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NEGLIGENCE—RECOVERY FOR NEGLIGENTLY INFLICTED MENTAL DISTRESS PERMITTED TO MOTHER WHO WITNESSED THE VIOLENT DEATH OF HER CHILD EVEN THOUGH THE MOTHER WAS OUTSIDE ZONE OF DANGER.

Sinn v. Burd (Pa. 1979)

While standing near the front door of her home on June 12, 1975, Mrs. JoAnne Sinn saw an automobile strike her daughter and hurl the child through the air, causing injuries that resulted in the girl's death.¹ Mrs. Sinn was located outside the area endangered by the vehicle and had no reason to fear for her own safety.² On June 3, 1976, the Sinn family filed a four-count trespass complaint in the court of common pleas against Brad Burd, the driver of the automobile.³ One count was brought by Mrs. Sinn to recover for emotional distress suffered as a result of witnessing the fatal occurrence.⁴ Finding that Mrs. Sinn was not within the zone of danger,⁵ the trial

1. *Sinn v. Burd*, ___ Pa. ___, ___, 404 A.2d 672, 674 (1979). The victim, Lisa Sinn, was standing with her sister Deborah along the edge of the road in front of their home. *Id.* The automobile narrowly missed striking Deborah. *Id.*

2. *Id.* at ___, 404 A.2d at 673. For a discussion of the relevance of Mrs. Sinn's location with respect to the place of the accident, *see* text accompanying note 33 *infra*.

3. *Id.* at ___, 404 A.2d at 674. The first count was brought under Pennsylvania's then-current wrongful death statute which provided in pertinent part: "[T]he persons entitled to recover damages for any injuries causing death, shall be [*inter alios*] the . . . parents of the deceased . . ." Act of Apr. 26, 1855, Pub. L. No. 323, § 1, 1855 Pa. Laws 309 (current version at 42 PA. CONS. STAT. ANN. § 8301 (Purdon 1979)). With respect to damages, the statute provided:

[T]he plaintiff may recover, in addition to the damages now recoverable in such actions, the expenses incurred for medical and surgical care and for nursing of the deceased, and such other expenses caused by the injury which resulted in death as could have been recovered in an action begun by the injured person in his lifetime; and plaintiff may also recover the reasonable funeral expenses of the deceased . . .

Act of May 13, 1927, Pub. L. No. 480, § 1, 1927 Pa. Laws 992 (current version at 42 PA. CONS. STAT. ANN. § 8301 (Purdon 1979)). The second count was brought on behalf of the deceased daughter under the Pennsylvania Survival Act which provides in pertinent part: "All causes of action or proceedings, real or personal, except actions for slander or libel, shall survive the death of the plaintiff or of the defendant . . ." Act of Apr. 18, 1949, Pub. L. No. 121, § 601, 1949 Pa. Laws 541 (current version at 42 PA. CONS. STAT. ANN. § 8302 (Purdon 1979)). The third count was brought on behalf of Deborah for the psychological damages she sustained as a result of witnessing the fatal accident in which her sister died. ___ Pa. at ___, 404 A.2d at 674. For the final count, *see* note 4 and accompanying text *infra*.

4. ___ Pa. at ___, 404 A.2d at 674. Mrs. Sinn's claim stated, *inter alia*, that she had become emotionally shattered from viewing the accident, and, as a consequence, suffered a shock to her nervous system and grievous mental pain which resulted in severe depression and an acute nervous condition. *Id.* Mrs. Sinn further alleged that as a result of the foregoing, she incurred expenses for medicine and tranquilizers, and might be required to expend considerable sums in the future for the treatment of her resulting injuries and mental trauma. *Id.* at ___, 404 A.2d at 675.

5. For a discussion of the traditional "zone of danger" requirement, *see* notes 32-43 & 47-54 and accompanying text *infra*.

court sustained defendant's demurrer to this count,⁶ and, on appeal, the Pennsylvania Superior Court affirmed without opinion.⁷

In a plurality decision, the Supreme Court of Pennsylvania reversed and remanded,⁸ *holding* that a cause of action exists when a mother, not within the zone of personal danger, suffers emotional shock from personal observance of the event which causes the violent death of her small child. *Sinn v. Burd*, _____ Pa. _____, _____, 404 A.2d 672, 686 (1979).

Traditionally, recovery for the negligent infliction of emotional distress⁹ was viewed with disfavor by the courts.¹⁰ The reluctance of courts to award such damages stemmed from their fears that to permit recovery would 1) burden the judicial system with increased liti-

6. ___ Pa. at ___, 404 A.2d at 675. Appellee had demurred to both the third and fourth counts, "claiming that the complaint failed to aver that Deborah and appellant were in personal danger of physical impact, that they feared such physical impact, or that they suffered physical injury as a result of the emotional distress caused by the accident." *Id.* The demurrer to the third count was overruled by the trial court which found that Deborah was within the zone of danger and, thus, could proceed with her action. *Id.* For a discussion of the "zone of danger" rule, see notes 32-43 & 47-54 and accompanying text *infra*.

7. 253 Pa. Super. Ct. 627, 384 A.2d 1003 (1978).

8. ___ Pa. at ___, 404 A.2d at 686. Justice Nix, joined by Justice Manderino, delivered the opinion of the court. Chief Justice Eagen filed a concurring opinion, while Justice Larsen concurred only in the result. *Id.* Justice Roberts filed a dissenting opinion in which Justice O'Brien joined. *Id.* The seventh seat on the Pennsylvania Supreme Court was vacant at the time of this decision.

9. The phrase "emotional distress" has been used interchangeably with phrases such as "mental anguish," "mental harm," "emotional disturbance," and "mental suffering," all of which convey equally vague meanings. See Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1238 n.7 (1971). See also RESTATEMENT (SECOND) OF TORTS § 46, Comment j (1965). Comment j defines "emotional distress" to include "all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea." *Id.* Compare *Cosgrove v. Beymer*, 244 F. Supp. 824, 826 (1965) ("shock or mental anguish") with *Knaub v. Gotwalt*, 422 Pa. 267, 270, 220 A.2d 646, 647 (1966) ("fright or nervous shock or mental or emotional disturbances or distress").

10. See, e.g., *Huston v. Borough of Freemansburg*, 212 Pa. 548, 550, 61 A. 1022, 1023 (1905). In denying recovery for fright and resulting death caused by a nearby explosion, the *Huston* court stated:

In the last half century the ingenuity of counsel, stimulated by the cupidity of clients and encouraged by the prejudices of juries, has expanded the action for negligence until it overtops all others in frequency and importance; but it is only in the very end of that period that it has been stretched to the effort to cover *so intangible, so untrustworthy, so illusory, and so speculative a cause of action as mere mental disturbance.*

Id. (emphasis added). See also *Western Union Tel. Co. v. Wood*, 57 F. 471 (5th Cir. 1893); *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 354 (1896). See generally W. PROSSER, LAW OF TORTS § 54, at 327 (4th ed. 1971).

gation;¹¹ 2) proliferate fraudulent claims¹² due to the inherent difficulties in proving mental distress;¹³ and 3) impose liability upon a tortfeasor disproportionate to the culpability of his conduct.¹⁴ It appears, however, that the courts were primarily concerned with the second factor—the potential for fraudulent claims—because eventually they began to permit recovery under circumstances which tended to verify the genuineness of the mental harm.¹⁵ Thus, when the alleged emotional suffering could be attributed to a plaintiff's physical

