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S. _____ v. S. _____ establishes that a guardian ad litem must be appointed to represent a minor child when his paternity is an issue. This requirement is a step forward. It recognizes that the interests of a child in a paternity dispute are significant and helps to ensure that they are presented to the court. Requiring a guardian ad litem in a wide range of cases represents an improvement over the case-by-case, result-oriented approach used by courts before *S. _____ v. S. _____*.

JAN ROBEY ALONZO

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS ABSENT PHYSICAL IMPACT OR SUBSEQUENT PHYSICAL INJURY

*Molien v. Kaiser Foundation Hospitals*¹

As a member of the Kaiser Health Plan, Valerie Molien visited Kaiser for a routine physical examination. After examination and testing, a Kaiser staff physician concluded that she had contracted an infectious form of syphilis.² She was instructed to advise her husband, Stephen, of the test results. She subsequently underwent treatment for the disease, including heavy doses of penicillin. Tests revealed that Stephen had not contracted the disease. It was later discovered that the staff physician's diagnosis was inaccurate—Valerie did not have syphilis.³ In the meantime, the misdiagnosis had caused her to become "upset and suspicious that . . . [Stephen] had engaged in extramarital sexual activities; tension and hostility arose between the two, 'causing a break-up of their marriage and the initiation of dissolution proceedings.'"⁴

Stephen sued Kaiser Foundation Hospitals and the diagnosing physician for negligent infliction of emotional distress⁵ and for loss of consortium. He did not allege that he suffered any *physical* injury as a result of the emo-

1. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

2. *Id.* at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.

3. *Id.*

4. *Id.* at 920, 616 P.2d at 814-15, 167 Cal. Rptr. at 832-33.

5. The court used the terms "mental" distress and "emotional" distress interchangeably. Although the court's holding refers to "emotional" distress, there is no reason to believe that a cause of action framed in terms of "mental" distress would be treated any differently. See Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1238 n.7 (1971); RESTATEMENT (SECOND) OF TORTS § 46, Comment j (1965).

tional distress. The trial court sustained a demurrer to the complaint. The court of appeals affirmed⁶ on the traditional basis that "[t]here can be no recovery for negligent infliction of emotional distress in the absence of physical injury."⁷ The California Supreme Court reversed and held that "a cause of action may be stated for the negligent infliction of serious emotional distress" absent any physical impact or subsequent physical injury.⁸

Although a variety of objections has been raised against allowing recovery for mental or emotional distress,⁹ the predominant fear seems to be "the danger of vexatious suits and fictitious claims."¹⁰ As a result, various limitations have been imposed on mental and emotional distress claims to assure the genuineness of the claim. One limitation is the "impact" rule. This rule is followed in a minority of states,¹¹ including Missouri.¹² It requires that the plaintiff suffer contemporaneous physical impact or injury accompanied by the mental or emotional distress.¹³ In the absence of any impact, recovery

6. *Molien v. Kaiser Foundation Hosps.*, 96 Cal. App. 3d 469, 158 Cal. Rptr. 107 (1979), *rev'd*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

7. 96 Cal. App. 3d at 475, 158 Cal. Rptr. at 110.

8. 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839. The court also held that the plaintiff stated a cause of action for the loss of consortium based on the mental suffering of the plaintiff's wife. *Id.* at 931, 616 P.2d at 821-23, 167 Cal. Rptr. at 839-41.

9. The main objections are as follows: (1) mental distress cannot be measured in terms of money, (2) the physical consequences of mental distress are too remote, (3) there is a lack of precedent, (4) a vast increase in mental distress claims would result, and (5) there is a danger of vexatious suits and fictitious claims. W. PROSSER, *LAW OF TORTS* § 54 (4th ed. 1971); *RESTATEMENT (SECOND) OF TORTS* § 436A, Comment b (1965).

