992) (stating that "bystander liability is premised upon a defendant's violation of a duty not to negligently cause emotional distress to people who observe conduct which causes harm to another"). In contrast, the "direct victim" label is used to distinguish cases in which damages for serious emotional distress are sought as a result of a breach of duty owed the plaintiff that is "assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two." Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., 770 P.2d 278, 282 (Cal. 1989). For a complete discussion of a recent direct victim case, *see* Boyles v. Kerr, *supra* note 103.

189. *Burgess*, 831 P.2d at 1200. *See supra* note 188.

190. *Burgess*, 831 P.2d at 1197.

191. *Id.*

192. Burgess v. Superior Court, 831 P.2d 1197, 1199 (Cal. 1992).

193. *Id.*

194. *Id.* at 1199. *See supra* notes 173-200 and accompanying text for a full discussion of Thing v. La Chusa, 771 P.2d 814 (Cal. 1989).

Burgess was a "direct victim" rather than a "bystander."[195] The Supreme Court of California affirmed, reasoning that the distinction between the "bystander" and "direct victim" cases is found in the source of the duty owed by the defendant to the plaintiff.[196] Similar to the holding in *Molien*,[197] the court reasoned that a doctor owed a direct duty to a patient that is assumed or imposed as a matter of law, or that arises out of a relationship between the two.[198] Thus, the *Burgess* court recognized the "sound" principles of *Molien*, that damages for NIED may be recovered absent physical injury or impact, and, notwithstanding the criteria imposed upon recovery by bystanders, in cases of a breach of duty arising from a preexisting relationship.[199] This Section has identified various factors that courts have used to decide when a bystander who is a close family member and outside of the zone of danger may recover for NIED. Obviously, there is no cohesiveness among the courts as exemplified by

---

195. *Burgess*, 831 P.2d at 1199 (defining the bystander theory in terms of a defendant's violation of a duty not to negligently cause emotional distress to people who observe conduct which causes harm to another). For a complete discussion of a direct victim case, see *supra* note 103.

196. Burgess v. Superior Court, 831 P.2d 1197, 1200 (Cal. 1992).

197. *See supra* section III.A.2, notes 124-40 and accompanying text.

198. *Burgess*, 831 P.2d at 1201. *See also* Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., 770 P.2d 278, 282 (Cal. 1989) (holding that professional relationship between psychiatrist and patient imposed a duty on the defendant as a matter of law).

199. *Burgess*, 831 P.2d at 1201. In cases where a duty arising from a preexisting relationship is negligently breached, the injured party constitutes a direct victim. *Id.* Confusion has reigned in cases involving family relationships and medical treatment as to whether and under which "theory" plaintiffs may seek damages for NIED. *See* Ochoa v. Superior Court, 703 P.2d 1 (Cal. 1985) (permitting recovery by parents on a "bystander theory," rather than a "direct victim theory," as a result of the parents' observation of the defendants' failure to treat their deathly ill child); Schwartz v. Regents of the Univ. of Cal., 276 Cal. Rptr. 470 (Cal. Ct. App. 1990) (denying recovery to a father for the refusal of child's therapist to provide the father with information about the child's whereabouts); Golstein v. Superior Court, 273 Cal. Rptr. 270 (Cal. Ct. App. 1990) (denying parents recovery of damages for emotional distress based upon lack of contemporaneous knowledge of their child's injury arising from administering an overdose of radiation to the child); Hurlbut v. Sonora Community Hosp., 254 Cal. Rptr. 840 (Cal. Ct. App. 1989) (reversing judgment for parents who recovered damages for emotional distress solely under the bystander theory arising from an injury to their child during labor and delivery); Martinez v. County of Los Angeles, 231 Cal. Rptr. 96 (Cal. Ct. App. 1986) (denying recovery to parents for "restructuring life" to care for child injured at birth); Newton v. Kaiser Found. Hosps., 228 Cal. Rptr. 890 (Cal. Ct. App. 1986) (permitting parents of child left partially paralyzed during birth to plead entitlement to damages for emotional distress); Andalon v. Superior Court, 208 Cal. Rptr. 899 (Cal. Ct. App. 1984) (permitting recovery by parents for failure to diagnose Down's syndrome in child prior to birth); Wiggins v. Royale Convalescent Hosp., 206 Cal. Rptr. 2 (Cal. Ct. App. 1984) (denying recovery of damages for emotional distress to wife for convalescent home's failure to prevent husband's injurious fall); Sesma v. Cueto, 181 Cal. Rptr. 12 (Cal. Ct. App. 1982) (finding a question of fact sufficient to warrant trial of mother's claim for damages for emotional distress arising out of death of child at birth); Johnson v. Superior Court, 177 Cal. Rptr. 63 (Cal. Ct. App. 1981) (permitting mother to state claim for emotional distress resulting from stillbirth as part of her medical malpractice claim). These cases illustrate the need for concrete guidelines to determine if a preexisting relationship between the doctor and the parent of the victim will preclude recovery by the parent as a bystander.

the cases discussed in Section III. Section IV will introduce the recent decision of *Dunphy v. Gregor*[200] to show the current trend toward recovery for non-family members, and the inapplicability of a bright-line rule to determine who may recover. Further, Section IV surveys the policy considerations surrounding the debate over further expansion of bystander recovery.

IV. RECENT EXPANSION OF THE BYSTANDER RECOVERY RULE

In recent years, courts have further expanded recovery for NIED to even non-family members by crafting a two-tiered analysis.[201] First, the claim must prove the four standard elements for negligence:

> 1) that the defendant owed a duty of care to the bystander-plaintiff; 2) that the defendant's conduct fell below the applicable standard of care; 3) that the bystander-plaintiff was injured; and 4) that the defendant's conduct caused the injury.[202] Second, the claim must meet a public policy interest in preventing cases that are not "authentic" and in placing a fair burden on defendants.[203] To meet the public policy burden, a [NIED] claim must involve a victim who was killed or seriously injured; [a] bystander [who is] a close family member of the victim; and [a] bystander [who] viewed either the event that injured the victim or its immediate aftermath.[204]

Recently this two-tiered analysis has been expanded to allow for recovery in the case of a close, intimate, non-family relationship.[205]

A. Dunphy v. Gregor - Expansion Beyond the Immediate Family

In *Dunphy v. Gregor*,[206] the New Jersey courts expanded the class of plaintiffs that may recover for NIED.[207] Eileen Dunphy was watching her fiance, with whom she had lived for two years, change a flat tire when he was

---

200. 642 A.2d 372 (N.J. 1994).

201. James Podgers, *Witnesses to Tragedy: Courts Open Door To More Suits For Negligent Infliction Of Emotional Distress*, 81 A.B.A. J., Jan. 1995, at 44.

202. *Id.*

203. *Id.* Podgers argues that the claim must satisfy the policy of not hauling a defendant into court without adequate cause. *Id.* A requirement of death or serious injury in the presence of a close family member of the victim, or with the family member arriving at the scene in the aftermath, constitutes an adequate burden on the defendant. *Id.*

204. *Id.*

205. Dunphy v. Gregor, 642 A.2d 372 (N.J. 1994).

206. 642 A.2d 372 (N.J. 1994).

