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Torts - New Mexico Establishes a Cause of Action for Negligent Infliction of Emotional Distress to a Bystander: Ramirez v. Armstrong

Karen Molzen

TORTS—New Mexico Establishes a Cause of Action for Negligent Infliction of Emotional Distress to a Bystander: *Ramirez v. Armstrong*

I. INTRODUCTION

In *Ramirez v. Armstrong*,[1] the New Mexico Supreme Court held that, under certain conditions, a cause of action exists for the negligent infliction of emotional distress to bystanders.[2] The *Ramirez* decision is especially important because its rationale, if applied in other cases, may justify recovery for emotional distress even where the defined circumstances for bystander recovery do not exist. *Ramirez* represents an admirable attempt to recognize an individual's interest in emotional security. Yet the court's reluctance to trust a jury to apply the traditional tort principles engendered an artificial delineation of actionable emotional injury to a bystander. This Note presents an analysis of *Ramirez* in light of the three approaches used in other jurisdictions to assess the liability to a bystander for negligently inflicted emotional distress. The impact of *Ramirez* on negligence actions in New Mexico and potential problems with its application also are discussed.

II. STATEMENT OF THE CASE

While attempting to cross a street, Santana Ramirez was struck and killed by a motor vehicle driven by William Armstrong.[3] Two of Ramirez's children and an unrelated girl who lived with his family were walking behind him and observed the accident.[4] A third child of Ramirez, not present at the scene, was informed of her father's death and viewed his body after the accident.[5]

Guardians of the four children brought suit on behalf of the children for wrongful death and for damages for physical and mental injuries resulting from the negligent infliction of emotional distress.[6] After settlement of the wrongful death action, the lower court granted the defendant's motion for judgment on the pleadings as to the remaining claims on the grounds that New Mexico recognized no cause of action for neg-

1. 100 N.M. 538, 673 P.2d 822 (1983).
2. *Id.* at 539, 673 P.2d at 823.
3. *Id.*
4. *Id.*
5. *Id.* at 540, 673 P.2d at 824.
6. *Id.* at 539, 673 P.2d at 823.

ligent infliction of emotional distress.[7] The plaintiffs appealed the court's ruling.[8]

On certification from the court of appeals, the supreme court held that, under certain defined circumstances, the principles of foreseeability and limited liability did not preclude recovery by a bystander for negligent infliction of emotional distress.[9] The court established a four-pronged test which must be satisfied, in addition to the traditional elements of negligence, to recover under this cause of action.[10] Applying this test to the facts, the court reversed the dismissal of the complaint as to the children of Ramirez who were present and who observed the fatal accident.[11] The supreme court affirmed the dismissal of the unrelated girl's claim because of her lack of a close familial relationship to the victim.[12] The court also held that the lower court had properly dismissed the claim of the daughter who had not observed the accident, apparently because she had not experienced a contemporaneous sensory perception of the accident.[13]

III. ANALYSIS

A. Historical Perspective

The judiciary has long been reluctant to permit recovery of damages for emotional distress.[14] This is especially true when the absence of a separate and independent tort by the defendant against the plaintiff precludes the emotional distress from falling in the category of parasitic damages.[15] As the rationale for refusing to consider infliction of emotional distress as an independent cause of action, the courts have often cited the difficulty of measuring the damages and the fear of fictitious claims.[16]

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7. *Id.*

8. *Id.*

9. *See id.* at 541-42, 673 P.2d at 825-26. The court also held that, because a bystander's action is a separate and independent claim, the Wrongful Death Act, N.M. Stat. Ann. §§ 41-2-1 to -4 (Repl. Pamp. 1982), does not bar an action for negligent infliction of emotional distress. 100 N.M. at 543, 673 P.2d at 827.

10. 100 N.M. at 541-42, 673 P.2d at 825-26. The court also indicated that the comparative negligence principles adopted by New Mexico in Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981), will apply to actions for the negligent infliction of emotional distress. 100 N.M. at 542, 673 P.2d at 826. The comparative fault of each actor involved in the accident, including that of the victim, will be assessed in order to determine the relative liabilities for the harm.

11. 100 N.M. at 543, 673 P.2d at 827.

12. *See id.*

13. *See id.*

14. *See* W. Prosser, HANDBOOK OF THE LAW OF TORTS § 12, at 49-51 (4th ed. 1971).

15. *Id.* at 52. Parasitic damages are those injuries which cannot alone serve as a basis for a redressable claim. Rather, an independent tort must support the award for the "parasitic" damages deemed to flow from the breach of that tort. *Id.* Prosser noted that "a factor which is today recognized as parasitic will, forsooth, tomorrow be recognized as an independent basis of liability." *Id.* at 52 n.47 (quoting from 1 Street, Foundations of Legal Liability 460, 470 (1906)).