10. W. PROSSER, *supra* note 9, § 54.

11. *Id.* at 331 n.64; *Kelley v. Kokua Sales & Supply Ltd.: Redefining the Limits to Recovery for Negligently Inflicted Mental Distress*, 11 *TULSA L.J.* 587, 590 n.12 (1976).

12. *Oblatore v. Brauner*, 283 F. Supp. 761 (W.D. Mo. 1968); *Williams v. School Dist. of Springfield R-12*, 447 S.W.2d 256 (Mo. 1969); *Langworthy v. Pulitzer Publishing Co.*, 368 S.W.2d 385 (Mo. 1963).

Litigation arising out of the Hyatt Regency skywalk collapse in Kansas City, Missouri, on July 17, 1981, *see* *TIME*, July 27, 1981, at 26, may result in a re-examination of Missouri's approach to recovery for negligent infliction of mental distress. There have been suggestions that persons attending the tea dance at the Hyatt at the time of the disaster may seek recovery for negligent infliction of mental distress, despite suffering no physical impact from the fallen skywalks.

13. *E.g.*, *Spade v. Lynn & B. R.R.*, 168 Mass. 285, 47 N.E. 88 (1897) (no recovery for mental distress or physical injuries caused solely by such distress when no injury to person from without); *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 354 (1896) (plaintiff denied recovery for fright and subsequent miscarriage caused by uncontrolled team of horses because no immediate personal injury); *Zelinski v. Chimics*, 196 Pa. Super. Ct. 312, 175 A.2d 351 (1961) (jostling of occupants of automobile in collision found to be sufficient impact to allow recovery for emo-

is denied.¹⁴ In some cases, however, the impact requirement has been satisfied by very minor contacts, even though the impact itself caused no real harm.¹⁵ One frequently cited case found smoke inhalation a sufficient impact to allow recovery for mental distress.¹⁶

Absent physical impact, many courts nevertheless allow recovery if the plaintiff has suffered physical harm as a *consequence* of the mental or emotional distress.¹⁷ Echoing the rationale for the impact rule, these courts rely on a physical manifestation of the psychic injury to screen out baseless claims.¹⁸ Such cases generally arise in one of two situations. In the first situa-

tional distress). See generally Leibson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. FAM. L. 163, 168-72 (1977); Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute Between California and New York*, 51 ST. JOHN'S L. REV. 1, 7-9 (1976); *Torts—Negligence—Direct Impact Rule*, 39 TEMP. L. Q. 229 (1966); 11 TULSA L.J., *supra* note 11, at 589-92.

14. See cases cited notes 12 & 13 *supra*. For a bristling criticism of the impact rule, see Justice Musmanno's dissent in *Bosley v. Andrews*, 393 Pa. 161, 183, 142 A.2d 263, 274 (1958) (Musmanno, J., dissenting). Pennsylvania later abandoned the impact rule in *Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84 (1970). W. PROSSER, *supra* note 9, at 332 (citing *Bosley* and *Niederman*), concluded that the impact rule is headed for rapid extinction.

15. See, e.g., *Christy Bros. Circus v. Turnage*, 38 Ga. App. 581, 144 S.E. 680 (1928) (defendant's horse evacuated its bowels onto plaintiff's lap); *McCardle v. Peck Dry Goods Co.*, 271 Mo. 111, 195 S.W. 1034 (1917) (defective elevator struck bottom of shaft with thud); *Porter v. Delaware, L. & W.R.R.*, 73 N.J.L. 405, 63 A. 860 (1906) (dust from crash of railway bridge got into plaintiff's eyes).

