McGeorge Law Review

Volume 22 | Issue 1 Article 9

1-1-1991

Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.: Negligent Infliction of Emotional Distress Bounces Out of Bounds

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Since the thirteenth century, the law of torts has been concerned with the allocation of losses arising out of human activities.[1] Losses to peace of mind and emotional tranquility, however, have been slow to gain recognition as an independent tort.[2] Facing the fear of fictitious claims and the threat of unlimited liability, courts afforded protection for emotional distress only when accompanied by a separate tort, such as assault, battery, or false imprisonment.[3] Eventually courts recognized genuine emotional distress claims independent of an underlying tort, and in doing so, formulated different models of recovery.

In 1968, California became a forerunner in molding the tort of negligent infliction of emotional distress with the *Dillon v. Legg*[4] decision. In *Dillon*, the California Supreme Court allowed a foreseeable bystander to recover for the emotional distress suffered as a result of negligent conduct directed at a third person.[5] The court defined the defendant's duty in a foreseeability model utilizing three

1. *See generally* W. KEETON, PROSSER AND KEETON ON TORTS §6, at 29 (5th ed. 1984) (indicating that the first procedural writ that emerged in the thirteenth century was the action of trespass, which was available for remedies that were purely tortious in character).

2. *See* Chamberlin v. Chandler, 3 F. Cas. 242 (1823) (No. 2,575) (holding the master of a ship liable for a breach of an implied contract to be polite after he threatened to confine the plaintiff passengers to their cabins). *See also* W. KEETON, *supra* note 1, §12, at 54-55 (noting that *Chamberlin v. Chandler* is the earliest appearance of anything resembling a separate cause of action for mental suffering).

3. *See* W. KEETON, *supra* note 1, §12, at 56-57.

4. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

5. *See id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 81.

factors to determine the plaintiff's proximity to the primary victim.[6] While a majority of jurisdictions have rejected the bystander proximity theory of *Dillon* for fear of unlimited liability,[7] California courts have required strict adherence to the *Dillon* factors in order to succeed on a negligent infliction of emotional distress cause of action.

In 1980, the California Supreme Court created a second cause of action for the negligent infliction of emotional distress. The court's decision in *Molien v. Kaiser Foundation Hospitals*[8] characterized the plaintiff as a "direct victim" of the defendant's negligent act, notwithstanding the fact that the conduct involved a third person and the plaintiff did not meet the *Dillon* factors of foreseeability.[9] The court distinguished *Dillon* and treated the two cases as defining two separate causes of action.[10] Prior to *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*,[11] California courts were unwilling to allow recovery in cases factually dissimilar to *Dillon* or *Molien*.[12]

In the recent decision of *Marlene F.*, the California Supreme Court afforded relief for the emotional distress suffered by a plaintiff whose child was sexually molested by a psychotherapist.[13] The plaintiff, who was neither a "proximate bystander" under the *Dillon* approach nor a "direct victim" under the *Molien* approach, received recognition for the breach of a limited duty owed to her arising out of the professional relationship.[14]

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6. *Id.*

7. *See* Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969) (predicting that the *Dillon* factors could not withstand a case-by-case analysis and that *Dillon* would leave California without the means to limit the scope of liability in the bystander witness cases).

8. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

9. *Id.* at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834.

10. *Id.*

11. 48 Cal. 3d 583, 770 P.2d 278, 257 Cal. Rptr. 98 (1989).

12. *See, e.g.*, Thing v. LaChusa, 48 Cal. 3d 644, 668, 771 P.2d 814, 829-30, 257 Cal. Rptr. 865, 880-81 (1989) (denying recovery to a mother who, because she appeared on the scene moments after her son was run over by a truck driven by the defendant, did not meet the *Dillon* guidelines of proximity); Holiday v. Jones, 215 Cal. App. 3d 102, 111-12, 264 Cal. Rptr. 448, 453 (1989) (denying relief for emotional distress claimed by children who witnessed their father incarcerated for murder on the grounds that they could not be considered direct victims under *Molien* standards); Hoyem v. Manhattan Beach City School Dist., 22 Cal. 3d 508, 522, 585 P.2d 851, 859, 150 Cal. Rptr. 1, 9 (1978) (denying recovery for emotional distress suffered by the plaintiff mother, who came to see her son in the hospital after a motorcycle accident, for not satisfying the *Dillon* guidelines of proximity to the accident).

13. Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., 48 Cal. 3d 583, 770 P.2d 278, 257 Cal. Rptr. 98 (1989).

14. *Id.* at 590, 770 P.2d at 282, 257 Cal. Rptr. at 102.

This Note examines the approach used by the California Supreme Court in deciding that the negligent conduct of the defendant psychotherapist in *Marlene F.* created a right of recovery by the plaintiff mother. Part I discusses the evolution of the emotional distress torts and the policy considerations contemplated in the recognition of the torts as separate causes of action.[15] Part II will summarize the facts of *Marlene F.* and review the majority and concurring opinions set forth in that decision.[16] Part III of this Note will discuss the possible legal ramifications that the court's decision in *Marlene F.* will have on future claims of negligent infliction of emotional distress.[17]

I. Legal Background

The emotional distress torts are currently in a dynamic state of development.[18] A little over sixty years ago our legal system did not redress emotional distress injuries, which courts labeled as simple annoyances and trivialities of life.[19] Fearing fictitious and limitless claims, courts were reluctant to afford tort protection for the infliction of emotional distress without an accompanying physical harm.[20] The underlying tort served as a peg upon which the "parasitic damages" for mental distress could be awarded.[21]

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15. *See infra* notes 18-132 and accompanying text.
16. *See infra* notes 133-164 and accompanying text.
17. *See infra* notes 165-199 and accompanying text.
18. *See generally* W. Keeton, *supra* note 1, § 12, at 54-56 (observing the modern trends taking place in the development of the emotional distress torts); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033 (1936) (commenting on the future development of the emotional distress torts).
19. *See* Mitchell v. Rochester Railway Co., 151 N.Y. 107, 45 N.E. 354, 354 (1896) (denying recovery for injuries occasioned by fright when no immediate personal injury resulted from a horse carriage stopping just short of the plaintiff); Spade v. Lynn & B. Ry. Co., 168 Mass. 285, 288, 47 N.E. 88, 89 (1897) (denying recovery for fright, terror, alarm, anxiety or distress of mind if unaccompanied by some physical injury). *See also* Magruder, *supra* note 18, at 1035 (suggesting that, as against a large part of the frictions incident to community life, a certain toughening of the mental hide was better protection than the law could ever be).
20. *See* Trogden v. Terry, 172 N.C. 540, 90 S.E. 583, 585 (1916) (awarding compensatory damages for the humiliation and mental suffering, which resulted from a physical assault on the plaintiff in a hotel dining room, when the defendant forced him to sign a note against his will); Draper v. Baker, 61 Wis. 450, 21 N.W. 527, 528-30 (1884) (allowing recovery for the emotional distress accompanying an action for battery when the defendant spit in the plaintiff's face); Glasden General Hospital v. Hamilton, 212 Ala. 531, 103 So. 553, 554 (1925) (holding damages are recoverable for nightmares suffered after the plaintiff's tortious detention in the hospital for failure to pay her bill); Anthony v. Norton, 60 Kan. 341, 56 P. 529, 530 (1899) (compensatory damages awarded for general family mortification and distress for the seduction of their daughter).
21. *See* 1 Street, Foundations of Legal Liability 460-70 (1906) (commenting that treating any element of damages as parasitic was transitory in nature, and suggesting that tomorrow such damages will be recognized as an independent basis of liability).