207. *Id.* at 377.

run over by another car and dragged nearly 250 feet.[208] She accompanied him to the hospital, where he died the next day.[209] Prior to *Dunphy*, the rule in New Jersey for NIED cases was that only members of the victim's immediate family who witnessed the infliction of injuries could recover for NIED.[210] Rejecting a "bright-line" distinction between a married and unmarried person, the New Jersey Supreme Court instead adopted a fact-driven approach to recovery for NIED based on the relationship of the parties.[211] The New Jersey Supreme Court held that the solution to the question of expansion of bystander liability lay in the application of the principles of tort law.[212] Application of tort law principles serves to determine whether a particular claimant is owed a duty of care, rather than using a hastily-drawn "bright-line" distinction between married and unmarried persons.[213] The *Dunphy* court acknowledged that the critical determination of an interpersonal relationship necessary to adjudicate a NIED claim arising from that relationship must be guided by a focus on those factors that identify and define the intimacy and familial nature of such a relationship.[214] The court devised a standard that takes into account: 1) the duration of the relationship; 2) the degree of mutual dependence; 3) the extent of common contributions to a life together; and 4) the extent and quality of shared experience.[215] As non-familial relationships are considered as candidates for recovery, advocates and critics of such a course of action have raised several policy arguments concerning the issue.

B. Arguments Against Expansion of the Bystander Recovery Rule

The expansion of the Bystander Recovery Rule in *Dunphy* has been both supported and criticized.[216] Several policy reasons have been used to justify

---

208. *Id.* at 373.

209. Dunphy v. Gregor, 642 A.2d 372, 373 (N.J. 1994).

210. Portee v. Jaffee, 417 A.2d 521, 526 (N.J. 1980).

211. Dunphy v. Gregor, 642 A.2d 372, 376 (N.J. 1994).

212. *Id.* (quoting People Express Airlines, Inc. v. Consolidated Rail Corp., 495 A.2d 107, 107 (N.J. 1985)).

213. *Id.*

214. *Id.* at 378.

215. Dunphy v. Gregor, 642 A.2d 372, 378 (N.J. 1994). The last two factors include "whether the plaintiff and the injured person were members of the same household, their emotional reliance on each other, the particulars of their day to day relationship, and the manner in which they related to each other in attending to life's mundane requirements." *Id.*

216. Dunphy v. Gregor, 617 A.2d 1248, 1248 (N.J. 1992). The New Jersey Appellate Court ruled that a jury should be allowed to determine whether the relationship of cohabitants engaged to be married was the functional equivalent of an intimate familial relationship. *Id.* at 1254. However, a dissent in the appellate court interpreted the "familial relationship" as one restricted to marriage or blood ties. *Id.* at 1255. *See also* Portee v. Jaffee, 417 A.2d 521, 526 (N.J. 1980) (recognizing the existence of a marital or intimate familial relationship as being essential to a cause of action for NIED); Elden v. Sheldon, 758 P.2d 582, 588 (Cal. 1988) (refusing to extend the cause of action for

the rejection of a claim by a non-family member for NIED.[217] In *Nieto v. City of Los Angeles*,[218] the argument was made that providing unmarried cohabitants with the same rights as married persons would inhibit the states' interest in promoting the marriage relationship.[219] The *Nieto* court reasoned that the state accords marriage special treatment in recognition of its solemn and binding nature.[220] The court reasoned that providing unmarried cohabitants the same treatment could impede the state's interest in promoting marriage.[221]

The emphasis on the state's interest in promoting marriage is based on the fact that "formally married couples are granted significant rights and bear important responsibilities toward one another which are not shared by those who cohabit without marriage."[222] The state's interest in marriage is demonstrated by those state statutes that govern the requirements for entry into and termination of marriage, the property rights which flow from that

---

NIED to persons in a cohabitant relationship).

217. John L. Diamond, Dillon v. Legg *Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477, 492 (1984) (stating that recovery for damages for NIED involving the consequences of a negligent act must be limited in order to avoid an intolerable burden on society); Borer v. American Airlines, Inc. 563 P.2d 858, 861 (Cal. 1977) (holding that foreseeable injury to a legally recognized relationship does not necessarily give rise to a cause of action, and that "social policy must at some point intervene to delimit liability"); Laws v. Griep, 332 N.W.2d 339, 340 (Iowa 1983) (holding that the policy favoring marriage is "rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society"); Mobaldi v. Regents of Univ. of California, 55 Cal. App. 3d 573, 582 (Cal. Ct. App. 1976) (expressing the view that to require a court to inquire into the relationship of the partners to determine whether the "emotional attachments of the family relationship" existed between the parties would impose a difficult burden on the courts).

218. 138 Cal. App. 3d 464 (Cal. Ct. App. 1982).

219. *Id.* at 470.

220. *Id.* (quoting Mott v. Mott, 22 P. 1140 (Cal. 1889)).

221. Nieto v. City of Los Angeles, 138 Cal. App. 3d 464, 470-71 (Cal. Ct. App. 1982).

> Unmarried cohabitants with enforceable contracts for support clearly differ as a class from spouses and putative spouses. Spouses receive special consideration from the state, for marriage is a civil contract 'of so solemn and binding a nature . . . that the consent of the parties alone will not constitute marriage . . .; but one to which the consent of the state is also required.

Mott v. Mott, 22 P. 1140 (Cal. 1889). Marriage is accorded this degree of dignity in recognition that "[t]he joining of man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." Marvin v. Marvin, 557 P.2d 106, 122 (Cal. 1976). Consonant therewith, the state is most solicitous of the rights of spouses. *See, e.g.*, Civ. Code §§ 5100 et seq. The state affords similar protection to certain putative relationships in recognition of the good faith in which the innocent party undertook to marry. Civ. Code, § 4452. Unmarried cohabitants receive no similar solicitous statutory protection, nor should they; such would impede the state's substantial interest in promoting and protecting marriage. *Id.* at 469.

222. Elden v. Sheldon, 758 P.2d 582, 587 (Cal. 1988).

relationship,[223] and the laws imposing various obligations on spouses, such as the duty of support.[224] Opponents of expansion of the Bystander Recovery Rule believe that expansion would grant some of the legal benefits of marriage without the associated obligations, thus impeding the state's interest.[225]

Another argument against expansion of the bystander recovery rule is the burden that such an expansion would impose on the courts.[226] The expansion of the "Dillon rule" to include nonfamily members would require a court to inquire into the relationship of the partners to determine whether the "emotional attachments of the family relationship" existed between the parties[227] and whether the relationship was "stable and significant."[228] The problem with an analysis of an unmarried cohabitation relationship is that it would require a massive intrusion into the private lives of the partners, with a corresponding increase in the expense of proving which relationships meet the standard.[229]

Finally, opponents of the expansion of the bystander recovery rule argue that the number of persons to whom a negligent defendant owes a duty of care must be limited.[230] As a New York judge commented in *Tobin v. Grossman*,[231] "[e]very injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of the wrongs to a controllable degree."[232] This argument against expansion of the rule reasons that, if recovery for mental distress is permitted, it must be limited so as not to unreasonably burden all human activity by compelling the defendant to pay for the hurt feelings of every other disturbed

---

223. Cal. Civ Code, § 4000 et. seq.

224. *See* Elden, 758 P.2d at 587 (citing Cal. Civ. Code § 4000 §§ 242, 244).

225. *Id.*

226. *Id.*

227. *See* Mobaldi v. Regents of Univ. of Cal., 55 Cal. App. 3d 573, 582 (Cal. Ct. App. 1976) (allowing a foster mother to recover damages for emotional distress after she watched hospital personnel negligently administer a fatal dose of glucose solution to her foster child, who was laying in the plaintiff's arms as he went into convulsions and became comatose, suffering irreversible brain damage). The close relationship test of *Dillon* is expressed as "one test of foreseeability that negligent infliction of injury upon one person will cause emotional distress and consequent physical harm to another." *Id.* Consequently, the emotional attachments of the family relationship and not legal status are those which are relevant to foreseeability. *Id.*

228. Butcher v. Superior Court, 139 Cal. App. 3d 58, 70 (Cal. Ct. App. 1983) (suggesting that the stability of a cohabitation relationship could be established by evidence of its duration, whether the parties had a contract, the degree of economic cooperation, the exclusivity of sexual relationships, and whether the couple had children).

