CASE NOTES

Shepard v. Superior Court — Recovery For Mental Distress In A Products Liability Action

In *Shepard v. Superior Court*,[1] the California Court of Appeals held that a party directly witnessing injury to a close relative[2] could recover damages for resulting mental distress in a strict products liability action.[3] By recognizing a duty to avoid infliction of emotional distress in a products liability case,[4] *Shepard* elevated a manufacturer's duty in strict liability to the level recently recognized in a negligence action.[5] The court correctly reasoned that a cause of action for mental distress in products liability was consistent with economic realities of modern

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1. 76 Cal. App. 3d 16, 142 Cal. Rptr. 612 (1977).

2. *Shepard* is limited to a situation in which the plaintiff has suffered actual physical injury as a result of witnessing the infliction of injury upon a family member. *Id.* at 19, 142 Cal. Rptr. at 614.

In this comment "mental distress," "emotional harm," "mental trauma," and "emotional distress" are used interchangeably and may include a manifestation of physical harm within their meaning.

3. *Id.* at 21, 142 Cal. Rptr. at 615. The *Shepard* action grew out of a defective door latch. For information concerning what constitutes a defective product and the standards of proof applied, see Cronin v. J. B. E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 103 (4th ed. 1971) [hereinafter cited as PROSSER]. *See also* Note, 23 DRAKE L. REV. 197 (1973).

4. Liability for infliction of emotional injury is not new in tort law; indeed, intentionally inflicted mental distress is a traditional basis for damages. *See generally* PROSSER § 12. More recently, courts have granted recovery for negligent infliction of emotional harm. *See* Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); note 5 *infra*. Most courts, however, have not adopted *Shepard*'s extension of recognizing mental distress as a compensable injury under products liability theory. *See, e.g.*, Woodill v. Parke Davis, 58 Ill. App. 3d 349, 374 N.E.2d 683 (1978) (expressly denied any extension of mental distress in products liability).

5. A negligent tortfeasor's liability extends to the mental distress of third party witnesses. Courts' recent recognition of negligent infliction of emotional distress began with the California case of Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). *Dillon* allowed a mother to recover damages for injuries sustained in witnessing a car hit her child. The court, however, restricted those situations where liability is imposed by establishing guidelines to determine whether an injury was sufficiently forseeable to warrant redress. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80. *See also* Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970) (no physical injury necessary to recover for mental distress). Subsequent decisions expanding recovery to this level include: D'Amicol v. Alvarez Shipping Co., 31 Conn. Supp. 164, 326 A.2d 129 (Super. Ct. 1973); Toms v. McConnell, 45 Mich. App. 647, 207 N.W.2d 140 (1973); Hughes v. Moore, 214 Va. 27, 197 S.E.2d 214 (1973); Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976). *But see* Jelley v. LaFlame, 108 N.H. 471, 238 A.2d 728 (1968); Guilmette v. Alexander, 128 Vt. 116, 259 A.2d 12 (1969).

society[6] and the purposes behind products liability.[7]

The plaintiffs in *Shepard* were the parents and brother of a child killed because of an allegedly defective door latch in the family's Ford Pinto wagon.[8] Based on strict liability and warranty, the plaintiffs brought suit against Ford Motor Company for emotional shock and resulting physical injuries caused by observing the child's death. Accepting Ford's contention, however, that the California Supreme Court's holding in *Dillon v. Legg*[9] prohibited plaintiffs from recovering for emotional injury in other than a negligence action, the trial court sustained Ford's demurrer without leave to amend.[10] Plaintiffs sought a writ of

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6. 76 Cal. App. 3d at 21, 142 Cal. Rptr. at 615.

7. Strict products liability evolved from judicial dissatisfaction with negligence theory where fault is the overriding ideal. Under negligence theory, courts subject manufacturers to liability only upon proof of actual negligence in production or design of a product, *see generally* PROSSER § 96, or misrepresentation, *see* Shapo, *A Representative Theory of Consumer Protection: Doctrine, Function, and Legal Liability for Product Dissappointment*, 60 VA. L. REV. 1109 (1974). In strict liability, however, fault is not an element; an injured plaintiff need not prove negligence or fault on the part of a defendant. This does not mean, however, that strict liability implies no fault. Rather, once the plaintiff shows a defect in the product, the court will infer fault lies with someone in the product's manufacture or chain of distribution.

