Bystanders' Negligent Infliction of Emotional Distress Claims in Washington State: Must You Be Present to Win?

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I. INTRODUCTION

For more than a century, the dominant theory of redress for liability for unintended harm has been negligence.[1] "Leading cases are filled with resounding affirmations, such as that of Commissioner Earl in *Losee v. Buchanan*: '. . . the rule is, at least in this country, a universal one, which, so far as I can discern, has no exceptions or limitations, that no one can be made liable for injuries to the person or property of another without some fault or negligence on his part.'"[2] The necessary elements to bring a claim founded upon such negligence have traditionally been stated as follows: a legally recognized duty to protect others against foreseeable risk; a breach of that duty; a connection between the conduct and the resulting injury, commonly known as causation or "proximate cause"; and the occurrence of actual loss or damages to another.[3]

On many occasions, the law of negligence needs no other formulation besides the duty of reasonable care. Other cases, however, present circumstances rendering application of that general standard difficult, if not impossible. This difficulty has been recognized by

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1. ROBERT L. RABIN, PERSPECTIVES ON TORT LAW 1 (4th ed. 1995) (citing Losee v. Buchanan, 51 N.Y. 476 (1873)).

2. *Id.*

3. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164-65 (5th ed. 1984).

courts considering liability for mental and emotional distress.[4] The imposition of such liability is made even more confusing when such a claim is brought by a bystander who is not physically injured.[5] The traditional argument is that the imposition of such liability unoccasioned by any physical impact may lead to "mere conjecture and speculation."[6] Thus, the "task [put to modern courts] involves the refinement of principles of liability to remedy violations of reasonable care"[7] while avoiding speculative results which would allow juries to impose liability that is not commensurate with the culpability of a defendant's conduct.[8]

Unfortunately, Washington law only complicates a court's position. As set out in *Hegel v. McMahon*, Washington courts, in some circumstances, do not require a bystander to be present at the time of the injury-causing event to state a claim for negligent infliction of emotional distress.[9] For example, a family member may recover for emotional distress if he or she merely arrives at the scene "shortly after an accident and before substantial change has occurred in the victim's condition or location."[10]

In responding to the alternative theory of recovery, some may argue that permitting the recovery of damages for injury to third persons will allow limitless recoveries and have ruinous consequences because such indirect losses appear to be open-ended. Many critics of such an extension of liability quote the oft-cited statement of Judge Cardozo that such liability would be ". . . liability in an indeterminate amount for an indeterminate time to an indeterminate class."[11] The

4. *Id.* § 54, at 360-61.

5. *Id.* at 360. The Restatement (Second) of Torts § 436A provides: "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm . . . the actor is not liable for such emotional disturbance."

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

7. *Id.*

8. *See* Julie A. Greenberg, *Negligent Infliction of Emotional Distress: A Proposal for a Consistent Theory of Tort Recovery for Bystanders and Direct Victims*, 19 PEPP. L. REV. 1283, 1287 (1992).

9. *See* Hegel v. McMahon, 136 Wash. 2d 122, 132, 960 P.2d 424, 429 (1998). In two consolidated actions, Hegel v. McMahon and Marzolf v. Stone, the plaintiffs sought damages for the emotional trauma they experienced after witnessing an injured family member's suffering at the scene of the accident where the injury occurred. In each case, the plaintiffs came upon the injured family member soon after the injury occurred, but did not actually witness the accident or the injury.

10. *Id.* The rule explicitly requires that the plaintiff's emotional distress be reasonable, and the plaintiff must present objective symptoms of the distress that are susceptible to medical diagnosis and proved through qualified evidence. *Id.* at 132, 960 P.2d at 430 (citing Hunsley v. Giard, 87 Wash. 2d 424, 436, 553 P.2d 1096 (1976)).

11. *See, e.g.*, Migliori v. Airborne Freight Corp. 690 N.E.2d 413, 418 (Mass. 1998) (quoting Ultramares v. Touche, 174 N.E. 441, 444 (N.Y. 1931)).

relevant question concerns not simply recovery in an individual case, but the consequences and effects of a rule of law that would permit that recovery.

This Comment examines the route taken by the Supreme Court of Washington to afford plaintiffs their day in court while potentially forcing certain tortfeasors to pay for plaintiffs' emotional distress claims. This Comment will also examine the framework that claimants and Washington courts need for evaluating a bystander's claims of negligent infliction of emotional distress. The framework should be free of artificial, vague, and inconsistent rules, and should allow plaintiffs to recover for negligently inflicted severe emotional distress while protecting tortfeasors from spurious claims, including claims concerning minor psychic and emotional shocks, and from liability disproportionate to culpability. Moreover, the "societal benefits of certainty in the law, as well as traditional concepts of tort law, dictate the certain limitation of bystander recovery of damages for emotional distress."[12]

Part II provides some background on emotional distress claims. Part III summarizes two recent cases in this area of tort law and the courts' analyses, then reviews and critiques the court opinions dealing with "shortly thereafter" language. Finally, Part IV recommends a different approach to resolving inconsistent treatment of bystander emotional distress claims.

II. BACKGROUND CASE LAW ON BYSTANDER EMOTIONAL DISTRESS CLAIMS

Present case law in the area of bystander negligent infliction of emotional distress has evolved according to the dictates of public policy—that a defendant must answer for the consequences of his or her own actions, however little intended and however unforeseen. Whichever theory of recovery one considers in this area of tort law, one is sure to encounter considerable difficulty associated with setting a boundary for liability.

Some jurisdictions which have found liability for the negligent infliction of emotional distress upon a bystander have placed limits on this type of negligence liability consistent with their view of the individual interest being injured.[13] Although a defendant's duty to a

12. Thing v. La Chusa, 771 P.2d 814, 815 (Cal. 1989).

13. *See id.* at 828-29.

Emotional distress is an intangible condition experienced by most persons, even absent negligence, at some time during their lives. Close relatives suffer serious, even debilitating, emotional reactions to the injury, death, serious illness, and evident suffering of loved ones. These reactions occur regardless of the cause of the loved one's

potential plaintiff is often analyzed in terms of foreseeability, such analysis could result in an unlimited class of plaintiffs and injuries. After all, it is certainly foreseeable from a factual standpoint that many persons, including strangers, may experience emotional distress as the result of any given accident or injury.[14] Furthermore, it is clearly more foreseeable that a close family member will experience severe emotional distress upon merely learning of the injury to or death of a loved one.[15]

Since 1968 some United States jurisdictions have recognized a duty toward people who were not touched or endangered in the accident, provided that certain other criteria were met. This approach is commonly named after the California case that originated it, *Dillon v. Legg*.[16]

In this landmark case, California became the first jurisdiction to allow a bystander who was not in any physical danger to recover for the emotional distress that arose upon viewing injuries to a third person.[17] In *Dillon*, a mother and sister witnessed an automobile strike and kill a family member.[18] The California Supreme Court awarded the mother damages for the negligent infliction of emotional distress proximately caused by the driver who struck and killed her daughter.[19] The *Dillon* court thereby overruled prior case law requiring that the emotional distress plaintiff be within the "zone of danger."[20]

The *Dillon* court enunciated a then-novel three-factor test for other courts to follow in determining whether a defendant owed the emotionally distressed plaintiff a duty of care.[21] The courts will take into account such factors as: whether the plaintiff was located near the scene of the accident, as contrasted with one who was a distance away;

> illness, injury, or death. That relatives will have severe emotional distress is an unavoidable aspect of the inner "human condition." The emotional distress for which monetary damages may be recovered, however, ought not to be that form of acute emotional distress or the transient emotional reaction to the occasional gruesome or horrible incident to which every person may potentially be exposed in an industrial and sometimes violent society.

Id.

14. Paul V. Calandrella, Note, *Safe Haven for a Troubled Tort: A Return to the Zone of Danger for the Negligent Infliction of Emotional Distress*, 26 SUFFOLK U. L. REV. 79, 84 (1992).

15. *Id.*

16. 441 P.2d 912 (Cal. 1968).

17. *See id.*

18. *Id.* at 914.