229. Elden v. Sheldon, 758 P.2d 582, 587 (Cal. 1988).

230. Borer v. American Airlines, 563 P.2d 858, 860 (Cal. 1977); Dunphy v. Gregor, 642 A.2d 372, 382 (N.J. 1994).

231. 249 N.E.2d 419 (N.Y. 1969).

232. *Id.* at 424.

person shocked at an accident.[233] Opponents also conclude that conditioning defendants' liability upon plaintiff's ability to prove that he or she shared a "strong bond" with the deceased or injured person would unreasonably extend the limits of a defendant's duty.[234] Thus, policy arguments have been made that expansion will usurp the institution of marriage, unduly burden the courts, and needlessly extend the limits of a defendant's duty.

C. Arguments For Expansion of the Bystander Recovery Rule

Proponents of expanding the bystander recovery rule maintain that attention must be given to the close emotional ties between unrelated or distantly related persons, for at times it is undeniable that such relationships may offer as much affection, support, and solace as is provided by immediate family members.[235] Proponents argue that the emotional trauma suffered as the result of injuries to a person in such a relationship is as devastating as that suffered by a member of the immediate family.[236] Those in favor of extending the bystander recovery rule also assert that limiting the class of bystanders to those individuals with marital or intimate familial relations will sufficiently circumscribe the defendant's liability.[237] In light of the modern advances made in medical and psychiatric science, some courts view expansion of bystander recovery as a trend which adapts the law to the dynamics and nuances of modern twentieth century society.[238]

Advancements in modern science make psychic injury more easily proved despite the absence of a physical manifestation or the presence of a blood

---

233. PROSSER, LAW OF TORTS 55, 353-54 (3d ed. 1964).

234. *See* Elden v. Sheldon, 758 P.2d 582, 585 (Cal. 1988); *see also* Tobin v. Grossman, 249 N.E.2d 419, 421 (N.Y. 1969). Moreover, the difficulty of proving a strong bond would give rise to fictitious claims. *Eldon*, 758 P.2d at 588. A determination whether a partner in an unmarried cohabitation relationship may recover damages for emotional distress based on such matters as the sexual fidelity of the parties, and their emotional and economic ties would require a court to undertake a massive intrusion into the private life of the partners. *Id.* at 587. Further, application of these factors would not provide a sufficiently definite and predictable test to allow for a consistent application from case to case. *Id.*

235. *Elden*, 758 P.2d at 588.

236. *Id.*

237. James v. Lieb, 375 N.W.2d 109 (Neb. 1985). In *James*, a young boy saw his sister run over by a truck and killed. *Id.* at 111. Though the Nebraska courts had not extended recovery to siblings outside of the zone of danger, they had expanded on the "zone of danger rule," deciding that in an action for NIED, the relationship between the plaintiff and the victim is the most crucial element in determining foreseeability. *Id.* The court held that a plaintiff bystander has a cause of action for negligently inflicted foreseeable emotional distress upon a showing of a marital or intimate familial relationship with a victim who was seriously injured or killed as a result of the proven negligence of a defendant. *Id.* at 115.

238. Paugh v. Hanks, 451 N.E.2d 759, 762 (Ohio 1983).

relationship with the victim.[239] Therefore, expansion of bystander recovery insures an individual's right to emotional tranquility, through a genuine claim against a blameworthy defendant.[240] However, the determination of both seriousness and reasonable foreseeability must be accomplished on a case-by-case basis, since no fixed or immutable rule is capable of resolving all the cases brought under an action for the NIED.[241] Finally, some proponents of the expansion of the bystander recovery rule maintain that the mental distress of a bystander is directly related to the strength of the bond between that bystander and the victim.[242] Therefore, recovery should logically be based on the strength of the bond. This syllogism is violated by blindly restricting recovery to "immediate family" members, thereby ignoring many strong relationships.[243]

Only the relationship between the victim and bystander relates in any significant way to foreseeability.[244] Thus, the foreseeability of a distinct class of plaintiffs, identified by applying a standard that recognizes the strength of the bond between bystander and victim and whether or not there is an intimate familial relationship, should dictate recovery for NIED. In this way, the other elements of the bystander cause of action, such as contemporaneous observation, death or serious injury to the victim, and severe emotional injury to the plaintiff, will structure the kind of "particularized foreseeability" that ensures that the class of plaintiffs is reduced even further and that limitless liability is avoided.[245] One can reasonably foresee that people who enjoy an intimate familial relationship with one another are especially vulnerable to emotional injury resulting from a tragedy befalling one of them. Thus, foreseeability based on that standard preserves the distinction between ordinary emotional injuries that would be experienced by friends and relatives in general and those "indelibly stunning" emotional injuries suffered by one whose relationship with the victim "at the time of injury, is deep, lasting, and genuinely intimate."[246] Once the degree of intimacy in the bystander-victim relationship is recognized,

---

239. *Id.* at 765.

240. *Id.* In *Paugh*, the plaintiff feared for the safety of her children and was emotionally injured when a car crashed through her house. *Id.* at 761. The court held it was not necessary that the victim (whose safety was feared for by the plaintiff-bystander) even suffer actual physical harm. *Id.* at 764. Further, a strict blood relationship between the accident victim and the plaintiff bystander, though present in this case, is not necessarily required. *Id.* at 766. The more closely the plaintiff and the victim are related, the more likely it is that the emotional injury was reasonably foreseeable. *Id.* at 767.

241. Paugh v. Hanks, 451 N.E.2d 759, 766 (Ohio 1983).

242. *Id.*

243. *Hallahan*, *supra* note 27, at 445.

244. *Diamond*, *supra* note 217, at 487-89.

245. Dunphy v. Gregor, 642 A.2d 372, 377 (N.J. 1994).

246. *Id.*

the special circumstances surrounding the injury to the victim can be used to qualify the plaintiff for recovery.[247] To extend the duty of care owed a victim to a bystander as a foreseeable and protectable person does not increase the burden of care or extend it beyond what is ordinarily expected and appropriate.[248] However, as the proposed model will advocate, the burden of proof, by way of circumstances of the case at hand, can be increased as the bystander-victim relationship becomes more distant.[249]

Contract, property, and labor rights have been stretched to their limits as the judicial system has searched for alternative solutions to the "immediate family" requirement for bystander recovery.[250] However, as the court noted in *Dunphy*, irrespective of the label placed upon a particular relationship, it is a question for the jury as to whether the interpersonal bonds upon which the cause of action is based actually exist.[251] The court in *Dunphy* developed a standard that focused on factors that identify and define the intimacy and familial nature of such a relationship.[252] The standard takes into account: 1) the duration of the relationship; 2) the degree of mutual dependence; 3) the extent and quality of shared experience; and 4) whether the plaintiff and the injured person were members of the same household, their emotional reliance on each other, the particulars of their day-to-day relationship, and the manner in which they related to each other in attending to life's mundane requirements.[253] The major decisions concerning NIED since *Dillon v. Legg* show a need to resolve the inconsistent holdings of the last twenty-five years surrounding bystander

---

247. Special circumstances include whether there was death or serious injury, whether the plaintiff was in the zone of danger, or manifested physical injuries from the emotional distress, and whether the plaintiff contemporaneously observed the accident. *See infra* section V, notes 254-96 and accompanying text.