11. *See, e.g.*, *Kalen v. Terre Haute & I.R.R.*, 18 Ind. App. 202, 213, 47 N.E. 694, 698 (1897) (uncertainties in ascertaining the truth would encourage litigation); *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 110, 45 N.E. 354, 354-55 (1896) (recovery would result in flood of litigation); *Knaub v. Gotwalt*, 422 Pa. 267, 271, 220 A.2d 646, 647 (1966) ("courts would be swamped by virtual avalanche of cases"); *Ewing v. Pittsburgh, C., C. & St. L. Ry.*, 147 Pa. 40, 43, 23 A. 340, 340 (1892) (recovery would increase scope of so called "accident cases"). *But cf.* *Robb v. Pennsylvania R. R.*, 58 Del. 454, 463, 210 A.2d 709, 714 (1965) (if there is a flood of litigation, the courts must willingly cope with it); *Falzone v. Busch*, 45 N.J. 559, 567, 214 A.2d 12, 16 (1965) (expansion of litigation should not deter courts in granting relief for meritorious claims); *Niederman v. Brodsky*, 436 Pa. 401, 412, 261 A.2d 84, 89 (1970) (courts should remedy wrongs even at the expense of increased litigation); *Bohlen, Right to Recover for Injury Resulting from Negligence Without Impact*, 50 AM. L. REV. 141, 172-73 (1902) (policy of law is and should be to encourage litigation); *Prosser, Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 877 (1939) (fear of increased litigation is a poor reason for denying relief to one suffering genuine mental injury).

12. *See, e.g.*, *Spade v. Lynn & B.R.R.*, 168 Mass. 285, 290, 47 N.E. 88, 89 (1897) (recovery would open door for unjust claims); *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 110, 45 N.E. 354, 354-55 (1896) (injury may be easily feigned); *Bosley v. Andrews*, 393 Pa. 161, 169, 142 A.2d 263, 266-67 (1958) (for every genuine claim there would be a tremendous number of illusory ones). *But see* *Tobin v. Grossman*, 24 N.Y.2d 609, 616, 249 N.E.2d 419, 442, 301 N.Y.S.2d 544, 559 (1969) (difficulty of proof should not cause arbitrary denial of all claims). *See also* note 59 *infra*.

13. *See* *Bosley v. Andrews*, 393 Pa. 161, 168-69, 142 A.2d 263, 266-67 (1958); *Ward v. West Jersey & S.R.R.*, 65 N.J.L. 383, 385, 47 A. 561, 562 (1900). In recent years, however, most courts have agreed that emotional distress is capable of medical proof. *See, e.g.*, *Orlo v. Connecticut Co.*, 128 Conn. 231, 236, 21 A.2d 402, 404 (1941) (advance in medical knowledge has minimized difficulty in tracing resulting injury through fright to negligent conduct), *cited in* *Robb v. Pennsylvania R.R.*, 58 Del. 454, 460, 210 A.2d 709, 712 (1965); *Niederman v. Brodsky*, 436 Pa. 401, 406, 261 A.2d 84, 86 (1970) (improved techniques and equipment require us to give greater credit to medical evidence). Similarly, many commentators have recognized the advances of medical science in diagnosing emotional distress. *See, e.g.*, *Cantor, Psychosomatic Injury, Traumatic Psychoneurosis, and Law*, 6 CLEV.-MAR. L. REV. 428, 430-37 (1957); *Smith, Relations of Emotion to Injury and Disease*, 30 VA. L. REV. 193, 303-04 (1943).

14. *See, e.g.*, *Spade v. Lynn & B.R.R.*, 168 Mass. 285, 290, 47 N.E. 88, 89 (1897) (unreasonable to require one who is merely negligent to anticipate consequences resulting from fright); *Waube v. Warrington*, 216 Wis. 603, 613, 258 N.W. 497, 501 (1935) (liability for emotional harm would be wholly out of proportion to defendant's culpability).

15. *Leong v. Takasaki*, 55 Hawaii 398, 402-03, 520 P.2d 758, 761-62 (1974) (courts resorted to artificial standards tending to guarantee that the claim was not spurious). For courts permitting recovery for mental harm when special circumstances exist to insure the validity of the damages, *see, e.g.*, *Pennsylvania Co. v. White*, 242 F. 437, 440 (6th Cir. 1917) (damages for fright are recoverable when plaintiff suffers physical injuries from defendant's negligence); *Southern Ry. v. Owen*, 156 Ky. 827, 831, 162 S.W. 110, 111 (1914) (slight physical injury is sufficient to permit jury to determine damages for mental distress). *See also* W. PROSSER, *supra* note 10, at 328.

injury, courts were willing to permit recovery for the emotional distress.¹⁶

This requirement of physical injury, which became commonly known as the "impact rule,"¹⁷ was consistently applied in Pennsylvania,¹⁸ thus obviating the application of traditional tort concepts such as proximate cause, in mental distress cases.¹⁹ Nonetheless, probably out of a concern for meritorious claimants who could be barred by the impact requirement, the Pennsylvania courts began to make inroads on the rule by granting relief in cases where the contemporaneous physical injury contributed little in attesting to the genuineness of the claim for emotional disturbance.²⁰ For instance, in *Hess v. Philadelphia Transportation Co.*,²¹ plaintiff sought damages for his mental distress and subsequent neurosis allegedly caused by an electric shock that he sustained when defendant's overhead trolley wire came in contact with plaintiff's car.²² Although expert

16. See cases cited note 15 *supra*; cf. *Spade v. Lynn & B.R.R.*, 168 Mass. 285, 290, 47 N.E. 88, 89 (1897) (no recovery for distress without accompanying physical injury); *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 109, 45 N.E. 354, 354 (1896) (no recovery for mere fright without immediate personal injury).

17. See *Sinn v. Burd*, ___ Pa. at ___, 404 A.2d at 675; W. PROSSER, *supra* note 10, at 331.

18. See, e.g., *Knaub v. Gotwalt*, 422 Pa. 267, 270, 220 A.2d 646, 647 (1966); *Bosley v. Andrews*, 393 Pa. 161, 164, 142 A.2d 263, 264 (1958); *Potere v. Philadelphia*, 380 Pa. 581, 589, 112 A.2d 100, 104 (1955); *Ewing v. Pittsburgh, C., C. & St. L. Ry.*, 147 Pa. 40, 44, 23 A. 340, 340-41 (1892) (alternative holding).

19. The requirement of physical injury or physical impact, in lieu of deciding the question on the basis of foreseeability or proximate cause, was initiated in Pennsylvania early in the 20th century. See *Huston v. Borough of Freemansburg*, 212 Pa. 548, 61 A. 1022 (1905). Prior to *Huston*, the Pennsylvania Supreme Court applied traditional tort concepts in analyzing claims for damages based on emotional harm. See, e.g., *Ewing v. Pittsburgh, C., C. & St. L. Ry.*, 147 Pa. 40, 23 A. 340 (1892); *Fox v. Borkey*, 126 Pa. 164, 17 A. 604 (1889). In *Fox*, the court denied a claim for mental distress and nervous shock that was not accompanied by physical injury, holding that the harm complained of was not foreseeable and, thus, was not the ordinary or proximate result of defendant's act. 126 Pa. at 169, 17 A. at 604-05. Three years later, in *Ewing*, the court faced another claim for emotional disturbance unaccompanied by a contemporaneous physical injury, although the plaintiff did claim subsequent illness and disability. 147 Pa. at 41, 23 A. at 340. In denying recovery, the court based its holding on two theories: 1) that plaintiff's mental distress was not the proximate result of defendant's conduct; and 2) that mere fright, unaccompanied by bodily injury, is not actionable. *Id.* at 44, 23 A. at 340-41. Despite the fact that *Ewing* involved alternative holdings, the case has been credited as being a leading decision in establishing the impact rule in the United States. See *Robb v. Pennsylvania R.R.*, 58 Del. 454, 458-59, 210 A.2d 709, 711 (1965).