The courts' purpose for imposing products liability is to place the risk of loss on the party best able to bear it, to disperse the loss among society through the sale of goods, *see* Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 *passim* (1965); *see also* PROSSER § 75; Charmichael, *Strict Liability in Tort — An Explosion in Products Liability Law*, 20 DRAKE L. REV. 528, 539 n.72 (1971); Frauen, *Submission of a Strict Products Case (A Defense Lawyers View)*, 20 FED. INS. COUNSEL Q. 22 (1970); Lascher, *Strict Liability in Tort For Defective Products: The Road to and Past Vandermark*, 38 S. CAL. L. REV. 30, 47-48 (1965), and to reduce injury through enhanced safety. By imposing greater liability on the seller, manufacturers will produce safer products to reduce the chances of a lawsuit and avoid the costs and complexities of modern litigation. *See* Vetri, *Products Liability: The Developing Framework For Analysis*, 54 ORE. L. REV. 293, 299 n.35 (1975) (a discussion of an empirical study concerning the persuasiveness of the enhanced safety argument). *Compare* Price v. Shell Oil Co., 2 Cal. 3d 245, 251, 466 P.2d 722, 725-26, 85 Cal. Rptr. 178, 181-82 (1970) ("[e]ssentially the paramount policy to be promoted by the rule is the protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society the cost of compensating them") *with* RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1965) [hereinafter referred to as RESTATEMENT § 402A] ("public policy demands that the burden of accidental injuries caused by products intended for consumption be placed on those who market them, and be treated as a cost of production against which liability insurance can be obtained").

8. 76 Cal. App. 3d at 18, 142 Cal. Rptr. at 613. The Shepard family was traveling home from vacation when another driver lost control of his automobile and struck the left side of the Shepard car. Because of the defective latch, the rear door came open allowing the children to fall out onto the highway. As the parents turned to look, they observed the other automobile strike and kill one of the children. *Id.* at 18-19, 142 Cal. Rptr. at 613-14.

9. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). *See* note 5 *supra*.

10. 76 Cal. App. 3d at 18, 142 Cal. Rptr. at 613.

mandate compelling the trial court to vacate its order.[11] Despite Justice Kane's lengthy dissent, a California Court of Appeals[12] granted the writ, reasoning that *Dillon* did not involve a products liability issue and therefore was not dispositive of the plaintiffs' complaint.[13] The majority in *Shepard*, however, did not find *Dillon* totally inapposite. Rather, the court relied heavily on *Dillon*'s reasoning in allowing witnesses to recover damages in strict liability for mentally induced physical injury.

Prior to *Dillon*,[14] courts allowed damages for emotional harm in negligence only upon proof of actual or threatened physical impact.[15] *Dillon* abrogated the qualifications on the rule and allowed recovery even though the witness was not physically threatened by the tortfeasor's negligence. The *Dillon* court, although noting the difficulty in fixing limits on this recovery,[16] indicated that this difficulty did not justify the denial of recovery in all cases, and defined guidelines to govern the extent of future liability. The *Dillon* guidelines are factors for courts to consider on a case-by-case basis in ascertaining whether a defendant reasonably should foresee injury to the plaintiff, and whether the

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11. *Id.*

12. California Court of Appeal, First District, Division Two.

13. 76 Cal. App. 3d at 21, 142 Cal. Rptr. at 614.

14. *Dillon* embodies the original notion of negligent infliction of emotional harm. *See* note 5 *supra*.

15. Courts are reluctant to grant an interest in mental tranquility independent legal protection. *See, e.g.*, Taylor v. Spokane, P. & S. Ry., 72 Wash. 387, 130 P. 506 (1913). *See generally* C. McCormick, Handbook on the Law of Damages § 88 (1935); Prosser § 12. Reasons for this reluctance include problems of proof and measurement of damages. *See id.* § 12 n.28. Reluctant to impose liability for mental distress, courts resorted to legal fictions such as an "impact rule" and "zone of danger" test to narrow and minimize potential law suits. The impact rule limited recovery to situations where a direct physical impact occurred. *See, e.g.*, Spade v. Lynn & B. R.R., 168 Mass. 285, 47 N.E. 88 (1897). The impact seems to afford a greater likelihood of genuine mental disturbance. Once this determination is made, courts will allow damages for the mental suffering as well as physical harm. *See* Goodrich, *Emotional Disturbance as Legal Damage*, 20 Mich. L. Rev. 497, 504 (1922) (when "[t]he magic formula 'impact' is pronounced; the door opens to the full joy of a complete recovery"). Courts, however, have stretched this rule to allow recovery for very minor impacts. Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928) (defendant's horse evacuated his bowels into the plaintiff's lap); Porter v. Delaware, L. & W. R. Co., 73 N.J.L. 405, 63 A. 860 (1906) (dust in eyes satisfied the test); Colla v. Mandella, 1 Wis. 2d 594, 185 N.W.2d 345, 347 (1957) (recognizing that courts "go very far in finding sufficient impact from the most trivial contact"). Because of the impact rule's harshness, many jurisdictions abandoned it in favor of the more liberal zone of danger rule. *See* Prosser § 54. The zone of danger rule imposes a duty of care to persons directly threatened by a defendant's negligence, but does not require any physical impact to allow recovery for mental distress. A few jurisdictions still recognize the zone of danger standard. *See, e.g.*, Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974).