248. Dunphy v. Gregor, 642 A.2d 372, 377 (N.J. 1994). *See also* Hopkins v. Fox & Lazo, 625 A.2d 1110, 1120 (N.J. 1993) (emphasizing that duty owed to a potential purchaser who was injured when she fell at an "open house" "arises . . . when . . . such an inspection is part of the professional services that would be undertaken by a reasonable broker"). To extend a similar duty of care to an engaged cohabitant does not increase the burden of care beyond what is ordinarily expected and appropriate for reasonable drivers. Dunphy, 642 A.2d at 377.

249. See *infra* section V for an illustration of how the burden of proof shifts to the plaintiff, as the relationship to the victim becomes more attenuated.

250. *See infra* notes 260-64 and accompanying text.

251. Dunphy v. Gregor, 642 A.2d 372, 378 (N.J. 1994) (holding that "[a] defendant should always have the right, even in the case of a parent and child or a husband and wife, to test the operative facts upon which the claim is based irrespective of the relationship involved"). *Id. See infra* section V, notes 254-96 and accompanying text for a graphical representation of operative facts vs. the relationship involved in order to determine recovery.

252. *Dunphy*, 642 A.2d at 378.

253. *Id.*

recovery. Section V will provide a model by which the courts can arrive at consistent results on which a bystander-plaintiff may recover in an action for NIED.

V. MODEL REASONING TO DETERMINE BYSTANDER RECOVERY

A. Description of the Model

Presently no legislation exists that addresses the major issues[254] that have been considered by the courts to determine bystander recovery in an action for NIED. Each court has adopted its own strategy to address the problem, resulting in inconsistent decisions that do not apply the same rules on a case-by-case basis.[255] This approach has failed to create uniform standards among the states, with a consequential loss of judicial efficiency as each court addresses issues common to many jurisdictions in a different way, resulting in contradictory opinions.

This Note has surveyed policy considerations surrounding bystander claims to achieve a cohesive policy regarding recovery for certain types of intangible loss, instead of the patchwork of rulings decided since *Dillon*.[256] Zoning law, family law and employment law have been analyzed for determinative elements with which a court can ascertain who can recover without substantially increasing the liability of negligent actors. As a summary of the diverse rulings, a chart is provided which shows the overall lack of uniformity among various jurisdictions and the resulting need for change. Although the chart indicates a willingness by the courts to grant recovery to plaintiffs other than spouses or blood relatives, plaintiffs with very similar bystander-victim relationships and

---

254. Major issues include: 1) the relationship of the bystander to the victim; 2) whether the victim was seriously injured, or died; 3) whether the bystander contemporaneously viewed the accident or came on the scene shortly thereafter; 4) whether the bystander was in the zone of danger, and 5) whether the bystander exhibited physical manifestation of the emotional distress injury. For a full discussion of these issues, and how the courts could apply them to determine recovery for NIED, see *infra* section V.B, notes 275-85 and accompanying text.

255. *See supra* sections II-IV, notes 39-253 and accompanying text.

256. The major cases analyzed in this note are summarized in the chart on pages 950-51. The chart has a column for each of: 1) the jurisdiction that decided the case; 2) the case name; 3) whether the plaintiff was a direct victim or a bystander; 4) whether the plaintiff was in the zone of danger; 5) whether the victim suffered serious injury, or death; 6) whether the plaintiff had physical manifestation of the emotional injury; 7) whether the plaintiff had sensory and contemporaneous observance of the accident rather than coming on the scene afterwards; 8) the relationship of the plaintiff to the victim; 9) whether the plaintiff was granted recovery as parasitic damages; 10) whether the plaintiff was granted recovery; and 11) the total "objective factor" grade. For a discussion of parasitic damages see *supra* note 13. For a discussion of the "objective factors" and the grading system, see *infra* note 258 and accompanying text.

Valparaiso University Law Review, Vol. 30, No. 3 [1996], Art. 4

Jurisdiction	Case	Dir. or Bysndr	Zn of Dngr 2	Dth 2 or injy 1	Phys Mnfl'n 2	Snsry & cntmprns 2	Rel'tnship	Parasitic Damges	Recovery	Grading
Ca 1968	Dillon	B	No (0)	Dth (2)	Yes (2)	Yes (2)	Mother	No	Yes	6
Ca 1976	Mobaldi	B	No (0)	Dth (2)	Yes (2)	Yes (2)	Foster Mother	No	Yes	6
Ca 1980	Molien	D	N/A	No	No	N/A	N/A	No	Yes	N/A
Ca 1988	Elden	B	Yes (2)	Dth (2)	No (0)	Yes (2)	Defacto Spouse	No	No	6
Ca 1989	Thing	B	No (0)	Inj (1)	No (0)	After (1)	Mother	No	No	2
Ca 1992	Burgess	D	N/A	N/A	No	Yes	Phys/Pt	No	Yes	N/A
Haw 1970	Rodrigues	B	No (0)	No (0)	No (0)	After (1)	Property	No	Yes	1
Haw 1974	Leong	B	No (0)	Dth (2)	No (0)	Yes (2)	Step Grand mother	No	Yes	4
Mass 1978	Dziokons ki	B	No (0)	Inj (1)	Yes (2)	After (1)	Parents	No	Yes	4

Jurisdiction	Case	Dir. or Bystdr	Zn of Dngr 2	Dth 2 or inj 1	Phys Mnft'n 2	Susty & cnfrmtn 2	Rel'tnship	Parasitic Damges	Recovery	Grading
N.J. 1980	Portee	B	No (0)	Dth (2)	Yes (2)	Yes (2)	Mother	No	Yes	6
N.J. 1994	Dunphy	B	No (0)	Dth (2)	No (0)	Yes (2)	Fiance	No	Yes	4
Ohio 1983	Paugh	B	No (0)	No (0)	Yes (2)	Yes (2)	Mother	No	Yes	4
Tex 1885	Stuart	D	N/A	N/A	Yes	N/A	N/A	Yes Contract	Yes	N/A
Tex 1890	Hill	D	N/A	N/A	Yes	N/A	N/A	No	Yes	N/A
Tex 1987	Garrard	B	No (0)	No (0)	No (0)	No (0)	Parent	No	Yes	0
Tex 1992	Boyles	D	N/A	N/A	N/A	N/A	N/A	No	No	N/A
Wyo 1986	Gates	B	N (0)	Inj (1)	No (0)	After (1)	Parent	No	Yes	2
Fed. 1994	Gotshall	B	Yes (2)	Dth (2)	Yes (2)	Yes (2)	Co-worker	No	Yes	8

similar circumstances of injury, share markedly dissimilar results.[257] The chart on pages 950-51 summarizes the most influential decisions from the early cases recognizing emotional distress as an item of damage, to the most recent bystander decisions since *Dillon v. Legg*.[258]

---

257. The plaintiff in Thing v. La Chusa, 771 P.2d 814 (Cal. 1989), did not recover, while the plaintiffs in Dziokonski v. Babineau, 380 N.E.2d 1295 (Mass. 1978) and Gates v. Richardson, 719 P.2d 193 (Wyo. 1986), did. All plaintiffs were parents of the victim, and did not contemporaneously observe the accident. Further, the plaintiff in Elden v. Sheldon, 758 P.2d 582 (Cal. 1988) and the plaintiff in Dunphy v. Gregor, 642 A.2d 372 (N.J. 1994), were both part of a cohabitating couple in a very similar set of circumstances, and yet Dunphy recovered while Elden did not. *See* chart, *infra* note 258 and accompanying text.