16. See *Morton v. Stack*, 122 Ohio St. 115, 170 N.E. 869 (1930).

17. See, e.g., *Bowman v. Williams*, 164 Md. 397, 165 A. 182 (1933) (plaintiff became very weak and nervous, remained in bed for two weeks, and unable to work for six months); *Netusil v. Novak*, 120 Neb. 751, 235 N.W. 335 (1931) (plaintiff suffered nervous prostration from threatened attack by defendant's dog); *Falzone v. Busch*, 45 N.J. 559, 214 A.2d 12 (1965) (recovery may be had for substantial bodily injury or sickness resulting from defendant's negligent operation of his automobile if plaintiff in fear for own safety); *Lambert v. Brewster*, 97 W. Va. 124, 125 S.E. 244 (1924) (plaintiff suffered miscarriage as result of witnessing defendant assault and beat her father); RESTATEMENT (SECOND) OF TORTS § 436 (1965).

Some courts have denied recovery for the physical consequences of mental distress on the ground that the subsequent physical injury was not foreseeable. E.g., *Justesen v. Pennsylvania R.R.*, 92 N.J.L. 257, 106 A. 137 (1919); *Miller v. Baltimore & O.S.W. R.R.*, 78 Ohio St. 309, 85 N.E. 499 (1908). See generally Hallen, *Damages for Physical Injuries Resulting From Fright or Shock*, 19 VA. L. REV. 253, 253 (1933).

18. One of the major difficulties courts encounter with this approach is in distinguishing a physical injury from a mental one. This distinction is, of course, a crucial one since characterization of the injury as physical is necessary for recovery. See, e.g., *Sloane v. Southern Cal. Ry.*, 111 Cal. 668, 680, 44 P. 320, 322 (1896); Annot., 64 A.L.R.2d 100, 104-05 (1959). This fine line between physical and mental

tion, the defendant may be liable to the plaintiff if his negligent act causes mental or emotional distress that the defendant should have realized might result in illness or bodily harm to the plaintiff.¹⁹ The threat of physical harm is created solely by the mental or emotional distress; the plaintiff is not in danger of an impact from some external force.²⁰ The existence of the mental or emotional distress is important only because it involves a risk of bodily harm to the plaintiff.²¹ Additionally, if no bodily harm actually results, there can be no recovery for the mental or emotional distress alone.²²

The other situation arises in "close call" occurrences when an external force places the plaintiff in fear for his own safety.²³ The theory followed by many courts in this situation has been labeled the "zone of danger" rule.²⁴

injuries has resulted in confusion regarding the proper classification of certain injuries. See Comment, *supra* note 5, at 1241 n.24 & 1259 n.128 (citing, *inter alia*, *Cosgrove v. Beymer*, 244 F. Supp. 824 (D. Del. 1965), in which physical manifestations such as dizziness, mild headache, and nervousness were not considered bodily harm). Advancements in medical science have caused courts and scholars to examine critically the medical aspects of mental and emotional distress. See *Leong v. Takasaki*, 55 Hawaii 398, 411-13, 520 P.2d 758, 766-67 (1974); *Simons*, *supra* note 13, at 26 n.112; Comment, *supra* note 5, at 1248-62.

19. RESTATEMENT (SECOND) OF TORTS §§ 306, 312, 313, 436(1) (1965). See cases cited note 20 *infra*.

20. *E.g.*, *Espinosa v. Beverly Hosp.*, 114 Cal. App. 2d 232, 249 P.2d 843 (1952) (plaintiff given baby other than one born to her, but recovery denied because of absence of resulting physical injury); *Urban v. Hartford Gas Co.*, 139 Conn. 301, 306, 93 A.2d 292, 294 (1952) (seller of water heater negligently sent his employees to home of nondefaulting buyer to remove heater); RESTATEMENT (SECOND) OF TORTS §§ 306, Comment a, 313, Comment b (1965).

21. RESTATEMENT (SECOND) OF TORTS §§ 306, Comment b, 312, Comment a, 313, Comment a, 436, Comment 1 (1965).

22. See authorities cited note 21 *supra*. See also RESTATEMENT (SECOND) OF TORTS § 436A (1965). *But see Montinieri v. Southern New Eng. Tel. Co.*, 175 Conn. 337, 398 A.2d 1180 (1978).