16. 68 Cal. 2d at 739, 441 P.2d at 919, 69 Cal. Rptr. at 79.

defendant owes plaintiff a duty of due care.[17] Accordingly, the *Dillon* guidelines intertwine foreseeability and duty by requiring: (1) close proximity of the plaintiff to the accident; (2) emotional impact of direct observation; and (3) a close relationship between the plaintiff and victim.[18] *Dillon* also imposed a requirement of physical harm as a prerequisite to the action: a plaintiff could maintain an action only when the emotional shock resulted in physical injury.[19] These guidelines and the physical harm requirement thus limit the defendant's "otherwise potentially infinite liability."[20]

One significant issue in *Shepard* was whether *Dillon*, including its guidelines and restrictions, should apply in a products liability action where fault is not an element of proof.[21] Fundamental to this issue is whether the policy reasons underlying strict products liability should apply equally for physical harm caused by mental distress and for physical harm caused by direct force. To answer this question the *Shepard* court ascertained the existing limitations on the type of injury compensable in products liability as defined in Restatement (Second) of Torts, Section

17. *Id.* at 740, 441 P.2d at 921, 69 Cal. Rptr. at 80.

18. *Id.* at 738, 441 P.2d at 920, 69 Cal. Rptr. at 80. "[N]o immutable rule can establish the extent of that obligation for every circumstance of the future. We can, however, define guidelines which will aid in the resolution of such an issue as the instant one." *Id. Dillon* indicated that courts will evaluate these factors in deciding whether the accident and injury are reasonably foreseeable. This reasonableness standard, however, is not limited to *Dillon*'s guidelines alone. Rather, the *Dillon* court maintained that in future cases courts will establish limits based upon facts less clear than the prima facie facts in *Dillon*. *Id.* at 740, 441 P.2d at 921, 69 Cal. Rptr. at 80.

19. *Id.* at 738, 441 P.2d at 920, 69 Cal. Rptr. at 80.

20. *Id.* at 739, 441 P.2d at 919, 69 Cal. Rptr. at 79. *Shepard* adopts these restrictions for the same reason. 76 Cal. App. 3d at 19, 142 Cal. Rptr. at 614.

21. Previously, products liability theory did not include recovery for the mental distress of third parties. The *Shepard* dissent advanced one reason for denying such an extension based upon RESTATEMENT § 402A, *see* note 22 *infra*. *See also* Woodill v. Parke Davis, 58 Ill. App. 3d 349, 374 N.E.2d 683 (1978). The language of § 402A limits its impact to sellers' liability for "physical harm" to users or consumers. The drafters entitled this section: "Special Liability of Seller of Product for Physical Harm to User or Consumer." Neither this section, nor the drafters' comments, explain what constitutes physical harm. The *Shepard* dissent argues that the limitation of "physical harm" excludes mentally induced physical injury. 76 Cal. App. at 21, 22, 142 Cal. Rptr. at 616. This argument, however, fails for two reasons. First, although the reasoning may be valid in a case of mental distress to the user himself, courts should not apply the reasoning to third persons because a caveat to § 402A explicitly states that "the Institute expresses no opinion as to whether the rule stated . . . may not apply . . . to harm to persons other than users or consumers." RESTATEMENT § 402A, Caveats. Second, § 402A incorporated the requirement of physical harm to exclude economic or pecuniary harm, rather than mental injury. *See generally* Trans World Airlines, Inc. v. Curtiss Wright Corp., 1 Misc. 2d 447, 148 N.Y.S.2d 284 (Sup. Ct. 1955); PROSSER § 101.