258. 441 P.2d 912 (Cal. 1968). The chart contains decisions concerning bystander recovery for NIED, and represents eight jurisdictions, in chronological order for each jurisdiction. Five direct victim cases are represented for comparison, however, the bystander cases are what concerns the proposed model. The eleventh column in the chart is a point total derived from the following schedule:

1) Severe Emotional Distress (Assumed) = 0
2) Death = 2;
   or
3) Serious Injury = 1
4) Contemporaneous Observance = 2;
   or
5) Arrival in the Aftermath = 1
6) Physical Manifestation = 2
7) Plaintiff in the Zone of Danger = 2

The graded criteria are hereinafter referred to as "objective factors," and although there are eight types, only five of them can occur simultaneously. The grading system is provided as an illustration of how the courts should evaluate the circumstances of the accident relevant to the relationship of the plaintiff, to the victim. The chart shows that historically plaintiffs with a low grade of 0 - 2, like the plaintiff in *Garrard*, *Rodrigues*, and *Gates*, have recovered, while a plaintiff with many factors in his or her favor has been denied recovery, like the plaintiff in *Elden*.

The *Dillon* court set guidelines that assumed that as the relationship between the victim and the person witnessing the accident becomes more attenuated, the mental harm to that person becomes less plausible. Dillon v. Legg, 441 P.2d 912, 917-18 (Cal. 1968). However, as the chart shows, negligent conduct towards property, a corpse, or a co-worker has resulted in recovery, while death to a child has not. The model will allow recovery to a plaintiff more distantly related, if other distress-inducing "objective factors" are present. Thus, the more subjective criteria of determining the closeness of a bystander-victim relationship is guided by the objective factors of the case. To illustrate how the proposed mechanism of recovery will function, a graph is provided on page .

The horizontal axis of the graph represents the degree of closeness of the bystander-victim relationship. Zero on the horizontal axis represents a bystander and victim that are complete strangers, and a value of 12 represents a parent, child, or spousal relationship. All other relationships are in between these two extremes. The courts will use such factors as those outlined in *Dunphy v. Gregor*, the zoning laws for family dwellings, employment laws, or family law to determine where the relationship falls relative to the two extremes. *See infra* notes 272-74 and accompanying text for a discussion of the criteria used to define a familial relationship.

Once the degree of intimacy is determined, the "objective factors" of the case are used to arrive at the point represented on the vertical axis. A plot of the "objective element" grade vs. the degree of closeness of the bystander-victim relationship shows the spacial relationship between the cases presented in the chart. A baseline is established using a stranger with all the objective factors

The requirement that the bystander be closely related to the victim embodies the judgment that only the most profound emotional interests should receive vindication when negligently injured.[259] This conclusion requires an analysis of those relationships outside of the immediate family which have merited recovery by the courts in the past. These relationships include cohabitating couples,[260] concern for property by the property owner,[261] foster parent-foster child relations,[262] concern arising out of a contractual relationship,[263] and concern for a step-relation.[264] As the relationship between bystander and victim is less clearly defined by blood, it becomes subject to other elements of

---

present compared to a parent with emotional distress only, as in *Garrard*, for the negligent treatment of a corpse. Any claim to the left of the baseline should be denied recovery, while any claim to the right should obtain recovery. A case that falls directly on the baseline will be granted recovery only at the discretion of the court. Thus, as the relationship between bystander and victim diminishes, the "objective factors" become more determinative of recovery. The slope of the graph was determined by drawing a "best fit" to the cases which represent the outer limits of recovery in a bystander action for NIED, Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396 (1994), Dunphy v. Gregor, 642 A.2d 372 (N.J. 1994), and St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649 (Tex. 1987). For a complete discussion of these cases, see *infra* note 270, *supra* notes 165-71 and 206-16 and accompanying text. The plaintiffs in *Gottshall*, *Dunphy*, and *Garrard* all recovered and represented a very distant relationship of a co-worker in *Gottshall*, to a very close relationship of a parent and child in *Garrard*. The *Dunphy* fiancé relationship represented a point that was midway between these extremes. Using these cases as reference points, other representative cases were plotted, and all but *Thing v. La Chusa* were consistent with the courts' actual decision. In *Thing*, recovery was not granted, however, under the proposed model recovery should have been granted. *Elden v. Sheldon* was not granted recovery by the courts, and since it falls on the baseline, *Elden* would not recover solely on the basis of this model.

259. Dunphy v. Gregor, 642 A.2d 372, 377-78 (N.J. 1994).

260. *Id.* *See supra* notes 206-16 and accompanying text for a complete discussion of the *Dunphy* case.

261. Brown v. Crocker, 139 So. 2d 779 (La. Ct. App. 1962). Allowing recovery for the mental anguish one suffers upon witnessing the loss of one's property, yet not allowing this type of recovery for witnessing an injury to a close relation is inconsistent. *See also* Rodrigues v. State, 472 P.2d 509 (Haw. 1970).

262. Mobaldi v. Regents of The Univ. Of Cal., 55 Cal. App. 3d 573 (Cal. Ct. App. 1976). In *Mobaldi*, the mother of a foster child that sustained permanent brain damage through due negligence of the hospital sought damages based on her intimate "family-like" relationship with the child. *Id.* at 573.

263. Holland v. St. Paul Mercury Ins. Co., 135 So. 2d 145 (La. Ct. App. 1961). In *Holland*, parents brought suit for mental anguish damages for worrying about their child eating rat poison. The parents were granted recovery arising out of the exterminator's contract with the parents. *Id.* at 145, 157.

264. Leong v. Takasaki, 520 P.2d 758 (Haw. 1974). In *Leong*, the court ruled that a step-grandson was entitled to recover damages for NIED for witnessing the death of his step-grandmother caused by the defendant's negligent conduct. The court found the relationship to be of the same quality as a blood relationship, given the local prevailing custom in Hawaii of grandparents being responsible for child care. *Id.* at 766. In *Leong*, the step-father gave his mother responsibility for caring for his step-son. *Id.*

definition, such as duty.[265] The body of case law assembled in this Note has served to analyze each instance of bystander action for NIED in order to find those elements common to the plaintiffs that recover. The proposed model will balance the concerns of excessive litigation against the rights of those parties involved in an intimate familial relationship worthy of recovery.