23. See, *e.g.*, *Netusil v. Novak*, 120 Neb. 751, 755, 235 N.W. 335, 337 (1931) (plaintiff suffered physical injuries as result of mental shock inflicted when defendant's dog threatened to attack); *Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84 (1970) (plaintiff in fear for his own safety when defendant's car narrowly missed him).

24. *E.g.*, *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963) (overruled by *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968)); *Okrina v. Midwestern Corp.*, 282 Minn. 400, 165 N.W.2d 259 (1969); *Tobin v. Grossman*, 24 N.Y.2d 609, 247 N.E.2d 419, 301 N.Y.S.2d 554 (1969); *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935); RESTATEMENT (SECOND) OF TORTS § 313(2) (1965).

Some courts appear to apply the zone of danger rule, although they do not specifically refer to it by that name. See, *e.g.*, *Bowman v. Williams*, 164 Md. 397, 165 A. 182 (1933); *Falzone v. Busch*, 45 N.J. 559, 214 A.2d 12 (1965).

Rather than requiring that the plaintiff be physically touched, the rule allows recovery if the plaintiff was in the zone of physical danger created by the defendant's negligence and, at the same time, feared for his own safety. The zone of danger test frequently is applied in bystander cases, such as when a mother suffers mental or emotional distress with resulting physical injuries after seeing her child struck by the defendant's car.²⁵

Under both the impact rule and those cases allowing recovery for physical consequences, the recovery for the mental or emotional distress is viewed as parasitic to the recovery for the physical injuries.²⁶ Courts generally have not extended independent legal protection to mental or emotional suffering caused unintentionally.²⁷

In response to a deficiency in the zone of danger rule, the California Supreme Court, in *Dillon v. Legg*,²⁸ expanded the scope of recovery for bystanders. The *Dillon* court identified "foreseeability of the risk" as "the chief element in determining whether [a] defendant owes a duty or an obligation to [the] plaintiff."²⁹ Thus, the plaintiff in *Dillon*, the mother of a child killed by the defendant's car, was allowed to proceed to trial on her claim for emotional disturbance and shock and accompanying physical injuries, despite absence from the zone of physical danger.³⁰

Finally, courts, including Missouri,³¹ have recognized that *intentional* infliction of mental or emotional distress is an independent cause of action.³²

25. *E.g.*, *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963) (overruled by *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968)); *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935). *Cf.* *Dziokonski v. Babineau*, 375 Mass. 555, 380 N.E.2d 1295 (1978) (recovery allowed even though mother did not witness school bus strike child, but arrived at accident scene shortly thereafter and saw daughter lying injured on ground).

26. *See* W. PROSSER, *supra* note 9, § 54, at 330; Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1048 (1936).

27. *See* RESTATEMENT (SECOND) OF TORTS § 436A (1965). In two groups of cases, however, the negligent transmission of telegraph messages, such as one announcing death, and the negligent handling of corpses, courts have allowed recovery for mental distress. *See* W. PROSSER, *supra* note 9, § 54, at 329-30. These cases are unique, however, because the negligent act involved provided a very high degree of reliability that the plaintiffs suffered genuine mental distress.

28. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

29. *Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

30. *See* notes 54-58 and accompanying text *infra*.

31. *Warrem v. Parrish*, 436 S.W.2d 670 (Mo. 1969); *Pretsky v. Southwestern Bell Tel. Co.*, 396 S.W.2d 566 (Mo. 1965).