402A.[22] A strict reading of the Restatement, however, does not conclusively establish the limits of compensable injury. Thus, to clarify the scope of the Restatement's language,[23] the majority reviewed past California products liability cases[24] and determined that precedent allowed extensions beyond the Restatement's lit-

22. RESTATEMENT § 402A: Special Liability of Seller of Products for Physical Harm to User or Consumer.

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
  (a) the seller is engaged in selling such a product, and
  (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in subsection (1) applies although
  (a) the seller has exercised all possible care in the preparation and sale of his product, and
  (b) the user or consumer has not bought the products from or entered into any contractual relation with the seller.

23. The California Supreme Court previously held that a plaintiff in products liability could seek recovery under both strict liability and negligence theories for physical injuries. Jiminez v. Sears, Roebuck & Co., 4 Cal. 3d 379, 482 P.2d 681, 93 Cal. Rptr. 769 (1971). The *Shepard* majority saw "no logical reason why the same rule of multiple theories of recovery should not be extended to those who suffer *physical injuries* indirectly as a result of emotional shock, as contended in this case." 76 Cal. App. 3d at 20-21, 142 Cal. Rptr. at 615.

24. The California Supreme Court first imposed tort liability on manufacturers of defective products in Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 67, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). There, the court noted that to establish a manufacturer's liability a plaintiff need only prove correct product usage and a product defect causing injury. *Greenman* reasoned that manufacturers, rather than unwary customers, should bear the costs of defect related injuries. *Id.* at 74, 377 P.2d at 901, 27 Cal. Rptr. at 701. The court expanded *Greenman* to impose liability on retail dealers in Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964). *Vandermark* was the first judicial extension beyond *Greenman* and indicates courts' early willingness to expand products liability. *Vandermark* indicated that strict liability on the manufacturer and retailer affords maximum protection to the plaintiff and works no injustice because manufacturers and dealers can adjust the costs of injury among themselves (presumably through obtaining insurance). 61 Cal. 2d at 662-63, 391 P.2d at 172, 37 Cal. Rptr. at 900.

California cases have expanded products liability by imposing strict liability upon wholesale and retail distributors, Barth v. B.F. Goodrich Tire Co., 65 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968), home builders, Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969), bailors and lessors of personal property, McClaflin v. Bayshore Equip. Rental Co., 274 Cal. App. 2d 446, 79 Cal. Rptr. 337 (1969), and licensors of chattels, Garcia v. Halsett, 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970). Strict liability applies to defects in design as well as manufacture. Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970). Furthermore, strict products liability extends recovery to bystanders injured when a defective product causes an accident. Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969); Johnson v. Standard Brands Paint Co., 274 Cal. App. 2d 331, 79 Cal. Rptr. 194 (1969). These cases indicate a trend in California to broaden the scope of liability to cover all reasonably foreseeable plaintiffs when recovery is consistent with the purposes of loss-distribution, injury reduction, and enhanced safety. *See* note 7 *supra*.

eral language when shown to be consistent with the policies and purposes underlying strict products liability.[25]

The majority implied that extending recovery for mentally induced physical injury accorded with the policies and purposes for imposing strict products liability—policies and purposes articulated as early as 1944 by California's Justice Traynor.[26] Justice Traynor recognized that persons suffering injury from defective products may not be prepared to meet the costs of injury and the resulting loss of time and health.[27] He viewed these burdens as needless misfortunes because manufacturers could insure against the risk of injury and distribute the loss among the public as a cost of doing business.[28] Justice Traynor realized that in balancing the responsibility of injury and the policy of preventing injurious accidents, "the manufacturer is best situated to afford such protection."[29]

Accordingly, the *Shepard* majority equated the defendant's duty to avoid infliction of mental distress to the plaintiff in strict products liability to the defendant's duty to the plaintiff that *Dillon* applied in negligence.[30] The majority indicated the plaintiffs' allegations, if true, established plaintiffs' right to recover under a negligence theory.[31] Because the duty owed to a plaintiff in strict liability is the same as the duty owed in negligence, these

25. "[T]he purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than the injured persons who are powerless to protect themselves." Greenman v. Yuba Power Products, Inc., 59 Cal. 2d at 74, 377 P.2d at 901, 27 Cal. Rptr. at 701. *See also* notes 26-29 *infra* and accompanying text. The *Shepard* majority stated "[o]ur conclusion is in consonance with the stated purpose of the courts in adopting the doctrine of strict liability." 76 Cal. App. 3d at 21, 142 Cal. Rptr. at 615.

26. Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. 2d 453, 458, 150 P.2d 436, 440 (1944) (concurring opinion). Even in the absence of negligence, "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." *Id.*

27. *Id.* at 459, 150 P.2d at 441.

28. *Id.* Justice Traynor maintained that discouraging defective products serves the public interest; but if these products nevertheless reach the market, the public interest is in shifting the responsibility for *whatever injury they may casue* to the manufacturer responsible for them reaching the market. Such a general and constant risk requires public protection. *Id.*

29. *Id.*

30. *Shepard* uses the limiting factors from Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), in determining whether the defendant owes a duty to avoid infliction of mental distress. According to the majority, by alleging the presence of these factors in the complaint, a sufficient cause of action is stated. 76 Cal. App. 3d at 21, 142 Cal. Rptr. at 615.

31. *Id.* at 20, 142 Cal. Rptr. at 614.

allegations also should establish a prima facie case in products liability.[32]

The majority also indicated that although *Dillon* did not preclude extending products liability for mental distress, the *Dillon* restrictions were applicable.[33] In so holding, the majority rejected the dissent's contention that *Dillon* limits recovery to negligence cases where fault is the foundation for the duty imposed.[34] The majority held that the injuries complained of in *Shepard* were equally foreseeable consequences of defective design or manufacture, or of negligent driving,[35] and that the manufacturer of the defective product should be liable for those consequences. Accordingly, to permit recovery against the manufacturer responsible for the injury is consistent with both *Dillon* and Justice Traynor's policy reasons for imposing strict products liability.[36]

Although the *Shepard* majority implied that foreseeability is a question for the trier of fact, Justice Kane in his dissent argued that foreseeability is a question of law.[37] Arguing against acknowledging the plaintiffs' cause of action, Justice Kane viewed the crucial policy question as whether the manufacturer's limited duty should include liability for mental, as opposed to physical trauma.[38] Justice Kane proposed several factors useful in evaluating a manufacturer's liability and duty of care to third persons. Those factors are:

> [T]he extent to which the transaction was intended to affect the plaintiff; the foreseeability of harm to him; the degree of certainty that the plaintiff suffered injury; the closeness of the connection between the defendant's conduct and the injury suffered; the moral blame attached to the defendant's conduct; the

32. For the action to lie in strict liability, however, the court had to conclude that *Dillon* would not exclude liability for mental distress if the action were brought in products liability. Although the majority indicated that *Dillon* did not limit the extension of products liability to include mental distress, they did indicate that the limits *Dillon* imposed on recovery applied equally to negligence, strict liability, and warranty cases. *Id.* at 21, 142 Cal. Rptr. at 615.

33. *Id.* at 20, 142 Cal. Rptr. at 614.

34. *Id.*

35. *Id.* at 21, 142 Cal. Rptr. at 615.

36. "To permit recovery against the negligent driver and except the manufacturer responsible for the defective condition contributing to the injuries," stated the majority, "would deny common sense and be inconsistent with the realities of modern society." *Id.*

37. Justice Kane concluded that ascertaining the duty to avoid injury to the plaintiff is a question of law. *Id.* at 23, 142 Cal. Rptr. at 616. He then reasoned that the same policy factors are applicable to foreseeability and duty. Consequently, foreseeability was also determined as a matter of law. *Id.* at 23-30, 142 Cal. Rptr. at 616-21.

38. *Id.* at 23, 142 Cal. Rptr. at 616.

> extent of the burden to the defendant and the consequences to the community of imposing a duty with resulting liability for breach; and the availability, cost and prevalence of insurance for the risk involved . . . .[39]

Justice Kane analyzed these factors as individual policy arguments to defeat arguments in favor of finding a manufacturer's duty to prevent infliction of mental distress, and thus to deny recovery, in strict liability, for injuries caused by mental trauma. Justice Kane first attempted to show that, from a policy standpoint, no intent to protect witnesses existed within the transaction.[40] Courts, however, long have eliminated privity as a criterion for imposing strict liability; the policy reasons behind eliminating privity requirements[41] should not be discounted merely because the plaintiffs were physically injured by witnessing an accident rather than by direct force. Further, the factors concerning certainty of injury and causation, contrary to Justice Kane's contention, are questions of fact for a jury. Because *Dillon*'s guidelines adequately provide a vehicle for jury determination of causation and certainty of injury, a court's only difficulties in allowing the fact-finder to decide these factors are administrative.[42] Justice Kane presented no compelling policy argument against the *Dillon* view that "administrative difficulties do not justify the denial of relief for serious invasions of mental and emotional tranquility . . . ."[43]