The proposed model assumes that the court will decide the degree of intimacy of the bystander-victim relationship through the use of existing law dealing with family issues. Various communities across the country in states such as California, Colorado, and Minnesota, have devised local statutes to deal with non-traditional families in the gay population.[266] Some labor unions and employers have allowed bereavement leave for the death of foster children, step-relations, and in some cases, anyone that has lived in the bereaved person's home for more than one year.[267] Provisions such as these have been used by courts in the past to determine the degree of intimacy of the bystander-victim relationship.[268]

The Federal Employer's Liability Act (FELA) has allowed employees who were bystanders to the death or serious injury of a co-worker to recover for NIED.[269] However, while FELA expanded the group of potential plaintiffs

---

265. The duty may be that of a parent to provide for a child's safety or of any bystander who may be a care provider for the victim. *See* Eyrich v. Dam, 473 A.2d 539, 547 (N.J. Super. Ct. App. Div. 1984) (viewing a person who has been entrusted with the care of a child, and has witnessed the child's accidental death as experiencing an excruciating burden of guilt). Further, the court argued that one's status as a child's temporary caretaker should fulfill the condition of being bound by an intimate family tie. *Id.* The court declined to extend bystander recovery to the plaintiff as custodian, stating that an extension of the law should come from the Supreme Court. *Id.*

266. The following municipalities have adopted some type of domestic partnership ordinance: Berkeley, Los Angeles, Santa Cruz, and West Hollywood, California; Takoma Park, Maryland; New York City, New York (allowing bereavement leave only); and Madison, Wisconsin. Berkeley, Santa Cruz, and West Hollywood extend health care benefits to domestic partners. *See Koch Grants Paid Leave To Unmarried Couples*, N.Y. TIMES, Aug. 8, 1989, at B3. West Hollywood, Cal., Mun. Code §§ 4220-28 (1985), *reprinted* in Lambda Legal Defense and Education Fund, Inc., Domestic Partnership: Issues and Legislation, Oct. 1990, at 101-04 (unpaginated collection of reprints; page numbers count from first text page) (allowing domestic partners, both residents and nonresidents, to register their relationships at city hall, and providing for visitation rights at local hospitals and jails). A subsequent law provides eviction protection against the domestic partners of tenants in rent-controlled apartments. *See* Stephen Braun, *Presented To W. Hollywood Council: Voluminous Rent Law a Creature of Compromise*, L.A. TIMES, June 16, 1985, § 9, at 1. In 1989, the city extended insurance benefits to the domestic partners of city employees. *See* Ron Russell, *W. Hollywood Will Insure Partners of Single Employees*, L.A. TIMES, Feb. 22, 1989, Metro Section, at 3. *See also* Scott Harris, *Council O.K.'s Leave for Unwed Partners*, L.A. TIMES, Oct. 6, 1988, § 2, at 1.

267. CITY OF SOUTH BEND, INDIANA, EMPLOYEE BENEFIT HANDBOOK (1994).

268. *See infra* notes 272-73 for a listing of factors used by courts to determine the intimacy of a given relationship.

269. Federal Employer's Liability Act (FELA), 35 Stat. 65, as amended, 45 U.S.C. §§ 51-60 (1988).

who may recover outside of the immediate family, it has narrowed the mechanism by which they may recover by requiring the plaintiff to be in the "zone of danger."[270]

The following model provides a remedy for bystander-plaintiffs who are now excluded from recovery for NIED because their relationship with the victim is not linked by blood, marriage, or adoption. The model distinguishes several classes of plaintiffs, ranging from those with a traditional familial relationship to the victim, to those with a relationship based on domicile, contract, or employment with the victim. The list of plaintiffs is not meant to be exhaustive, as it is up to the court to determine the degree of intimacy of the bystander-victim relationship in the case at hand and grant recovery if certain factors are present. Thus, the model will address a bystander-victim relationship based on non-traditional elements that give rise to a deep, lasting emotional connection, each in its own way unique. However, by granting weight to the "objective factors" present in a given case, a court will achieve the proper balance between the relationship and the circumstantial elements of the case at hand.[271]

Expanding bystander liability to non-traditional bystander-victim relationships will create an eminently foreseeable, but discrete class of plaintiffs. The purpose of this model is not to determine the degree of intimacy in a bystander-victim relationship for a claim for NIED, but to provide a sufficiently definite and predictable method that will allow for consistent decisions on recovery from case to case, once the court has established where the relationship lies. The traditional categories of blood, marriage, and adoption are under—and over-inclusive with respect to the qualities that the state seeks to promote by providing protection to people sharing these relationships.[272]

Therefore, it is the totality of the relationship, as evidenced by the

---

270. Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396, 2399-2400 (1994) (holding that since the zone of danger test presently is followed by 14 jurisdictions, it remains a well-established "common law" concept of negligence that is suitable for determination of the federal question of what constitutes negligence for purposes of FELA).

271. *See supra* note 258 and accompanying text for an identification and definition of the "objective elements."

272. James D. Esseks, *Redefining The Family*—Braschi v. Stahl Associates, 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989), 25 HARV. C.R.-C.L. L. REV. 183 (1990). These qualities include emotional and financial interdependence, long-term cohabitation, and exclusive devotion. *Id.* at 200 n.52. The traditional family relationships are underinclusive because nontraditional families often exhibit them as well. *Id.* The traditional categories "are overinclusive because many marital, adoptive and blood relationships do not maintain these characteristics." *Id.*

dedication, caring and self-sacrifice of the parties, which should control.[273] This model does not establish new criteria to define the closeness of a bystander-victim relationship. Instead, the solution proposes more barriers for recovery as the bystander-victim relationship becomes more distant. However, in order to apply the solution, the court must decide the degree of intimacy between the bystander and victim, evaluating any of a variety of factors used by courts in the past.[274] Once the status of the relationship has been established, the model can be applied to determine the barriers to recovery that the plaintiff must overcome. A graphical representation of the application of the model is provided on page 965.

B. Application of the Model to Example Cases

1. Definitions

1) *Direct Victim:* Plaintiff who is put in fear for his or her own safety based on actions of the defendant and sustains direct physical injury.

2) *Bystander:* Plaintiff who, not directly sustaining physical injury, witnesses peril or injury to another.

3) *Impact Rule:* Limits recovery for NIED to cases where the injured party sustained a contemporaneous physical impact or injury.

4) *Family Relationship:* Relationship between bystander and victim arising out of blood, marriage, or other special, legally recognized circumstances, such as adoption or foster care.

---

273. Braschi v. Stahl Associates, 543 N.E.2d 49, 55 (N.Y. 1989) (holding that a ten-year relationship between two gay partners fulfilled any definitional criteria of the term family). In *Braschi*, two men that were gay life partners lived as a couple for over 10 years. *Id.* The two men shared a strong emotional bond, maintained a faithful and exclusive commitment to one another and linked their financial lives through joint bank accounts. *Id.* The court evaluated their relationship based on the exclusivity and longevity of the relationship, the level of emotional and financial commitment to each other, and the reliance placed upon one another for daily family services. *Id.*

274. The court may confine its "inquiry to an examination of contracts, powers of attorney, wills, life insurance policies and other written documents, as a basis for establishing a family relationship." Esseks, *supra* note 272, at 200 n.61. There are also many elements of unmarried cohabitation, some of which may not be present in any particular relationship. They include: joint housing, joint economy, joint ownership of real and personal property, children together, meals together, sexual relations, looking upon themselves and being looked upon by friends and family as a unit, and looking upon themselves and being looked upon by friends and family as having responsibility for each other in case of accident or illness. Note, *Looking For A Family Resemblance: The Limits Of The Functional Approach To The Legal Definition Of Family*, 104 HARV. L. REV. 1640 (1991). *See supra* notes 200-05 and accompanying text.

Commentary: This solution is provided for recovery of bystanders only, but has defined a direct victim as well as a bystander in order to differentiate between the two. The family relationship is defined in order to distinguish plaintiffs with a traditional familial relationship from the extended classes of plaintiffs which this model seeks to reach. Finally, the impact rule is defined as a point of comparison to the more liberal zone of danger and physical manifestation requirements to better grade the mechanism of recovery to plaintiffs as they become more distantly connected to the victim.

2. Objective Factors

(1) Severe Emotional Distress: An invasion of an individual's right to peace of mind that "includes fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation and indignity, as well as physical pain."[275] Severe emotional distress is beyond that which would be anticipated in a disinterested witness.[276] In terms of this model, severe emotional distress is assumed in order to bring an action for NIED, and does not add weight to the claim. Weight factor = 0.