19. *Id.* at 925.

20. *Id.* (overruling Amaya v. Home Ice, Fuel & Supply Co., 379 P.2d 513 (Cal. 1963)).

21. *Id.* at 920. Nearly half of the states, including Washington, elected to follow in *Dillon*'s footsteps by allowing bystanders (usually close relatives) outside the zone of danger to recover damages under some circumstances for emotional distress caused by witnessing the injury to a third party. *See* Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 549 n.10 (1994).

whether the shock resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence; and whether the plaintiff and the victim were closely related, as opposed to the absence of any relationship or the presence of only a distant relationship.[22]

The first factor discussed in *Dillon*—that the plaintiff be near the injured person—is the central issue in the Washington courts' recent obfuscation in this area of tort law. The physical proximity is relevant to show the closeness of the emotional bond between the plaintiff and the injured family member and the resulting harm to the plaintiff. For example, one would generally suppose that the risk of emotional distress to a brother who is halfway across the country is not as great as the risk to a mother or father who is at the scene of the accident. However, others have argued that the risk of emotional injury exists by virtue of the plaintiff's perception of the accident, not his proximity to it.[23]

A. Analysis of the Elements of Emotional Distress Claim

In addition to debating whether the plaintiff is owed a duty and what the plaintiff actually observes, we must examine the basic principles underlying the tort of negligent infliction of emotional distress. The *Dillon* court held that liability could be circumscribed in these types of cases, as in all tort cases, by the application of the general principles of negligence.[24]

Courts interpreting the *Dillon* factors have emphasized that a plaintiff will more likely suffer when physically close to an accident.[25] Moreover, courts have determined that an individual observing an accident firsthand will likely suffer greater trauma than one learning of it later.[26]

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22. *Dillon*, 441 P.2d at 920, *see also Consolidated Rail*, 512 U.S. at 549 n.11.

23. "The distance from the scene and time of notice of the accident are quite inconsequential for the shock more likely results from the relationship with the injured party than what is seen of the accident." Tobin v. Grossman, 249 N.E.2d 419, 424 (N.Y. 1969).

24. *Dillon*, 441 P.2d at 924.

25. *See* Dunphy v. Gregory, 642 A.2d 372, 375 (1994) (citing John L. Diamond, Dillon v. Legg *Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L. J. 477, 487-89 (1984)).

26. *See* Diamond, *supra* note 25, at 488.

1. "Danger Zone"

The time-honored case of *Palsgraf v. Long Island R.R. Co.*[27] articulates the principles underlying the zone of danger rule that *Dillon* applied as its first element. *Palsgraf* limited defendants' duties to exercise reasonable care to an area in which their actions could foreseeably physically endanger others.[28] The zone of danger rule requires the plaintiff to be the object of immediate threat of harm. Thus, under the zone of danger rule, a bystander not threatened with physical harm does not have a cause of action to recover for emotional distress.[29] For example, a person who witnessed a loved one being run over would not have a cause of action under the zone of danger analysis unless she was proximately located so that it would be reasonable for her to believe that she too would be run over.[30]

California was the first state to abandon the zone of danger rule.[31] The *Dillon* court reasoned that to deny the mother's cause of action would be to draw artificial lines.[32] The particular facts of *Dillon* graphically illustrated the artificial lines of the zone of danger rule.[33]

2. Symptoms of Actual Distress (Impact Rule)

From around the turn of the century, courts established that a plaintiff needed to have suffered some kind of physical impact in the course of events leading up to her mental injury to recover emotional distress damages.[34] This is commonly known as the "impact rule" and was applied by *Dillon* as its second factor.[35] The view that damages for nonphysical injury were mere trifles, and hence not the concern of the law, was challenged by cases where a plaintiff suffered some physi-

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27. Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

28. *Id.* at 100 (finding a duty to those within range of apprehension).

29. *See* Elizabeth Handsley, *Mental Injury Occasioned by Harm to Another: A Feminist Critique*, 14 LAW & INEQ. 391, 418 (1996).

30. Plaintiff Marzolf's Brief in Response to Defendant Snohomish County School District's [School District] Motion for Summary Judgment at 20, Marzolf v. Stone, No. 93-2-05005-2 (Snohomish County Super. Ct. filed Sept. 3, 1993).

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

32. *Id.* at 925.

33. The deceased's sister was also a witness to the accident, but the sister was a few yards closer to the accident and was therefore arguably within the zone of danger. The application of the zone of danger rule would allow the sister to recover for emotional distress while barring the mother's action because she was slightly further away and not within the zone of danger. *See* Plaintiff Marzolf's Brief in Response to Defendant School District's Motion for Summary Judgment at 20-21, Marzolf v. Stone, No. 93-2-05005-2 (Snohomish County Super. Ct. filed Sept. 3, 1993).

34. *See* Thomas T. Uhl, *Bystander Emotional Distress: Missing an Opportunity to Strengthen the Ties That Bind*, 61 BROOK. L. REV. 1399, 1412 (1995).

35. *Id.*

cal consequences of his or her fright; one such example is that of a pregnant woman suffering a miscarriage.[36] Finding it difficult to regard such an injury as trivial, courts found other justifications for denying recovery, such as the danger of a flood of fabricated claims and the difficulty of proving factual causation.[37] The "impact rule" was thought to satisfactorily avoid those two main difficulties.[38]

Other state courts "adopted the 'impact rule' under which plaintiffs could recover for negligent infliction of emotional distress only when they had suffered a contemporaneous physical injury or physical impact on their person."[39] The rule seemed very precise and stringent. However, factual circumstances "inevitably arose that did not satisfy the requirements of the impact rule."[40] In such cases, "some courts stretched the concepts of physical injury and physical impact where justice seemed to call for compensation."[41] Where courts were less inventive, the rule proved unsatisfactory because it barred plaintiffs from recovering even when they could establish a causal link between the defendant's negligence and the plaintiff's emotional injury.[42]

3. Injured Relative

Dillon's third element is premised on the idea that relationships between individuals, both in family units and as individuals, are fundamental to human society.[43] The boundaries of negligently inflicted bystander emotional distress are properly defined using relational interests as a touchstone.[44]

Consistent with this idea, in Washington, a person must merely be a relative to maintain a negligently inflicted emotional distress

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36. *Id.*

37. *See id.*

38. *See* Alvan Brody, *Negligently Inflicted Psychic Injuries: A Return to Reason*, 7 VILL. L. REV. 232, 233-35 (1961-62).

39. Bowen v. Lumbermens Mut. Cas. Co., 517 N.W.2d 432, 437 (Wis. 1994).

40. *Id.*

41. *Id.*

42. *Id.*

43. *See* THEODORE LIDZ, THE PERSON: HIS DEVELOPMENT THROUGHOUT THE LIFE CYCLE (3d ed. 1968) *cited in* Uhl, *supra* note 34, at 1407.

44. Uhl, *supra* note 34, at 1407-09. The California Supreme Court narrowed the relationship factor of *Dillon* to allow recovery only by members of a victim's family. Elden v. Sheldon, 758 P.2d 582 (Cal. 1988). The *Elden* court denied the plaintiff recovery because she was merely a cohabitant of the deceased, rather than a legally married spouse. The court emphasized the state's interest in legal marriage, difficulties in assessing the closeness of nonmarital relationships, and the need to limit defendants' liability. *Id.* at 589-90.

action.[45] This requirement is intended to promote stability and guard against the "specter of unlimited liability to third parties."[46] Other jurisdictions have proposed that a bystander who suffers significant emotional distress should be permitted to maintain an action when an individual with whom the bystander has the functional equivalent of a traditional family relationship is physically injured.[47]

B. *Progeny of* Dillon v. Legg

In the years following *Dillon*, this area of the law was so ambiguous that courts described it as an "amorphous nether realm"[48] with "murky waters."[49] The California courts were notable in their inconsistent application of the *Dillon* factors.[50]

For example, in *Ochoa v. Superior Court*, the California Supreme Court held that a plaintiff could only recover if he or she both observed the defendant's conduct and the resultant injury and was aware of the conduct and injury at the time of the injury being caused.[51] The underlying issue of when the plaintiff arrived upon the accident scene was not a critical factor.[52] What became critical were various courts' erroneous interpretations of *Ochoa*. For example, the Alaska Supreme Court in *Croft v. Wicker*[53] erroneously interpreted *Ochoa* by stating that the *Dillon* factors were mere guidelines rather than requirements.[54] The *Croft* court, preferring a liberal interpretation of *Dillon*, allowed an action for emotional distress by parents who were in the vicinity of their daughter when she was sexually molested.[55]

The California Supreme Court responded to this ambiguity by narrowing the *Dillon* reach in *Elden v. Sheldon*.[56] In *Elden*, the court limited *Dillon* by allowing recovery only when the victim was a mem-

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45. *See* Cunningham v. Lockard, 48 Wash. App. 38, 44-45, 736 P.2d 305, 308 (1987) (adopting policy guidelines from the tort of outrage).