The dissent also incorrectly interjected fault into its choice of applicable factors. Inquiry into moral blame proves inappropriate and ineffective in a products liability case because judicial policy favors spreading the losses of injury regardless of blameworthiness, fault, or intent.[44] Because Justice Kane believed this should not be a products liability case, he would have applied this fault related argument to deny the cause of action. His moral blame argument suggested that physical injuries caused by emotional trauma are more speculative and conjectural than those caused by direct impact.[45] Justice Kane felt that because of the speculative nature of the injury, fault should govern the issue of

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39. *Id.* at 23, 142 Cal. Rptr. at 616-17.

40. *Id.* at 24, 142 Cal. Rptr. at 617.

41. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

42. Further, experiments have proven that emotional shock can cause physical injury. *See* note 50 *infra.*

43. *See* 68 Cal. 2d at 743, 441 P.2d at 922, 69 Cal. Rptr. at 82 (quoting State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952)).

44. *See* note 7 *supra.*

45. 76 Cal. App. 3d at 25-26, 142 Cal. Rptr. at 618.

a manufacturer's liability. He felt the inherent dangers of imposing strict liability should be mitigated when the claim of injury had a greater probability of abuse, and fault is the proper basis for balancing speculative injury against a genuine need for recovery.[46]

To justify applying fault, Justice Kane relied upon a passage from *Dillon* which stated that "[t]he basis for such claims must be the adjudicated liability and fault of defendant; that liability and fault must be the foundation for the tort-feasor's duty of due care to third parties who, as a consequence of such negligence, sustain emotional trauma."[47] Justice Kane maintained that *Dillon,* through the quoted passage, explicitly required fault as an indispensable element of duty to the plaintiff in a mental distress action. The *Dillon* passage, however, refers only to the limitation that a third person suffering emotional harm after witnessing an accident could not recover unless the tortfeasor, rather than the victim, was the primary cause of the accident.[48] This meant only that the victim's contributory negligence defeats the witness' claim. Accordingly, the mother in *Dillon* who witnessed the tortfeasor's car strike her child could recover because the driver was at fault rather than the child.[49]

Furthermore, although fault may have been the foundation for the *Dillon* holding, fault is the foundation in almost every negligence action. Fault is a factor useful at trial in negligence to weigh the rights and liabilities of the parties, but for an appellate court, determining whether a class of injury can be redressed as a matter of law, fault is an inappropriate criterion. The issue is whether physical injuries caused indirectly through emotional harm are as equally compensable as physical injuries caused through direct forces. Merely because the *Dillon* court recognized mental distress in negligence should not preclude its recognition in other types of actions. Fault has no basis in strict liability where the emphasis is upon loss-distribution, risk-spreading, and

46. *Id.* at 26, 142 Cal. Rptr. at 618.

47. *Id.* (citing Dillon v. Legg, 68 Cal. 2d 728, 733, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968)).

48. As the court in *Dillon* stated, immediately preceding the statement quoted by the dissent, "[i]n the absence of primary liability of the tortfeasor for the death of the child, we see no ground for an independent and secondary liability for claims for injuries by third parties." 68 Cal. 2d at 733, 441 P.2d at 916, 69 Cal. Rptr. at 76. The court made this statement to qualify a question concerning contributory negligence. If contributory negligence exists it relieves liability of the defendant to third persons. *Id.* The dissent read the statement out of context.

49. *Id.*

injury-reduction through enhanced safety, rather than blameworthy conduct.[50] An injury compensable in negligence should not be denied in products liability simply because the basis of liability is different.