32. *E.g.*, *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952) (threats of physical harm and of harm to plaintiff's business); *Turman v. Central Billing Bureau, Inc.*, 279 Or. 443, 568 P.2d 1382 (1977) (collection agent made repeated badgering telephone calls and referred to plaintiff, a blind woman,

This cause of action is reflected in Restatement (Second) of Torts section 46. Recovery under this theory requires that the defendant intentionally or recklessly cause severe emotional distress by extreme and outrageous conduct.³³ Neither contemporaneous physical impact nor resulting physical consequences are necessary for recovery.³⁴

The significance of the court's holding in *Molien* is that a plaintiff may state a cause of action for negligent infliction of serious mental or emotional distress, even though he suffers neither a physical impact nor a subsequent physical injury.³⁵ The standard adopted for proof of such an injury, however, is unclear. The court said that it agreed with a decision of the Hawaii Supreme Court, *Rodrigues v. State*.³⁶ In relying on *Rodrigues*, the *Molien* court stated, "[T]he general standard of proof required to support a claim of mental distress is some guarantee of genuineness in the circumstances of the case."³⁷

Molien's characterization of the *Rodrigues* standard was not entirely accurate. The standard enunciated in *Rodrigues* was that "serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."³⁸ Perhaps the *Molien* court impliedly adopted this reasonable man standard through its heavy reliance on *Rodrigues*.³⁹ Nevertheless, this uncertainty could be confusing in future cases, particularly when instructing the jury. Furthermore, the court chose not to specify the types of suffering that constitute "serious" mental or emotional distress.⁴⁰ The

as "scum" and "deadbeat"); *Samms v. Eccles*, 11 Utah 2d 289, 358 P.2d 344 (1961) (repeated and persistent solicitations for illicit sexual relations); W. PROSSER, *supra* note 9, § 12; Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40 (1956); Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

33. RESTATEMENT (SECOND) OF TORTS § 46, Comment d (1965).

34. *See, e.g.*, *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952); *Curnutt v. Wolf*, 244 Iowa 683, 688, 57 N.W.2d 915, 918 (1953); *Samms v. Eccles*, 11 Utah 2d 289, 293, 358 P.2d 344, 346-47 (1961).

35. 27 Cal. 3d at 930, 616 P.2d at 820-21, 167 Cal. Rptr. at 838-39. Subsequent California cases also have stated this to be the major significance of *Molien*. *See Hathaway v. Superior Court*, 112 Cal. App. 3d 728, 737, 169 Cal. Rptr. 435, 440 (1980); *Cortez v. Macias*, 110 Cal. App. 3d 640, 648, 167 Cal. Rptr. 905, 909 (1980).

36. 52 Hawaii 156, 472 P.2d 509 (1970).

37. 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839 (quoting *Rodrigues v. State*, 52 Hawaii at 172, 472 P.2d at 520).

38. 52 Hawaii at 173, 472 P.2d at 520.

39. *See* notes 41-46 and accompanying text *infra*.

40. The court said that "a cause of action may be stated for the negligent infliction of serious emotional distress."²⁷ Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839 (emphasis added). Since the judge will determine whether the plain-

task of defining the parameters of serious mental and emotional distress lies with future court decisions.

In deciding *Molien*, the court relied heavily on *Rodrigues*.⁴¹ The plaintiffs in *Rodrigues* recovered money from the State of Hawaii for mental distress suffered as a result of flood damage to their home. The state highway department was found negligent for failing to clear a blocked drainage culvert. The result was an overflow of surface waters that flooded the plaintiffs' home causing extensive damage to the house and furnishings. The plaintiffs, however, suffered no bodily harm.⁴² In recognizing the cause of action for mental distress, the Hawaii court said, "We recognize that the interest in freedom from negligent infliction of serious mental distress is entitled to independent legal protection. We hold, therefore, that there is a duty to refrain from the negligent infliction of serious mental distress."⁴³ Although it appears that Hawaii recognized the *Molien* approach to mental distress ten years prior, *Rodrigues* is distinguishable on the facts. The plaintiffs in *Rodrigues* also recovered money for the property damage to their home—a home they had waited fifteen years to build.⁴⁴ Therefore, although the court's language is couched in terms of affording mental distress "independent legal protection," the recovery could be viewed as parasitic to the property damage, with the property damage serving as the guarantee that the mental distress claim was genuine.⁴⁵ This fact situation is significantly different from that in *Molien*, in which the emotional distress claim truly was an independent cause of action.⁴⁶