46. Uhl, *supra* note 34, at 1401.

47. *Id.* at 1465 (citing Ochoa v. Superior Court, 703 P.2d 1 (Cal. 1985)).

48. Newton v. Kaiser Foundations Hospitals, 228 Cal. Rptr. 890, 893 Cal. Ct. App. (1986); *see also* Thing v. La Chusa, 231 Cal. Rptr. 439, 444 (Cal. Ct. App. 1986), *rev'd*, 771 P.2d 814 (Cal. 1989).

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

50. *See* S. Claire Swift, *Bystander Liability After* Dunphy v. Gregor*—A Proposal for a New Definition of the Bystander*, 15 REV. LITIG. 579, 581-82 (1996).

51. *See* Ochoa v. Superior Court, 703 P.2d 1 (Cal. 1985).

52. The plaintiff in *Ochoa* was at the scene of the negligent conduct. *Id.* at 3-4.

53. Croft v. Wicker, 737 P.2d 789 (Alaska 1987).

54. *Id.* at 790-91.

55. *Id.* at 790.

56. 758 P.2d 582 (Cal. 1988).

ber of the plaintiff's immediate family.[57] The *Elden* court denied the plaintiff recovery because she was merely a cohabitant of the deceased, rather than a legally married spouse.[58]

In an effort to further clear the water, the California court in *Thing v. LaChusa*,[59] expressly stated, "the dictum in *Ochoa* suggesting that the factors noted in the *Dillon* guidelines are not essential in determining whether a plaintiff is a foreseeable victim of [sic] defendant's negligence should not be relied on."[60] In *Thing*, the court held that a mother who did not witness the accident involving her child being struck by a car could not recover damages from the driver for emotional distress.[61] In effect, *Thing* turned the *Dillon* foreseeability guidelines into doctrinal barriers.[62]

Some twenty years after *Dillon*, the California Supreme Court recognized in *Thing* that visual perception of an accident was required to recover for the negligent infliction of emotional distress.[63] By this measure, the *Thing* court continued to refine *Dillon*. Specifically, the *Thing* court limited the scope of the defendant's duty to third party bystanders.[64]

C. *The "Sensory and Contemporaneous Observance of the Accident" Requirement Finds Support in Jurisdictions Nationwide*

A survey of our states reveals that an increasing number of jurisdictions are following California's lead by allowing bystanders outside of the physical zone of danger to recover damages under certain cir-

57. *See id.*

58. *See id.*

59. 771 P.2d 814 (Cal. 1989).

60. *Id.* at 830.

61. *Id.* at 881.

62. The *Thing* court specifically held that a plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury to a family member only if the plaintiff is present at the scene of the injury-producing event at the time it occurs. *Id.* at 829.

63. *See id.* at 821-22 (citing Krause v. Graham, 562 P.2d 1022 (1977)) (discussing the California decisions that held visual perception was not required). In *Krause*, the California Supreme Court allowed a husband to maintain a claim for shock resulting from "perceiving" his wife was killed in a collision while she was unloading groceries from the car. The court emphasized that while the husband did not actually see his wife being struck by defendant's car, he contemporaneously perceived the accident and its likely effect through other than visual means. *Krause*, 502 P.2d. at 1031.

See also Justus v. Atchinson, 565 P.2d 122 (Cal. 1977) (cited in *Thing*, 771 P.2d at 821-22). In *Justus*, the court refused to allow a husband to recover for shock resulting from his observation, while his wife was in labor, of allegedly negligent medical malpractice resulting in the death of the fetus. The court found that the husband's anxiety did not ripen into the disabling shock which resulted from the death of the fetus until he was actually informed of that event. *Id.* at 136.

64. *Thing*, 771 P.2d 814.

cumstances.[65] However, several of those jurisdictions have denied such recovery for close family members who were not physically pres??ent at the time of the accident, even though they may have arrived moments after the injury-producing accident.[66] These jurisdictions require a direct sensory and contemporaneous observance of the accident, which occurs when "the relative contemporaneously observes the tortious conduct and has no time to brace his or her emotional system."[67]

For example, in *Mazzagatti v. Everingham*, the Pennsylvania Supreme Court granted summary judgment in favor of the defendant, stating, "where the close relative is not present at the scene of the accident, but instead learns of the accident from a third party, the close relative's knowledge of the injury to the victim serves as a buffer against full impact of observing the accident scene . . . [h]ence, the critical element for establishing such liability is the contemporaneous observance of the injury to the close relative."[68] In *Mazzagatti*, the plaintiff had not met the critical element of contemporaneous observance of the injury to her daughter. Similarly, in *Yandrich v. Radic*, the Pennsylvania Supreme Court held that there was no cause of action because there was no contemporaneous observance of the accident by the claimant.[69]

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65. *See, e.g.*, Daley v. LaCroix, 179 N.W.2d 390 (Mich. 1970). A growing number of states have adopted the *Dillon* rule or have expanded liability even further to allow recovery for bystanders. *See, e.g.*, Haught v. Maceluch, 681 F.2d 291 (5th Cir. 1982); D'Amico v. Alvarez Shipping Co., 326 A.2d 129 (Conn. 1973); Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981); Culbert v. Sampson's Supermarkets, Inc. 444 A.2d 433 (Me. 1982).

66. *See* Paugh v. Hanks, 451 N.E.2d 759 (Ohio 1983); Fineran v. Pickett, 465 N.W.2d (Iowa 1991) (the victim's father was riding his bicycle some distance behind her and subsequently arrived at the injury scene approximately two minutes after the collision).

See also Brooks v. Decker, 516 A.2d 1380 (Pa. 1986). In *Brooks*, the plaintiff was driving home when an ambulance passed him and turned onto the street where he lived. The ambulance stopped where a crowd of people had gathered. The plaintiff, who had allowed the ambulance, noticed a bicycle that belonged to his son on the ground. As plaintiff got out of his vehicle, he discovered that his son had been the victim of an automobile accident while he had been riding his bicycle. The plaintiff's son was in a coma for ten days following the accident and suffered severe and permanent brain damage as a result.

See also Freeman v. City of Pasadena, 744 S.W.2d 923 (Tex. 1988). In *Freeman*, the plaintiff sought to recover damages for his emotional distress allegedly caused by the negligent defendant in an automobile accident in which two of the plaintiff's stepsons were injured. Upon hearing of the accident, the plaintiff hurried to the scene where he saw one of his injured stepsons; the other stepson had already been transported to the hospital where he later died.

67. Mazzagatti v. Everingham, 516 A.2d 672, 679 (Pa. 1986).

68. *Id.* at 679. After receiving a telephone call alerting her that her daughter had been involved in an automobile accident, the plaintiff mother arrived at the scene of the accident minutes afterward and saw her daughter's body lying in the street.

69. Yandrich v. Radic, 433 A.2d 459, 461 (Pa. 1986). The father arrived at the hospital and stayed with his injured son until his son's death, five days later.

