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RECOVERY FOR EMOTIONAL DISTRESS IN STRICT PRODUCTS LIABILITY

JANE B. SILVERMAN*

I. INTRODUCTION

In 1963, California opened the door for plaintiffs, as users or consumers of a product, to recover from manufacturers or retailers under a theory of strict liability when a defect in a product causes physical injury.[1] Other jurisdictions quickly followed California's recognition of this cause of action and strict products liability is now an accepted cause of action. The boundaries of a manufacturer's liability, however, are still developing.[2]

In 1968, California allowed a bystander to recover for negligent infliction of emotional distress.[3] *Dillon v. Legg* established that plaintiffs could recover for their emotional distress if they witnessed the negligent infliction of a physical injury to a close relative.[4] At least twelve other states have followed the lead of California and adopted the holding of *Dillon*.[5]

The courts are now beginning to address the question whether a plaintiff, who suffers emotional distress from witnessing a defective product physically injure another, may recover in strict products liability.[6] The courts' responses to the question of recovery have been varied. Some jurisdictions have found that the plaintiff is a *Dillon* type bystander even though the action is one in strict products liability and held that *Dillon*

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1. Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

2. Prosser, *The Assault Upon the Citadel, Strict Liability to the Consumer*, 69 YALE L.J. 1099 (1960).

3. Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

4. The court in *Dillon* established three guidelines to determine whether a plaintiff was foreseeable. In addition to requiring that the plaintiff have a close relationship with the victim, the court indicated that the plaintiff should be physically present at the scene of the accident and have a contemporaneous and sensory observance of it. *Id.*

5. These states are Arizona, Connecticut, Hawaii, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, Pennsylvania, Rhode Island, Texas and Washington. *See* Winter, *A Tort in Transition: Negligent Infliction of Mental Distress, ABA Journal* at 62, (March, 1984).

6. *See, e.g.*, Rahn v. Gerdts, 119 Ill. App. 3d 781, 455 N.E.2d 807, 74 Ill. Dec. 378 (1983); Walker v. Clark Equip. Co., 320 N.W.2d 561 (Iowa, 1982); Woodill v. Parke Davis & Co., 58 Ill. App. 3d 349, 374 N.E.2d 683, 15 Ill. Dec. 900 (1978), *aff'd* 79 Ill. 2d. 26, 402 N.E.2d 194, 37 Ill. Dec. 304 (1980); and Shepard v. Superior Court, 76 Cal. App. 3d 16, 142 Cal. Rptr. 612 (1977).

applies to strict products liability cases.[7] Other jurisdictions have refused to extend *Dillon* in this way.[8] California and one federal court used a different analytical route and held that the plaintiffs, who would not recover under *Dillon*, were, nevertheless, users of the defective products and could recover for the emotional distress caused by witnessing a defective product physically injure another.[9] Finally, some courts have avoided the question and decided the case on other grounds.[10]

All of the methods of analysis are problematic. When a plaintiff's emotional injury is caused by witnessing a defective product physically injure another, it may seem, at first glance, that the only question before the court is whether *Dillon* should be applied to a strict products liability action. This initial assumption is incorrect. The action is one in strict products liability and in such actions, plaintiffs have traditionally been referred to as users.[11] In addition to being a user of the defective product, the plaintiff who sues for emotional injury caused by witnessing the physical injury to another may also be a *Dillon* type bystander. Accordingly, this plaintiff has a dual status, that is, he or she may be both a *Dillon* type bystander and a user of the defective product. The courts, however, have not recognized the existence of the dual status plaintiff

7. *See, e.g.*, Shepard v. Superior Court, 76 Cal. App. 3d 16, 142 Cal. Rptr. 612 (1977).

8. *See, e.g.*, Gnirk v. Ford Motor Co., 572 F. Supp. 1201 (D.S.D. 1983).

9. *Id.* and Kately v. Wilkinson, 148 Cal. App. 3d 576, 195 Cal. Rptr. 902 (1983).

10. Plummer v. Abbott Labs., 568 F. Supp. 920 (D.R.I. 1983). In *Plummer*, 51 plaintiffs brought a strict products liability action against seven manufacturers of DES. Some of these plaintiffs alleged that they were suffering emotional distress from the fear of contracting cancer and out of concern for the future medical problems that their children might encounter as a result of the plaintiffs' use of DES. The court ruled that because the plaintiffs did not allege that they had suffered any physical harm or physical manifestations of their emotional distress, their claim regarding the fear of a heightened risk of cancer did not state a cause of action.

11. Plaintiffs in strict products liability actions have also been denominated bystanders but the bystanders in strict liability cases for physical injury are far different from bystanders in a *Dillon* type case for negligent infliction in emotional distress. A good example of a physically injured bystander would be a pedestrian who is walking down the street and is struck by a car that has defective brakes. The following fact situations led the courts to classify the physically injured plaintiff as a bystander in a strict products liability action: a defective car hit the plaintiff who was in a second car; Williams v. National Trailer Convoy, Inc., 549 F. Supp. 305 (D. Colo. 1982); Sullivan v. Green Mfg., 118 Ariz. App. 181, 575 P.2d 811 (1978); Mieher v. Brown, 3 Ill. App. 3d 802, 278 N.E.2d. 869 (1972), *rev'd on other grounds*, 54 Ill. 2d 539, 301 N.E.2d 307 (1973); Lamendola v. Mizell, 280 A.2d 241, 115 N.J. Super. 514 (1971); Caruth v. Mariani, 111 Ariz. App. 188, 463 P.2d 83 (1970); Elmore v. American Motors Corp., 70 Cal. 2d 578, 75 Cal. Rptr. 652, 451 P.2d 84 (1969); and Darryl v. Ford Motor Co., 440 S.W.2d 630, (Tex. 1969); an out-of-control car ran into a school yard killing plaintiff's child: Haumerson v. Ford Motor Co. 257 N.W.2d 7 (Iowa 1977); a defective car exploded causing a dense cloud of gas which restricted visibility and caused plaintiffs' cars to become involved in a multiple car accident: Giberson v. Ford Motor Co., 504 S.W.2d 8 (Mo. 1974); a child was run over by a lawn mower: Chrysler Corp. v. Alumbaugh, 168 Ind. App. 363, 342 N.E.2d 908, *modified* 168 Ind. App. 383, 348 N.E.2d 654 (1976); Howes v. Hansen, 56 Wis. 2d 247, 201 N.W.2d 825 (1972); and a Caterpillar grader ran over a woman: West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976).

and have tended to classify the plaintiff as either a *Dillon* bystander or a strict products liability user.

The question of the plaintiff's status is more than a mere problem in semantics because the court's categorization of the plaintiff will affect the plaintiff's ability to recover. An example will clarify this problem. A bus full of passengers is involved in an accident and the passengers are physically injured. If a defect in the bus caused the accident, the passengers might sue the manufacturer of the bus in strict products liability. These passengers would fall within the definition of "user" in the Restatement (Second) of Torts.[12] As users they could recover for their physical injuries. Now, suppose that the same bus hits a pedestrian and the passengers witness this injury and suffer emotional distress as a result. If the accident was caused by the negligence of the driver, the passengers could sue the driver or the bus company for negligent infliction of emotional distress under *Dillon*. Even in a jurisdiction that follows *Dillon* the passengers would not recover, however, because they fail to meet an element necessary to recovery under *Dillon*: they lack a close relationship with the pedestrian victim.[13] The passengers' recovery for their emotional distress becomes a more complex question if the bus hits the pedestrian because of a defect in the bus. The passengers are dual status plaintiffs; they are both *Dillon* bystanders and users of the defective product.[14] If the court defines the passengers as *Dillon* bystanders, they will not re-

12. The RESTATEMENT (SECOND) OF TORTS § 402A Comment L (1965) defines a user as:

> In order for the rule stated in this Section to apply, it is not necessary that the ultimate user or consumer have acquired the product directly from the seller, although the rule applies equally if he does so. He may have acquired it through one or more intermediate dealers. It is not even necessary that the consumer have purchased the product at all. He may be a member of the family of the final purchaser, or his employee, or a guest at his table, or a mere donee from the purchaser. The liability stated is one in tort, and does not require any contractual relation, or privity of contract, between the plaintiff and the defendant.
> "Consumers" include not only those who in fact consume the product but also those who prepare it for consumption; and the housewife who contracts tularemia while cooking rabbits for her husband is included within the rule stated in this Section as is also the husband who is opening a bottle of beer for his wife to drink. Consumption includes all ultimate uses for which the product is intended, and the customer in a beauty shop to whose hair a permanent wave solution is applied by the shop is a consumer. "User" includes those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purpose of doing work upon it, as in the case of an employee of the ultimate buyer who is making repairs upon the automobile which he has purchased.