16. W. Prosser, *supra* note 14, § 12, at 50-51.

The primary reason that courts continue to reject the independent tort of emotional distress, however, lies in the fear of unlimited liability.[17]

Starting in the 1930s, the courts began to realize that the fear of unlimited liability had no basis where the defendant purposely caused the emotional distress.[18] The required element of outrage as to the intentional act provided a sufficient guarantee that the emotional harm was both serious and authentic.[19] The tort of intentional infliction of emotional distress thus gradually gained favor.

Where the distress was inflicted negligently, however, courts considered the emotional harm and resulting injuries too speculative to support imposition of liability for merely negligent conduct.[20] Courts deemed such injuries to be unforeseeable.[21] Courts found an exception, however, where the emotional distress was precipitated by a fear for one's own physical

17. *See, e.g.*, Tobin v. Grossman, 24 N.Y.2d 609, 617-19, 249 N.E.2d 419, 423-24, 301 N.Y.S.2d 554, 560-61 (1969).

18. *See* W. Prosser, *supra* note 14, § 12, at 55-56. *See also* Restatement (Second) of Torts § 312 comment e (1965) (discussing the greater foreseeability of intentionally inflicted distress and its consequences as compared with that which is negligently inflicted).

19. *See* W. Prosser, *supra* note 14, § 12, at 52.

20. *See* W. Prosser, *supra* note 14, § 54, at 333. Two exceptions to this view were found where the negligent conduct involved the mishandling of a dead body or messages regarding the health or death of a family member. *Id.*, § 54, at 329-30. Under these circumstances, the harm was deemed foreseeable and the fact patterns inherently seemed to offer a sufficient guarantee of genuine claims. *See, e.g.*, Cary v. Lima, Salmon & Tully Mortuary, 168 Cal. App. 2d 42, 335 P.2d 181 (1959) (negligent embalming of the corpse of the plaintiff's father); Western Union Tel. Co. v. Crumpton, 138 Ala. 632, 36 So. 517 (1903) (negligent failure of telegraph company to deliver message of the death of plaintiff's mother).

21. Palsgraf v. Long Island Railroad Co., 162 N.E. 99 (N.Y. 1928), presents the leading commentary on the proper justifications for imposing liability upon the negligent defendant for the harms which he causes. The *Palsgraf* court developed the role of foreseeability of harm in the establishment of a legally recognized duty to the individual plaintiff. *See id.* at 99. *Palsgraf* dealt with a case of physical injury to the plaintiff, but its principles for the imposition of liability nonetheless prove instructive for assessing recovery for negligenty caused emotional injuries. *See id.*

The plaintiff in *Palsgraf* was injured by a scale at a railway station when employees of the defendant railroad negligently attempted to help a third party board a moving train. *Id.* An innocent looking package carried by the third party contained fireworks which exploded when the package fell to the ground. *Id.* The repercussion from that explosion caused the scales to fall on the plaintiff. *Id.*

Writing for the *Palsgraf* majority, Chief Judge Cardozo reasoned that a plaintiff must show that the duty is owed to her individually; a plaintiff may not recover as a "vicarious beneficiary of a breach of duty to another." *Id.* at 100-01. The *Palsgraf* majority defined the duty to another by reference to the risks of harm to the plaintiff which are reasonably perceived. *See id.* Foreseeability of harm comprises a reasonable expectation by a vigilant person that the type of harm suffered by the plaintiff will be a natural and probable consequence of the defendant's negligent conduct. *See id.* at 101. The mere fact of injury will not justify the imposition of liability for a negligent wrongful act. *See id.*

In order to impose a duty, the harm experienced by the plaintiff must be within the zone of foreseeable consequences. *See id.* Arguably, the zone of emotional danger extends beyond the zone of physical danger. The physical zone of risk is basically limited by the sense of touch, while the emotional zone is affected by all of the senses. The limits of perception, not merely distance from the defendant's conduct, create the boundaries of the zone of psychic impact.

safety.[22] Under such a circumstance, the fear was deemed foreseeable. The courts thus began to allow recovery for negligently inflicted emotional distress resulting from a threat to one's physical integrity.[23]

The so-called "impact" and "zone of danger" rules were created to allow recovery only if the distress was occasioned by a fear for one's own safety.[24] The "impact" rule denies recovery to a plaintiff for harms resulting from emotional distress unless the plaintiff proves some actual physical contact with his person caused by the defendant.[25] Although the impact requirement sought to prevent fraudulent claims by providing an objective proof of reasonable fear for one's physical safety, it resulted in stretching the technical "impact" requirement beyond reason in order to permit recovery.[26]

The "zone of danger" rule dispensed with the impact requirement in order to provide relief to deserving plaintiffs suffering from emotional distress caused by a fear for their own safety, but who had escaped physical impact by the defendant's fortuitous "miss."[27] The rule nonetheless still required that the plaintiff himself be within the "zone of physical danger" and not merely in fear for the safety of a third person.[28]

Both the "impact" and "zone of danger" rules reflect a presumption that foreseeable emotional harm to the bystander arises only where the defendant's negligent conduct physically threatens the bystander.[29] Courts

22. *See* Restatement (Second) of Torts § 313 comment d (1965). Once the defendant's actions have physically threatened the plaintiff, however, this breach of duty will support recovery for bodily injuries resulting solely from fear for the safety of an immediate family member. *Id.* at § 436 (3).