Gradually, courts formulated models of recovery which protected against fictitious and limitless claims, and the individual torts of infliction of emotional distress emerged.[22] Courts established the torts of intentional and negligent infliction of emotional distress, and within each of these torts, a further classification was made which recognized both mental distress inflicted directly upon a plaintiff and mental distress resulting from conduct directed at a third person. A closer look at the development of the emotional distress torts generally, and the latter classification in particular, will provide a basis for understanding the legal ramifications of the California Supreme Court's recent decision in *Marlene F.*

A. Policy Considerations for the Nonrecognition of Emotional Distress Torts

Early common law did not recognize emotional distress as the basis of liability in tort.[23] Initially, this reluctance stemmed from the belief that emotional distress was too subtle and speculative to be capable of measurement.[24] Furthermore, if courts did afford such protection to peace of mind, it was believed that the judicial system and society would be burdened with imaginary and trivial claims.[25] With modern advances in psychology, the difficulties with setting

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22. *Compare* Battalla v. State, 10 N.Y.2d 237, 241, 176 N.E. 2d 729, 731-32 (1969) (not requiring physical injury or impact be shown in order to afford recovery) *and* Rodrigues v. State, 52 Haw. 156, 472 P.2d 509, 520 (1970) (Hawaii Supreme Court decision dropping the presence requirement for emotional distress, but adopting a reasonable person standard) *and* Crisci v. Security Ins. Co., 66 Cal. 2d. 425, 433-34, 426 P.2d 173, 179, 58 Cal. Rptr. 13, 19 (1967) (Supreme Court of California rejecting the physical injury or impact requirement, but requiring a showing of substantial damage) *with* Porter v. Delaware L. & W. Ry. Co., 73 N.J. 405, 63 A. 860, 860 (1906) (Supreme Court of New Jersey decision requiring that impact be shown, but holding that dust in the eyes qualified as a physical impact).

23. *See generally* Victorian Ry. Comm'n v. Coultras, 13 App. Cas. 222 (P.C. 1888) (denying relief for the plaintiff's fright suffered from a near miss of a passing train when defendant caused plaintiff's car to become stuck in a railroad level crossing); Lynch v. Knight, 11 Eng. Rep. 854 (1861) (denying recovery for mere fright when a run-away horse carriage stopped inches away from the plaintiff's face); W. KEETON, *supra* note 1, § 12 at 54-55; Magruder, *supra* note 18, at 1035.

24. Lynch v. Knight, 11 Eng. Rep. 854, 863 (1861) (announced that the law cannot value mental pain or anxiety standing alone). *See generally* Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40 (1956) (tracing the developments in the emotional distress torts and the damages associated with them).

25. *See* Victorian Ry. Comm'n v. Coultras, 13 App. Cas. 222, 226. *See generally* F. HARPER & F. JAMES, THE LAW OF TORTS § 18.4, at 1032 (1956); W. KEETON, *supra* note 1, §54, at 329.

damages and preventing so-called trivial claims have been largely rejected as antiquated concepts.[26]

In addition to the early difficulties of setting damages and preventing trivial claims, the common law was also concerned with discouraging fraudulent claims and limiting the defendant's liability.[27] Courts reasoned that allowing recovery for emotional distress would result in a flood of litigation in which the injury could easily be feigned.[28] Moreover, these courts reasoned, plaintiffs would allege mental distress no matter how slight the injury.[29] Barring all claims based on mental distress alone, however, meant that many valid claims would go unredressed.

In more recent decisions, the California Supreme Court has acknowledged that fraudulent assertions of emotional distress are relatively isolated, and that a wholesale rejection of this entire class of claims is not justified.[30] While the court seems willing to accept the risk of fictitious suits, the fear of unlimited liability remains a core concern. Having established legal protection for emotional distress claims standing alone, a line must be drawn beyond which the defendant is not liable, so that the liability of the defendant is not unreasonable. The manner in which that line is drawn has shaped our current understanding of the emotional distress torts.