The passengers in the bus in this hypothetical are certainly "passively enjoying the benefit of the product."

13. The court phrased this prong as "[w]hether plaintiff and the accident victim were closely related, as contrasted with the absence of any relationship or the presence of only a distant relationship." Dillon v. Legg, 68 Cal. 2d 728, 740.

14. The passengers' injury is like that suffered by plaintiffs in *Dillon* type actions but the passengers still fall within the RESTATEMENT (SECOND) OF TORTS § 402A (1965) ("hereinafter Restatement") definition of a user although their injury is emotional rather than physical.

cover because they again fail to meet a necessary element, a close relationship with the victim. If, however, the court defines the passengers as users, *Dillon* and its elements would not be applied and the passengers could recover despite the fact that they have no relationship with the victim.

In addition, the courts have failed to address the most basic policy question: whether strict products liability should be extended to cover this type of harm. Assuming that the plaintiff's status has been properly determined, the courts must contend with the view that strict products liability is limited to recovery for physical injury.[15]

After a brief review of the *Dillon* cause of action and the doctrine of strict products liability, this article will analyze those cases which have addressed the question whether a plaintiff may recover in strict products liability for the emotional distress caused by witnessing a defective product physically injure another, and will examine both the dual status plaintiff and policy questions.

II. BACKGROUND

A. *The* Dillon *Cause of Action*

In *Dillon v. Legg*, the Supreme Court of California held that a mother could recover for the emotional distress caused by witnessing the death of her young child by the allegedly negligent driving of the defendant. Prior to this time, a plaintiff in the position of Mrs. Dillon could not recover for negligent infliction of emotional distress unless he or she also suffered some physical impact or was within the zone of danger.[16] Mrs. Dillon suffered no physical impact and was not within the zone of danger. She alleged that the defendant's negligent operation of his car caused him to collide with her young daughter who was crossing the

15. Section 402A(1) of the Restatement specifies that "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for *physical harm* thereby caused to the ultimate user or consumer, or to his property. . . ." (emphasis added). *See also* Shepard v. Superior Court, 76 Cal. App. 3d 16, 142 Cal. Rptr. 612 (1977) (Kane, J. dissenting).

16. Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). Nine states still adhere to the zone of danger rule: Colorado, Delaware, Illinois, Maryland, Minnesota, Nebraska, Tennnessee, Vermont, and Wisconsin according to W. Winter, *A Tort in Transition: Negligent Infliction of Mental Distress*, ABA JOURNAL at 64 (March 1984) (Illinois may however have abrogated the zone of danger requirement in Rickey v. Chicago Transit Auth., 101 Ill. App. 3d 439, 428 N.E.2d 596, 57 Ill. Dec. 46 (1981); *aff'd*, 98 Ill. 2d. 546, 75 Ill. Dec. 211, 457 N.E.2d 1 (1983). In addition, according to Mr. Winter's article, eight states still require physical impact. These are Arkansas, Florida, Georgia, Idaho, Indiana, Kentucky, Mississippi and North Carolina. Other states have abrogated the impact rule but not in the bystander context: Minnesota, Missouri and Ohio.

At the time *Dillon* was decided, California followed the zone of danger rule.

street. The plaintiff also alleged that she was "in close proximity to the collision and personally witnessed said collision."[17] This, according to the plaintiff, caused her "great emotional disturbance and shock and injury to her nervous system which caused her great physical and mental pain and suffering."[18]

In finding that Mrs. Dillon could recover, the court rejected the argument that allowing plaintiffs such as Mrs. Dillon to recover would lead to either fraudulent or indefinable claims. The court also held that Mrs. Dillon was a foreseeable plaintiff. "Surely the negligent driver who causes the death of a young child may reasonably expect that the mother will not be far distant and will upon witnessing the accident suffer emotional trauma."[19] The court then set forth three guidelines for determining whether a plaintiff, such as Mrs. Dillon, was foreseeable:[20]

> (1) whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it;[21]
>
> (2) whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence;[22]
>
> (3) whether plaintiff and the accident victim were closely related, as contrasted with the absence of any such relationship or the presence of only a distant relationship.[23]

The court's holding was, at least in part, based on the fact that the action was one for negligence and based on the fault of the defendant. The court noted:

> In the absence of the primary liability of the tort-feasor for the death of the child, we see no ground for an independent and secondary liability for claims for injuries by third parties. The basis for such claims must be adjudicated liability and fault of defendant; that liability and fault must be the foundation for the tort-feasor's duty of due care to third

17. *Dillon*, 69 Cal. Rptr. at 74.
18. *Id.*
19. *Id.* at 81.
20. The court indicated that these three elements were only guidelines. This article does not address the difficulty of applying these three elements or whether they have, indeed, been applied rigidly to become more of a test than guidelines. For examples of application of the *Dillon* elements, *See, e.g.*, Nazaroff v. Superior Court, 80 Cal. App. 3d 553, 145 Cal. Rptr. 657 (1978) (mother heard and arrived to see her child being pulled from a swimming pool was allowed to recover); Krouse v. Graham, 19 Cal. 3d 59, 137 Cal. Rptr. 863, 562 P.2d 1022 (1977) (husband who was near family car sensed but did not actually see vehicle hit his wife was allowed to recover); Arauz v. Gerhardt, 68 Cal. App. 3d 937, 137 Cal. Rptr. 619 (1977) (child injured in car accident but mother who arrived on scene some minutes later not allowed to recover); and Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969) (mother who arrived within moments after her child was injured in explosion was allowed to recover).
21. Hereinafter referred to as the physically present element.
22. Hereinafter referred to as the sensory observance element.
23. Hereinafter referred to as the close relationship element.

> parties who, as a consequence of such negligence, sustain emotional trauma.[24]

Accordingly, after *Dillon*, in many jurisdictions, a plaintiff may recover for the negligent infliction of emotional distress if the three prong test of *Dillon* is met.

B. Strict Products Liability

Strict products liability was recognized in *Greenman v. Yuba*.[25] Prior to this decision, strict products liability was not a widely accepted theory. According to the Comments to Section 402A of the Restatement (Second) of Torts, strict products liability had first been extended to products intended for intimate bodily contact. The Comments note that Michigan, in 1958, was the first state to abrogate this limit and apply strict products liability to any product, which, if defective, could be expected to cause physical harm to the user or consumer or the user's property.[26] After *Greenman*, however, plaintiffs could recover from a manufacturer for physical injuries caused by a defective product without establishing that the manufacturer was at fault.

Perhaps the most frequently cited definition of this cause of action is:

> (1) One who sells any product in a defective[27] condition unreasonably dangerous[28] to the user or consumer or to his property is subject to

24. Dillon v. Legg, 69 Cal. Rptr. at 76.
25. Greenman v. Yuba Power Prods., Inc., 27 Cal. Rptr. 697, 59 Cal. 2d 57, 377 P.2d 897 (1963).
26. RESTATEMENT (SECOND) OF TORTS § 402A comment b (1965) (hereinafter referred to as "RESTATEMENT").
27. The RESTATEMENT, in Comment g defines defective condition:

> The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.
>
> Safe condition at the time of delivery by the seller will, however, include proper packaging, necessary sterilization, and other precautions required to permit the product to remain safe for a normal length of time when handled in a normal manner.

The RESTATEMENT gives examples of a defective condition as harmful ingredients, foreign objects and dangerous containers. RESTATEMENT (SECOND) OF TORTS § 402A Comment h (1965).

28. Unreasonably dangerous is explained in the RESTATEMENT, Comment i, as:

> The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. This is not what is meant by 'unreasonably dangerous' in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who

> liability for physical harm thereby caused to the ultimate consumer, or to his property, if
> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> (2) The rule stated in Subsection (1) applies although
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Restatement (Second) of Torts, Section 402A(1) (emphasis added).

Regardless of whether the plaintiff in this type of action is classified as a *Dillon* bystander or a user in strict products liability language, the Restatement limits liability to actions for physical injury.[29] The physical injury limitation of the Restatement may present a real obstacle to plaintiffs seeking to recover for emotional distress, and will be discussed in more detail later.

In addition, the explicit language of the Restatement limits recovery to users or consumers. The American Law Institute expressed no opinion as to whether the section should apply to "harm to persons other than users or consumers."[30] The limitation of the Restatement to users of the product does not present a problem to plaintiffs seeking to recover for their emotional distress in strict products liability; even if the plaintiffs are classified as *Dillon* bystanders and are not, in fact, users, due to developments in the doctrine after the drafting of the Restatement.