In 1905, the *Huston* court clearly replaced the previous approach of applying basic tort principles with the requirement of physical injury in mental distress cases. See 212 Pa. at 550, 61 A. at 1022. The court stated that even though there was sufficient evidence of negligence and proximate cause to carry the case to the jury, "there can be no recovery of damages from fright or other merely mental suffering unconnected with physical injury." *Id.* at 549-50, 61 A. at 1022.

20. See notes 21-27 and accompanying text *infra*.

21. 358 Pa. 144, 56 A.2d 89 (1948).

22. *Id.* at 144-45, 56 A.2d at 89-90. According to the plaintiff, the electric current lifted him out of his seat. *Id.* at 144-45, 56 A.2d at 89. Two engineers, however, offered evidence to prove that a party in an automobile is insulated from such shock. *Id.* at 146-47, 56 A.2d at 89. The

testimony established that plaintiff had suffered no *physical injuries*,²³ the court was apparently unwilling to deny relief to one sustaining such a sudden, forceful *impact* at the hand of another.²⁴ Thus, recovery for mental distress was permitted in *Hess*.²⁵ Similarly, Pennsylvania courts allowed relief when claimants had suffered minor physical injuries that provided little authenticity to the claim of mental distress,²⁶ as well as when the alleged physical injuries were not externally visible.²⁷ Nevertheless, these inroads upon the impact rule were relatively rare,²⁸ and the Supreme Court of Pennsylvania

court nevertheless affirmed a judgment for the plaintiff, concluding that the jury was justified in believing the plaintiff's claim. *Id.* at 148, 56 A.2d at 91.

23. *Id.* at 146, 56 A.2d at 90. Plaintiff's physician testified "that plaintiff had no organic injuries but apparently was suffering from a mental neurosis which made him believe many things were wrong with him." *Id.*

24. *See id.* at 148, 56 A.2d at 91. The *Hess* court reasoned that "[a]n electric shock is 'a direct and personal assault,' and any fright or nervous disorders arising from such an 'assault' negligently caused is compensable in damages." *Id.*, citing *Buckbee v. Third Ave. R.R.*, 64 A.D. 360, 72 N.Y.S. 217 (1901). It is submitted that by emphasizing the severity of the impact, rather than the accompanying physical injury, the *Hess* decision may have led later courts in Pennsylvania to begin allowing recovery for mental distress under the impact rule, even in situations where the minor injuries from such impact did little to demonstrate the genuineness of the claim. *See* notes 26-27 and accompanying text *infra*.

25. 358 Pa. at 148-49, 56 A.2d at 91.

26. *See Potere v. Philadelphia*, 380 Pa. 581, 589, 112 A.2d 100, 104 (1955). In *Potere*, plaintiff's automobile fell through a city street that was under construction. *Id.* at 584, 112 A.2d at 102. Plaintiff suffered a sprained ankle, bruised elbow, stiff neck, and severe shock to his nervous system, the latter being diagnosed as anxiety neurosis caused by the accident. *Id.* at 588, 112 A.2d at 104. In permitting recovery for *all* of plaintiff's injuries, the major amount of which compensated plaintiff for his anxiety neurosis, the *Potere* court held: "Where . . . a plaintiff sustains bodily injuries, even though trivial or minor in character, which are accompanied by fright or mental suffering directly traceable to the peril in which the defendant's negligence placed the plaintiff, then mental suffering is a legitimate element of damages." *Id.*, citing *Hess v. Philadelphia Transp. Co.*, 358 Pa. 144, 56 A.2d 89 (1948); *Applebaum v. Philadelphia Rapid Transit Co.*, 244 Pa. 82, 90 A. 462 (1914). *Accord*, *Porter v. Delaware Lack. & W.R.R.*, 73 N.J.L. 405, 406, 63 A. 860, 860 (1928) (dust in eyes was a sufficient impact). *But cf.* *Chittick v. Philadelphia Rapid Transit Co.*, 224 Pa. 13, 17-18, 73 A. 4, 6 (1909) (recovery denied although plaintiff suffered bruises when a nearby explosion threw her to the floor).

27. *See Howarth v. Adams Exp. Co.*, 269 Pa. 280, 282-83, 112 A. 536, 537 (1921). Although a judgment for the plaintiff in the lower court was reversed and remanded on other grounds, the *Howarth* court stated:

Here there were no visible external marks upon the person of Mrs. Howarth, but her own testimony, and that of her physicians, indicate an actual physical injury to her back, sufficient to take the case to the jury While a recovery should not be sustained in such case upon dubious evidence, it cannot be affirmed as matter of law that the physical injury must be externally visible.

Id. at 282-83, 112 A. at 537 (citations omitted). *See also Samarra v. Allegheny Valley St. Ry.*, 238 Pa. 469, 86 A. 287 (1913).

28. *See Bosley v. Andrews*, 393 Pa. 161, 179-81, 142 A.2d 263, 272-73 (1958) (Musmanno, J., dissenting). Justice Musmanno, a firm believer that emotional distress could be caused without physical injury or impact, stated: "I have said that this Court has been consistent in refusing recovery in this type of case. I must modify that statement somewhat. There has been an occasion or two when a ray of wholesome and humane inconsistency broke through the dark clouds of illogical consistency." *Id.* at 179, 142 A.2d at 272 (Musmanno, J., dissenting). *See* notes 21-27 and accompanying text *supra*.

strongly reiterated its requirement of physical impact in its 1966 decision of *Knaub v. Gotwalt*²⁹—even though it had earlier recognized that the doctrine was no longer followed by a majority of courts.³⁰

The *Knaub* decision thus kept Pennsylvania among the minority of jurisdictions which continued to rely upon the impact rule;³¹ most jurisdictions had adopted the so-called “zone of danger” doctrine.³² Under the zone of danger test, one who is in the immediate zone of personal danger caused by another’s negligent conduct—*i.e.*, one

For cases denying relief for negligent infliction of emotional distress when impact was absent, *see, e.g.*, *Knaub v. Gotwalt*, 422 Pa. 267, 220 A.2d 646 (1966); *Bosley v. Andrews*, 393 Pa. 161, 142 A.2d 263 (1958); *Koplin v. Louis K. Liggett Co.*, 322 Pa. 333, 185 A. 744 (1936); *Morris v. Lackawanna & Wy. V.R.R.*, 228 Pa. 198, 77 A. 445 (1910); *Ewing v. Pittsburgh, C., C. & St. L. Ry.*, 147 Pa. 40, 23 A. 340 (1892).

29. 422 Pa. 267, 220 A.2d 646 (1966) (sister and parents of victim denied recovery for mental shock sustained from witnessing automobile strike and kill victim). *See also* *Bosley v. Andrews*, 393 Pa. 161, 142 A.2d 263 (1958) (recovery denied for heart ailments occasioned by plaintiff’s fright and fall when being chased by defendant’s trespassing bull). Even in *Bosley*, however, there were indications that the impact requirement was losing its adherents on the Pennsylvania Supreme Court. Justice Musmanno, dissenting on the ground that only an arbitrary rule would deny relief to innocent victims suffering grievous injuries, stated in *Bosley*:

[I]t is inexplicable how this Court can legally dispose of a controversy which is peculiarly one for a jury’s determination To say that to grant what the law allows in this case might create an untoward situation in other cases is like saying that the fountain of justice should be boarded up because of the possibility that someone might drown in its salutary waters.

In recapitulation I wish to go on record that the policy of non-liability announced by the Majority in this type of case is insupportable in law, logic, and elementary justice—and I shall continue to dissent from it until the cows come home.