Justice Kane's most critical factor in determining liability involves foreseeability of harm to the plaintiff.[51] Although, according to Justice Kane, foreseeability embraces both policy and social considerations, he offers no explanation as to why this is true.[52] Justice Kane contends that the criteria used in determining foreseeability are similar to those used in determining the duty to the plaintiff. Those criteria, however, are inapplicable in determining foreseeability in a products liability suit for the same reasons that factors of privity, causation, certainty of injury, and moral blame are inappropriate in the duty determination.[53] Nevertheless, Justice Kane uses those criteria to conclude that foreseeability of the occurrences in *Shepard* are too speculative and that this class of injury is not foreseeable as a matter of law.[54] It is not speculative, however, to foresee children thrown from a car because of a defective rear door latch. Similarly, it is reasonable

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50. Even the dissent in *Shepard* recognized these factors as the avowed purposes behind strict products liability. 76 Cal. App. 3d at 26-27, 142 Cal. Rptr. at 619. *See* note 7 *supra*.

The question involved herein is whether this class of injury is compensable in a strict liability action. Fault has no bearing on this inquiry. *See* notes 7 & 20 *supra*, and text accompanying notes 26-29 *supra*. The reasoning of the *Shepard* majority is consistent with Justice Traynor's purposes for imposing products liability. The decision illustrates courts' growing awareness of the potential injury from emotional shock. Experiments have proven the interrelationship between the physical organism and strong emotions, and medical science has demonstrated that mental distress, such as fright, will accompany and precede definite and readily observable physical reactions. *See* Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944). *See also* Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497, 499 (1922) where the author states "[i]t is clearly demonstrated that it is impossible to have fear as a purely emotional thing. 'We fear not in our hearts alone, not in our brains alone, not in our viscera alone—fear influences every organ and tissue.' " Smith, *supra*, at 217-20, contains an extensive listing of clinical disorders produced or aggravated by psychic stimuli. Direct physical results of fear can include diabetes, heart attack, and even tooth decay. Goodrich, *supra*, at 503.

Mental distress, therefore, is neither too metaphysical nor so inconsequential as to preclude liability for its physical manifestations. Cases recognizing physical injury traceable to mental distress include: Robb v. Pennsylvania R.R., 58 Del. 454, 210 A.2d 709 (1965); Purcell v. St. Paul City Ry., 48 Minn. 134, 50 N.W. 1034 (1892); Batalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729 (1961); Simone v. Rhode Island Co., 28 R.I. 186, 66 A. 202 (1907); Gulf, C. & S. F. Ry. v. Hayter, 93 Tex. 239, 54 S.W. 944 (1900); H. E. Butt Grocery Co. v. Perez, 408 S.W.2d 576 (Tex. Civ. App. 1966).

51. 76 Cal. App. 3d at 24, 142 Cal. Rptr. at 617.

52. *Id.*

53. *See* notes 40-50 *supra* and accompanying text.

54. 76 Cal. App. 3d at 24, 142 Cal. Rptr. at 617.

to assume the children's parents would be driving the defective automobile and would witness the tragedy.[55] The reasonableness standard to determine foreseeability of injury should be a key factor in a factual determination of liability. Justice Kane, in using policy factors to hold as a matter of law that emotional injuries in products liability are so speculative or bizarre[56] as to completely deny liability, ignores both use of the reasonableness standard and *Dillon*'s requirement of determining foreseeability on a case-by-case basis.[57]

Justice Kane's final argument concerned protection of American economic activity.[58] Examining the effect of strict liability for mental distress on manufacturers, Justice Kane argued for weighing economic realities against the reasons for recovery. Fearing the possibility of infinite liability to the manufacturer, he urged a balancing of the need for an adequate recovery and the survival of viable enterprises.[59] Although the dissent correctly concluded that industry survival is necessary, it should not be a reason to deny liability in all instances. Reduction of injury and death should predominate in a balancing analysis. Moreover, the possibility of infinite liability should not arise because the *Dillon* restrictions delineate the scope of liability and because courts can utilize the reasonableness standard to define limits on duty and foreseeability.[60] Accordingly, because existing theories of law properly limit recovery, the dissent's balancing approach should not weigh in favor of completely denying liability, but rather in favor of a case-by-case determination of the merits of the claim in light of *Dillon* and the reasonableness standard.[61] Only through an

55. The majority had no trouble finding this event foreseeable. *Id.* at 21, 142 Cal. Rptr. at 615. Indeed, many similar hypothetical situations can be foreseen; for example, a mother witnessing the death of a child because of a defective tricycle rolling into the path of a car; the family witnessing the electrocution of the father using a defective power tool.

56. The dissent in *Shepard* stated "it is hardly questionable that the foreseeability of the precise occurrence here is nothing more than mere speculation" and that from a practical viewpoint "it can hardly be said that the manufacturer in actuality envisioned or foresaw this bizarre sequence of events . . . ." 76 Cal. App. 3d at 24, 142 Cal. Rptr. at 617.