The state of Texas also requires a sensory and contemporaneous observance of the accident.[70] As the Texas Supreme Court noted in *United Services Automobile Association v. Keith*, "Texas law still requires the bystander's presence when the injury occurred and the contemporaneous perception of the accident."[71] In *Keith*, plaintiffs were not present at the time of the fire and, because they did not discover until some time afterwards which relatives had died or been injured in the fire, they could not fulfill the requirements for bystander recovery under Texas law.[72]

New Hampshire is yet another state that denies a bystander relative's claim of negligent infliction of emotional distress if the element requiring emotional impact from the sensory and contemporaneous observance of the accident was not met.[73] In *Nutter v. Frisbee Memorial Hospital*, the New Hampshire Supreme Court applied its own version of the *Dillon* test.[74] The *Nutter* court held that the parents of a child who died as a result of the alleged malpractice of the defendant doctor could not bring a bystander action because their emotional distress did not result from the parents' sensory perception contemporaneous with the accident.[75] The New Hampshire Supreme Court did not base its decision in dismissing the claim on the fact that it arose in the medical malpractice context. Rather, it held that a bystander claim cannot be allowed for every parent who, though not present, learned of a child's negligently inflicted death.[76]

D. Bystanders' Emotional Distress Claims in Other Jurisdictions

As previously discussed, nearly half the states presently permit bystanders outside the zone of danger to obtain recovery for emotional distress in certain circumstances.[77]

The Pennsylvania Supreme Court first allowed recovery for negligently caused mental trauma to plaintiffs not within any zone of personal physical danger and without any reason to fear for their own

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70. *See* United Services Auto. Ass'n v. Keith, 970 S.W.2d 540, 542 (Tex. 1998).

71. *Id.* at 542.

72. *See id.*

73. *See* Nutter v. Frisbee Mem'l Hosp., 474 A.2d 584 (N.H. 1984).

74. *Id.* at 585-86 (citing Corso v. Merrill, 406 A.2d 300 (N.H. 1979)).

75. *Id.* In *Nutter*, the child was examined but not admitted into the hospital. Three days later, the parents left her with a babysitter. She developed complications and was rushed to the hospital where she died. The parents were contacted and went to the hospital where they viewed the child's body.

76. *See id.* at 587.

77. Iowa recognized a bystander's claim for emotional distress in Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981).

safety in *Sinn v. Burd*.[78] The *Sinn* court held that a cause of action existed "[w]here the bystander was a mother who witnessed the violent death of her small child and the emotional shock emanated directly from personal observation of the event. . . ."[79]

The Wisconsin Supreme Court wrestled with the weight of conflicting authority in the area of bystanders' recovery for emotional distress claims in *Bowen v. Lumbermens Mutual Casualty Company*.[80] There, a vehicle negligently collided with 14-year-old Steven Bowen, who was riding a bicycle. Steven was gravely injured and died in a hospital soon after the accident. Steven's mother sought damages for negligent infliction of emotional distress.[81] As the court observed,

> According to her amended complaint, [the mother] did not witness the collision itself; she arrived at the scene a few minutes after the collision occurred and personally witnessed its violent and gruesome aftermath. She saw her severely injured son trapped beneath the defendant's car and also watched the prolonged rescue attempt. The complaint asserted that these experiences caused the mother extreme emotional and psychic injuries with accompanying physical symptoms including hysteria, insomnia, nausea and the disruption of work and family relationships.[82]

Mrs. Bowen's argument in support of her claim for negligent infliction of emotional distress was that the court should abandon the so-called "zone of danger" rule it adopted in 1935 in *Waube v. Warrington*.[83]

The *Bowen* court stated the obvious dilemma and struggle it had in this issue,[84] and went on to describe the fundamental distrust that courts of previous eras had toward victims claiming emotional damages.[85] At common law, "emotional suffering was deemed genuine and compensable only if it was associated with a provable physical injury claim in an accepted tort cause of action."[86] Direct victims were

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78. 404 A.2d 672 (Pa. 1979).

79. *Id.* at 686.

80. 517 N.W.3d 432 (Wis. 1994).

81. *Id.*

82. *Id.* at 435.

83. 258 N.W. 497 (Wis. 1935).

84. "The tort of negligent infliction of emotional distress has troubled this court and other courts for many years. Our decision today demands an appraisal of the evolution of our cases on negligent infliction of emotional distress, especially those arising over the almost 60 years since our discussion of a bystander's claim in *Waube* . . . ." *Bowen*, 517 N.W.3d at 436.

85. The tort of intentional infliction of emotional distress was not recognized in Wisconsin until 1963. *See* Alsteen v. Gehl, 124 N.W.2d 312 (Wis. 1963).

86. *Bowen*, 517 N.W.3d at 437.

treated as more or less on par with victims of physical injury, whereas "bystanders" were in a special category. They were not subject to the normal principles of tort law, and were not owed a duty in relation to the injury they suffered. Judge Cardozo established the temporal relationship between duty and foreseeability: "the question of liability is always anterior to the question of the measure of the consequences that go with liability."[87] The conclusion may be that there is no general duty towards the loved ones of the people one endangers physically through his or her negligent acts.[88]

III. WASHINGTON LAW ON BYSTANDER EMOTIONAL DISTRESS CLAIMS

Prior to *Hegel*, Washington courts held that a plaintiff may recover damages for negligent infliction of emotional distress only if the plaintiff was personally placed in peril by the defendant's negligent conduct, or if the plaintiff was present at the scene of the defendant's negligent conduct that resulted in injury to a close family member.[89]

A. *Washington's Recognition of Bystander Emotional Distress Claims*

Originally, Washington law only allowed for recovery of damages stemming from emotional and mental suffering if the plaintiff suffered direct physical injury in an accident.[90] However, as early as 1916, this rule was overruled in *O'Meara v. Russell*, where the Washington Supreme Court allowed a plaintiff who was not physically impacted to recover for physical harm caused by fright.[91] The rule in *O'Meara* was very broad, allowing plaintiffs to recover when an injury resulted from emotional causes.[92]

The rule in *O'Meara* was subsequently narrowed in *Frazee v. Western Dairy Products*,[93] when the Washington Supreme Court adopted the "zone of danger" rule.[94] The history of the Washington courts' decisions in negligent infliction of emotional distress cases

87. Palsgraf v. Long Island R. Co., 162 N.E. 99, 101 (N.Y. 1928).

88. *See* Handsley, *supra* note 29, at 412.

89. The Washington Supreme Court held that emotional distress damages "were not compensable, even to close family members, unless the plaintiff was present at the scene of the fatal accident." Physicians Ins. Exch. & Ass'n. v. Fisons, 122 Wash. 2d 299, 321, 858 P.2d 1054, 1065 (1993) (citing Gain v. Carroll Mill Co., 114 Wash. 2d 254, 787 P.2d 553 (1990)).

90. Provided that the defendants action was negligent and not willful or intentional. *See* Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976).

91. *See* O'Meara v. Russell, 90 Wash. 557, 156 P. 550 (1916).

92. *Id.*

93. 182 Wash. 578, 47 P. 1037 (1935).

94. *See Hunsley*, 87 Wash. 2d at 432-33, 553 P.2d at 1101 (citing *Frazee*, 182 Wash. 578, 47 P. 1037 (1935)).

demonstrates the problem with the "zone of danger" doctrine: while it appears to allay the courts' apprehension of opening the doors to trivial or fraudulent claims and to unlimited liability for a negligent tortfeasor, its rigid application may prevent redress in deserving cases. Its companion rules requiring fear for one's own safety and physical manifestation of emotional distress have the same effect.