The historical development of strict products liability has greatly influenced the ability of a plaintiff to recover for emotional distress for witnessing a defective product physically injure another. Strict products liability began as an action for breach of warranty requiring privity of contract between the plaintiff and the manufacturer, and later developed into a cause of action for breach of implied warranty without regard to privity of contract.[31] This warranty action then developed into the present day strict products liability action which the Restatement indicates

purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fuel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil is unreasonably dangerous.

29. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

30. RESTATEMENT (SECOND) OF TORTS § 402A Comment on Caveat 0 (1965).

31. Note, *Strict Products Liability to the Bystander: A Study in Common Law Determinism*, 38 U. CHI. L. REV. 625 (1971).

will lie without regard to privity.[32] The use of the term user in the Restatement, as well as its caveat regarding recovery by non-users, is apparently a holdover from the old requirement of privity between the plaintiff and the defendant.

In 1969 the courts began to address the question whether a non-user of a product, a strict products liability bystander,[33] could recover for physical injury caused by a defective product. In *Elmore v. American Motors Corp.*,[34] a defect in the defendant's car caused the drive shaft to fall, which caused plaintiff's car to swerve to avoid hitting it and the plaintiff was injured. The plaintiff sued the manufacturer of the defendant's car.[35] The Supreme Court of California labelled the plaintiff a bystander and held that the plaintiff could recover in strict products liability. To reach this holding, the court first addressed the traditional view that limited recovery to users of a defective product. It rejected this traditional view and accepted the notion that privity has no place in strict products liability and that bystanders, such as the plaintiffs in *Elmore*, should recover for their physical injuries.[36] Indeed, the court reasoned that a bystander might, in fact, need more protection than a user because a bystander has no opportunity to test the safety of the product and was indeed, an innocent victim.

The holding of *Elmore* is widely, if not universally, followed in other jurisdictions.[37] Accordingly, non-users can recover when they are physically injured by a defective product. As will be discussed below, however, it is less clear whether non-users (or even users) can recover when they are emotionally injured by a defective product.

III. The Cases

Several jurisdictions have now addressed the question whether a plaintiff may recover in strict products liability for witnessing a defective product physically injure another. Some of the jurisdictions have classified the plaintiffs in these cases as *Dillon* type bystanders and then gone on to decide whether to extend *Dillon* to strict products liability. Two

32. Restatement (Second) of Torts § 402A(2)(b) (1965).

33. The physically injured bystander was at issue here as opposed to the bystander in a *Dillon* case for negligent infliction of emotional distress.

34. 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).

35. These facts are taken from the appellate court decision, Waters v. American Motors, 69 Cal. Rptr. 799 (Cal. App. 1968). The opinion of the supreme court does not contain facts sufficient to understand who was the physically injured bystander.

36. W. Prosser, *The Assault Upon the Citadel, Strict Liability to the Consumer*, 69 Yale L.J. 1099 (1960) and Note, *Strict Products Liability to the Bystanders: A Study in Common Law Determinism*, 38 U. Chi. L. Rev. 625 (1971).

37. See cases cited at note 11, *supra*.

courts, after finding that the plaintiffs could not recover under *Dillon*, went on to a second step, and defined the dual status plaintiffs as users and found that, as users, the plaintiffs could recover for their emotional distress.

A. *The* Dillon *Approach*

Parker v. Chemical Way Company[38] was one of the first cases to address whether *Dillon* applied to strict products liability actions. Mr. Parker had purchased a container of drain opener that exploded. His wife found him, presumably physically injured by the explosion, shortly after the accident occurred. The Parkers sued the manufacturer of the drain opener in strict products liability. While the husband could recover for his physical injury, the California Court of Appeals held, with little explanation, that the wife could not recover in strict products liability for the emotional distress she suffered by viewing her husband's injury. The court could have been trying to limit *Dillon* to negligence cases. Another possibility is that the court felt that while *Dillon* could be extended to strict products liability, the wife did not meet the three prong test of *Dillon* because she was either not physically present at the time of the accident, or did not have a sensory observance of the injury to her husband at the time of the explosion. This latter explanation is more likely, because one year later, the California court, in *Shepard v. Superior Court*[39] defined the plaintiffs as *Dillon* bystanders and allowed them to recover for their emotional distress in a strict products liability case.

The facts of *Shepard* presented a compelling case for recovery. Mr. and Mrs. Shepard and their two children were riding in the family car when a serious accident occurred involving a second car. One of the Shepard children was thrown from the car and was run over and killed by the second car. The parents and surviving child sued the manufacturer of their own car, alleging that the deceased child was thrown from the car because of a defect in that car. The Shepards met the three prong test of *Dillon* and the court held that the plaintiffs could recover for the emotional distress caused by witnessing the death of a family member. The court reasoned that it would make no sense to permit recovery against a negligent driver, as in *Dillon*, while denying recovery from the manufacturer responsible for the defective condition. According to the court, its "conclusion is in consonance with the stated purpose of the courts in adopting strict liability, i.e., to relieve the plaintiffs from

38. Parker v. Standard Chemical Way Co., 60 Cal. App. 3d 47, 131 Cal. Rptr. 338 (1976).
39. 76 Cal. App. 3d 16, 142 Cal. Rptr. 612 (1977).

problems of proof inherent in negligence and warranty remedies, and thereby to 'insure that the costs of injury resulting from defective products are borne by the manufacturer.' "[40]

The majority of the court in *Shepard* provided no other explanation for extending the *Dillon* cause of action to strict products liability. It did not mention the Restatement's limitation to cases involving physical harm. Further, it did not address the plaintiffs' status as both *Dillon* type bystanders and users within the Restatement definition of that term.

The dissent noted that while California had a history of allowing recovery for emotional distress in negligence and intentional tort cases, it raised a question not dealt with by the majority—whether such damages should be recoverable when the manufacturer's conduct is not culpable. The dissent went on to note that one of the rationales behind the holding in *Dillon* was the fault of the defendant. In addition, the dissent voiced the opinion that a manufacturer was not an insurer and that a balance was needed between a plaintiff's ability to recover and the continuing viability of defendant's enterprise.[41]

At least one other jurisdiction has explicitly held that a *Dillon* type bystander may recover in strict products liability. In *Walker v. Clark Equipment*[42] the Iowa court extended *Dillon* to actions brought under a strict products liability theory. One year earlier, that court had held that a bystander could recover in *Dillon* negligence cases, that is, Iowa adopted *Dillon*.[43] In *Walker*, the court could see "no qualitative difference once liability is found, between recoveries under theories of negligence, strict liability or warranty."[44] There was no way a line could be drawn between the three causes of action according to the Iowa court and it reasoned that once a defendant is liable, a plaintiff should recover all damages. In terms of compensability the emotional injury to the plaintiff was to be treated as the equivalent of physical injury. Like the majority in *Shepard*, the Iowa court did not address whether the defendant's culpability was a factor to be considered in extending *Dillon* to strict products liability cases.

The Illinois Appellate Court, however, has rejected the idea that

40. 76 Cal. App. 3d at 21, 142 Cal. Rptr. at 615, *quoting* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 403 (1972).

41. 76 Cal. App. 3d at 31, 142 Cal. Rptr. at 622.

42. 320 N.W.2d 561 (Iowa 1982). This is the only case discussed in this article in which the plaintiff was a single status plaintiff, that is, she was only a *Dillon* type bystander because she did not fall with the RESTATEMENT definition of a user. In *Walker*, Carl Walker was operating a forklift that turned over and he was killed. The plaintiff was Carl's sister who was a witness to the accident.

43. Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981).

44. 320 N.W.2d at 563.

Dillon bystanders can recover in strict products liability. In *Woodill v. Parke Davis & Co.*,[45] the court held that emotional distress, unaccompanied by physical injury, was not compensable in strict products liability. The plaintiff, while hospitalized as an obstetrical patient, was treated with a drug manufactured by the defendant. Plaintiff later gave birth to a son and sued the drug manufacturer on behalf of her son for his injury and for the emotional distress that she suffered as a result of the injury to her infant son. The court rejected plaintiff's claim for emotional distress and held that strict liability should not be extended to cover this type of injury because § 402A expressly limits recovery to cases involving physical harm.

This view was upheld three years later in *Rahn v. Gerdts*[46] despite the fact that in the interim between *Woodill* and *Rahn*, the Illinois court had adopted *Dillon* in a negligence case, *Rickey v. Chicago Transit Authority*.[47] In *Rahn*, however, the court refused to extend *Dillon* to strict products liability cases and noted that *Dillon* and its adoption in *Rickey* were grounded on policy considerations related to the nature of the defendant's conduct and on the element of foreseeability present in a negligence action.