Id. at 194-95, 142 A.2d at 279-80 (Musmanno, J., dissenting).

30. *See* *Bosley v. Andrews*, 393 Pa. 161, 167-68, 142 A.2d 263, 266 (1958); note 32 and accompanying text *infra*. *See also* W. PROSSER, *supra* note 10, at 332. Dean Prosser stated that after Justice Musmanno’s “literary dissent” in *Bosley*, “which may well be one of the classics of the law, it became apparent that the impact rule is destined for rapid extinction, and might perhaps even never be applied again.” *Id.* Although Dean Prosser’s words proved to be prophetic for Pennsylvania law, *see* notes 44-47 and accompanying text *infra*, the *Knaub* decision indicated that a majority of the court had not yet abandoned the impact rule. *See* note 29 and accompanying text *supra*. This led Justice Musmanno to vehemently dissent again, stating:

It is a matter of infinite regret to me that in the train of Progress in the Law of Humanity, Pennsylvania is a car frequently clattering close to the caboose instead of cheerfully gliding over the rails immediately behind the locomotive. Why is it that in ameliorating the rigors of the common law, Pennsylvania must copy after other States, rather than take the lead?

How many States must repudiate the cruel rule announced in this case before Pennsylvania consents to march in the procession of recognition of realities?

Id. at 273, 220 A.2d at 648 (Musmanno, J., dissenting).

31. Even today, a minority of courts continue to require physical impact. *See, e.g.*, *Beaty v. Buckeye Fabric Finishing Co.*, 179 F. Supp. 688, 697 (W.D. Ark. 1959) (applying Arkansas law); *Pretsky v. Southwestern Bell Tel. Co.*, 396 S.W.2d 566, 568 (Mo. 1965).

32. *See, e.g.*, *Orlo v. Connecticut Co.*, 128 Conn. 231, 239, 21 A.2d 402, 405 (1941) (“range of ordinary physical danger”); *Robb v. Pennsylvania R.R.*, 58 Del. 454, 464, 210 A.2d 709, 714 (1965) (“immediate area of physical danger”); *Bowman v. Williams*, 164 Md. 397, 403, 165 A. 182, 184 (1933) (“imminent danger of physical contact”). *See also* Annot., 65 A.L.R.2d 100 (1959).

who fears bodily harm from such conduct—may recover for emotional distress and the resulting physical consequences even though no physical impact occurred.³³

The zone of danger rule was, however, determined to be inadequate by the Supreme Court of California in the 1968 case of *Dillon v. Legg*,³⁴ where the court permitted bystander recovery.³⁵ Confronting a factual setting similar to the situation in *Sinn*,³⁶ the *Dillon* court ruled that recovery will be permitted where a defendant should have foreseen that his conduct would cause emotional disturbance resulting in physical injuries³⁷ to a person of average sensitivities.³⁸

The *Dillon* decision, however, did not cause the demise of the zone of danger doctrine, for only one year later, in *Tobin v. Grossman*,³⁹ the New York Court of Appeals refused to permit bystander recovery.⁴⁰ The *Tobin* court declared that permitting persons beyond the zone of danger to recover for their emotional distress would create a new duty and that “there are no new technological,

33. See, e.g., *Robb v. Pennsylvania R.R.*, 58 Del. 454, 210 A.2d 709 (1965); *Falzone v. Busch*, 45 N.J. 559, 214 A.2d 12 (1965).

34. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

35. See *id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80; note 37 and accompanying text *infra*.

36. See notes 1-2 and accompanying text *supra*.

37. 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80. It should be recognized that the *Dillon* court permitted recovery for emotional distress only when there was a resulting physical injury. *Id.* The court stated: “We note, first, that we deal here with a case in which plaintiff suffered a shock which resulted in physical injury and we confine our ruling to that case.” *Id.* The Supreme Court of California has reaffirmed its position in *Dillon* that physical injuries emanating from emotional shock are required before recovery will be permitted. See *Krouse v. Graham*, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977). Other jurisdictions have similarly required some physical manifestation resulting from the mental distress before allowing recovery. See, e.g., *Keck v. Jackson*, 122 Ariz. 114, 593 P.2d 668 (1979); *D’Amicol v. Alvarez Shipping Co.*, 31 Conn. Supp. 164, 326 A.2d 129 (1973); *Neuberg v. Michael Reese Hosp. & Med. Center*, 60 Ill. App. 3d 679, 377 N.E.2d 215; *D’Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975). *But cf.* *Sinn v. Burd*, — Pa. at —, 404 A.2d at 679 (plaintiff need not show physical manifestation of alleged mental distress).

38. 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80. The *Dillon* court emphasized the following factors in determining whether a defendant reasonably should foresee the plaintiff’s injury:

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

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

39. 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

40. *Id.* at 611, 249 N.E.2d at 419-20, 301 N.Y.S.2d at 555. The *Tobin* court framed the issue presented to it as “whether a mother may recover against a tort-feasor for her own mental and physical injuries caused by shock and fear for her two-year-old child who suffered serious injuries in an automobile accident.” *Id.* at 611, 249 N.E.2d at 419, 301 N.Y.S.2d at 554.

economic, or social developments" which warrant legal recognition of an entirely new cause of action.⁴¹ While rejecting the argument that elimination of the zone of danger rule would cause a proliferation of both valid and fraudulent claims,⁴² the *Tobin* court did find that the proposed foreseeability test would lead to unlimited and unduly burdensome liability which could not be reasonably circumscribed.⁴³

Confronted with the divergent views enunciated in *Dillon* and *Tobin*, the Supreme Court of Pennsylvania, in the 1970 case of *Niederman v. Brodsky*,⁴⁴ was faced with the question of whether it should discard the impact rule in favor of another standard. In *Niederman*, the plaintiff sought recovery for heart damage and shock that he suffered when defendant's automobile narrowly missed plaintiff but struck plaintiff's son who was standing next to him.⁴⁵ Finding that the underpinnings of the impact rule were no longer valid, the court eliminated the requirement that the plaintiff prove actual impact in order to recover for the negligent infliction of mental distress.⁴⁶ Adopting the zone of danger doctrine, the *Niederman* court held that a cause of action for damages proximately caused by the tort can be maintained by one who is within the zone of personal danger and who actually fears the potential impact.⁴⁷

41. *Id.* at 615, 249 N.E.2d at 422, 301 N.Y.S.2d at 558.

42. See notes 11-13 and accompanying text *supra*.

43. 24 N.Y.2d at 616, 249 N.E.2d at 423, 301 N.Y.S.2d at 559. With reference to this concern, the *Tobin* court maintained that the eyewitness limitation imposed by the *Dillon* court under the foreseeability test provides no rational basis for limiting liability. *Id.* at 618, 249 N.E.2d at 424, 301 N.Y.S.2d at 561. In rejecting the *Dillon* rationale, the court noted that such factors as the plaintiff's distance from the accident, the age of the victim, and the relationship of the parties are "too relative to permit creation of only a limited scope of liability or duty." *Id.* at 618-19, 249 N.E.2d at 424, 301 N.Y.S.2d at 561. The *Tobin* court further reasoned that with respect to bystander recovery, the theory of providing a remedy for every wrong is limited by the recognition that the law must draw the line somewhere. *Id.* at 619, 249 N.E.2d at 424, 301 N.Y.S.2d at 561.

44. 436 Pa. 401, 261 A.2d 84 (1970).

45. *Id.* at 402-03, 261 A.2d at 84-85. Plaintiff alleged that the defendant negligently drove his vehicle onto the sidewalk, striking a fire hydrant, a litter pole and a basket, a newsstand, and eventually plaintiff's son. *Id.* at 402, 261 A.2d at 84. Almost immediately thereafter, plaintiff suffered chest pains, which were later diagnosed as heart failure stemming from an apprehension or fear of impending death. *Id.* at 402-03, 261 A.2d at 84.