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26. *See* Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d 917, 933, 122 Cal. Rptr. 470, 481 (1975) (indicating that with the advances of modern psychological techniques, mental trauma can be quantified and qualified just as easily as any physical paralysis). *See also* Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497, 513 (1922) (analogizing emotional distress to other instances of non-pecuniary harm, such as in the case of defamation, which the law already redresses with money damages).

27. *See* W. KEETON, *supra* note 1, § 12, at 56 (indicating that the most cogent objection to the protection of mental interest lies in the wide door which might be opened not only to fictitious claims, but to unlimited litigation in the "field of trivialities"); Comment, *Negligent Infliction of Emotional Distress: New Horizons after* Molien v. Kaiser Foundation Hospitals, 13 PAC. L. J. 179, 182 (1981) (indicating that the considerations of fraudulent claims and unlimited liability remain the strongest policy arguments against recovery for emotional distress claims).

28. Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354, 354 (1896) (denying recovery for a miscarriage caused by the fright occasioned by defendant's negligence in stopping a horse carriage inches from the plaintiff's face). The court announced the common law rule that no recovery can be had for fright and its consequences. *Id.*, 45 N.E. at 355.

29. *Id.*, 45 N.E. at 355.

30. *See, e.g.*, Dillon v. Legg, 68 Cal. 2d 728, 736, 441 P.2d 912, 917-18, 69 Cal. Rptr. 72, 77-78 (1968). *Accord*, Battalla v. State, 10 N.Y.2d 237, 241, 176 N.E.2d 729, 731, 219 N.Y.S.2d 34, 37 (1961) (granting relief to an infant plaintiff for the emotional distress suffered on a ski lift when not properly fastened into the chair; stating that even if a flood of litigation were realized, it is the duty of the courts to settle these disputes, thereby expressly overruling *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 45 N.E. 354 (1896)); W. KEETON, *supra* note 1, §12, at 57; Magruder, *supra* note 18, at 1035.

B. *The First Recognized Mental Disturbance Tort: Intentional Infliction of Emotional Distress*

The earliest form of a separate cause of action for emotional distress appeared in the common carrier context.[31] While ordinary defendants were not liable for what courts termed mere insult and indignity, public utility defendants were deemed to be under a special obligation to the public, and because of this obligation they opened themselves to liability for grossly insulting their patrons.[32] Once the law began to move in this direction, however, courts were forced to address concerns about fictitious claims and vexatious suits, which had previously served to bar the existence of an independent tort for mental distress.[33] Because of the emphasis placed on these two policy considerations, courts agreed that ordinary defendants would not be held liable for mere insult, indignity, or annoyances.[34]

In special situations of extreme misconduct by an ordinary defendant, however, courts allowed recovery. Courts were willing to afford relief under the rationale that the gravity of the offense assured them of the genuineness of the claim.[35] As a result, in 1930 the common law recognized that the intentional infliction of mental distress by extreme and outrageous conduct of any defendant constituted a cause of action in itself.[36]

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31. *See* Chamberlin v. Chandler, 3 F. Cas. 242 (1823) (No. 2,575).

32. *See* Cole v. Atlanta West Point Ry. Co., 102 Ga. 474, 31 S.E. 107, 108 (1897). The court held a railroad liable for its conductor's abusive swearing at a passenger, which caused the passenger humiliation and mortification. *Id.* The court reasoned that harm to a person's feelings is as much actual damage as breaking the person's limbs. *Id. See also* Texas & Pacific Railway Co. v. Jones, 39 S.W. 124, 125 (Tex. Civ. App. 1897) (holding that a potential railroad passenger may recover for mental suffering caused by the defendant's abusive language while the plaintiff was purchasing her ticket); Emmke v. De Silva, 293 F. 17, 20-21 (8th Cir. 1923) (holding an innkeeper liable for mental distress and anxiety accompanying his entrance into plaintiff's room and his accusations of unchastity, spoken in "loathsome terms of vulgarity"). *But cf.* Jenkins v. Kentucky Hotel, Inc., 261 Ky. 419, 87 S.W. 2d 951 (1935) (denying recovery to a plaintiff, who was only in the defendant's hotel lobby and not a patron, after being insulted by a house detective); Wallace v. Shoreham Hotel Corp., 49 A.2d 81 (D.C. 1946) (denying recovery to a plaintiff, who was not a patron but merely a customer in a hotel bar, when he was insulted and embarrassed by a waiter).