B. The Two Tier Approach

Two courts have gone further in their analysis of cases than those mentioned above. Both courts first determined that the plaintiffs, as *Dillon* bystanders, could not recover, but then defined the plaintiffs as users of the product and held that, as users, the plaintiffs could recover for the emotional distress caused by witnessing a defective product physically injure another.

In *Gnirk v. Ford Motor Co.*[48] the United States District Court for the District of South Dakota held that South Dakota would not extend *Dillon* to strict products liability cases. Plaintiff, the driver of a defective car, got out of her car to open a gate while her young son remained in the car. While the plaintiff was outside her car, she witnessed the death of her son when the car's gears shifted into reverse, the car struck a post and the car, containing her child, was propelled into a dam. The court, apparently using the Restatement's definition, held that the plaintiff was

45. 58 Ill. App. 3d 349, 374 N.E.2d 683, 15 Ill. Dec. 900 (1978), *aff'd* 79 Ill. 2d 26, 402 N.E. 2d 194, 37 Ill. Dec. 304 (1980).
46. 119 Ill. App. 3d 781, 455 N.E.2d 807, 74 Ill. Dec. 378 (1983).
47. 101 Ill. App. 3d 439, 428 N.E.2d 596, 57 Ill. Dec. 46 (1981), *aff'd*, 98 Ill. 2d 546, 457 N.E.2d 1, 75 Ill. Dec. 211 (1983).
48. 572 F. Supp. 1201 (D.S.D. 1983).

a user of the car and that the manufacturer owed her an independent legal duty. Therefore, despite the court's holding regarding *Dillon*, the plaintiff, as a user, was permitted to recover for her emotional distress.

California also used this two tier analysis in *Kately v. Wilkinson*.[49] In *Kately*, the California Court of Appeals reaffirmed its decision in *Shepard* that *Dillon* could be extended to strict products liability cases but noted that the plaintiffs in *Kately* failed to meet the three prong test of *Dillon*. The court went on, however, to find that the plaintiffs were users who could recover for emotional distress.

The plaintiffs in *Kately* were a mother, Mrs. Kately, and her fourteen year old daughter, Rebecca. The plaintiffs, along with Rhonda, a fourteen year old friend of Rebecca's, were using the Kately's boat for waterskiing. Rhonda was waterskiing when the boat's steering column locked and she was run over by the boat's propeller. The plaintiffs were eventually able to get Rhonda, who was critically injured, into the boat but the locked steering column prevented them from getting the boat to shore to obtain the necessary medical help. Rhonda died on the boat. Mrs. Kately and Rebecca sued the manufacturer of the boat for the emotional distress caused by witnessing the horrifying death of Rhonda.[50]

In one of the claims for relief, the Katelys alleged that the boat had been negligently manufactured and that they suffered negligent infliction of emotional distress as a result, a *Dillon* negligence claim. The court found that the plaintiffs could not recover under *Dillon* because they failed the close relationship prong of *Dillon*. The only way around this obstacle would have been for the court to abrogate this element by enlarging it to include social relationships that are as close as familial ones. This court refused to enlarge the *Dillon* cause of action to include non-family members.[51]

49. 148 Cal. App. 3d 576, 195 Cal. Rptr. 902 (1983).

50. The Katelys brought eight causes of action in all as follows:

> The first cause of action was for rescission of the contract of sale of the boat on the ground of intentional misrepresentation; the second was for compensatory damages for negligent misrepresentation; and the third was for exemplary damages for intentional misrepresentation. The fourth cause of action was for negligence in the manufacture of the boat; the fifth was for breach of express warranty; the sixth was for breach of warranty of merchantability; the seventh was for products liability; and the eighth was for negligent infliction of emotional distress caused by Kately's witnessing the death of plaintiff's daughter, Rhonda, a person Kately considered as a daughter. The damages alleged in the fourth through seventh causes of action were emotional and mental damages resulting from the death of Rhonda as to whom there existed a relationship akin to that of a mother and daughter with Rhonda.

148 Cal. App. 3d at 579, 195 Cal. Rptr. 903, n.3.

51. Some courts have enlarged the requirement that the plaintiff have a close relationship with the victim although none have gone so far as to totally eliminate it. *See, e.g.*, Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974).

The court then turned to Mrs. Kately's alternative claim that her injuries were not bystander injuries governed by *Dillon* but were the direct result of the defective product. The court phrased the issue as whether a user of a defective product can recover damages for emotional trauma that the user sustains through sensory perception of an injury to another caused by the defect in the product she is using.

In order to resolve this question, the court first relied on *Shepard* to find that a plaintiff can recover for emotional distress in strict products liability. The court then relied on a negligence case, *Molien v. Kaiser Foundation Hospitals*[52] to avoid applying the limitations of *Dillon* to Mrs. Kately's strict products liability claim.

In *Molien*, a physician had misdiagnosed a woman as having a venereal disease. The woman's husband sued the physician, claiming that the negligent misdiagnosis had caused him emotional distress. If the court had applied *Dillon* to the facts of *Molien* the husband could not have recovered because he failed to meet either the physically present or the sensory observance element. In order to avoid the application of the *Dillon* elements, the court adopted a new test in *Molien*, that of directness of the injury. If the injury was direct, the three prong test of *Dillon* was not controlling. Direct injuries were defined as "those in which the defendant's negligence is foreseeably directed toward the person asserting the claim for emotional distress."[53]

The *Kately* court applied *Molien* and found that the injury to Mrs. Kately was direct. The manufacturer of the boat should have reasonably foreseen that the purchaser and operator of a defective boat would suffer emotional distress when the boat malfunctioned and killed or injured another.

> The user of a defective product is not a mere bystander but a primary and direct victim of the product defect; this is true whether the defective product directly and immediately injures the user or severely harms another while being operated by the user; it is equally true whether the user suffers physical or emotional injuries.[54]

In addition, the emotional distress suffered by a user was foreseeable regardless of the relationship between Mrs. Kately and the victim.

The court then considered Rebecca's claim. The court first noted that a mere passenger in a defective vehicle was not a "user who would *foreseeably* suffer emotional injuries. . ." when the product defect causes

52. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).
53. 148 Cal. App. 3d at 586, 195 Cal. Rptr. at 908.
54. 148 Cal. App. 3d at 588, 195 Cal. Rptr. at 909.

severe injury or death to a third party.[55] The court found, however, that Rebecca was more than a mere passenger. Relying on a state statute that required the presence of a person over the age of twelve to observe the towed skier, the court labelled Rebecca a user of the defective product. She was given the opportunity to amend her complaint to allege that because of this statute her presence in the boat was reasonably foreseeable, that it was foreseeable that she would witness injury to the water skier for whom she was the responsible observer, and that her feelings of guilt and responsibility would be severe notwithstanding her knowledge of the actual cause of the injury.

IV. Analysis

A. *The Status of the Plaintiffs*

As the cases discussed above reveal, the courts have taken various positions on the question whether a plaintiff may recover in strict products liability for the emotional distress caused by witnessing a defective product physically injure another. The results may be summarized as follows:

1. In two cases, *Walker* and *Shepard*, the courts held that the plaintiffs were *Dillon* bystanders, that *Dillon* applied to strict products liability, and because the plaintiffs met the three prong test of *Dillon*, the plaintiffs could recover.

2. One jurisdiction, Illinois, held in *Woodill* and *Rahn*, that *Dillon* was inapplicable in strict products liability cases. The plaintiffs in both cases, however, could have been defined as strict products liability users but the court did not take this approach.

3. In *Gnirk*, the United States District Court for the District of South Dakota held that while South Dakota would not extend *Dillon* to strict products liability cases, the plaintiff was a user who could recover for her emotional distress.

4. California, in *Kately*, held that users, who witness injury to another, may recover for the emotional distress they suffer as a result.

These cases also reveal that a plaintiff classified as a *Dillon* bystander will recover for emotional distress in strict products liability if that jurisdiction had adopted *Dillon* in negligence cases and decides to extend it to strict products liability, and if the plaintiff meets the three prong test of *Dillon*. In a jurisdiction that does not follow *Dillon*, or one that refuses to extend it to strict products liability, or if the jurisdiction

55. *Id.*

follows *Dillon* but the plaintiff does not meet the three prong test of *Dillon*, the plaintiff may still recover for emotional distress in strict products liability if the plaintiff is also a user. Plaintiffs are most likely to recover if they can convince the court to label them *Dillon* bystanders and as users and follow a two step approach.[56] That is, first analyze the case under *Dillon* and then, if *Dillon* is held not to apply to strict products liability or if the plaintiff fails to meet the three prong test, to proceed to a second step and assess whether the plaintiff, as a user of the defective product, can recover for emotional distress.