46. *Id.* at 413, 261 A.2d at 89-90. In rejecting the requirement of physical impact, the majority gave recognition to Justice Musmanno's strong dissenting opinions in two prior cases which had denied recovery for mental distress due to the absence of physical injury or impact. *Id.* at 403, 261 A.2d at 85. See *Knaub v. Gotwalt*, 422 Pa. 267, 220 A.2d 646 (1966) (Musmanno, J., dissenting); *Bosley v. Andrews*, 393 Pa. 161, 142 A.2d 263 (1958) (Musmanno, J., dissenting); notes 29 & 30 *supra*. The *Niederman* court noted: "Today the cows come home. We decide that on the record before us, appellant may go to trial and if he proves his allegations, recovery may be had from a negligent defendant, despite the fact that appellant's injuries arose in the absence of actual impact." 436 Pa. at 403, 261 A.2d at 85 (footnotes omitted). Cf. note 29 *supra*.

47. 436 Pa. at 413, 261 A.2d at 90. Since *Niederman*, two Pennsylvania Superior Court decisions have applied the zone of danger doctrine. See *Bowman v. Sears, Roebuck & Co.*, 245

Against this background, Justice Nix addressed the claim presented in *Sinn*⁴⁸ by noting that the zone of danger doctrine arbitrarily prevented recovery to Mrs. Sinn who, although not in personal danger, had allegedly suffered emotional distress from witnessing the negligent infliction of injury to her minor child.⁴⁹ Justice Nix reasoned that the mental anguish suffered in such bystander cases is as severe and genuine as the distress suffered by a plaintiff located within the zone of danger.⁵⁰ Indeed, Justice Nix found that the true cause of harm in either case emanates from the parent witnessing the serious injury or death of the child, irrespective of whether the parent is personally exposed to possible impact.⁵¹

Having noted the arbitrary limitations of the zone of danger doctrine, Justice Nix began his consideration of whether relief should be afforded to bystanders by presuming that a tortfeasor, whose wrongful acts are the proximate cause of an innocent plaintiff's injuries, should be liable for the consequences of his conduct.⁵² Justice Nix indicated that this presumption is rebuttable, but only when there are sufficient public policy reasons for denying recovery.⁵³ Within this context, Justice Nix considered the policy arguments typically advanced as justifications for limiting liability in cases where a plaintiff outside the zone of danger alleges mental distress.⁵⁴

Pa. Super. Ct. 530, 369 A.2d 754 (1976); *Scarf v. Koltoff*, 242 Pa. Super. Ct. 294, 363 A.2d 1276 (1976).

48. See note 4 and accompanying text *supra*.

49. — Pa. at —, 404 A.2d at 677. Justice Nix stated that the zone of danger doctrine was ineffective in carrying forward the basic premise of the common law system "that one may seek redress for every substantial wrong." *Id.*, quoting *Niederman v. Brodsky*, 436 Pa. at 403, 261 A.2d at 85. See also Comment, 1977 Wis. L. REV. 1089, 1108.

50. — Pa. at —, 404 A.2d at 677. Justice Nix noted that a majority of commentators and an increasing number of jurisdictions have recognized that the zone of danger concept unreasonably limits recovery in bystander cases. *Id.* at — & n.7, 404 A.2d at 677 & n.7.

51. *Id.* at —, 404 A.2d at 678. It should be noted that at least one jurisdiction has applied a modified zone of danger test by allowing recovery for the mental distress suffered from fear of personal injury *as well as* for the mental harm attributable to fearing for another's safety. See *Bowman v. Williams*, 164 Md. 397, 402, 165 A. 182, 184 (1933). Accord, RESTATEMENT (SECOND) OF TORTS § 436(3), Comment *f* (1965). In contrast to the *Bowman* approach, the majority of jurisdictions which apply the zone of danger rule permit recovery only when the plaintiff fears for *his own* safety. See, e.g., *Strazza v. McKittrick*, 146 Conn. 714, 156 A.2d 149 (1959); *Falzone v. Busch*, 45 N.J. 559, 214 A.2d 12 (1965).

52. — Pa. at —, 404 A.2d at 681.

53. *Id.* at — n.13, 404 A.2d at 682 n.13. Justice Nix cautioned that these policy reasons "must be made very clearly to appear and must be strongly grounded on considerations of public welfare." *Id.*, quoting *Throckmorton, Damages for Fright*, 34 HARV. L. REV. 260, 264 (1921).

54. *Id.* at —, 404 A.2d at 678. Justice Nix enumerated the arguments against bystander recovery as follows:

[1] medical science's supposed difficulty in proving causation between the claimed damages and the alleged fright, [2] the fear of fraudulent or exaggerated claims, [3] the concern that to allow such a recovery will precipitate a veritable flood of litigation, [4] the

Justice Nix first noted that the problem of establishing a causal nexus between the psychic harm and the fright from witnessing the accident provides no basis for rebutting the presumption.⁵⁵ In Justice Nix's view, advancements in science have rendered this argument obsolete.⁵⁶ Furthermore, Justice Nix's confidence in such advancements led him to reject the requirement that a plaintiff prove resulting physical manifestations of the alleged mental distress⁵⁷—a requirement which until *Sinn*, existed in every state except Hawaii.⁵⁸

Moreover, Justice Nix found that the presumption in favor of permitting recovery was not rebutted by the possibility of increased litigation, stating that even those courts which deny recovery in bystander cases recognize that such an argument is without merit.⁵⁹ Justice Nix also found that the potential for fraudulent claims is narrowed by the abilities of medical experts and the judicial system to expose fictitious claims.⁶⁰

The argument which Justice Nix noted as being the most determinative of whether recovery in bystander cases should be denied was the possibility that unlimited and unduly burdensome liability would be imposed upon the defendant.⁶¹ Although Justice Nix noted

problem of unlimited and unduly burdensome liability, and [5] the difficulty of reasonably circumscribing the area of liability.

Id. For Justice Nix's treatment of these arguments, see notes 55-66 and accompanying text *infra*.

55. See ___ Pa. at ___, 404 A.2d at 678-79.

56. *Id.* at ___, 404 A.2d at 678. For a discussion of the recent trend toward recognizing that emotional distress is capable of medical proof, see note 13 *supra*.

57. ___ Pa. at ___, 404 A.2d at 679. The *Sinn* court decided that the absence of resulting physical injury is now only a factor to be considered in determining whether a plaintiff is entitled to relief for mental distress, not an absolute bar to such relief. *Id.* at ___, ___, 404 A.2d at 679, 683, citing *Leong v. Takasaki*, 55 Hawaii 398, 403, 520 P.2d 758, 762 (1974). Additionally, the court stated that the requirement of physical manifestations of emotional distress is merely another "synthetic device to guarantee the genuineness of the claim." *Id.*, citing *Leong v. Takasaki*, 55 Hawaii 398, 404, 520 P.2d 758, 763 (1974).

58. ___ Pa. at ___, 404 A.2d at 689 (Roberts, J., dissenting), citing *Leong v. Takasaki*, 55 Hawaii 398, 520 P.2d 758 (1974). For a discussion of courts which require a resulting physical injury from the emotional distress, see note 37 *supra*.