(2) Death: Death of the victim. Weight factor = 2; or

(3) Serious Injury: Serious injury to the victim. Weight factor = 1.

(4) Contemporaneous Observance: Presence at the scene of the accident at the time it occurs, with sensory perception and awareness that the event is causing injury to the victim. Weight factor = 2; or

(5) Arrival in the Aftermath: Arrival on the scene of the accident shortly after its occurrence, but without material change in the condition and location of the victim. Weight factor = 1.

(6) Physical Manifestation: The psychic injury must manifest itself in physical injury that is at least objective in some regard so that causation can be attributed to the defendant's negligence and can be proved through qualified medical witnesses.[277] Weight factor = 2.

(7) Plaintiff in the Zone of Danger: Plaintiff is in the zone of danger to his physical well-being at the time that he sustained the fright, shock, or emotional distress giving rise to the claim. Weight factor = 2.

---

275. Deevy v. Tassi, 130 P.2d 389, 396 (Cal. 1942).
276. Thing v. La Chusa, 771 P.2d 814, 815 (Cal. 1989).
277. 1 MINZER ET AL., *supra* note 14, at § 5.24(4).

Commentary: No single "objective factor" defined in this solution is dispositive of a plaintiff's right to recovery for NIED. The factors are meant to be taken cumulatively, and then balanced against the degree of closeness of the bystander-victim relationship. A plaintiff can have up to five of these factors simultaneously,[278] or only severe emotional distress,[279] which is given no weight, yet still recover in both situations, depending on the degree of closeness of the bystander-victim relationship. However, even though no one "objective factor" is absolutely necessary for recovery, sensory and contemporaneous observance of the accident is directly linked to the bystander being in the zone of danger, and therefore the zone of danger requirement will rarely, if at all, be a necessary factor for recovery without being accompanied by contemporaneous observance. Fear for the safety of another has merited recovery in the past;[280] thus, the severe injury or death factor is not necessarily linked to the others. However, fear for safety of another has not been given any weight in this model. Many more factors will have to be present as the plaintiff's relationship with the victim becomes more attenuated.

3. Examples

a. Traditional Bystander

> All bystanders that are related by blood, marriage, or adoption to the victim of the defendant's negligence may recover for NIED if any objective factor, in addition to severe emotional distress, is present. If only emotional distress is present, the court may consider other factors to determine recovery.[281]
>
> Minimum Objective Factor Grade = 0.

Example: *St. Elizabeth Hospital v. Garrard*.[282] The plaintiff in *Garrard* was a parent, however recovery was granted only for the mishandling of a corpse. There was no contemporaneous viewing, injury, or death, or other physical

---

278. Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396, 2406 (1994). *See* chart, *supra* note 258 and accompanying text.

279. St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 654 (Tex. 1987). *See* chart, *supra* note 258 and accompanying text.

280. Paugh v. Hanks, 451 N.E.2d 759, 766 (Ohio 1983) (holding that a cause of action for the negligent infliction of "emotional distress may be stated where the plaintiff-bystander reasonably appreciated the peril which took place, whether or not the victim suffered actual physical harm, and, that as a result of this cognizance or fear of peril, the plaintiff suffered serious emotional distress").

281. Other factors might include a lack of recovery from other sources or parasitic damages. *See supra* note 13.

282. 730 S.W.2d 649 (Tex. 1987). *See supra* notes 165-71 and accompanying text for a complete discussion of the holdings in *Garrard*.

manifestations.

b. Nontraditional Bystander

1) Co-Employee Relationship.

Any bystander that has worked for over one year with the victim of the defendant's negligence may recover for NIED if all objective factors are present and:

A) The defendant's negligence results in death, rather than serious physical injury to the victim.

B) The bystander had sensory and contemporaneous observance of the accident, rather than coming on the scene in the aftermath.
Minimum Objective Factor Grade = 8.

Example: In the case of *Consolidated Rail Corporation v. Gottshall*,[283] the plaintiff contemporaneously viewed his friend and co-worker collapse from heat exhaustion and die of a heart attack. The plaintiff was working under the same conditions, and was therefore in the zone of danger. Further, the plaintiff suffered physical manifestations of his emotional distress. Thus, under the model, the plaintiff had objective factors with a total weight of eight, and was certainly more than a complete stranger to the victim. Therefore, as shown on the graph, recovery should be granted.

2) Shared domicile/de facto spousal relationship.

Any bystander that has shared the same household for more than two years with the victim of the defendant's negligence may recover for NIED if:

A) The bystander was in the zone of danger of the accident. Objective factor = 2.

B) The emotional distress suffered by the bystander results in physical manifestations. Objective factor = 2.
and either:
C) The defendant' negligence results in serious injury to the victim rather than death. Objective factor = 1. Along with:
The bystander had sensory and contemporaneous observance of the

283. 114 S. Ct. 2396 (1994). *See supra* note 270 and accompanying text for a discussion of the holdings in *Gottshall*.

accident. Objective factor = 2.

Or:

D) The defendant's negligence results in death to the victim rather than serious injury. Objective Factor = 2. Along with: The plaintiff came on the scene in the aftermath of the accident rather than contemporaneously observing it. Objective Factor = 1.

Or:

E) The defendant's negligence results in death to the victim rather than serious injury. Objective Factor = 2. Along with:

D) The bystander had sensory and contemporaneous observance of the accident. Objective factor = 2.

Minimum Objective Factor Grade = 7, although 8 is one of the alternatives.

Example: In *Elden v. Sheldon*,[284] the plaintiff was in the zone of danger, the victim died, and the plaintiff viewed the accident contemporaneously. The circumstances of the case gave the plaintiff an objective factor grade of six, precluding him from recovery under the model, since his de facto spousal relationship was not deemed close enough to a traditional spousal relationship to grant recovery. However, this case is very close to recovery by the model. The court could take into account that Elden suffered physical impact, and thus grant him recovery as a direct victim rather than a bystander, although this would take the plaintiff outside the scope of this model.

3) Contractual Relationship, Caretaker, or Custodian.

Any bystander who has had a contractual relationship for more than one year to provide primary care to the victim of the defendant's negligence is subject to the same criteria for recovery as that of a relationship of shared domicile only. This may also include situations in which a plaintiff has been entrusted with the temporary care of a loved one. Such bystanders may recover if their total objective factor grade is a minimum of six.[285] Two examples of a grade of six or more which will warrant recovery are:

A) The defendant's negligence results in death to the victim rather than serious injury. Objective Factor = 2.

---

284. 758 P.2d 582 (Cal. 1988). *See supra* notes 1-6 and accompanying text for a discussion of the holdings in *Elden*.

285. In cases of objective factor grades of one through six, any of a multitude of combinations of objective factors will reach the same numerical minimum or more. Therefore, one example is provided for illustration purposes. However, the court must go to the facts of the case to calculate the specific objective factor grade for a specific case.

B) The plaintiff came on the scene in the aftermath of the accident rather than contemporaneously observing it. Objective Factor = 1.

C) The bystander was in the zone of danger of the accident. Objective Factor = 2.

D) The emotional distress suffered by the bystander results in physical manifestations. Objective Factor = 2.

Objective Factor Grade = 7.

or

A) The defendant's negligence results in death to the victim rather than serious injury. Objective Factor = 2.

B) The bystander had sensory and contemporaneous observance of the accident. Objective Factor = 2.

And at least one of the following:

C) The bystander was in the zone of danger of the accident. Objective Factor = 2.

D) The emotional distress suffered by the bystander results in physical manifestations. Objective Factor = 2.