23. *See generally* Annot., 29 A.L.R.3d 1337 (1970) (a discussion of the traditional view denying any liability for emotional distress and of the rationales for and applications of the three modern rules for defining liability to a bystander for negligent infliction of emotional distress).

24. In Dillon v. Legg, 69 Cal. Rptr. 72, 441 P.2d 912 (1968), the dissent noted that even under the "zone of danger" rule "[t]he impact feared must be to oneself, and it must be an objective fear—not merely that of an excessively imaginative or timid plaintiff." 69 Cal. Rptr. at 87, 441 P.2d at 927 (1968) (Burke, J., dissenting).

25. W. Prosser, *supra* note 14, § 54, at 330-32.

26. *See, e.g.*, Morton v. Stack, 122 Ohio St. 155, 170 N.E. 869 (1930) (inhalation of smoke); Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931) (fall caused by the plaintiff fainting from fright); Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928) (defendant's horse "evacuated his bowels" on the plaintiff's lap).

27. *See* Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969). In *Tobin*, the court viewed the "zone of danger" rule as an expansion of the "impact" rule rather than the creation of a wholly new cause of action. *See id.* at 613, 249 N.E.2d at 420-21, 301 N.Y.S.2d at 556-57.

28. The first Restatement of Torts left open the possibility of recovery by a spouse or parent for emotional distress suffered from observing the negligent injury of his loved one. *See* Restatement of Torts § 313, caveat at 851 (1934). However, the addition of § 313(2) resulted in the deletion of this caveat and the second Restatement now encompasses the "zone of danger" rule. *See* Restatement (Second) of Torts § 313 (1934). See also Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978), for an excellent discussion and critique of these rules and their ultimate rejection by the Massachusetts court.

29. *See, e.g.*, Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897) (applying the "impact" rule, which was later abandoned by Massachusetts in Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978)); Amaya v. Holme Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d

applying the "impact" and "zone of danger" rules reason that no person truly could foresee that the bystander would have such a severe reaction to perceiving another in danger so as to experience harm as a result.[30] Imposing a duty to keep a bystander secure in his or her emotional tranquility, they assert, would result in virtually unlimited liability.[31] Merely negligent action is deemed insufficiently culpable to justify imposition of such liability.[32] The courts further assert that any relaxation of these rules would promote fraudulent claims, result in arbitrary distinctions as to what is foreseeable, flood the courts with claims, and open the door to plaintiffs of unusual sensitivity to shock.[33]

In the watershed case of *Dillon v. Legg*,[34] the California Supreme Court rejected the policies underlying the "impact" and "zone of danger" rules and permitted recovery for negligently inflicted emotional distress by a bystander in no physical danger. The *Dillon* court dealt with a situation in which emotional distress was caused by observing a loved one in peril.[35] The court's primary concern was that admittedly deserving plaintiffs might not recover because of a conviction that emotional harm to a bystander was not reasonably foreseeable.[36] The court agreed that the harm was not sufficiently foreseeable where the bystander was a stranger to the victim or had a distant relationship to him.[37] Nonetheless, the majority reasoned that severe emotional distress could be anticipated by

513, 29 Cal. Rptr. 33 (1963) (applying the "zone of danger" rule; *Amaya* was later overruled in Dillon v. Legg, 69 Cal. Rptr. 72, 85, 441 P.2d 912, 925 (1968)). *See also* W. Prosser, *supra* note 14, § 54, at 333-35.

30. W. Prosser, *supra* note 14, § 54, at 333. The principles of foreseeability as put forth in Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 162 N.E. 99 (1928) are more fully discussed *supra* note 20.

31. *See Tobin*, 24 N.Y.2d at 615-17, 249 N.E.2d at 422-24, 301 N.Y.S.2d at 558-60. *But see* Portee v. Jaffee, 84 N.J. 88, 417 A.2d 521 (1980) (reversing summary judgment against a mother who suffered emotional distress as a result of helplessly watching for four hours the slow death of her son who was trapped by an elevator). The *Portee* court stated that "[t]he interest assertedly injured is more than a general interest in emotional tranquility. It is the profound and abiding sentiment of parental love." *Id.* at 93, 417 A.2d at 526.

32. *See* Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477 (1982) (maintaining that imposition of liability for emotional distress punishes the defendant rather than compensating the plaintiff, and advocating the zone of danger rule because it limits liability by means of an internally consistent rationale).

33. *See, e.g.*, Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

34. 69 Cal. Rptr. 72, 441 P.2d 912 (1968).