This two step approach has obvious advantages for plaintiffs. First, it affords plaintiffs an additional theory of recovery. The two step method is especially helpful to plaintiffs who do not meet the three prong test of *Dillon*, or who find themselves in jurisdictions that either decline to follow *Dillon* or to extend it to strict products liability cases. Under the two step method the court does not have to follow one method to the exclusion of the other. This choice leaves the parties with little ability to anticipate the court's decision and, therefore, little ability to assess the likelihood of plaintiff's success.

At first glance, this approach may seem unfair to defendants. However, it is not as unfair as it seems. Plaintiffs often seek to recover under different theories and the two tier approach is merely another example. The Federal Rules of Civil Procedure allow a plaintiff to plead inconsistent theories and a plaintiff who argues for a two tier approach is merely seeking alternative avenues of recovery. With proper instructions, both theories could be presented to a jury with minimal confusion.[57]

There are two reasons why a court may not use the two tier method. The court may not recognize that the plaintiff is also a user of the product. In addition, and more important, the courts may be reluctant to designate the plaintiff as a user because of the broad definition of that term in strict liability cases for physical injury.[58] If a court designates

56. No court has used merely the "user" approach to the exclusion of determining whether *Dillon* was applicable although courts have applied *Dillon* without determining whether the plaintiff was also a user of the product.

57. The court could instruct the jury to determine whether the elements of *Dillon* were met by the plaintiff. The jury could also be asked to determine whether the plaintiff met the definition of user in that jurisdiction or in the RESTATEMENT. The court could use this second determination if it has decided not to apply *Dillon* or if the plaintiff does not meet the three prong test of *Dillon*.

58. Neither of the two articles that address whether a plaintiff may recover in strict products liability for the emotional distress caused by witnessing a defective product physically injure another address this problem. In P. Joseph, *Dillon's Other Leg: The Extension of the Doctrine Which Permits Bystander Recovery for Emotional Trauma and Physical Injuries to Actions Based on Strict Liability in Tort*, 18 DUQ. L. REV. 1 (1979), the author argues that *Dillon* should be extended to strict products liability cases. The article does not address, however, how courts should deal with plaintiffs who are injured in this manner but who are also users of the product. Although the author is

the plaintiff as a user in strict products liability cases, the court may open the door to recovery by plaintiffs that we do not wish to protect. The court may therefore find it easier to address the issue by asking only whether *Dillon* applies to strict products liability cases. Judicial reluctance to grapple with the difficult question of which users may recover for emotional distress in strict products liability may explain the court's holding in *Shepard*.

In *Shepard*, the court referred to the plaintiffs, the driver and passengers of a defective car who witnessed the death of a family member in a car accident, as *Dillon* bystanders and extended *Dillon* to strict products liability cases. The court recognized a new cause of action by extending *Dillon* to strict products liability cases, rather than categorize the plaintiffs as users even though the plaintiffs fit within the Restatement's definition of users. If the court had chosen to define the plaintiffs as users, the court would have had to find a way to limit its holding to exclude some of the users that fall within the Restatement's broad definition of that term.

Recall the hypothetical of the passengers on the bus that hit a pedestrian, causing the passengers who witnessed it to suffer emotional distress. If the accident was caused by the negligence of the driver and the passengers sued using a *Dillon* negligence theory, they would not recover because they fail to meet the close relationship prong of the *Dillon* test. If, however, the accident was caused by a defect in the bus, the passengers could sue in strict products liability. If the court defined the plaintiffs as *Dillon* bystanders, they still could not recover. If, however, the court defined these dual status plaintiffs as users, the passengers could, at least in theory, recover. The anomalous result points out the necessity of redefining the term user. Although the emotional distress suffered by the bus passengers by witnessing injury to a total stranger may not present a compelling case for recovery, there are users who are unable to recover under *Dillon*, but who should be allowed to recover. Consider the

also of the opinion that there are some difficulties in extending *Dillon* to strict products liability, such as lack of precedent, floodgates of litigation and the possibility of a fraud on the court, he does not mention the problem that courts will face in cases involving a dual status plaintiff. In addition, the article states that the three prong test of *Dillon* provides enough controls to resolve any difficulties in extending *Dillon* to strict products liability. While *Dillon* may indeed resolve some of these problems, California, in Kately v. Wilkinson, has ruled that *Dillon* does not always control in strict products liability cases. In Note, *Emotional Distress in Products Liability: Distinguishing Users from Bystanders*, 50 FORDHAM L. REV. 291 (1981), the author noted that many plaintiffs who were classified as bystanders were also users of the product. The author argued that these plaintiffs should have been classified as users to effectuate recovery. The author, however, did not address the problem that the courts would face in categorizing the plaintiffs as users. Once the court classified these plaintiffs as users, they would have had to redefine or limit the RESTATEMENT'S broad definition of that term to exclude the hypothetical passengers on the bus.

Shepards, for example. If that case arose in a jurisdiction that declines to follow *Dillon*, and the two tier approach was not used, the Shepards would not have been able to recover.

By implicitly redefining the term user, the *Kately* court attempted to resolve the anomalous results discussed above.[59] To reiterate, the plaintiffs in *Kately* were a mother and daughter who witnessed the tragic death of the daughter's friend, Rhonda, while waterskiing. As *Dillon* bystanders, the plaintiffs could not recover because they failed to meet the close relationship prong of the *Dillon* test and the court refused to make an exception to that element. The court went on, however, to analyze the plaintiffs as users of the defective product who had sustained emotional injury while using the product. Once the court defined the plaintiffs as users not subject to the three prong test of *Dillon*, the court had to find a way to limit its holding to exclude the hypothetical passengers on the bus.

In order to accomplish this, the court relied on the *Molien* test of foreseeability, that of directness. According to the court, if Mrs. Kately's injuries were "a direct result of the use of the defective product" as opposed to "her status at the scene of the accident,"[60] she could recover. The court concluded that Mrs. Kately's injury was direct. With little explanation, the court found that the defendants:

> [S]hould reasonably have foreseen that Kately, as the purchaser and an operator of the defective boat, would suffer emotional distress when the boat malfunctioned and killed or injured another human being. . . . It is clearly predictable that the user of a defective product will feel guilt and responsibility for the injury or death of another notwithstanding that the actual cause was the malfunction of the product he was using. Such feelings of guilt and responsibility are foreseeably an integral part of resultant emotional distress and suffering caused by the product malfunction.[61]

In this manner, the court redefined the definition of user and limited the Restatement's definition. Although the redefinition is subtle and difficult to articulate, the court did distinguish Mrs. Kately from the hypothetical passengers on the bus. The court did this by focusing on Mrs. Kately's position as the operator of the boat who was responsible for the safe operation of the boat as well as the safety of the passengers. Unlike the bus passengers, Mrs. Kately was doing more than "passively enjoying the benefits of the product"[62] and could recover for her emotional

59. *See* the RESTATEMENT definition of user, *supra* note 13.
60. 148 Cal. App. 3d at 587, 195 Cal. Rptr. at 909.
61. *Id.* at 587-88.
62. RESTATEMENT (SECOND) OF TORTS § 402A comment l (1965).

distress.

The court's discussion of Rebecca's case, further illustrates the importance of Mrs. Kately's position as the operator of a defective boat. Although Rebecca falls within the Restatement's definition of a user, the court explicitly held that Rebecca, as a mere passenger, was not a user who would foreseeably suffer emotional distress when the defective product caused injury to a third party. This holding clearly excludes recovery by the hypothetical bus passengers. The court went on to add, however, that the daughter could be a user who would foreseeably suffer emotional distress by noting the existence of a California statute that requires that a person over the age of twelve be present on the boat to observe the towed skier. Rebecca was given an opportunity to amend her complaint to allege that it was:

> [R]easonably foreseeable that the boat would be used to tow a water-skier and, in that event, there would necessarily be a second person in that boat who had a responsibility of care to the victim and who was *actively involved in the control and safe operation of the boat.* It was certainly foreseeable that Rebecca, who undertook this duty, would witness an injury to the water-skier. Moreover, it was foreseeable that she also would suffer emotional distress from witnessing injury to the skier for whom she was the responsible observer and that her feelings of guilt and responsibility would be severe notwithstanding her knowledge that the actual cause of the injury, i.e., was the malfunction of the boat.[63]

Accordingly, Rebecca could recover if she was more than a mere passenger on the boat. By being responsible, in some way, for the safe operation of the boat, Rebecca's status changed from mere passenger to a user who could foreseeably suffer emotional distress from a defective product.