1. *Hunsley v. Giard*

Washington courts first recognized a cause of action for negligent infliction of emotional distress in *Hunsley v. Giard;*[95] taking *Dillon's* lead, Washington broke from the zone of danger analysis.[96] In *Hunsley*, the Washington Supreme Court replaced the zone of danger's arbitrary lines with common law negligence principles.[97] Thus, under *Hunsley*, a plaintiff has a cause of action if the defendant breached his duty to avoid the negligent infliction of emotional distress to those foreseeably endangered.[98] The *Hunsley* court concluded that a defendant's duty to avoid the negligent infliction of emotional distress is dependent in part on the element of foreseeability.[99] The element of foreseeability was further characterized as a question of fact for the jury to resolve.[100] However, even the *Hunsley* court recognized that "adequate limitations" would have to be employed to further administer and adjudicate this particular tort.[101]

The courts in Washington and other jurisdictions have consistently held that a line must be drawn to define the class of persons who are entitled to recover for mental suffering, thereby excluding potential plaintiffs who would otherwise be "foreseeable" from the standpoint of a jury.[102]

> [F]oreseeability of the injury alone is not a useful 'guideline' or a meaningful restriction on the scope of the [negligent infliction of emotional distress] action . . . The *Dillon* experience confirms . . . "[f]oreseeability proves too much" . . . "it provides virtually no limit on liability for nonphysical harm" . . . [it] is not ade-

95. 87 Wash. 2d 424, 553 P.2d 1096 (1976).

96. *Id.* at 433, 553 P.2d 1096.

97. *Id.* at 435, 553 P.2d 1103.

98. *Id.* at 436, 553 P.2d 1103.

99. *See* Brief of Respondent School District at 4, Hegel v. McMahon, 136 Wash. 2d 122, 960 P.2d 424 (1998) (No. 65105-1) (citing Hunsley v. Giard, 87 Wash. 2d 424, 435 (1976)).

100. *See id.*

101. *Hunsley*, 87 Wash. 2d at 435, 553 P.2d at 1103 (cited in Brief of Respondent School District at 4, Hegel v. McMahon, 136 Wash. 2d 122, 960 P.2d 424 (1998) (No. 65105-1)).

102. *See* Gain v. Carroll Mill Co., 114 Wash. 2d 254, 260, 787 P.2d 553, 557 (1990) (cited in Brief of Respondent School District at 23, Hegel v. McMahon, 136 Wash. 2d 122, 960 P.2d 424 (1998) (No. 65015-1)).

> quate when the damages sought are for an intangible injury. In order to avoid limitless liability out of proportion to the degree of a defendant's negligence, and against which it is impossible to insure without imposing unacceptable costs on those among whom the risk is spread, the right to recover for negligently caused emotional distress must be limited.[103]

Unfortunately, Washington courts have muddled this rule since it was first established. The next section explores the beginning of this obfuscation.

2. Trend Toward Obfuscation: *Cunningham v. Lockard*

Recognizing that the *Hunsley* court did not decide the scope of legal liability, the Washington Court of Appeals for Division Two in *Cunningham v. Lockard*,[104] expressed its concerns regarding potentially unlimited liability.[105] The court also recognized that although cause in fact is usually a jury question, legal causation is a question of law to be determined by the court based upon policy considerations.[106] The *Cunningham* court looked to the elements of the tort of outrage, which require that the plaintiff either be the object of the defendant's actions, or be an immediate family member of the injured person and present at the time of the defendant's conduct.[107]

3. *Gain v. Carroll Mill Co.*

Nearly ten years after *Hunsley* first allowed the claim, the Washington Court of Appeals reasoned that a liability scheme that was limited by foreseeability alone was contrary to public policy.[108] The

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103. Thing v. La Chusa, 771 P.2d 814, 826-27 (Cal. 1989).

104. 48 Wash. App. 38, 736 P.2d 305 (1987).

105. "[T]he decision subjects defendants to potentially unlimited liability to virtually anyone who suffers physical manifestations of emotional distress caused by personal peril or by concern for the peril of another. Because of this virtually unlimited liability, a boundary establishing the class of persons who can sue must be drawn." *Cunningham*, 48 Wash. App. at 44, 736 P.2d at 308.

106. *Id.* (cited in Brief of Respondent School District at 5, Hegel v. McMahon, 136 Wash. 2d 122, 960 P.2d 424 (1998) (No. 65105-1).

107. *Id.* (citing Chambers-Castanes v. King County, 100 Wash. 2d 275, 669 P.2d 451 (1983)).

108. *See Cunningham*, 48 Wash. App. at 44, 736 P.2d at 308. The plaintiffs in *Cunningham* were the minor children of a mother who was struck by a car. The children neither witnessed the accident, nor came upon the scene shortly after its occurrence. The court of appeals held as a matter of law that the children could not recover for emotional distress. The court went on to conclude:

> Because the tort of outrage limits the plaintiff class and involves conduct of greater severity then that required for the negligent infliction of emotional distress, we conclude that policy considerations dictate that the legal liability of defendants who negligently inflict emotional distress must be limited to plaintiffs who are actually

physical presence requirement articulated in *Cunningham* was approved by the Washington Supreme Court in *Gain v. Carroll Mill Co.*[109] In *Gain*, the family members of a state trooper killed by a truck brought a claim for negligent infliction of emotional distress based upon their viewing of a television news broadcast relating to the accident.[110] The Washington Supreme Court held that the plaintiffs' claims for emotional distress damages were properly dismissed because "the plaintiffs were not physically present at the scene of the accident."[111] Later in the opinion, the court stated: "We conclude that mental suffering by a relative who is not present at the scene of the injury-causing event is unforeseeable as a matter of law. We reach this conclusion after balancing the interests of the injured party to compensation against the view that a negligent act should have some end to its legal consequences."[112]

The *Gain* court further stated: "Other jurisdictions facing the issue raised by this case and which have adopted the foreseeability analysis comport with our holding. These cases require plaintiffs to either witness the injury-causing event or see the victim immediately after the accident."[113] Then, without explanation for broadening its language, the *Gain* court concluded:

> A defendant has a duty to avoid the negligent infliction of emotional distress. However, this duty does not extend to those plaintiffs who have a claim for mental distress caused by the negligent bodily injury of a family member, unless they are physically present at the scene of the accident or arrive shortly thereafter. Mental distress where the plaintiffs are not present at the scene of the accident and/or arrive shortly thereafter is unforeseeable as a matter of law.[114]

Although the *Gain* court relied on several cases in dicta that were considered questionable authority,[115] that fact does not render the

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placed in peril by the defendant's negligent conduct and to family members present at the time who fear for the one imperiled.

Id. at 44, 736 P.2d at 308.

109. *See* Gain v. Carroll Mill Co., 114 Wash. 2d 254, 260, 787 P.2d 553, 557 (1990).

110. *Id.* at 255, 787 P.2d at 554.

111. *Id.*

112. *Id.* at 260, 787 P.2d at 557.

113. *Id.* (citing Nancy P. v. D'Amato, 517 N.E.2d 824 (Mass. 1988); Croft v. Wicker, 737 P.2d 789 (Alaska 1987); Tommy's Elbow Room, Inc. v. Kavorkian, 727 P.2d 1038 (Alaska 1986); Gates v. Richardson, 719 P.2d 193 (Wyo. 1986); Ochoa v. Superior Court, 703 P.2d 1 (Cal. 1985); Waid v. Ford Motor Co., 484 A.2d 1152 (N.H. 1984)).

114. *Id.*

115. *See* Respondent School District's Brief at 9, Hegel v. McMahon, 136 Wash. 2d 122, 960 P.2d 424 (1998) (No. 65105-1); *see also Gain*, 114 Wash. 2d at 260, 787 P.2d at 557. The cases cited in the *Gain* decision, *see supra* note 113, were also cited by the petitioner in *Hegel* as

"shortly thereafter" language dicta. It does, however, further weaken language that has little force to begin with.[116] In addition, *Ochoa v. Superior Court*,[117] cited in *Gain* and by the plaintiff in *Marzolf*, is of no assistance to the claimants.[118] As previously addressed, *Ochoa* held only that the plaintiff can recover if the plaintiff both observes the defendant's conduct and the resultant injury and is aware of both at the time of the injury being caused.[119] Therefore, whether the plaintiff arrived "shortly thereafter" was irrelevant.

It is worth noting that Washington Supreme Court rulings in *Gain*, *Hegel*, and *Cunningham*—that a family member must be present at the accident scene to recover damages for the negligent infliction of emotional distress—comport with general pre-*Thing* cases from California discussed previously.