35. *Id.* at 75, 441 P.2d at 915. The plaintiff mother in *Dillon* had suffered emotional distress from watching a negligently driven car strike her daughter. The victim's sister also saw the accident and she alleged similar emotional injury. Both plaintiffs alleged physical manifestations of the distress. The mother's claim had been dismissed by the lower court because she, unlike the plaintiff sister, had been outside the "zone of physical danger" at the time of the accident. *Id.*

36. *See id.* at 77-78, 441 P.2d at 917-18. The majority opinion emphasized that because duty is so intertwined with foreseeability, "no immutable rule can establish the extent of that obligation [to the bystander] for every circumstance of the future." *Id.* at 80, 441 P.2d at 920.

37. *Id.* at 81, 441 P.2d at 921.

the ordinary person where the bystander had a close relationship to the victim and had personally witnessed the accident.[38]

The *Dillon* majority discarded administrative difficulties as grounds for the wholesale denial of legal redress to all plaintiff bystanders.[39] Instead, the court, opting for a case-by-case determination of the degree of foreseeability of harm to a particular bystander plaintiff, used the following factors as guidelines: (1) whether the plaintiff was located close to the accident; (2) whether the shock resulted from the sensory and contemporaneous observation of the accident; and (3) whether the victim and the plaintiff had a close relationship.[40] The court expressly confined its ruling to cases in which the emotional distress resulted in physical injury to the bystander plaintiff.[41] The majority declined to determine whether liability could be imposed in future cases where some of the factors were absent or of reduced weight when compared with those presented in the *Dillon* case.[42]

B. The Ramirez Decision

New Mexico law permits recovery for injuries resulting from severe emotional distress when the distress has been intentionally inflicted.[43] The *Ramirez* case presented the first opportunity for the court to decide directly if relief is available for negligent infliction of emotional distress where the bystander has alleged physical manifestations of the distress.[44]

Noting that the theory of negligence encompasses the concepts of duty and foreseeability,[45] the *Ramirez* court discussed the roles of these con-

38. The majority expressed revulsion towards the view that the interest in the safety of loved ones was less foreseeable or less worthy of protection than the interest in one's own physical integrity. *Id.* at 78-79 n.4, 441 P.2d at 918-19 n.4.

39. *Id.* at 82, 441 P.2d at 922.

40. *Id.* at 80-81, 441 P.2d at 920-21.

41. *Id.* at 80, 441 P.2d at 920.

42. *Id.* at 81, 441 P.2d at 921. *But see infra* notes 81-87 and accompanying text for California's later restrictive interpretation of the *Dillon* guidelines.

43. Dominguez v. Stone, 97 N.M. 211, 638 P.2d 423 (Ct. App. 1981) (claim for emotional distress where the defendant made statements before a public meeting that the plaintiff was unsuited for her current employment because of her Mexican alienage and ethnicity).

44. In Curry v. Journal Pub. Co., 41 N.M. 318, 68 P.2d 168 (1937), the supreme court held that negligently spoken words cannot constitute a cause of action for negligently inflicted emotional distress. In *Curry,* the Albuquerque Journal had incorrectly reported the death of former territorial governor, George Curry. Curry's son alleged that his distress from the article had triggered a heart attack. Curry's daughter-in-law alleged physical injuries to both herself and the child she was carrying at the time of the report. The court in *Ramirez* expressly overruled dicta in *Curry* to the extent that it conflicted with the holding in *Ramirez.* 100 N.M. at 540, 673 P.2d at 824.

The New Mexico courts avoided addressing the issue on two previous occasions on the grounds that no physical manifestation of injury or actual physical injury to the bystander was alleged or proven. *See* Thompkins v. Carlsbad Irrigation Dist., 96 N.M. 368, 630 P.2d 767 (1981), *and* Aragon v. Speelman, 83 N.M. 285, 491 P.2d 173 (1971).

45. *See supra* note 20.

cepts in establishing a legal obligation not to invade a bystander's interest in freedom from emotional distress.[46] The court first considered the three rules used in other jurisdictions to assess liability to a bystander.[47] The *Ramirez* court rejected the "impact" and "zone of danger" rules and instead embraced the rationale adopted by California in *Dillon v. Legg*.[48] The court agreed that, under some circumstances, the ordinary person should foresee harm to a bystander resulting from fear for another's safety.[49] In such cases, the principle of foreseeability does not stand as a barrier to the establishment of a bystander cause of action for negligent infliction of emotional distress.[50]

In its unamimous opinion, the *Ramirez* court concluded that, to justify liability under the bystander cause of action, the identification of the specific personal interest to be protected is more important than foreseeability.[51] The court stressed that the legal conclusion of "duty" simply delineates an obligation to which the law will give recognition and effect.[52] Thus, a legal duty will be established only if a protected interest is infringed when a bystander suffers the distress from fear for the safety of another.[53] Where the person in peril is a loved one of the bystander, the court determined that the "marital or intimate familial relationship" is the essence of this interest and is worthy of legal protection.[54] The court characterized an invasion of this interest as a "tort against the integrity of the family unit."[55]

46. 100 N.M. at 541, 673 P.2d at 825.