tiff has stated a cause of action, it follows that the judge, not the jury, will determine whether the plaintiff has pleaded "serious" emotional distress. A mere recital in the complaint that the plaintiff has suffered "serious emotional distress" will not suffice; he also must plead facts sufficient to satisfy the judge that his claim is a serious one. CAL. CIV. PROC. CODE § 425.10(a) (West Cum. Supp. 1981). The lack of guidance by the court on this point could result in a number of claims being thrown out before they reach the jury. Only after the judge has found that a cause of action exists will a jury decide whether the plaintiff has suffered the mental or emotional distress he claims to have suffered.

41. 27 Cal. 3d at 927-30, 616 P.2d at 819-21, 167 Cal. Rptr. at 837-39.

42. *Rodrigues v. State*, 52 Hawaii 156, 169-73, 472 P.2d 509, 518-20 (1970).

43. *Id.* at 174, 472 P.2d at 520.

44. *Id.* at 157, 472 P.2d at 513.

45. See *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 433-34, 426 P.2d 173, 179, 58 Cal. Rptr. 13, 19 (1967) ("We are satisfied that a plaintiff who as a result of a defendant's tortious conduct loses his property and suffers mental distress may recover not only for the pecuniary loss but also for his mental distress."). *Accord*, *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal. App. 3d 917, 122 Cal. Rptr. 470 (1975). See generally *Annot.*, 28 A.L.R.2d 1070, 1078-90 (1953) (recovery for mental shock or distress in connection with injury to or interference with realty).

46. Although the plaintiff stated a cause of action for loss of consortium, the court did not view the emotional distress claim as parasitic to recovery for loss of

Considering the court's heavy reliance on *Rodrigues*, it is interesting that the court did not discuss *Leong v. Takasaki*,⁴⁷ another major and more recent Hawaii decision on mental distress.⁴⁸ The sole cause of action in *Leong* was a claim for damages "for nervous shock and psychic injuries suffered without accompanying physical impact or resulting physical consequences or manifestations thereof, when . . . [the plaintiff] witnessed his stepgrandmother . . . being struck and killed by" the defendant's automobile.⁴⁹ In holding that the plaintiff had stated a cause of action,⁵⁰ the court said that "the requirement of resulting physical injury, like the requirement of physical impact, should not stand as another artificial bar to recovery, but merely be admissible as evidence of the degree of mental or emotional distress suffered."⁵¹ Although *Leong* was a bystander case, nothing in the language of the decision limited its holding to such cases. The Hawaii court's willingness to allow recovery by a *bystander* for mental distress in the absence of both contemporaneous and subsequent physical injury should make the same recovery available to one who is the *direct* victim of the defendant's negligent act.⁵² Consequently, *Leong* may have been the true forerunner to *Molien* and perhaps would have formed a more solid basis for the court's holding than *Rodrigues*.

Perhaps the court's reluctance to rely on *Leong* stemmed from its characterization of the plaintiff as a direct victim of the negligent diagnosis rather than as a bystander.⁵³ This distinction was crucial to recovery by the plaintiff. Had the court treated him as a bystander, the three guidelines for bystander recovery laid down in *Dillon v. Leggo*⁵⁴ would have precluded recovery.

The plaintiffs in *Dillon*, the mother and sister of a deceased child, witnessed the defendant's car strike and kill the child. The trial court recognized that the sister had a cause of action for emotional shock and resulting physical injuries because she may have been in the zone of physical danger at the time of the accident.⁵⁵ The trial court denied recovery to the

consortium. Even if the plaintiff's emotional distress claim were viewed as parasitic to the loss of consortium claim, the court's abandonment of the physical consequences requirement would remain untarnished. The loss of consortium claim also was based on emotional distress to the wife without any resulting physical injuries. 27 Cal. 3d at 931-33, 616 P.2d at 821-23, 167 Cal. Rptr. at 839-41.