It appears from *Kately* that users who are either responsible for the safe operation of the product, or who are actively involved in the operation of that product, are users who can recover for emotional distress caused by witnessing that product physically injure another. It is also apparent that not all users will fit this new definition. While it may be easy to say that some users were responsible for the safe operation of the product, the *Kately* court's limited definition of a user will prove difficult to apply to other plaintiffs.

Applying *Kately* literally would exclude recovery by hypothetical passengers who witness injury to a stranger; the court's new definition of a user would allow the driver of the bus to recover. The driver is responsible for the safe operation of the bus and unlike the passengers, would have been doing more than passively enjoying the benefits of the product.

63. 148 Cal. App. 3d at 588-89, 195 Cal. Rptr. at 910 (emphasis added).

It is unclear how the *Kately* court would have dealt with the problem if, in addition to the two Katelys, another person over the age of twelve had been present on the boat. The court allowed Rebecca to recover based on a statute that requires only one person to observe the towed skier. If the court's holding regarding Rebecca is strictly construed, only the person designated as the responsible observer under the statute could recover, although all those present on the boat would have witnessed the same injury. The facts could be confounded even further if one imagines that the additional persons on the boat took turns observing the towed skier. Because the statute only requires one person to observe, the manufacturer could reasonably foresee only that two persons would be users responsible for the safe operation of the boat, the operator and the statutory observer.

In future cases, the court will have to draw very fine distinctions between those users who are responsible for the safety of the victim or the safe operation of the vehicle and other users. *Kately* hints at one way to draw those lines. While the court analyzed the case in terms of the directness of the injury, much of the discussion of the facts reveals the court's concern with the intimate and personal contact that the Katelys had with the critically injured water skier.[64] Neither of the Katelys merely observed the injury to Rhonda, they participated in trying to save her. This active involvement by the Katelys may help the court in future cases to distinguish plaintiffs like the Katelys from other users. The suggestion in *Kately* that plaintiffs may recover if they are responsible for the safe operation of the product and also actively aid the injured victim could be used to bar recovery by the driver of the bus who witnessed the bus injure another. Although the driver of the bus is responsible for the

64. The court's recitation of the facts was as follows:

> While Rhonda was being towed as a skier, the steering column on the boat locked. This made it impossible to steer the boat. As a result the boat circled in the water and struck Rhonda's body.
>
> The impact with the boat partially dismembered Rhonda's leg, the leg being three-quarters severed from her body. Additionally, the impact tore deep lacerations in Rhonda's breast area; it tore a deep laceration in her abdomen, resulting in partial evisceration; it also tore a deep laceration in the groin area and five deep lacerations in Rhonda's left thigh and leg.
>
> Kately was operating the boat at the time the steering column locked, causing the impact with Rhonda. At the same time Kately's daughter, Rebecca, was in the back of the boat observing Rhonda while the boat was towing her. After the impact, Kately and Rebecca climbed into the water to aid Rhonda, and they succeeded in pulling her back into the boat. In the course of the rescue, Rebecca inadvertently thrust her hand into Rhonda's body through one of her wounds. Rhonda was still alive when she was pulled from the water, but because of the locked steering column, Kately was unable to operate the boat. Kately and Rebecca were compelled to sit with Rhonda in her badly mutilated condition as the boat circled in the water. Rhonda died as a result of her injuries.

148 Cal. App. 3d at 580, 195 Cal. Rptr. at 904.

safe operation of the bus, it is unclear from the *Kately* decision whether the driver could recover if he observed the accident but did nothing more. It is arguable that *Kately* is limited to its unique facts.

In addition to the problem of distinguishing which plaintiffs fall within the *Kately* court's new definition of a user, the *Kately* approach will also produce anomalous results. Attempting to apply *Kately* to the facts in *Shepard* demonstrates the difficulties inherent in the approach taken in *Kately*. The plaintiffs in *Shepard* were defined as *Dillon* bystanders and could recover because the court decided that *Dillon* was applicable in strict products liability and that all of the plaintiffs met the three prong test of *Dillon*. All of the plaintiffs in *Shepard* fall within the Restatement's definition of user, but all of them would not meet the new definition of user implicitly announced in *Kately*. The driver of the car, Mr. Shepard, was the operator of the car and stood in the position of Mrs. Kately in terms of his responsibility for the safe operation of the vehicle. Applying *Kately*, it would be reasonably foreseeable that Mr. Shepard would suffer emotional distress when the car malfunctioned and his child was killed. As in *Kately*, it would be predictable that Mr. Shepard, as the operator user of the defective product, would feel guilt and responsibility for the death regardless of the fact that the actual cause of the death was the car's malfunction. The rest of the Shepards, however, were not operating the car and are, in *Kately* terms, mere passengers. There is no statute, as there was in *Kately*, that required their presence or that would make them responsible in any way for the safe operation of the car. The *Kately* approach would allow Mr. Shepard to recover as the driver of the car but would deny recovery by the remainder of the family.[65]

Therefore, although the *Kately* court recognized the problem of the dual status plaintiff and tried to limit the Restatement's broad definition of user, application of *Kately* in future cases may prove unworkable. If a court takes the two tier approach and categorizes the plaintiff first as a *Dillon* bystander, the plaintiff who can recover will avoid the problems inherent in *Kately*. Those plaintiffs who cannot recover under *Dillon* will have a chance of recovering as users, but the outcome is far from certain.

The one other court that took the two tier approach held that users could recover for the emotional distress caused by witnessing a defective product physically injure another did not attempt to limit the Restate-

65. As all of the Shepards met the *Dillon* test, the application of *Kately* is largely academic. If however, the Shepard case had arisen in a jurisdiction that either refused to follow *Dillon* or to extend it to strict products liability, this would be the result of application of the *Kately* court's definition of a user.

ment's broad definition of the the actual cause of the death was the car's malfunction. term user. In *Gnirk*, the plaintiff was the driver of a car who witnessed the death of her child due to a defect in that car. The court held that while South Dakota would not extend *Dillon* to strict products liability cases, the plaintiff was a user who could recover for her emotional distress. By holding that plaintiffs who fit the Restatement's definition of users may recover for emotional distress, the court opened the door for all users to recover for emotional injury. The court, while obviously trying to limit a manufacturer's liability by refusing to extend *Dillon* to strict liability cases, actually made it easier for many plaintiffs to recover for emotional distress. The court's holding would allow the hypothetical bus passengers to recover for their emotional distress caused by witnessing a defective bus physically injure a total stranger. When the question arises again in South Dakota, the court must recognize the ramifications of its holding in *Gnirk* and address the user's recovery in a more articulate manner than the *Kately* court.

It is unlikely that Illinois will take a two tier approach. In *Rahn*, the Illinois court refused to extend *Dillon* to strict products liability cases. Dual status plaintiffs who seek to recover based on their status as users in Illinois will probably be unsuccessful because in addition to refusing to extend *Dillon*, the *Rahn* court noted that plaintiffs in strict products liability cases could not recover for emotional distress unaccompanied by physical injury.[66] Regardless of whether a plaintiff is characterized as a *Dillon* bystander or a user, this would preclude recovery for emotional distress.

B. *Rationale for Recovery*

Assuming that the plaintiff's status has been properly determined, the next question must be whether strict products liability should be extended to cover this type of harm. Many courts have ignored this question. Those courts that have found that *Dillon* should be extended to strict products liability have failed to consider that the holding in *Dillon* was based on the defendant's fault while strict products liability is ostensibly liability without fault.[67] Courts that have allowed recovery for emotional distress in strict products liability have attempted to justify the result by citing Traynor's dissent in *Escola v. Coca Cola Bottling Co.*[68] for

66. Rahn v. Gerdts, 119 Ill. App. 3d 781, 784-85, 455 N.E.2d 807, 809, 74 Ill. Dec. 378, 380 (1983).

67. The RESTATEMENT (SECOND) OF TORTS § 402A (2)(a) (1965) provides that it applies even though "the seller has exercised all possible care in the preparation and sale of his product. . . ."

68. 24 Cal. 2d 453, 150 P.2d 436 (1944). The portion most frequently referred to is "it should

the proposition that manufacturers should be held liable whenever their product causes injury to a human being; some have cited *Elmore v. American Motors Corp.*[69] for the proposition that innocent bystanders are in need of protection. This attempted justification fails because it ignores the possible distinction between physically injured and emotional injured bystanders, and also fails to address the Restatement's limitation to cases involving physical injury.[70]

Before looking at the arguments, both for and against extending strict products liability to this type of harm, it must be noted that in answering this question, we must contend with the extensions of strict products liability that have come before, that is, there is no clean slate to write on.