47. *See Ramirez*, 100 N.M. at 541, 673 P.2d at 825. The *Palsgraf* case and principles are discussed *supra* note 20. The three rules for liability to a bystander are more fully addressed in *supra* notes 23-41 and accompanying text.

48. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72, 29 A.L.R.3d 1316 (1968). *Ramirez* termed this the "negligence theory" rationale for imposing liability. The *Dillon* rule and reasoning are more fully discussed *supra* notes 33-41 and accompanying text.

49. *See* 100 N.M. at 541-42, 673 P.2d at 825-26.

50. *See id.* The *Ramirez* court noted that the defendant had relied most heavily on the leading case opposing the *Dillon* rule, Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969). In *Tobin*, the New York Court of Appeals conceded that a negligent actor should foresee harm to a mother who witnesses injury to her young child, but expressed concern that "foreseeability, once recognized, is not so easily limited . . . [and] would, in short order, extend logically to caretakers other than the mother, and ultimately to affected bystanders." *Id.* at 615, 249 N.E.2d at 422, 301 N.Y.S.2d at 558 (1969).

51. *Ramirez*, 100 N.M. at 541, 673 P.2d at 825. This passage could be read to endorse the imposition of duty without regard to the foreseeability of the consequences to the bystander where the interest to be protected was of considerable import. Yet, this construction would render meaningless the court's reliance on the *Palsgraf* principle of foreseeability.

52. *Id.*

53. *See id.*

54. *See Ramirez*, 100 N.M. at 541, 673 P.2d at 825. The New Jersey Supreme Court had previously used this term to describe the essential relationship for bringing the bystander action for emotional distress. Portee v. Jaffee, 84 N.J. 88, 94, 417 A.2d 521, 527 (1980). The *Ramirez* court agreed with the concusion that "[t]he law should find more than pity for one stricken by seeing that a loved one has been critically injured or killed." 100 N.M. at 541, 673 P.2d at 825 (quoting *Jaffee*, 84 N.J. at 97, 417 A.2d at 526).

55. 100 N.M. at 541, 673 P.2d at 825.

To insure imposition of liability only when emotional harm to the bystander is actually foreseeable, the court required that, in addition to the traditional elements of negligence, the plaintiff bystander allege and prove four criteria.[56] These criteria include:

1. An accident resulting in physical injury or death to the victim;
2. A severe shock to the plaintiff that results from a direct emotional impact caused by the plaintiff's contemporaneous sensory perception of the accident;
3. A marital or intimate familial relationship between the victim and the plaintiff, limited to husband and wife, parent and child, grandparent and grandchild, brother and sister, and to those persons who occupy a legitimate position in loco parentis;
4. An emotional injury resulting in some physical manifestation or physical injury to the plaintiff.[57]

C. *The Ramirez Rule Elements*

Although the New Mexico Supreme Court followed the reasoning of *Dillon*, it chose not to establish guidelines for assessing foreseeability on a case-by-case basis. Rather, the court in effect established four additional "elements" of foreseeability necessary to state a claim for the negligent infliction of emotional distress to a bystander. By means of these standards, the court sought to make recovery possible to deserving plaintiffs while limiting liability to harm that is actually foreseeable.[58]

1. Physical Injury to the Victim

The first requirement, that the victim of the accident must have suffered physical injury or death, has no *Dillon* counterpart.[59] This may be a response to the *Dillon* dissent which questioned the imposition of liability when the bystander has been honestly mistaken in his or her belief that the "victim" was injured or in danger.[60]

Two possible rationales might support the existence of this element. First, any injury resulting from such a mistaken impression might be caused by a bystander's overly sensitive disposition to emotional dis-

56. *Id.* at 541-42, 673 P.2d at 825-26. The court stressed that no new obligation of conduct was imposed because the use of ordinary care by potential defendants will prevent liability.

57. *Id.* These elements are more fully discussed *infra* section III.C. of this Note.

58. *Ramirez*, 100 N.M. at 541, 673 P.2d at 825.

59. *Compare Ramirez*, 100 N.M. at 541-42, 673 P.2d at 825-26, *with Dillon*, 69 Cal. Rptr. at 80, 441 P.2d at 920. *Ramirez* failed to specify a requisite degree of physical injury to the victim. New Jersey holds that serious bodily injury to the victim is necessary for bystander recovery. *See Portee*, 84 N.J. at 94, 417 A.2d at 527.

60. *Dillon*, 69 Cal. Rptr. at 86, 441 P.2d at 926 (Burke, J., dissenting).

tress.[61] Second, the shock to the bystander logically should dissipate when he or she realizes that no member of the family suffered an injury.

Yet the requirement of physical injury to the victim suggests that the cause of action for the bystander may not comprise an independent tort.[62] Instead, the liability to the bystander may be a derivative of the liability to the victim. Thus, unless the victim suffers actual physical injury, the bystander's reaction to the perceived threatened physical injury is irrelevant.