59. ___ Pa. at ___ & n.12, 404 A.2d at 680 & n.12. See *Tobin v. Grossman*, 24 N.Y.2d at 615-16, 249 N.E.2d at 422, 301 N.Y.S.2d at 558-59 (denying bystander recovery but rejecting proliferation of litigation argument). With respect to the increased litigation contention, Justice Nix stated:

[T]he fundamental concept of our judicial system [is] that any [caseload] increase should not be determinative or relevant to the availability of a judicial forum for the adjudication of impartial individual rights. . . . We place the responsibility . . . on the judicial machinery of the Commonwealth to fulfill its obligation to make itself available to litigants.

___ Pa. at ___, 404 A.2d at 681, quoting *Niederman v. Brodsky*, 436 Pa. at 412, 261 A.2d at 89.

60. ___ Pa. at ___, 404 A.2d at 679-80. Additionally, Justice Nix criticized any finding that would bar meritorious claims for relief on the ground that other litigants might present fictitious claims. *Id.* at ___, 404 A.2d at 680.

61. ___ Pa. at ___, 404 A.2d at 681. The problem of unlimited and unduly burdensome liability was the major concern confronting the *Tobin* court. See note 43 and accompanying text *supra*.

that it was this contention that influenced the *Tobin* court to maintain the zone of danger rule,⁶² he nevertheless rejected the argument, stating that the nature of the claim for relief in bystander cases was overstated in *Tobin*.⁶³ In Justice Nix's view, permitting bystander recovery for emotional distress does not, as the *Tobin* court found, create a new cause of action; it is only the *scope* of the damages from tortious conduct which is altered.⁶⁴ Such a departure, Justice Nix maintained, is a function of imposing a greater responsibility upon a wrongdoer as societal relations become more complex.⁶⁵ Justice Nix further declared that expanding the scope of a motorist's duty of care will not lead to unlimited liability, because the concept of "duty" is no more than a conclusion reached after the law determines that the particular plaintiff in question is entitled to relief.⁶⁶

Thus, after concluding that there were no policy reasons justifying an absolute bar to recovery by bystanders,⁶⁷ Justice Nix addressed the problem of how to circumscribe this new area of liability.⁶⁸ Following the precedent established in *Dillon*,⁶⁹ Justice Nix held that when a plaintiff is outside the zone of danger, the area of liability can be reasonably circumscribed by applying a foreseeability test, which

62. See ___ Pa. at ___, 404 A.2d at 682-84. See also text accompanying note 52 *supra*.

63. ___ Pa. at ___, 404 A.2d at 683. Justice Nix rejected the rationale advanced in *Tobin*, concluding that to deny an emotionally distressed mother's legitimate claim for relief—merely because she was not within the zone of danger—by positing hypotheticals of other bystanders who might seek recovery, is to "mock justice and arbitrarily turn a deaf ear on a compelling claim . . ." ___ Pa. at ___, 404 A.2d at 683. According to Justice Nix, by arguing that unlimited liability might result if the zone of danger rule was discarded, the *Tobin* court was resorting "to the logical 'gimmick' of *reductio ad absurdum*." *Id.* (emphasis supplied by the court). For a discussion of *Tobin*, see notes 39-43 and accompanying text *supra*.

64. ___ Pa. at ___, 404 A.2d at 683. Justice Nix reasoned that, in *Sinn*, the conduct being offered as supporting liability—*i.e.*, the negligent operation of the automobile—"has traditionally been held to have been actionable by plaintiffs who had sustained provable damages." *Id.* Justice Nix then concluded that a court is justified in expanding the scope of liability flowing from such conduct because medical and psychiatric advances provide the impetus for legal recognition of the consequences which follow from the negligent act. *Id.*

65. *Id.* at ___, 404 A.2d at 681.

66. *Id.* Concerning the nature of legal duty, the court quoted Dean Prosser's contention that

[d]uty is only a word with which we state our conclusion that there is or is not to be liability; it necessarily begs the essential question. . . . The word serves a useful purpose in directing attention to the obligation to be imposed upon the defendant, rather than the causal sequence of events; beyond that it serves none.

Id., quoting Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953) (footnote omitted).

67. See ___ Pa. at ___-___, 404 A.2d at 678-84.

68. See *id.* at ___-___, 404 A.2d at 684-86.

69. *Id.* at ___, 404 A.2d at 685. For a discussion of *Dillon*, see notes 34-38 and accompanying text *supra*. It should be noted that there is one important difference between the holdings of *Dillon* and *Sinn*. In *Dillon*, the court limited its holding to those cases where the plaintiff suffers a resulting physical injury. See note 37 *supra*. On the other hand, Justice Nix held that the absence of physical injury is only a factor in determining the genuineness of the claim. See note 57 and accompanying text *supra*.

asks whether a claimant's emotional injuries were reasonably foreseeable to the defendant.⁷⁰ Justice Nix further held, as a matter of law, that mental distress and its effects constitute a foreseeable injury when the bystander is a mother who suffers emotional shock from witnessing the violent death of her small child.⁷¹

In a concurring opinion, Chief Justice Eagen stated that recovery should be permitted to one beyond the zone of danger only if the plaintiff 1) is closely related to the victim, 2) was near the scene of the accident, and 3) suffered serious mental distress accompanied by physical injury or by a severe physical manifestation of the mental distress.⁷²

Justice Roberts, in a dissenting opinion in which Justice O'Brien joined, criticized Justice Nix for replacing the zone of danger doctrine in bystander cases with a general foreseeability test.⁷³ According to the dissent, this standard will only lead to arbitrary results for there "is no natural non-arbitrary way to limit liability for this injury."⁷⁴ Reasoning that uncertainty was sure to follow, Justice Roberts stated that a jury could not be expected to distinguish between that distress suffered from witnessing an accident and the natural feeling of grief

70. ___ Pa. at ___, 404 A.2d at 684. Justice Nix paid elaborate attention to the three factors that the *Dillon* court deemed relevant in determining foreseeability. *Id.* at ___, 404 A.2d at 685. For a review of those factors, see note 38 *supra*. Other courts have followed *Dillon* and employed the same criteria in considering whether to allow recovery for mental distress. See, e.g., *D'Amicol v. Alvarez Shipping Co.*, 31 Conn. Super. 164, 326 A.2d 129 (1973); *Schurk v. Christensen*, 80 Wash. 2d 652, 497 P.2d 937 (1972).

71. ___ Pa. at ___, 404 A.2d at 686. As to other factual situations not posited by this appeal, the court reasoned that "[j]urisprudentially, the remote and unexpected can best be excluded by reaching these issues on a more appropriate record." *Id.* at ___ n.21, 404 A.2d at 686 n.21.

72. *Id.* at ___, 404 A.2d at 686-87. It is submitted that there are two major differences distinguishing Chief Justice Eagen's concurring opinion from the opinion of Justice Nix. The first difference is that Chief Justice Eagen would preclude recovery unless the factors he enumerated are present; whereas Justice Nix considers these factors as being relevant only with respect to the question of whether the injury to the plaintiff was reasonably foreseeable. See ___ Pa. at ___, 404 A.2d at 685; note 70 *supra*. The second difference is that before allowing recovery, Chief Justice Eagen would require a plaintiff to prove, in addition to mental distress, either physical injury or some severe physical manifestation of the emotional harm. Justice Nix, on the other hand, would require neither physical injury nor resulting physical manifestations of mental harm. See notes 57-58 and accompanying text *supra*.

73. See ___ Pa. at ___, 404 A.2d at 690-92 (Roberts, J., dissenting). Rather than expounding on the benefits of the zone of danger doctrine, the dissent concentrated on negating the rationale proffered by Justice Nix in permitting recovery for mental distress to bystanders who are outside the zone of personal danger and who suffer no resulting physical injuries. See *id.*; notes 74-78 and accompanying text *infra*.