57. "[R]easonable foreseeability does not turn on whether the particular defendant as an individual would have actually foreseen the exact accident and loss; it contemplates that courts, on a case-to-case basis, analyzing all circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen." Dillon v. Legg, 68 Cal. 2d at 740, 441 P.2d at 921, 69 Cal. Rptr. at 81.

58. 76 Cal. App. 3d at 28-29, 142 Cal. Rptr. at 620.

59. *Id.* at 29, 142 Cal. Rptr. at 620; *accord,* Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967). *See also* Note, 28 BAYLOR L. REV. 745 (1976).

60. 76 Cal. App. 3d at 21, 142 Cal. Rptr. at 615.

61. *See* note 56 *supra.* Speculation on the effects of liability to manufacturers should

analysis of the facts in an individual case can a determination of foreseeability and the goals of fairness, judicial temperance, and evenhandedness truly prevail.[62]

Contrary to the dissent's prediction, *Shepard*'s extension of products liability to include liability for mental distress will neither lead to a flood of litigation[63] nor to the possibility of infinite liability. Courts recognize mental distress in a negligence suit and avoid ficticious claims through both the *Dillon* restrictions and standards of reasonable foreseeability. Reasonableness standards to gauge objective physical symptoms manifesting mental distress in negligence[64] equally are applicable in a products liability case. Accordingly, courts should allow an action for mental distress in products liability to be heard by a jury and not be denied as a matter of law because of unfounded fears.

Justice Traynor's policy reasons for imposing strict products liability apply equally to indirect and direct physical injuries. Justice Traynor would place the responsibility on the manufacturer for whatever injury his defective product may cause.[65] The *Shepard* majority impliedly acknowledges Justice Traynor's analysis in allowing plaintiff witnesses to maintain their action for mentally induced physical injuries in products liability. The *Shepard* decision, consequently, furthers the argument that the objective of our court system should not be to reject and limit potential litigation, but to evolve a system to remedy wrongs in a reasonable and just way.[66] By recognizing emotional and physi-

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not affect the limits on this liability because reasonableness standards will sufficiently limit recovery.

62. The guiding principles of "judicial temperance," "even-handedness," and "fairness to all" are proclaimed by the dissent. The dissent indicated that plaintiffs' still have a claim in negligence for mental distress even if recovery in products liability is denied. 76 Cal. App. 3d at 29 n.3, 142 Cal. Rptr. at 620 n.3. Negligence, however, requires proof of fault; courts recognize fault is difficult to prove in products liability. *See* note 5 *supra*.

63. In jurisdictions that have allowed recovery for mental distress, statistics have failed to show any "flood of litigation." *See* Robb v. Pennsylvania R.R., 58 Del. 454, 460, 210 A.2d 709, 714 (1965) (citing Smith, *supra* note 50, at 302); Annot., 64 A.L.R.2d 100, 112 & n.7 (1959).

64. Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976), applied a reasonableness standard to gauge objective physical symptoms of mental distress in negligence.

65. *See* text accompanying note 28 *supra*.

66. In Washington, courts have not faced the precise question addressed in *Shepard*. Washington courts, however, have recognized negligent infliction of emotional harm in Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976), and products liability in Ulmer v. Ford Motor Co., 75 Wash. 2d 522, 452 P.2d 729 (1969). *Hunsley*, unlike the California court in *Dillon*, did not delineate the scope of negligent infliction of mental distress. Rather, the Washington court established the existence of a duty to avoid negligent infliction of emotional harm. *Hunsley* held that to recover a plaintiff must prove this duty

cal harm through mental distress to be as painful and destructive as physical damage caused by direct force, *Shepard* brings this objective closer to reality.

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was breached by demonstrating that the injury was reasonably foreseeable as a result of the defendant's conduct, and that the mental distress would be the reaction of a reasonable man. 87 Wash. 2d at 435-36, 553 P.2d at 1103. Further, the court declined to draw an absolute boundary around the class of persons whose peril may stimulate the mental distress as did *Dillon* by the requirement of proximity. Liability, instead, is left for jury determination within reasonableness standards.

The time is right for Washington courts to follow California's lead and make the extension recognizing mental distress in products liability. The reasonableness standard applied in *Hunsley* is applicable in both negligence and products liability as emphasized by this comment's analysis of *Shepard*.