2. Contemporaneous Sensory Perception of the Accident

The second *Ramirez* criterion requires that the severe shock to the bystander result from the contemporaneous sensory perception of the accident.[63] This element is based on the theory that a defendant is more likely to foresee harm where the third party directly perceives the accident than where the third party merely learns of the incident later.[64] "Without such perception, the threat of emotional injury is lessened and the justification for liability is fatally weakened."[65] Future litigation will surely seek to define the terms "contemporaneous" and "perception."[66] For

61. *But see* Martinez v. Teague, 96 N.M. 446, 631 P.2d 1314 (Ct. App. 1981). In *Martinez*, the New Mexico Court of Appeals stated that "there is nothing 'highly extraordinary' in incurring psychological problems as the result of an accident." *Id.* at 451, 631 P.2d at 1319.

62. This requirement may weaken the assertion that the *Palsgraf* principles support the imposition of a duty to the bystander. *See supra* note 20 (regarding the *Palsgraf* rule that a duty exists only where the plaintiff sues in his own right to be free from the defendant's conduct).

63. 100 N.M. at 541-42, 673 P.2d at 825-26. The *Ramirez* opinion cited to Dominguez v. Stone, 97 N.M. 211, 638 P.2d 423 (Ct. App. 1981), and held that the same standard used for intentionally inflicted distress would apply to this action. The standard requires that "the distress inflicted is so severe that no reasonable man could be expected to endure it." 97 N.M. at 215, 638 P.2d at 427.

64. Prior to *Ramirez*, the New Mexico Supreme Court had indicated that it would find a bystander claim for emotional distress inappropriate in those cases where the injury was not due to a sudden traumatic event. Wilson v. Galt, 100 N.M. 227, 233, 668 P.2d 1104, 1110 (Ct. App. 1983), *cert. quashed*, 100 N.M. 192, 668 P.2d 308. Thus, the lingering effects of medical malpractice probably do not satisfy the legal definition of accident for purposes of a bystander's claim. *But see* Bohrer, *Fear and Trembling in the Twentieth Century: Technological Risk, Uncertainty and Emotional Distress*, 1984 Wis. L. Rev. 83 (presenting a model for emotional distress claims and advocating, because of technological advances, a liberal interpretation of "traumatic" event where the injuries are manifested after a sometimes long dormant period).

65. Portee v. Jaffee, 84 N.J. 88, 94, 417 A.2d 521, 527 (1980).

66. A California Court of Appeals permitted recovery by a mother who had not witnessed the explosion which injured her child, but who had seen the child's injuries within moments of the accident. Archibald v. Braverman, 79 Cal. Rptr. 723 (Ct. App. 1969). The court reasoned that "the shock of seeing a child severely injured immediately after the tortious event may be just as profound as that experienced in witnessing the accident itself." *Id.* at 725 (1969). Later cases have more strictly construed the term "contemporaneous." *See, e.g.*, Hathaway v. Superior Court, 112 Cal. App. 3d 728, 169 Cal. Rptr. 435 (1980) (parents denied recovery for failure to observe the injury-producing event although they saw their dying son within minutes of his electrocution). *See also* Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977) (plaintiff husband present at the accident scene could maintain an action although he did not observe the accident because he knew from his wife's position that she had been struck by a car).

instance, the mother who hears the squeal of tires, but only minutes later finds her dying child, would desire a broad interpretation of these terms.[67]

Because the sensory perception of the accident, not the result of the accident, triggers the severe emotional distress, the *Ramirez* court wisely omitted the *Dillon* factor of close proximity to the accident.[68] As noted by the *Dillon* dissent, the factor relating to the specific physical location of the bystander to the accident has a tenuous bearing on the foreseeability of harm.[69] Rather, "[t]he risk of emotional injury exists by virtue of the plaintiff's perception of the accident, not his proximity to it."[70]

3. Marital or Intimate Familial Relationship

The third criterion of the *Ramirez* test defines the interest the court deemed worthy of protection, that of the "marital, or intimate familial relationship."[71] The usual emotional ties to one's family make actual distress more likely and also insure the sincerity of a claim. The court chose to limit the requisite relationship to specific degrees of consanguinity or the existence of a legally recognized marital status rather than rely upon the jury to determine whether the protected interest was sufficiently present.

In limiting the function of the jury, the court anticipated claims by remote relatives and opted to constrain the liability of the negligent defendant. Yet, many deserving plaintiffs whose injury may be equally foreseeable will be automatically barred from recovery. A victim's fiancée, or an unmarried cohabitant who observes the defendant's act of negligence cannot state a claim solely because of his insufficiently close relationship to the victim.[72] A more distant relative who nonetheless main-

67. In precisely this situation, the New York court refused to accept the *Dillon* rationale for fear that recovery under these circumstances would unleash the concept of unlimited liability for merely negligent conduct. *See* Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

68. *Compare Ramirez*, 100 N.M. at 541-42, 673 P.2d at 825-26, *with Dillon*, 69 Cal. Rptr. at 80, 441 P.2d at 920.