However, the *Thing* court expressly stated, "the dictum in *Ochoa* suggesting that the factors noted in the *Dillon* guidelines are not essential in determining whether a plaintiff is a foreseeable victim of a defendant's negligence should not be relied on."[120]

If one concludes that the "shortly thereafter" language in *Gain* is dicta, the law in Washington would still hold that a plaintiff seeking emotional distress damages as a result of the negligent conduct toward a third party must be a close family member who was present at the scene and observed the negligent conduct causing injury.[121] In other words, Washington would appear to apply the *Dillon* factors.[122]

Indeed, up until recently, courts in Washington have continued to follow the rule found in *Dillon*, that a plaintiff seeking emotional distress damages due to the negligent conduct toward a third party must have been present to observe the accident.[123] However, as the next section will illustrate, this rule may no longer be valid.

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authority for his position. Respondent School District's Supplemental Brief at 12-13, Hegel v. McMahon, 136 Wash. 2d 122, 960 P.2d 424 (1998) (No. 65105-1).

116. *See id.*

117. 703 P.2d 1 (Cal. 1985).

118. The plaintiff in *Ochoa* was at the scene of the negligent conduct. *See Ochoa*, 703 P.2d at 3-4.

119. *Id.* at 8.

120. Thing v. La Chusa, 771 P.2d 814, 830 (Cal. 1989).

121. *See* Respondent School District's Brief at 12, Hegel v. McMahon, 136 Wash. 2d 122, 960 P.2d 424 (1998) (No. 65105-1).

122. *See id.*

123. *See* Hegel v. McMahon, 85 Wash. App. 106, 112, 931 P.2d 184, 185 (1997).

B. *Washington Supreme Court's Recent Decisions on Bystanders' Emotional Distress Claims*

The modern obfuscation surrounding the recent Washington Supreme Court case law indicates that, currently, bystanders need not be present to bring a claim and recover for emotional distress.

In the recent case *Hegel v. McMahon*, the court expanded the scope of bystander recovery for the negligent infliction of emotional distress. Plaintiffs in the consolidated case, Hegel and Marzolf, sought to recover for emotional trauma they experienced after witnessing the suffering of an injured family member at the scene of the accident.[124] Their claims at the trial court level were dismissed because the plaintiffs were not present when the accident occurred. However, the supreme court reversed the trial court and held that "plaintiffs may recover for emotional distress caused by observing an injured relative at the scene of an accident shortly after its occurrence and before there is a substantial change in the relative's condition or location."[125]

1. *Hegel v. McMahon*

One night in October 1992, Dale Hegel ran out of gas and pulled over to the side of the road.[126] As he poured gasoline into his tank, a passing car struck him and knocked him into a ditch.[127] Coincidentally, members of the victim's family were driving along the same road and came upon the scene of the accident shortly after its occurrence.[128] The victim's parents and son found him lying in the ditch, severely injured and bleeding.[129] Moments later, Dale Hegel's brother and sister-in-law also came upon the scene and saw him in the ditch.[130] As a result of the accident, Dale Hegel suffered severe and permanent head injuries.[131]

Those relatives who came upon the accident scene brought an action against the driver for negligent infliction of emotional distress, alleging that the sight of their close relative's injured body in the ditch

124. *Hegel*, 136 Wash. 2d at 122, 960 P.2d at 424.

125. *Id.* at 124, 960 P.2d at 425. The Washington Supreme Court decision remanded the cases back to trial to decide the plaintiffs' emotional distress claims. *Id.* at 136, 960 P.2d at 431.

126. *See* Hegel v. McMahon, 85 Wash. App. 106, 107, 931 P.2d 181, 182 (1997).

127. *Id.*

128. Hegel v. McMahon, 136 Wash. 2d 122, 124, 960 P.2d 424, 426 (1998).

129. *Id.*

130. *Id.*

131. *Id.*

sent them into a severe state of fear and panic which escalated into a prolonged sensation of anxiety and shock.[132]

In their motion for summary judgment, the defendants asserted that they owed no duty to the Hegels and that their interrogatory answers did not allege sufficient objective symptoms of mental distress.[133] The Hegels sought to amend their interrogatory answers to include physical ailments caused by their emotional distress, but the trial court refused to consider the amended answers because they contradicted the Hegels' previous answers and were unsupported by medical evidence.[134] The trial court then dismissed the case on the grounds that the Hegels failed to show sufficient objective symptoms of emotional distress.[135] The court held that a plaintiff cannot recover for emotional distress caused by the tortious death of a family member unless the plaintiff was present near the scene of the tort and observed its occurrence.[136]

The Washington Court of Appeals for Division Three affirmed the summary judgment, but did not examine the sufficiency of the symptoms.[137] Instead, the court held that the family members could not recover for negligent infliction of emotional distress because they did not witness the accident.[138] The court acknowledged the presence of the language in *Gain* suggesting that a family member who comes upon the scene "shortly thereafter" an accident also may recover.[139] But the court also pointed out that "later cases have declined to allow recovery for plaintiffs who were not present near the scene and did actually observe the injury-causing accident.[140] The court ruled that a plaintiff must actually witness the injury-causing accident to bring a claim for negligent infliction of emotional distress.[141] The plaintiffs then petitioned the Washington State Supreme Court for discretionary review.[142]

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132. *Id.*

133. *Id.* at 124-25, 960 P.2d at 426.

134. *Id.* at 125, 960 P.2d at 426.

135. *Id.*

136. Hegel v. McMahon, 85 Wash. App. 106, 109, 931 P.2d 181, 182 (1997).

137. *Id.* at 111-12, 931 P.2d at 183.

138. *Id.*

139. *Id.* at 110, 931 P.2d at 183.

140. *Id.* at 111, 931 P.2d at 183. (citing Chan v. Society Expeditions, Inc., 39 F.3d 1398, 1409 (9th Cir. 1994); Lindsey v. Visitec, Inc. 804 F. Supp. 1340 (W.D. Wash. 1992); Washington State Physicians Ins. Exch. & Ass'ns v. Fisons Corp., 122 Wash. 2d 299, 858 P.2d 1054 (1993)).

141. *Id.* at 111-12, 931 P.2d at 184.

142. *See* Hegel v. McMahon, 136 Wash. 2d. 122, 125, 960 P.2d 424, 426 (1998).

2. *Marzolf v. Stone*

On September 6, 1990, two days into the new school year, a motorcyclist collided with a Snohomish school bus.[143] The motorcyclist, nineteen-year-old Jeremy A. Marzolf, was thrown from his motorcycle sustaining broken arms, a severely fractured and nearly amputated left leg, as well as serious chest and abdominal injuries.[144] Jeremy was airlifted to Harborview Medical Center where he died three hours later.[145]

All the witnesses, including Jeremy's father, Barton P. Marzolf, Sr., verified that Jeremy was conscious the entire time at the scene, screaming in pain, attempting to stand up on a leg that he had not realized he had lost, and writhing on the ground.[146]

The plaintiff, Barton Marzolf, happened onto the scene of the accident immediately following its occurrence and witnessed the grievous personal injuries to his son.[147] The profound emotional damages that this incident caused Barton were obvious to those who knew him.[148] He constantly relived what he saw and heard at the scene throughout his days and nights, and in his mind continued indefinitely to see and hear it as vividly as at the time it happened.[149]

Barton Marzolf brought wrongful death and negligent infliction of emotional distress claims against Snohomish County, School District No. 201, and Bonnie Rae Stone, the driver of the bus.[150] The defendants moved to dismiss the emotional distress claim on the grounds that Mr. Marzolf was not at the scene when the accident occurred.[151] Initially, the trial court denied the motion, but when the court of appeals issued its decision in *Hegel*, the County moved for reconsideration.[152] After considering *Hegel*, the trial court granted the motion to dismiss.[153] Marzolf petitioned the Washington Supreme Court for review and the two cases were consolidated.

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143. Stacey Kollman, *Snohomish Man Killed in Bus-Cycle Collision*, SNOHOMISH COUNTY TRIBUNE, Vol. 101, No. 37, September 12, 1990, at 1.