One argument that can be quickly disposed of for denying recovery to those plaintiffs classified as *Dillon* bystanders is their status as bystanders. Discussing recovery by physically injured bystanders, one writer expressed the view that once one accepts that privity has no place in strict products liability, recovery by bystanders is a foregone conclusion.[71] If privity truly has no place in this doctrine, then there is no reason to exclude emotionally injured bystanders differently from physically injured bystanders except for the nature of their injury.

A more difficult argument, however, is whether strict products liability was ever intended to cover emotional injury. The Restatement's discussion of the history of the doctrine reveals that strict products liability began in order to provide a remedy for physical injury, especially for injury caused by products intimately associated with the body.[72] Since

now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings." 24 Cal. 2d at 461, 150 P.2d at 440 (Traynor, J. concurring).

69. 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969), The following language is frequently relied on in cases involving physically injured bystanders:

> If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, whereas the bystander ordinarily has no such opportunities. In short, the bystander is in greater need of protection from defective products which are dangerous, and if any distinction should be made between bystanders and users, it should be made, contrary to the position of defendants, to extend greater liability in favor of the bystanders.

70 Cal. 2d at 586, 451 P.2d at 89, 75 Cal. Rptr. at 657. This language was also relied on by the court in Shepard v. Superior Court, 76 Cal. App. 3d 16, 142 Cal. Rptr. 612 (1977).

70. The RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides that "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for *physical harm* thereby caused. . . ." (emphasis added).

71. Note, *Strict Products Liability to the Bystander: A Study in Common Law Determinism*, 38 U. CHI. L. REV. 625 (1971).

72. RESTATEMENT (SECOND) OF TORTS § 402A Comment b (1965).

Section 402A expressly limits recovery to physical injury, the drafters of the Restatement seemed to exclude recovery for emotional injury.[73] This limitation has been noted by at least one court in refusing to extend strict products liability to cover emotional distress.[74] In those cases in which the courts allowed the emotionally injured bystander (or, in fact, user) to recover, no mention of this limitation was made.[75]

This is not to suggest that strict products liability should remain a static concept forever or that the intent of the drafters of the Restatement to deny recovery to emotionally injured plaintiffs should bind the courts' hands. It is meant to suggest, at least, that the courts should consider this limitation and indicate explicitly that they are extending the coverage of strict products liability. Prior to *Dillon*, a mother who witnessed the death of her child could not recover in negligence for her emotional distress unless she had suffered some physical impact or was within the zone of danger. While the historical denial of a cause of action did not stop the *Dillon* court from recognizing a new one, the court did explain its reasoning and justified its holding.[76] No less should be expected in strict products liability.

At the time that Section 402A was drafted,[77] recovery for emotional distress, particularly that unaccompanied by physical injury was just beginning.[78] Given the expansion of negligence theory to cover this type of

73. *See* RESTATEMENT, *supra* note 72.

74. Woodill v. Parke Davis & Co., 58 Ill. App. 3d 349, 374 N.E. 2d 683, 15 Ill. Dec. 900 (1978), *aff'd*, 79 Ill. 2d 26, 402 N.E.2d 194, 37 Ill. Dec. 304 (1980).

75. No mention of this language of the RESTATEMENT regarding physical harm was made in Kately v. Wilkinson, 148 Cal. App. 3d 576, 195 Cal. Rptr. 902 (1983); Gnirk v. Ford Motor Co., 572 F. Supp. 1201 (D.S.D. 1983); or in Walker v. Clark Equip. Co., 320 N.W.2d 561 (Iowa 1982) or in the majority's opinion in Shepard v. Superior Court, 76 Cal. App. 3d 16, 142 Cal. Rptr. 612 (1977). The meaning of the term physical harm, as used by the RESTATEMENT is not, however, crystal clear. In Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980), the California court overruled its previous requirement that in order to recover for emotional distress there must also be a physical injury or physical manifestations of the emotional injury such as headaches or nausea. Other cases which have held that in order to recover for emotional distress, there need be no physical injury include: Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983)(En Banc); Shultz v. Barberton Glass Co., 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983) and Culbert v. Sampson's Supermarkets, 444 A.2d 433 (Me. 1982). Other jurisdictions have rejected *Molien*: Oberreuter v. Orion Indus., Inc., 342 N.W.2d 492 (Iowa 1984); Payton v. Abbott Labs. 386 Mass. 540, 437 N.E.2d 171 (1982) and Fournell v. Usher Pest Control Co., 208 Neb. 684, 305 N.W.2d 605 (1981).

The RESTATEMENT language could mean either that there can be no recovery for emotional distress in strict products liability or that at least there must be physical injury in addition to the emotional distress. If it means the former, courts must address then those cases in which a plaintiff seeks to recover for emotional distress. This was the position taken by the dissent in Shepard v. Superior Court. If it means the latter, the courts should explain the meaning of the RESTATEMENT language and use it to justify their holdings.

76. Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

77. 1965.

78. The RESTATEMENT (SECOND) OF TORTS (1965) also included Section 436A which provides that "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily

injury that followed,[79] there may or may not be a reason to limit recovery in strict products liability to cases involving physical injury, but history or the frame of mind of the drafters of the Restatement in 1965 should not control the law forever.[80]

While the intent of the drafters of the Restatement may not be an adequate reason for declining to extend strict products liability to cover emotional distress, the courts should still consider the rationales underlying the doctrine of strict products liability to see whether such an extension is warranted. There are numerous theories advanced in support of strict products liability and several will be examined.

One theory advanced to justify strict products liability is that when there is a defective product, there is probably negligence somewhere. The injured plaintiff, however, will have difficulty proving negligence, and strict products liability is a way to ease the plaintiff's burden.[81] If a jurisdiction takes this view, it is really saying that strict products liability is virtually the same as negligence. The development of strict products liability in those jurisdictions is likely to follow that of negligence. If that jurisdiction follows *Dillon* in negligence cases, a *Dillon* type bystander should recover for the same injury even though the case is brought under a strict products liability theory. If the jurisdiction follows *Molien* in negligence cases, again, a plaintiff who suffers the same type of injury should be allowed to recover in strict products liability. Regardless of whether we think that *Dillon* or *Molien* are admirable approaches or produce inconsistent results, the difficulty of applying either case is not made more problematic if the case sounds in strict products liability.

Others take the countervailing position that strict products liability

harm or emotional disturbance to another, and it results in such emotional disturbance without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance." Under this section, in order to recover for emotional distress, a plaintiff had to suffer physical injury in addition to the emotional injury. The physical injury did not, however, have to be the result of a physical impact. This view was later rejected by the California court in *Molien*. This Section also appears to be adopting the zone of danger rule which was rejected by *Dillon*.

79. *Dillon* was decided three years after the RESTATEMENT, and *Molien* was decided 15 years after the drafting of the RESTATEMENT.

80. Therefore, while the dissent in *Shepard* may be correct that strict products liability was not intended to cover emotional distress, that reason alone is insufficient to restrict strict products liability to cases involving a physical injury.

81. *See, e.g.*, D. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681 (1980). One of the policies advanced for justifying strict products liability was felt to be that the majority of accidents caused by products and that are not caused by abuse of the product are probably attributable to negligent acts by the manufacturer but the difficulties of discovering and proving that negligence are practically insurmountable. *See also*, G. Schwartz, *Forward: Understanding Products Liability*, 67 CAL. L. REV. 435 (1979). Mr. Schwartz notes that strict liability can be seen as a fault rule which shifts the focus from the fault of the manufacturer (as in negligence cases) to the fault of the product itself. In addition, strict liability could be seen as negligence in combination with the doctrine of *res ipsa loquitur*.

is liability without fault, and is therefore different from negligence.[82] As the dissent in *Shepard* pointed out, the decision in *Dillon* was based, at least in part, on the defendant's fault and therefore should *not* be extended to strict products liability. While this argument may be emotionally satisfying, it cannot ultimately be justified. That a cause of action is based on fault or not based on fault does not automatically mean that some injuries, such as emotional distress, should not be remediable; unless, we are really saying that emotional distress is not a real injury like physical injury. Given the recognition of emotional distress as a true injury in negligence cases,[83] there is no apparent reason for saying that the same injury is less real when caused by a defective product. The injury is the same regardless of the cause. But, some courts still refuse to allow recovery when a defective product causes emotional distress. Implictly, the courts are saying that they value emotional health less than physical health. To say that a plaintiff may recover in strict products liability without proof of fault when a physical injury occurs, but that a plaintiff who suffers emotional distress must prove fault is to say that emotional injury is not as deserving of a remedy as physical injury is. Implicit in this is a distrust of emotional injury cases.