69. 69 Cal. Rptr. at 86, 441 P.2d at 926 (Burke, J., dissenting).

70. Portee v. Jaffee, 84 N.J. 88, 94, 417 A.2d 521, 527 (1980).

71. 100 N.M. at 541, 673 P.2d at 825. This policy-based decision is arguably an attempt by the *Ramirez* court to draw an arbitrary, but internally consistent line for preventing unlimited liability for negligent conduct. *See generally* Pearson, *supra* note 31 (examining the arbitrary nature of the bystander recovery rules).

72. *But see* Ledger v. Tippitt, 210 Cal. Rptr. 814 (Ct. App. 1985). In *Ledger*, the defendant had stabbed and killed a man who had lived with the plaintiff for two years and who had fathered her child. *Id.* at 815-16. The decedent and the plaintiff had twice attempted to get married, but circumstances beyond their control had frustrated their plans. *Id.* The plaintiff had observed the stabbing and the victim died in her arms. The court dismissed California precedent and held that the plaintiff stated a cause of action for the negligent infliction of emotional distress under the *Dillon* rule. *Id.* at 826-28. *See generally* Comment, *The Right of an Unmarried Cohabitant to an Action for Negligent Infliction of Emotional Distress in California*, 15 Pac. L.J. 925 (1984) (supporting an extention of the cause of action for domestic partners, whether heterosexual or homosexual, of the victim).

tains a closer actual relationship to the victim than those within the requisite degree of kinship is also precluded from recovery. The line the court draws appears arbitrary. This line, however, may also be seen as a rational attempt to limit liability to those instances where the protected interest will most likely be promoted.[73]

4. Physical Manifestation of Emotional Distress

Proof of some physical manifestation of the emotional distress is the fourth criterion of the New Mexico rule.[74] Such proof arguably assures that the emotional distress suffered is sufficiently serious to warrant imposition of liability upon the defendant.[75] This element possibly serves to ferret out trivial and fraudulent claims of emotional distress.[76] Yet at least one jurisdiction no longer prohibits recovery in the absence of some physical manifestation of the emotional distress.[77] Possibly, enhanced medical knowledge is seen as a reliable indicator of the authenticity of the claim.[78]

D. Implications of Ramirez

The New Mexico Supreme Court was clearly attempting to respond to *Dillon* rule critics by specifically defining which relationships of the victim to the bystander create sufficient foreseeability of harm.[79] The court's definition does prevent unlimited liability. The *Ramirez* court, however, surveyed the universe of foreseeable emotional harms and created an arbitrary and artificial distinction between those harms which are legally redressable and those which are not. Nonetheless, the rule provides internal consistentency by rooting the recovery in a policy of protecting the family unit.

Future litigators may seek to establish interests which are analogous

73. Even the final *Ramirez* category of sufficiently close relationships, in loco parentis, will seek to protect a parent-child type interest. In loco parentis: In the place of a parent; instead of a parent; charged, facticiously, with a parent's rights, duties, and responsibilities. BLACK'S LAW DICTIONARY at 708 (5th ed. 1979).

74. 100 N.M. at 542, 673 P.2d at 826.

75. *See* W. Prosser, *supra* note 14, § 55, at 335.

76. *See* Leong v. Takasaki, 520 P.2d 758 (Haw. 1974).

77. *See id.* Hawaii has been at the forefront of eradicating what are viewed as artificial barriers to recovery. The *Leong* case not only sustained recovery in the absence of resulting physical injury, but also for distress caused by observing the death of the mother of the plaintiff's step-father. *Id.* at 766. The Hawaiian courts more readily recognize a general right to be free from psychic injury without resort to relying on another interest to be protected. *See* Rodrigues v. State, 472 P.2d 509 (Haw. 1970).

78. *See* Rodrigues v. State, 472 P.2d at 519-20. *But see* Comment, *Traumatic Neurosis and Malingering: Illuminating Aladdin's Lamp*, 3 N.M.L. Rev. 381 (1973) (discussing the difficulties in detecting intangible emotional harm).

79. *See, e.g.*, Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969); Pearson, *supra* note 31, at 495-99.

to the integrity of the family unit. Recognition of such interests would provide for recovery for emotional distress to deserving plaintiffs not satisfying the *Ramirez* test, and yet would prevent unlimited liability in a principled manner. The New Mexico courts would likely find the interest in self-integrity, like the interest in the family unit, sufficiently compelling and foreseeable to warrant similar protection.[80] Other interests which are less likely to prevail might include interests in the integrity of property, the integrity of contractual relationships, and the integrity of a fetus.[81]

Within the *Ramirez* cause of action, the courts will be called upon to define the boundaries of several terms incorporated in the *Ramirez* elements. Future plaintiffs will seek expansive interpretations of such terms as "contemporaneous," "perception," and "accident." The necessary degree of physical injury to the victim and the requisite extent of physical manifestation of emotional distress also remain to be clarified.