47. 55 Hawaii 398, 520 P.2d 758 (1974).

48. The next major Hawaii decision on mental distress after *Leong* was *Kelley v. Kokua Sales and Supply, Ltd.*, 56 Hawaii 204, 532 P.2d 673 (1975).

49. 55 Hawaii at 399, 520 P.2d at 760.

50. *Id.* at 413, 520 P.2d at 767.

51. *Id.* at 403, 520 P.2d at 762.

52. See note 53 and accompanying text *infra*.

53. 27 Cal. 3d at 923, 616 P.2d at 816, 167 Cal. Rptr. at 834.

54. 68 Cal. 2d 728, 740-41, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968).

55. *Id.* at 732, 441 P.2d at 915, 69 Cal. Rptr. at 75.

mother, however, because she was not in the zone of physical danger, although she was just a short distance away.⁵⁶ The California Supreme Court found such a result anomalous and allowed the mother to proceed to trial on the basis that her emotional shock was a foreseeable result of the defendant's negligence.⁵⁷ The *Dillon* court said that similar cases should be guided by three factors: whether the plaintiff was located near the accident scene, whether the plaintiff observed the accident, and whether there existed a close relationship between the plaintiff and the victim.⁵⁸

When *Dillon* was decided, the court expressly confined its holding to cases in which the plaintiff suffered a physical injury as a result of the emotional shock.⁵⁹ Because the *Molien* court painstakingly distinguished *Dillon*,⁶⁰ the question arises whether bystander recovery for emotional distress under *Dillon* still requires a resulting physical injury.⁶¹ The *Molien* court used very broad language to discard the requirement of resulting physical injury.⁶² Although not specifically stating so, it seems inherent in the court's opinion that the absence of a physical injury should not bar a claim for mental or emotional distress, even in a bystander case.⁶³

Both *Rodrigues* and *Leong* may be read as recognizing an independent cause of action for negligent infliction of mental distress without any manifesting physical injury. *Molien*, however, is the first case which squarely holds that a direct victim of a negligent act may recover solely for mental or emotional suffering.⁶⁴ In so doing, the California Supreme Court has rejected limitations⁶⁵ that have been criticized as arbitrary and artificial.⁶⁶

56. *Id.*

57. *Id.* at 747, 441 P.2d at 925, 69 Cal. Rptr. at 85.

58. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

59. *Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

60. 27 Cal. 3d at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834.

61. Prosser suggests that resulting physical harm should remain a requirement for bystander recovery. Although he states that such a requirement admittedly is arbitrary, he indicates that it would be necessary to protect potential defendants from undue liability. W. PROSSER, *supra* note 9, § 54, at 335.

62. 27 Cal. 3d at 929-30, 616 P.2d at 820-21, 167 Cal. Rptr. at 838-39 ("In our view the attempted distinction between physical and psychological injury merely clouds the issue. The essential question is one of proof; whether the plaintiff has suffered a serious and compensable injury should not turn on this artificial and often arbitrary classification scheme.").

63. The three *Dillon* guidelines for bystander recovery, *see* note 58 and accompanying text *supra*, will remain intact. *See* *Hathaway v. Superior Court*, 112 Cal. App. 3d 728, 737, 160 Cal. Rptr. 435, 440 (1980); *Cortez v. Macias*, 110 Cal. App. 3d 640, 648-49, 167 Cal. Rptr. 905, 909 (1980). The effect of *Molien* on *Dillon* would be to remove the resulting physical injury requirement from bystander recovery.

64. 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

65. *See* notes 9-34 and accompanying text *supra*.

66. *See* *Leong v. Takasaki*, 55 Hawaii 398, 403-05, 520 P.2d 758, 766-67 (1974); *Rodrigues v. State*, 52 Hawaii 156, 171-74, 472 P.2d 509, 518-21 (1970);