Objective Factor Grade = 6.

Example: In *Eyrich v. Dam*,[286] a couple was entrusted with the son of a neighbor for an evening at the circus.[287] The child was subsequently mauled by a leopard and died from his injuries.[288] The woman in charge of his care witnessed the entire event, and the man in charge attempted to rescue the child, and was himself injured.[289] The man also suffered physical manifestations of his emotional distress.[290] Under the model, the female plaintiff would not recover, as she would have a weight factor of four, since she contemporaneously viewed the accident which resulted in death to the victim. The man could be considered a direct victim, in which case the model would not apply. However, at the discretion of the court, the man could be considered a bystander who was in the zone of danger, in which case he would have a weight factor of eight and would recover under the model. In order for the female plaintiff to recover, her relationship to the victim must be determined by the court to be at least as close

286. 473 A.2d 539 (N.J. Super. Ct. App. Div. 1984).
287. *Id.* at 541.
288. *Id.*
289. *Id.*
290. *Id.* at 543.

as the fiancé relationship in *Dunphy*.

4) Fiancé.

Any bystander who has had a monogamous relationship with the victim for more than one year with evidence of plans to marry.[291] Such bystanders may recover if their total objective factor grade is a minimum of four.[292] An example of a grade four which will warrant recovery is:

A) The defendant's negligence results in death to the victim rather than serious injury. Objective factor = 2.
And at Least One of the Following:

B) The bystander had sensory and contemporaneous observance of the accident. Objective Factor = 2.

C) The bystander was in the zone of danger of the accident. Objective Factor = 2.

D) The emotional distress suffered by the bystander results in physical manifestations. Objective Factor = 2.
Minimum Objective Factor Grade = 4.

Example: The case of *Dunphy v. Gregor* falls into this area. The fiancé relationship falls between that of a stranger and a true spousal relationship. Since Dunphy contemporaneously viewed the accident, and the victim died, she would have an objective factor weight of four and would be on the outer limits of recovery according to the model.

5) Cohabitant who has had children with victim.

Any bystander who has had a monogamous relationship with the victim for more than one year and has had children with the victim of the defendant's negligence may recover if their total objective factor grade is a minimum of five.[293] An example of a grade five which will warrant recovery is:

A) The defendant's negligence results in death to the victim rather than serious injury. Objective Factor = 2.

---

291. *See supra* notes 206-15 and accompanying text for a discussion of the determinative elements of a fiancé relationship used by the court in *Dunphy*.

292. *See supra* note 285.

293. *Id.*

B) The plaintiff came on the scene in the aftermath of the accident rather than contemporaneously observing it. Objective Factor = 1.

C) The emotional distress suffered by the bystander results in physical manifestations. Objective Factor = 2.
Objective Factor Grade = 5.

Example: The case of *Ledger v. Tippitt*[294] falls into this category. In *Ledger*, the plaintiff lived with the victim continuously for three years, and bore his child.[295] The plaintiff saw the decedent stabbed while seated in a vehicle a few feet away from him.[296] Under the model, the plaintiff had contemporaneous viewing of the event, and the victim died, for a weight factor of four. Under the model, the Ledger case is directly on the baseline, and there would be no recovery. However, unlike the *Elden* case, the court noted three facts present to distinguish *Ledger* from a mere cohabitation relationship: 1) the plaintiff made two attempts to marry the decedent; 2) the plaintiff bore the decedent's child; and 3) the plaintiff was economically dependant on the decedent. All of these factors make the relationship more familial or intimate than that of a cohabitant, therefore the court may grant recovery.

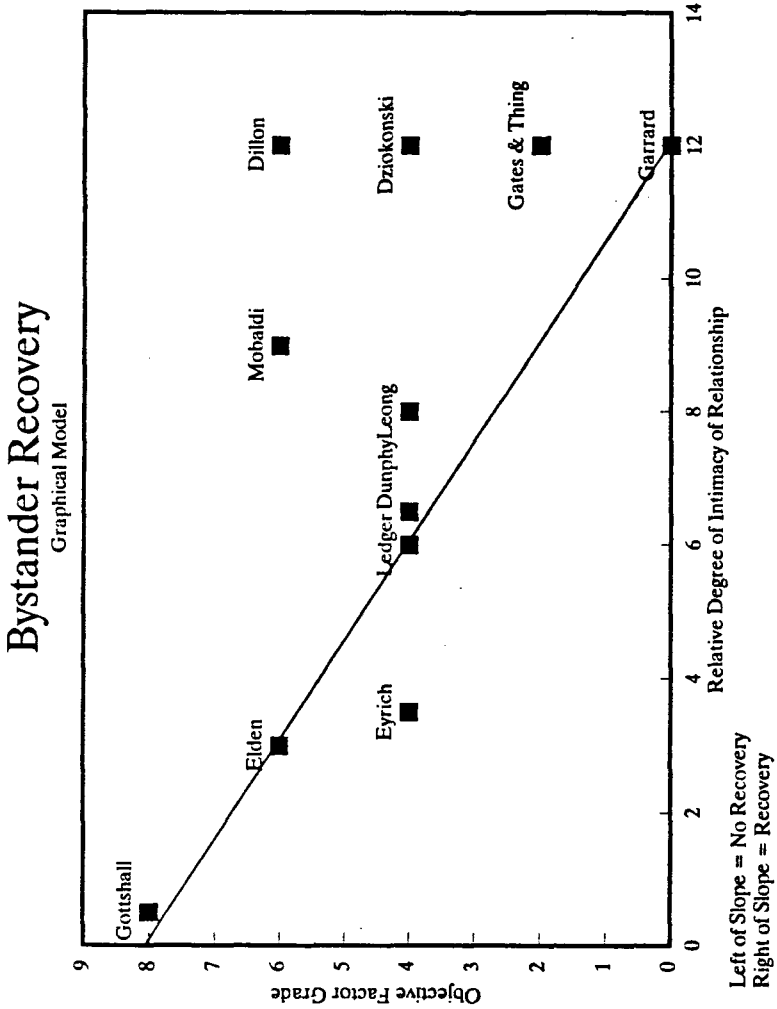
VI. CONCLUSION

Until this point in time, expansion of the bystander rule in a tort action for NIED has required that the court balance the concerns of excessive litigation against the rights of close family members. However, the definition of what constitutes a "family" has been rapidly changing in the last several years. With the rise of single parent households, foster parents, and relationships within the gay community, the question of who qualifies as an individual who may recover under a tort action for NIED has been left up to the judge to decide.

The recent case of *Dunphy v. Gregor* has identified several criteria for determining the family status of a given plaintiff. However, the criteria used to identify such a relationship is too unstable and unpredictable to manage the metamorphosis that has taken place in the traditional definition of family. An evaluation of the bystander-victim relationship, without a corresponding analysis of the circumstances surrounding the act of negligent conduct, is insufficient to provide a fair and balanced solution to bystander recovery. Therefore, the time has come to relate more objective criteria present in a given case to the relationship involved, in order to derive a more consistent method for deciding who should recover. This Note proposes a model that provides weights to

294. 164 Cal. App. 3d 625 (Cal. Ct. App. 1985).
295. *Id.* at 630-31.
296. *Id.* at 631.

various elements present in bystander actions for NIED, and moves away from a bright-line standard for determining who will recover. The proposed model employs "objective elements" that have been considered by courts in the past and applies them in a consistent manner for a case-by-case analysis. The proposed model will result in a dependable method for remedying the injured party while maintaining judicial efficiency.



Dennis G. Bassi