In addition, a court that requires proof of fault in emotional distress cases but not in physical injury cases is saying that it wants more proof before holding a manufacturer liable for emotional injury. A court may require more strenuous proof as a matter of policy before it will allow an emotionally injured plaintiff to recover, but if a court takes this view, it should at least admit the true reason behind its holding: limiting a manufacturer's liability.

An additional theory advanced in support of strict products liability is that the manufacturer is in a better position to bear responsibility for the harm than the plaintiff who must purchase the product in today's modern world.[84] Prosser phrased it as:

> The public interest in human life, health and safety demands the maximum possible protection the law can give against dangerous defects in products which consumers must buy, and against which they are help-

82. The RESTATEMENT provides that strict liability is applicable even though the manufacturer has exercised all possible care, that is, was not negligent. *See also*, J. Henderson, *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036 (1980). One theory noted by Mr. Henderson is that because manufacturers profit from their activities, fairness requires that innocent victims be compensated for injuries caused by defective products regardless of the supplier's fault.

83. This expansion can be seen in Dillon v. Legg, Molien v. Kaiser Found. Hosps., Shepard v. Superior Court, and Walker v. Clark Equip. Co..

84. *See, e.g.*, D. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681 (1980).

> less to protect themselves; and it justifies the imposition, upon all suppliers of such products, the full responsibility for the harm they cause, even though the supplier has not been negligent.[85]

If we accept the notion that physically injured bystanders can recover,[86] and if we believe that emotional injury is a real injury, then this rationale supports recovery by emotionally injured plaintiffs in strict products liability. Emotionally injured plaintiffs, no less than physically injured ones, are true innocent victims and are unable to protect themselves from unsafe products.

The rationale that a seller, who represents to the public that the product is safe for use and induces that belief, should be held responsible when a consumer relies on representations[87] can be readily applied to emotionally injured *Kately* users. If the plaintiff is a *Kately* user, that user may indeed have relied on representations of safety. As the responsible purchaser and operator of the product, like Mrs. Kately, the user may feel responsibility and guilt when the product causes injury to another. It is more difficult to apply this rationale to all other users within the Restatement's definition, such as the bus passengers, because no representations of safety were ever made to them. Since this rationale has not been an obstacle in applying strict products liability to users to whom no representations of safety were ever made when those users suffer physical injury, users in the same position who suffer emotional injury should also be able to recover. The same could be said of bystanders. This rationale was not an obstacle to recovery by physically injured bystanders and it would be hypocritical for the courts to dredge up this rationale now to deny recovery to emotionally injured bystanders.

There may be a reason to use an aspect of this rationale to argue that emotionally injured plaintiffs should not be able to recover. Closely tied to this rationale of reliance on representations of safety is the language of the Restatement that defines a defective product.[88] According

85. W. Prosser, *The Assault Upon the Citadel Strict Liability to the Consumer*, 69 YALE L.J. 1099, 1122 (1960).

86. *See* Note, *Strict Products Liability to the Bystander: A Study in Common Law Determinism*, 38 U. CHI. L. REV. 625 (1971). *See also* Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969) and cases cited *supra*, at note 11.

87. *See, e.g.*, D. Owen, *Rethinking the Policies of Strict Products Liability Law*, 33 VAND. L. REV. 681 (1980). The author indicated that manufacturers could be held liable on a strict liability theory because they convey to the public a general sense of product quality by the use of mass advertising and by merchandising practices. These, according to Owen, cause consumers to rely on the manufacturer's skill and expertise for protection. In J. Henderson, *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036 (1980), Mr. Henderson noted that consumers rely on manufacturers and suppliers for adequate protection and that these consumers should be allowed to recover when adequate protection is not provided.

88. RESTATEMENT (SECOND) OF TORTS § 402A Comment g (1965). *See also* G. Schwartz,

to the Restatement, a product is defective if it is unreasonably dangerous; that is, dangerous beyond that contemplated by the ordinary consumer. A physically injured user could say that defective brakes were beyond the danger contemplated. Even though a physically injured bystander has had no representations of safety made to him or her, a bystander could argue that he or she expected to walk safely down a street and not be hit by a car with defective brakes. Alternatively, even though it is a bystander who is physically injured, the user of the car could say that there was an expectation that the brakes would not fail and injure an innocent victim. A user could purchase a car with this expectation. Therefore, in cases involving physical injury, it is arguable that the defect in the product did present a danger beyond that contemplated by the user or bystander. However, in cases involving emotional distress, the argument falters. Whose expectations do we look to ascertain if the product was unreasonably dangerous? It seems somewhat disingenuous to argue that anyone ever thought about the danger of a product causing physical injury which in turn would cause emotional distress to someone else. We must wonder if the risk of emotional distress is what is meant by a danger beyond that contemplated by the ordinary consumer.

Other commentators have espoused a risk of loss spreading rationale in support of strict products liability.[89] Under this theory, manufacturers absorb the loss and then spread it out among all of the consumers of their product. This would support recovery by some users, those who purchased the product, because the loss would be spread among all consumers regardless of the fact that the loss was due to physical or emotional injury.

It is more difficult to apply this rationale to support recovery for emotional injury by non-users: *Dillon* type bystanders in strict products liability. When a non-consumer recovers, the loss is spread among consumers only and some might say that it is unfair to make consumers pay for this type of loss. There are two reasons why this argument will not stand up. First, this argument was unsuccessful in preventing recovery by physically injured bystanders. Once this argument failed to prevent physically injured bystanders from recovering, there is no reason for it to

Understanding Products Liability, 67 CAL. L. REV. 435 (1979). In discussing recovery by bystanders, Mr. Schwartz explores the concept of consumer expectations and concludes that the purchaser of the product may have intended to provide some protection to victims of the product.

89. *See, e.g.*, D. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681 (1980) and J. Henderson, *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036 (1980).

be successful in preventing recovery in emotional injury cases.[90] Second, in emotional injury cases in strict products liability, at least some of the plaintiffs will also be users and consumers of the product. Even if allowing recovery by plaintiffs who are only *Dillon* type bystanders will spread the rule of loss unfairly on consumers, this unfairness is lessened by the existence of some emotionally injured plaintiffs who are also users or consumers.

The rationale most difficult to square with recovery by emotionally injured bystanders is the ease of litigation theory. Those advancing this theory argue that since a user could already sue the retailer on warranty theories and the retailer could seek indemnity from those up the chain, it is easier to just let the plaintiff sue any supplier in the chain. While this theory would support recovery by emotionally injured users, it does not work well for emotionally injured bystanders. Again, however, this did not prevent the courts from allowing recovery by physically injured bystanders from recovering and unless there is something different about emotionally injured bystanders, courts should not hide behind this rationale to bar recovery to *Dillon* type bystanders who sue in strict products liability.

In summary, because many of the rationales underlying strict products liability were ignored when courts extended this cause of action to physically injured bystanders, courts should refuse to use these rationales to bar recovery by plaintiffs who suffer emotional distress by witnessing a defective product cause physical injury to another. To do so would be hypocritical at best.

V. CONCLUSION

Defendants in strict products liability cases can do little to protect themselves from liability to emotionally injured plaintiffs other than to argue that because strict products liability is liability without fault, the courts should not extend *Dillon* to strict products liability. In addition, future defendants may argue that strict products liability should not be extended to cover emotional distress even if the plaintiff is classified as a user. While these arguments have some appeal, they will not be successful in a jurisdiction that believes that emotional injury is as deserving of redress as physical injury. Lest this seem unfair to manufacturers, there remain many restraints on the *Dillon* cause of action in those jurisdictions that recognize it. Defendants should also argue that the definition

90. In the leading case of Elmore v. American Motors Corp., this theory was not even discussed.

of a user be limited as in *Kately*. Using this definition will impose some restraints on user recovery. Most important, however, is that there will be no recovery unless the product is defective. Plaintiffs who see someone injured by mishandling or misusing a product will not recover. Misuse of a product is a defense to a suit in products liability because it means that the product is not defective. It is only when a product's defect causes the injury that an emotionally injured plaintiff can recover. If the manufacturer can prevent the defect from existing, the product can result in neither physical nor emotional injury. In other words, to avoid suits for emotional injury, manufacturers need only do the same as they would to avoid suits for physical injury.

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