33. *See supra* notes 27-30 and accompanying text (discussing the policy considerations of fictitious claims and unlimited liability).

34. *See* W. KEETON, *supra* note 1, § 12, at 59 (commenting on the transition of liability from the common carrier context to that of the ordinary defendant).

35. *See, e.g.*, Wikinson v. Downton, 2 Q.B.D. 57 (Eng. 1897) (holding a practical joker liable for the serious distress caused by telling a women that her husband had been injured in an accident and that she should go to his aid).

36. *See* Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40 (1956) (commenting during the

The seminal California Supreme Court decision describing the independent tort of intentional infliction of emotional distress is *State Rubbish Collector's Association v. Siliznoff*.[37] In *Siliznoff*, the court awarded relief to a defendant suffering emotional distress as a consequence of the plaintiff's extreme and outrageous behavior.[38] The plaintiff, Rubbish Association, brought suit to collect on a promissory note signed by the defendant, Siliznoff.[39] Siliznoff counterclaimed for mental distress damages resulting from the threats the plaintiff used in extracting the note from the defendant.[40] The court concluded that the defendant had signed the note under duress, which the plaintiff was substantially certain would produce fear in the defendant.[41] Hence, it was clear that the rubbish association caused Silzinoff to suffer emotional distress, and liability would therefore attach.[42] The supreme court defined the cause of action as intentionally subjecting another to mental suffering incident to serious threats of physical well-being, whether or not these threats are made under such circumstances as to constitute the separate tort of assault.[43]

Modernly, the tort of intentional infliction of emotional distress has become firmly embedded in California law.[44] In the 1979 decision of *Cervantez v. J.C. Penney Co.*,[45] the California Supreme Court

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development of the Second Restatement of Torts that the time had come to define liability for insult and outrage standing alone); W. KEETON, *supra* note 1, § 12, at 59-61. In recognition of this development, the American Law Institute amended section 46 of the Restatement of Torts in 1947 to provide a cause of action against one who causes severe emotional distress to another. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

37. 38 Cal. 2d 330, 240 P.2d 282 (1952).

38. *Id.* at 335, 240 P.2d at 285.

39. *Id.* at 333-36, 240 P.2d at 283-84.

40. *Id.*

41. *Id.* at 339, 240 P.2d at 286.

42. *Id.*

43. *Id.* at 336, 240 P.2d at 284-85.

44. *See, e.g.*, Alcorn v. Anbro Eng'g, Inc., 2 Cal. 3d 493, 496-98, 86 Cal. Rptr. 88, 89-91, 468 P.2d 216, 217-19 (1970) (awarding damages for intentional infliction of emotional distress to an African-American employee who was verbally assaulted as to his conduct on the job, as well as his race); Vargas V. Ruggiero, 197 Cal. App. 2d 709, 717-18, 17 Cal. Rptr. 568, 569-78 (1961) (allowing plaintiff recovery for the severe shock and subsequent miscarriage resulting from the defendant driving onto the plaintiff's yard, entering her house, and threatening to harm her); Richardson v. Pridmore, 97 Cal. App. 2d. 124, 130, 217 P.2d 113, 117-18 (1950) (plaintiff was awarded damages after being forced out of her apartment and forced to retrieve her own belongings, which caused emotional trauma and a subsequent miscarriage); Bowden v. Speigel, Inc., 96 Cal. App. 2d 793, 794-95, 216 P.2d 571, 572-73 (1950) (plaintiff awarded mental distress damages when the defendant company called the plaintiff demanding her presence as some sort of emergency, when in actuality the defendant company simply desired payment of her bill); Emden v. Vitz, 88 Cal. App. 2d 313, 316-19, 198 P.2d 696, 697-700 (1948) (defendant held liable for the illness caused to the plaintiff by re-letting her apartment without notice).