74. *Id.* at ___, 404 A.2d at 691 (Roberts, J., dissenting). Concerning the arbitrariness of the foreseeability standard, Justice Roberts stated that such a limitation "cannot be applied evenhandedly and . . . will therefore lead to admittedly arbitrary results. . . . It would . . . frustrate a basic purpose and policy underlying the scope of liability rules, namely, to achieve consistently just results by providing for even and predictable resolutions of private disputes." *Id.*, quoting *D'Ambra v. United States*, 114 R.I. 643, 666-67, 338 A.2d 524, 536 (1975) (Joslin, J., dissenting).

accompanying the loss of a loved one.⁷⁵ Such a distinction is significant, Justice Roberts maintained, because damages for bereavement occasioned by a loved one's death are not recoverable in Pennsylvania.⁷⁶ Thus, the dissent contended that to allow bystander recovery "permits circumvention of the Commonwealth's Wrongful Death Statute."⁷⁷ Moreover, the dissent strongly disagreed with Justice Nix's elimination of the requirement that a plaintiff's mental anguish be proved by resulting physical consequences.⁷⁸

It is submitted that Justice Nix utilized a logical and functional approach for deciding the *general* question of whether bystander recovery should be permitted. By establishing a presumption that a plaintiff suffering emotional trauma through the actions of a wrongdoer is entitled to legal protection unless sufficient public policy reasons exist to deny recovery,⁷⁹ Justice Nix has determined that a bystander's right to legal protection from mental harm is paramount to the burdens imposed on society by the extension of liability. In reference to whether a *particular* bystander is entitled to relief, Justice Nix supported the *Dillon* approach and promulgated a foreseeability test.⁸⁰ Since the foreseeability standard permits the court to

75. ___ Pa. at ___, 404 A.2d at 690 (Roberts, J., dissenting). Justice Roberts further stated: "In fact, one may wonder whether it is not less injurious to a parent's mental state to see the accident which causes the death of his child than never to know exactly its circumstances." *Id.* The dissent maintained that Justice Nix failed to appreciate the extent of the causal problems involved in bystander recovery cases. *See id.*

76. *See id.* at ___, 404 A.2d at 692 (Roberts, J., dissenting); *Pennsylvania R.R. v. Zebe*, 33 Pa. 318, 328-30 (1858) (only pecuniary damage recovered under wrongful death statute). *See also Swartz v. Smokowitz*, 400 Pa. 109, 112-13, 161 A.2d 330, 330-32 (1960) (providing formula for calculating damages under wrongful death statute).

77. ___ Pa. at ___, 404 A.2d at 692 (Roberts, J., dissenting). The dissent recognized that Pennsylvania's wrongful death statute "specifically provides recovery to a mother injured by the tortfeasor's negligent killing of her child." *Id.* Thus, Justice Roberts reasoned that "[r]ecover here only undermines over a century's adherence to the legislative policy that compensation for damages suffered by the class of individuals to which plaintiff belongs is through the wrongful death statute." *Id.* Justice Nix, on the other hand, stated that Justice Roberts "inaccurately accuses this Court of subverting the Wrongful Death Act" by characterizing the present suit as one seeking *solatium*, when in fact, Mrs. Sinn "seeks damages for the emotional injuries she sustained as a result of witnessing the accident." *Id.* at ___ n.3, 404 A.2d at 675 n.3. For the pertinent part of the wrongful death statute, *see note 3 supra*. For a discussion of this conflict between Justices Nix and Roberts, *see notes 91-96 and accompanying text infra*.

78. *Id.* at ___, 404 A.2d at 688-89 (Roberts, J., dissenting). Noting that society required from its members a "remarkable degree of emotional fortitude," Justice Roberts stated that "[i]t is not unreasonable to draw the line between that degree which is required and that which is not by reference to the emotional distress which causes serious physical injury or harm." *Id.* at ___, 404 A.2d at 688 (Roberts, J., dissenting). The dissent noted that most other jurisdictions deny recovery for mental distress absent resulting physical injury and that Hawaii is the only state allowing recovery absent physical harm. *See id.* at ___, 404 A.2d at 689 (Roberts, J., dissenting); notes 37 & 57-58 and accompanying text *supra*.

79. *See notes 52-54 and accompanying text supra*.

80. *See notes 68-71 and accompanying text supra*.

resolve the claim for recovery by examining the specific facts of the case presented, this approach allows future courts to make proper policy determinations when deciding whether the case before it warrants the imposition of liability.⁸¹ It is therefore submitted that Justice Nix's return to the basic tort principles utilized in the earliest stages of this area of the law,⁸² is a welcomed departure from the inelastic rules which had since been employed.⁸³

It is suggested, however, that Justice Nix's assumption that a foreseeability approach is not arbitrary⁸⁴ appears to be unsupported.⁸⁵ The foreseeability standard requires judicial understanding that arbitrary results must occur, for it remains possible that a bystander who suffers legitimate damage will be denied relief because his or her injury is determined to be unforeseeable.⁸⁶ Nevertheless, although such a standard is arbitrary in that it may deny recovery to a claimant suffering legitimate injury, it is at least justifiable in that it allows some flexibility while avoiding the imposition of undue liability upon defendants. In contrast, the zone of danger concept is an inflexible rule which fails to consider that emotional distress may be entitled to legal protection in situations other

81. In preferring the foreseeability test over the zone of danger rule, one commentator has stated:

If a line of circumscription is to be drawn for the sake of public policy, or even in the application of traditional tort principles, is it not more reasonable and humane to draw it somewhere other than at the point where no recovery is allowed simply because drawing the line elsewhere is difficult?

Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute Between California and New York*, 51 ST. JOHN'S L. REV. 1, 21, 39 (1976). See also Comment, *supra* note 9 at 1262-63.

82. For a discussion of the traditional tort concepts originally employed by the Pennsylvania courts in analyzing mental distress cases, see note 19 *supra*.

83. For a discussion of the development of these rules, see notes 17-43 and accompanying text *supra*.

84. See ___ Pa. at ___ & n.6, ___, ___, 404 A.2d at 677 & n.6, 678, 683.

85. Dean Prosser has recognized that confining bystander recovery to immediate family members, or to those plaintiffs present at the scene of the accident, creates an arbitrary rule; yet he would impose liability under certain conditions designed to draw a line short of unlimited liability. See W. PROSSER, *supra* note 10, at 335.

86. Consider, for instance, the situation where a babysitter witnesses a negligently driven automobile strike and kill the small child entrusted to her care. It is submitted that although her emotional distress may be just as genuine as that of the child's natural mother, it is unlikely that the babysitter would recover because she was not related to the victim. The reason for this conclusion is that under the *Dillon* approach, which was quoted with approval by Justice Nix, the plaintiff must be closely related to the victim in order to be deemed "foreseeable." See *Dillon v. Legg*, 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80; ___ Pa. at ___, 404 A.2d at 685. Although Justice Nix did not expressly adopt this requirement, see *id.* at ___ n.21, 404 A.2d at 686 n.21, Chief Justice Eagen, in his concurring opinion, did adopt the close family relationship test. See *id.* at ___, 404 A.2d at 687 (Eagen, C.J., concurring). Thus, it is probable that unless a close family relationship is present in this type of mental distress case, a majority of the Pennsylvania Supreme Court would not permit recovery—even if the emotional harm is genuine.

than when the plaintiff fears for his or her own safety.⁸⁷ It is this type of arbitrary rule which is untenable once it is recognized that mental distress is a genuine injury.⁸⁸

It is further suggested that Justice Nix demonstrated an insight which other courts have lacked by concluding that advances in psychiatric science eliminate the need for proving a resulting physical manifestation to assure the validity of the claim for mental distress.⁸⁹ Since expert testimony is available to establish that the plaintiff did in fact suffer emotional harm, it thus seems unnecessary to *require* proof of physical consequences to assure the genuineness of the claim. While the absence of a resulting physical consequence may be an indication that there was in fact no mental harm,⁹⁰ such a requirement should not absolutely bar legitimate claimants whose trauma may be internalized.