If California's experience with the *Dillon* rule proves instructive, the New Mexico court will probably strictly interpret the *Ramirez* elements for bystander distress claims.[82] In 1980, however, the California Supreme Court ruled in *Molien v. Kaiser Foundation Hospitals*[83] that, under certain circumstances, the *Dillon* guidelines need not be satisfied in order to recover for negligently inflicted emotional distress.[84] The court found that the *Dillon* limitations on recovery are inapplicable where the plaintiff can be characterized as a "direct victim" rather than a percipient witness of the defendant's negligence.[85] The court relied upon the principles of foreseeability expressed in *Dillon* to impose a duty to the "direct victim" and refused to apply the *Dillon* guidelines in a rote fashion.[86] Apparently, the court found foreseeability of harm to the direct victim to be less

80. As noted by the *Ramirez* court, "we have not succumbed in the past to arguments concerning the dangers of expanded liability." 100 N.M. at 542, 673 P.2d at 826.

81. *See, e.g.*, Dold v. Outrigger Hotel, 501 P.2d 368 (Haw. 1972) (recovery allowed for emotional distress and disappointment due to recklessly broken contract); Rodrigues v. State, 472 P.2d 509 (Haw. 1970) (recovery permitted for emotional distress which resulted from negligently caused property damage to plaintiff's home).

82. *See* Nolan & Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 Hastings L.J. 583 (1982); Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute Between California and New York*, 51 St. John's L. Rev. 1 (1976).

83. 167 Cal. Rptr. 831, 616 P.2d 813 (1980).

84. *See id.* at 834-35, 616 P.2d at 816-17. In *Molien*, the plaintiff sued a hospital for his emotional distress resulting from the hospital incorrectly diagnosing his wife as having syphilis. Prior to filing the lawsuit, the plaintiff and his wife had divorced as a result of marital friction caused by the misdiagnosis.

85. *Id. See* Comment, *Negligent Infliction of Emotional Distress: Reconciling the Bystander and Direct Victim Causes of Action*, 18 U.S.F.L. Rev. 145 (1983). New York's highest court, which rejected the *Dillon* rationale in *Tobin*, had earlier established a similar direct victim cause of action for emotional distress based, not on foreseeability, but on a direct duty undertaken by the defendant. Johnson v. State, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975) (plaintiff daughter incorrectly informed of mother's death).

86. 167 Cal. Rptr. at 834-35, 616 P.2d at 816-17.

remote than foreseeability of harm to the percipient witness bystander.[87] The court also eliminated the need for physical manifestation of the emotional distress for a direct victim cause of action.[88]

The *Ramirez* court cited to the *Molien* opinion and was, therefore, aware of California's extension of the *Dillon* foreseeability principles.[89] This observation may signal a similar willingness to extend the *Ramirez* rationale to cases of emotional distress which fail to satisfy the *Ramirez* elements. Thus, the *Ramirez* rationale, even more than its holding, may play a significant role in the development of negligence actions in New Mexico.

IV. CONCLUSION

The New Mexico Supreme Court in *Ramirez v. Armstrong* established a test for identifying those situations in which a defendant may be held liable to a bystander for negligently inflicted emotional distress arising from fear for another's safety. Future negligence actions will undoubtedly attempt to extend the policy-oriented rationale of *Ramirez* to include protection from emotional distress for other significant interests beyond the marital or intimate familial relationship.

Ramirez was a positive step toward recognition of emotional interests worthy of legal protection. Although it is desirable that recovery for this harm be both available to deserving plaintiffs and yet limited to those cases in which the emotional harm is reasonably foreseeable, the court's ruling may exclude recovery in cases where both of these desired conditions exist.

Dillon's initial guideline approach for jury assessment of foreseeability and duty on a case-by-case basis would have been preferable to the imposition of duty only when the specific elements of *Ramirez* are met. Inherent mistrust that the jury will impose liability for negligently caused injuries beyond the confines of traditional tort principles has led the New Mexico court to construct an arbitrary barrier to recovery. As Justice Trobiner pointed out in *Dillon*, "[l]egal history shows that artificial islands of exceptions, created from the fear that the legal process will not work, usually do not withstand the waves of reality and, in time, descend into oblivion."[90]

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87. *See id.* The *Molien* court relied on a statutory provision which deems a false imputation of syphilis as slander per se as well as the likely effects on a marriage such a misdiagnosis might precipitate. *Id.* at 839, 616 P.2d at 821.

88. *Id.* at 838-39, 616 P.2d at 820-21.

89. *See* 100 N.M. at 542, 673 P.2d at 826. *Molien* was cited for the proposition that *Dillon* had not proven unmanageable for the courts, nor had it unleashed unlimited liability. *Id.*

90. *Dillon*, 69 Cal. Rptr. at 85, 441 P.2d at 925.