45. 24 Cal. 3d 579, 595 P.2d 975, 156 Cal. Rptr. 198 (1979) (holding that a plaintiff

delineated the elements of the prima facie case, which are: "(1) extreme and outrageous conduct by the defendant with the intention of causing or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct."[46] Moreover, California courts are willing to award damages for emotional distress without any additional requirement of physical injury.[47] Under the California approach, the defendant's extreme and outrageous conduct serves to assure the court of the genuineness of the claim.[48] While the gravity of the defendant's conduct serves to assure the validity of the plaintiff's claim when the conduct is directed at the plaintiff, a different set of assurances are necessary when the plaintiff suffers emotional distress due to conduct not directed toward the plaintiff, but toward a third party.

1. Intentional Infliction of Emotional Distress Resulting From Conduct Directed at a Third Person

When mental distress has been inflicted upon the plaintiff by conduct not directed at the plaintiff himself, a number of problems arise. As with all intentional torts, the plaintiff must prove that the defendant was substantially certain that the plaintiff would be harmed.[49] In most instances of mental distress suffered by a third

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could recover for mental distress because of her abrupt and unwarranted arrest by a plainclothes security guard in the defendant's store).

46. *Id.* at 593, 595 P.2d at 983, 156 Cal. Rptr. at 206.

47. *See, e.g.*, State Rubbish Collector's Assn. v. Siliznoff, 38 Cal. 2d 330, 337-38, 240 P.2d 282, 285-86 (1952) (awarding mental distress damages without any physical pain or suffering); Alcorn v. Anbro Eng'g, Inc., 2 Cal. 3d 493, 498, 468 P.2d 216, 218, 86 Cal. Rptr. 88, 90 (1970) (plaintiff suffered only humiliation and mental anguish from the verbal confrontation by his supervisor); Cornblith v. First Maintenance Supply Co., 268 Cal. App. 2d 564, 565, 74 Cal. Rptr. 216, 217 (1968) (denying mental distress damages to a plaintiff sales person who suffered only humiliation when the defendant conspired with plaintiff's co-workers). *See also* RESTATEMENT (SECOND) OF TORTS § 46 (1965) (rejecting any absolute necessity for physical harm accompanying a mental distress claim).

48. *See generally* W. KEETON, *supra* note 1, § 12, at 61-63 (defining extreme and outrageous conduct as conduct exceeding all bounds usually tolerated by a decent society, which may result from prolonged or repeated hounding, abuse of the defendant's position of trust, or the defendant's knowledge and abuse of the plaintiff's special sensitivities).

49. *See* Garratt v. Dailey, 46 Wash. 2d 197, 279 P.2d 1091, 1094-95 (1955) (a showing that the defendant intended to act was held insufficient to impose liability, but if the defendant knew with substantial certainty that the plaintiff would be harmed, then the defendant would be liable for the intentional tort of battery).

party plaintiff, the intent to harm the plaintiff is difficult to prove.[50] However, when a high degree of probability exists that the plaintiff's mental disturbance is a predictable and logical outcome of the defendant's conduct, courts have been willing to afford relief.[51] Much like the "extreme and outrageous" element required in the two party context, courts have reasoned in the third party context that the intent element may be shown by the defendant's conscious and deliberate disregard of the potential for harm.