144. *See id.*

145. *See id.*

146. *Id.*

147. Plaintiff Marzolf's Complaint for Damages at 9, Marzolf v. Stone, No. 93-2-05005-2 (Snohomish County Super. Ct. filed Sept. 3, 1993).

148. *See* Plaintiff Marzolf's Brief in Response to Defendant School District's Motion for Summary Judgment at 8, Marzolf v. Stone, No. 93-2-05005-2 (Snohomish County Super. Ct. filed Sept. 3, 1993).

149. *See id.*

150. *See Hegel*, 136 Wash. 2d 122, 125, 960 P.2d 424, 426.

151. *Id.* at 125, 960 P.2d at 426.

152. *Id.*

153. Judge Farris specifically reserved ruling if Mr. Marzolf was on the scene "shortly thereafter" by arriving ten minutes after the accident. Order Denying Defendant Snohomish

Chief Justice Durham, writing for the majority, stated the court's reluctance to establish a bright line rule that would exclude plaintiffs without meaningful distinction.[154] However, this area of tort law requires a dedicated and lucid rule to maintain a system that is predictable. Unfortunately, with its ruling in this case, the Washington court has made more work for itself in having to hear more potentially fraudulent claims. The secondary problem found in *Marzolf* is that the court fell prey to its own fear of creating an arbitrary distinction. The court seemed so focused on justifying its position of allowing recovery for relatives not at the scene, that it disregarded the omission in the record of any corroborating medical evidence of objective symptomatology[155]—an issue that both parties asked the court to decide,[156] and a requirement that it expressly held was necessary to satisfy the objective symptomatology requirement of the plaintiffs' emotional distress claims.[157]

The fact that the plaintiffs' emotional distress was not susceptible to medical diagnosis or proved through medical evidence completely undermines the court's efforts to restrict subjective symptoms such as unverified assertions of pain that have not been supported by outside evidence or authoritative testimony. Undoubtedly, Mr. Marzolf suffered when he witnessed the awful injury to his son. However, to prove his claim, the court's remand has effectively encouraged plaintiffs to exaggerate their pleadings, and ultimately compels the trial court to discount the reliability of psychiatric testimony that was only requested after the state supreme court heard the appeal, and is only now being obtained some nine years after the initial incident.[158]

3. Is The "Shortly Thereafter" Language in *Gain* Mere Dicta?

As mentioned, the *Gain* decision included language not contained in any prior Washington law. *Gain* stated that a plaintiff may not claim damages for the negligent infliction of emotional distress unless she was physically present at the scene of the injury to her family member or arrived "shortly thereafter."[159] The "shortly thereafter"

County's Motion for Reconsideration at 2, Marzolf v. Stone, No. 93-2-05005-2 (Snohomish County Super. Ct. filed Sept. 3, 1993). By virtue of her ultimate decision, this issue became moot at the trial level.

154. *Hegel*, 136 Wash. 2d at 130-31, 960 P.2d at 428-29.

155. *Id.*

156. *Id.*

157. *Id.*

158. *See id.* at 122, 960 P.2d at 424.

159. Gain v. Carroll Mill Co., 114 Wash. 2d 254, 261, 787 P.2d 553, 557 (1990).

language in *Gain* was not necessary to decide the issue before the court and, thus, constituted dicta.

It is apparent that the *Marzolf* case only came before the court because the standard applied in *Cunningham* and further adopted by *Gain* was blurred by this dictum.[160] Although the plaintiff in *Marzolf* claimed that the "shortly thereafter" language constituted controlling precedent in Washington, that language was argued by Defendant Snohomish County to be mere dicta that does not constitute a rule of law.[161] The defendants prevailed on that point at the trial level.[162]

The "shortly thereafter" language in *Gain* may be mere dicta for several reasons. First, the doctrine of stare decisis does not apply to language used in a court opinion that was not necessary to decide the issue in the case.[163] Moreover, a legal principle that is not applied to the facts of a case does not become precedent.[164] The "shortly thereafter" language was not applicable to the facts of *Gain* because the plaintiffs only learned of the accident while watching the account of it on the television news.[165] Therefore, the issue of determining whether the plaintiffs had arrived at the scene "shortly thereafter" the accident was moot.

Secondly, the *Gain* court approved of the *Cunningham* court's decision to limit the scope of a defendant's liability by restricting the family members eligible to recover emotional distress damages to those who were present at the scene of the injury-causing event.[166] Had the "shortly thereafter" language in *Gain* been the rule of law, the *Gain* court would not have followed *Cunningham*, but rather would have overruled or limited that case.[167] The *Gain* court did neither.

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160. See Respondent School District's Brief at 7, Hegel v. McMahon, 136 Wash. 2d 122, 960 P.2d 424 (1998) (No. 65105-1); *See also Gain*, 114 Wash. 2d at 261, 787 P.2d at 557 (stating that a plaintiff may not claim damages for emotional distress unless they were physically present at the scene of the injury to their family member or arrived "shortly thereafter").

161. *See* Brief of Respondent School District's Response to Petitioner's Motion for Discretionary Review at 2, Hegel v. McMahon, 136 Wash. 2d 122, 960 P.2d 424 (1998) (No. 65105-1).

162. Snohomish County Superior Court Judge Farris granted the defendants' motion for reconsideration because she held that *Gain*'s language was dicta and allowed trial court judges the opportunity to expand the holding in *Gain* to a case such as that presently before the court. *See* Hearing for Reconsideration (March 24, 1997) at 10, Marzolf v. Stone, No. 93-2-05005-2 (Snohomish County Super. Ct. filed Sept. 3, 1993).

163. *See* State v. Yelle, 7 Wash. 2d 443, 450-51, 110 P.2d 162, 166 (1941).

164. *See* State v. Zakel, 61 Wash. App. 805, 808, 812 P.2d 512, 514 (1991), *cited by* Respondent School District's Brief at 8, Hegel v. McMahon, 136 Wash. 2d 122, 960 P.2d 424 (1998) (No. 65105-1).

165. *See* Gain v. Carroll Mill Co., 114 Wash. 2d 254, 255, 787 P.2d 553, 557 (1990).

166. *See Gain* at 260, *cited by* Respondent School District's Brief at 8, Hegel v. McMahon, 136 Wash. 2d 122, 960 P.2d 424 (1998) (No. 65105-1).

167. *See* Respondent School District's Brief at 8-9, Hegel v. McMahon, 136 Wash. 2d 122, 960 P.2d 424 (1998) (No. 65105-1).

IV. A RETURN TO A STRINGENT STANDARD TO RESOLVE INCONSISTENT TREATMENT OF BYSTANDERS' EMOTIONAL DISTRESS CLAIMS

There is no question that the issue discussed in this Comment is of considerable significance to persons like Barton Marzolf, Sr., and the Hegel family members, who suffer devastating emotional damage and impairment by living through the experience of witnessing a close family member suffering physical injuries in the aftermath of a tort proximately caused or contributed to by third parties. However, this issue may be even more devastating to society as a whole, because if we were to "hold actionable all emotional trauma causally connected to a defendant's tortious conduct, we would wreak upon our society a problem of unlimited or unduly burdensome liability."[168]

The consolidated cases have not unearthed novel issues. Courts across the country have struggled with such rules that propose to expand or limit bystander recovery for emotional distress brought on by witnessing the injury or death of a close relative.[169] "Interestingly enough, the struggle has not necessarily been over jury verdicts, but rather the confusing legal standards inconsistently adopted by the various courts."[170]

No loss is greater than that of a loved one, and no tragedy is more wrenching than the helpless apprehension of the death or serious injury of a loved one. Claimants argue that the law should find more than mere pity for one who is emotionally stricken by seeing that a loved one has been critically injured or killed. However, this argument is rarely accepted by the general tortfeasor.

Tortfeasors have frequently argued that they should not have to bear liability for the unforeseen consequences of their wrongful conduct.[171] Tortfeasors will often argue for restrictions on the rights of victims and for the establishment of artificial rules limiting recovery, based on their skepticism of jurors' abilities to sort out fraudulent claims.[172]

The disparate judicial treatment of claims of intentional infliction of emotional distress and negligent infliction of emotional distress illustrates the concern with authenticating claims of emotional distress. Historically, courts have been apprehensive that psychological injuries would be easy to feign and that suits would be brought for

168. Brooks v. Decker, 516 A.2d 1380, 1382 (Pa. 1986).

169. *See generally* Calandrella, *supra* note 14.