Although it is commendable that legitimate claims will no longer be absolutely barred under Justice Nix's approach, it is nevertheless submitted that the court inadequately resolved the dissent's contention that the granting of relief in this case would circumvent the wrongful death statute by permitting recovery for other than pecuniary loss.⁹¹ Justice Nix, while discussing *Dillon*,⁹² indicated that the relationship between the plaintiff and the victim is an important factor bearing on recovery.⁹³ By distinguishing the plaintiff who is related to the victim from a total stranger witnessing the same event, Justice Nix inferred that the mental distress suffered by the related plaintiff is greater than that of the stranger. Therefore, inherent in Justice Nix's reasoning is the conclusion that it is the grief and bereavement from the loss of a loved one which entitles the related plaintiff to relief for his more intense emotional harm.⁹⁴ But as the dissent indicated, damages for grief and bereavement are not recoverable under Pennsylvania's present interpretation of its wrongful

87. See ___ Pa. at ___, 404 A.2d at 678.

88. See notes 13 & 56 and accompanying text *supra*.

89. See note 57 and accompanying text *supra*. For a discussion of courts which require a physical manifestation of the alleged emotional distress, see note 37 *supra*.

90. See ___ Pa. at ___, 404 A.2d at 679. Justice Nix concluded that the requirement of a resulting physical harm should not bar recovery, but should "merely be admissible as evidence of the degree of mental or emotional distress suffered." *Id.*, quoting *Leong v. Takasaki*, 55 Hawaii 398, 403, 520 P.2d at 758, 762 (1974). See notes 57-58 and accompanying text *supra*.

91. ___ Pa. at ___, A.2d at 692 (Roberts, J., dissenting). See note 77 and accompanying text *supra*. For pertinent parts of the wrongful death statute, see note 3 *supra*.

92. For an analysis of the *Dillon* approach, see notes 34-38 and accompanying text *supra*; note 86 *supra*.

93. ___ Pa. at ___, 404 A.2d at 685-86.

94. See note 75 and accompanying text *supra*.

death statute.⁹⁵ Although Justice Nix attempted to avoid this dilemma by characterizing Mrs. Sinn's claim as an action for the negligent infliction of mental distress,⁹⁶ it is submitted that Justice Nix failed to reconcile the conflict which his position creates with respect to this statutory limitation.⁹⁷

Because *Sinn* was decided by a plurality of the court,⁹⁸ the impact of this decision is difficult to ascertain. The only segment of Justice Nix's opinion that was supported by a majority of the justices was that the zone of danger doctrine should not preclude Mrs. Sinn from bringing a cause of action for the negligent infliction of mental distress.⁹⁹ With respect to the more general question of what criteria will be determinative of a bystander's right to recover in future litigation, the disparate views expressed in *Sinn* will most likely deter lower courts from extending recovery to factually dissimilar situations.¹⁰⁰ Moreover, fears of imposing unlimited and unduly burdensome liability upon a merely negligent defendant¹⁰¹ should be ameliorated by the fact that Justice Nix limited his holding to the situation where a mother alleges mental harm from witnessing the violent death of her small child.¹⁰²

95. See notes 76-77 and accompanying text *supra*. For the pertinent part of Pennsylvania's wrongful death statute, see note 3 *supra*.

96. ___ Pa. at ___ n.3, 404 A.2d at 675 n.3. Justice Nix reasoned that Mrs. Sinn was not seeking damages for grief, but was seeking relief for the mental distress which she suffered as a result of witnessing her child's death. *Id.* In Justice Nix's view, "[t]hese damages are independent of her grief and bereavement." *Id.*

97. Thus, it is submitted that Justice Nix has created an anomalous situation whereby Mrs. Sinn would be denied recovery for grief and bereavement had she brought a claim for wrongful death, yet may recover such damages in an action in tort for the negligent infliction of mental distress.

98. See note 8 *supra*.

99. It is submitted that since Justice Larsen only concurred in the result, one should not read his concurrence beyond the facts of this case. Therefore, the decision of the *majority* of the Justices is similarly limited to the facts of *Sinn*. Furthermore, the elimination of the requirement that the plaintiff prove resulting physical injury from the mental distress is supported only in the opinion of Justice Nix, with whom Justice Manderino joined.

100. See note 8 *supra*. Since the holding in *Sinn* is limited to the factual situation before the court, see note 99 and accompanying text *supra*, Pennsylvania is left without a standard for determining the extent to which recovery will be permitted. If the lower courts were to follow the foreseeability approach proposed by Justice Nix, it is possible that unlimited and unduly burdensome liability could be imposed upon the defendant, as feared by the *Tobin* court. See note 43 and accompanying text *supra*. However, considering Justice Nix's rationale behind adopting the foreseeability standard—that Mrs. Sinn, while witnessing the violent death of her daughter, may very likely have suffered legitimate emotional harm—it is submitted that Pennsylvania courts will either follow the plurality opinion of Justice Nix and not impose liability beyond the facts of *Sinn*, or else adopt the more restrictive standards set up by Chief Justice Eagen. See note 72 and accompanying text *supra*.

101. See notes 61-66 and accompanying text *supra*.

102. ___ Pa. at ___, 404 A.2d at 686. Justice Nix maintained that in such a situation mental distress is a foreseeable injury. Other authorities believe that the foreseeability approach is incapable of limiting liability. See ___ Pa. at ___, 404 A.2d at 691 (Roberts, J., dissenting); note 43 and accompanying text *supra*. Concerning the guidelines for limiting liability articulated in

Finally, it is suggested that the decision in *Sinn* should be viewed as only an exception to the zone of danger rule, not a complete abrogation of that doctrine.¹⁰³ Consequently, future plaintiffs who are exposed to personal danger will not be precluded from relying on the zone of danger rule to set forth a cause of action for mental distress. It is submitted that only those claimants who do not fear for their own safety will be forced to rely on the foreseeability standard to prove their case.

Justice Nix has, it is suggested, correctly decided that the arbitrary limitations imposed by the zone of danger rule, and by the requirement that the plaintiff suffer resulting physical harm, should no longer prevent bystanders who suffer mental distress from reaching the trier of fact. Thus, Justice Nix has placed great confidence in the ability of juries to evaluate claims for emotional harm according to the traditional principles of negligence law.¹⁰⁴ While our system of jurisprudence theoretically requires such confidence, the practical question of how far this liability for negligently inflicted mental distress will be extended remains unanswered after *Sinn*.

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Dillon, the dissent in *Dillon* stated that "notwithstanding the limitations which these 'guidelines' purport to impose, it is only reasonable to expect pressure upon our trial courts to make their future rulings conform to the spirit of the new elasticity proclaimed by the majority." 68 Cal. 2d at 749, 441 P.2d at 926, 69 Cal. Rptr. at 86 (Burke, J., dissenting). For a discussion of the guidelines established by the majority in *Dillon*, see note 38 *supra*.

103. It should be noted that since Deborah Sinn, the decedent's sister, was located within the zone of danger, the trial court held that she could proceed with her cause of action for emotional distress. See note 6 and accompanying text *supra*. Justice Nix, noting that the defendant had not appealed from the trial court's refusal to strike Deborah's claim, concluded that "the propriety of that decision is not before us." _____ Pa. at _____ n.2, 404 A.2d at 674 n.2.

104. See note 82 and accompanying text *supra*.



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