170. Petitioner Marzolf's Reply Brief at 4, Hegel v. McMahon, 136 Wash. 2d 122, 960 P.2d 424 (No. 65105-1) (1998).

171. *See id.*

172. *Id.*

trivial emotional distress complaints that were more dependent on the peculiar emotional sensitivities of the plaintiff than upon the nature of the tortfeasor's conduct.[173] Furthermore, courts have feared that opening the courts to claims for negligent infliction of emotional distress would open the floodgates of litigation and lead to unlimited liability for negligent tortfeasors.[174] Thus, courts have reasoned that people should not be able to sue for everyday minor disturbances.[175] The tort of negligently inflicted emotional distress is clearly not designed to compensate for all of the emotional traumas of everyday life.

Nevertheless, courts have acknowledged that justice requires recognition of some claims for negligently inflicted emotional harm. Thus, courts have devised various criteria to balance a plaintiff's compensatory interests for emotional distress against the interests of the judicial system in authenticating claims and preventing unlimited liability for the tortfeasor.[176]

Claimants will argue that a more stringent rule in this area of tort law may preclude them from obtaining a remedy for the injury because their case fails to meet the standard. Proponents of such a rule would contend that without a definitive standard, "the result would be inconsistent rulings in proliferating cases in the lower courts, and inconsistent results for plaintiffs and defendants similarly situated."[177]

A stringent standard should ensure that a defendant's liability is reasonably related to her culpability. Such "[f]ortuitous circumstances as whether a parent happens to arrive upon the accident scene or the number of close family members who happen to arrive upon the accident scene should not determine the scope of liability for a defendant who is negligent."[178] Certainly, a defendant should not be required to

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173. *See* Dennis G. Bassi, *It's All Relative: A Graphical Reasoning Model for Liberalizing Recovery for Negligent Infliction of Emotional Distress Beyond the Immediate Family*, 30 VAL. U. L. REV. 913, 922 (1996) (stating that the primary purpose for requiring physical contact has been to deter plaintiffs from fabricating claims for emotional distress).

174. Washington State Physicians Ins. Exch. & Ass'n. v. Fisons Corp., 122 Wash. 2d 299, 321, 858 P.2d 1054, 1066 (1993).

175. *See id.*

176. The principles of tort liability requires that a defendant's breach of a duty of care proximately causing a plaintiff's injury, have at some point along the causal chain, the passage of time and the span of distance mandate a cutoff point for liability. Mazzagatti v. Everingham, 516 A.2d 672, 676 (Pa. 1986).

177. Respondent School District's Brief at 25, Hegel v. McMahon, 136 Wash. 2d 122, 960 P.2d 424 (1998) (No. 65105-1).

178. *Id.*

anticipate the number of the victim's close relatives who may arrive at the scene after an accident.[179]

The *Hegel* court, in justifying its departure from the standard, explained that an appropriate rule should not be based on temporal limitations, but should differentiate between the trauma suffered by a family member who views an accident or its aftermath, and the grief suffered by anyone upon discovering that a relative has been severely injured.[180]

Another policy consideration that pervades all cases in this area of tort law is the need for rules that are feasible to administer and yield a workable degree of certainty. Such considerations, no doubt, resulted in the common law doctrine, applied in nearly all jurisdictions, that negligence unconnected with physical injury will not provide the basis for mental or emotional injuries, except in limited circumstances. Otherwise, the nature of such unbridled negligent infliction of emotional distress claims would cause exposure to the actor of indeterminate classes, amounts, and times.[181]

In addition, if the cost is not borne by the individual defendant, but rather is spread amongst society through the mechanism of insurance, the focus should not be devoted to the rights of the individual defendant, but should also address the needs of society to maintain a system that is predictable.[182]

Perhaps the best example of the need to return to a stringent standard is shown by attempting to define the term "shortly thereafter." For example, in *Gain's* dissent, Justice Brachtenbach asked, "what does 'shortly thereafter' mean? What magic elapse of time will serve as the dividing line?"[183] If the court was to set a finite time period for "shortly thereafter," it would invite litigation over how much

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179. *Id.* at 25-26.

180. Hegel v. McMahon, 136 Wash. 2d 122, 131, 960 P.2d 424, 429 (1998).

181. *See supra* note 11 and accompanying text.

182. *See* Respondent School District's Brief at 26, Hegel v. McMahon, 136 Wash. 2d 122, 960 P.2d 424 (No. 65105-1) (quoting *Mazzagatti*, 516 A.2d at 680 (Flattery, J. concurring)):

> It is illusory to believe the public does not pay for tort recoveries, or that resources for such are limitless. As it is with everything, a balance must be struck, in the end, dealing with money, and that money must come from somewhere—from someone: the public pays for the very most part by increased insurance premiums, taxation, prices paid for consumer goods, medical services, and in loss of jobs when the manufacturing industry is too adversely affected.

See Respondent School District's Brief at 26, Hegel v. McMahon, 136 Wash. 2d 122, 960 P.2d 424 (No. 65105-1) (quoting *Mazzagatti*, 516 A.2d at 680 (Flattery, J. concurring)):

183. Gain v. Carroll Mill Co., 114 Wash. 2d 254, 266, 787 P.2d 553, 560 (1990) (Brachtenbach, J., dissenting).

time elapsed and whose watch was correct.[184] If a jury is allowed to determine what "shortly thereafter" meant on a case-by-case basis, litigation over whether a jury will find that the parent or other close relative arrived "shortly thereafter" would occur in every case. One can only imagine the differing results and the extremes to which the term "shortly thereafter" might be applied. Do we apply the term only to those who fortuitously appear on the scene of an accident, or do we also apply it to those who arrive on the scene after receiving a telephone call regarding the accident?[185]

The term "shortly thereafter" in the context of relative bystander recovery of damages for negligent infliction of emotional distress is capricious. A finite time limit on bystander recovery may also prove unworkable. The only operable limitation, which policy and justice dictate, is to limit recovery for those family members who are actually present at the scene of the accident and witness the tortious conduct itself. The standard has already been set in Washington. The Washington Supreme Court should take the opportunity to strengthen it, not cloud the issue, as it has recently done in *Hegel*.

The recently established law in Washington is that a plaintiff seeking damages for emotional distress as a result of the defendant's negligence toward a third party must be a family member who is pres??ent or arrives shortly after the time of the tortious conduct. As the California Supreme Court observed:

> The impact of personally observing the injury-producing event in most, although concededly not all, cases distinguishes the plaintiff's resultant emotional distress from the emotion felt when one learns of the injury or death of a loved one from another, or observes pain and suffering but not the traumatic cause of the injury. Greater certainty and a more reasonable limit on the exposure to liability for negligent conduct is possible by limiting the right to recover for negligently caused emotional distress to plaintiffs who personally and contemporaneously perceive the injury-producing event and its traumatic consequences.[186]

V. CONCLUSION

This article has examined the need for the Washington Supreme Court's clarification of the law of bystander recovery for negligent

184. Respondent School District's Brief at 27, Hegel v. McMahon, 136 Wash. 2d 122, 960 P.2d 424 (No. 65105-1).

185. *Id.*

186. Thing v. La Chusa, 771 P.2d 814, 828 (Cal. 1989).

infliction of emotional distress. Part II examined the background of the tort and showed that courts around the nation interpret it in a clear and consistent manner. Part III examined the traditional law in Washington and how the Washington Supreme Court has recently rejected such law through the recent decision of *Hegel* and *Marzolf*. Part IV examined the need to return to a standard for determining legitimate claims, and argued that a return to clear-cut lines of certainty is needed. Regardless of whether the requirement is characterized as "physical presence" or a "sensory and contemporaneous observance" of the accident, the requirement exists as a means to reasonably limit the scope of a negligent defendant's liability.