The limits on recovery in the third party context have been acknowledged by the American Law Institute (ALI). The ALI's current formulation of these limits appear in section 46(2) of the Restatement of Torts, which limits recovery to two situations: (1) where the mental distress is suffered by a member of the victim's immediate family and that family member is present at the time of the defendant's tortious act;[52] or (2) where the mental distress is suffered by a person present at the time of the defendant's action and the mental distress manifests itself in bodily harm.[53] In both situations, the drafters of the Restatement chose to limit relief exclusively to plain-

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50. *See* Konnitz v. Keller, 52 Ohio App. 265, 3 N.E.2d 694, 697 (1936) (denying recovery to a plaintiff who came upon her murdered sister's body after the defendant assaulted the sister on the plaintiff's property); Renner v. Canfield, 36 Minn. 90, 30 N.W. 435, 436 (1886) (denying recovery because the plaintiff's presence was unknown to the defendant when the defendant shot the plaintiff's dog on the plaintiff's property). One possible way of proving the intent element is with the doctrine of transferred intent, as used in *Talmage v. Smith*, (holding the defendant was held liable for battery when he threw a stick in an attempt to hit one of two other boys on his roof) 101 Mich. 370, 59 N.W. 656, 657 (1894). As commentators have observed, however, the emotional distress cause of action did not originate from the old action of trespass, and thus the doctrine of transferred intent has been interpreted to be inapplicable. *See* W. KEETON, *supra* note 1, § 12, at 65. *See also* Taylor v. Vallelunga, 171 Cal. App. 2d 107, 109, 339 P.2d 910, 911 (1959) (holding that where the plaintiff's presence was unknown to the defendant, no intent to harm could be found and the defendant was not liable for the resulting distress). *But cf.* Lambert v. Brewster, 97 W.Va. 124, 125 S.E. 244 (1924) (holding that a pregnant plaintiff, whose presence was unknown to the defendant, can recover for emotional distress suffered from viewing her father being attacked).

51. *See* Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890) (plaintiff allowed to recover when the defendant inflicted battery upon another in the presence of the pregnant plaintiff, who suffered a miscarriage as a result of the mental disturbance); Rogers v. Williard, 144 Ark. 587, 223 S.W. 15 (1920) (quarrel in presence of pregnant woman led to emotional distress recovery); Jeppsen v. Jensen, 47 Utah 536, 155 P. 429, 430-31 (1916) (holding that a plaintiff could recover for emotional distress damages when the defendant came into her house, pointed a gun at plaintiff's husband, and threatened to kill him); Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E.2d 157 (1961) (holding that the murder of the plaintiff's husband in her presence created liability for the accompanying emotional distress); Young v. Western & Atlantic Ry. Co., 39 Ga. App. 761, 148 S.E. 414 (1929) (holding defendant liable for plaintiff's emotional distress resulting from the defendant's entering of her home and dragging her husband out of bed at gun point).

52. RESTATEMENT (SECOND) OF TORTS § 46(2)(a) (1965).

53. *Id.* §46(2)(b).

tiffs who are present at the time of the defendant's tortious act.

As the comments to the Restatement indicate, the limitation of the presence element grew out of the practical need to guarantee the genuineness of the plaintiff's claim.[54] Furthermore, the comments emphasize that the plaintiff's presence must be known by the defendant before liability can attach.[55] The Restatement, however, is not absolute. In a caveat to section 46, the commentators leave open the possibility of recovery in other situations.[56]

In a 1982 decision, *Delia S. v. Torres*,[57] the Second District Court of Appeals allowed a husband, who was outside the country at the time of the defendant's Act, to recover for the intentional infliction of emotional distress resulting from the rape of his wife by his friend.[58] The court balanced the husband's absence with the profound and extreme emotional consequences which can be reasonably inferred from the rape of one's wife.[59] The court's analysis focused on the plaintiff's relationship to the subject of the act, and held that the effect of the transgression gave rise to a cause of action for intentional infliction of emotional distress.[60] While courts have been slow to dispense with the presence requirement, there have been recent California decisions that place the continuing viability of the requirement in doubt.[61]

C. The Development of the Negligent Infliction of Emotional Distress Tort

The reluctance to redress emotional distress, as previously discussed, is even more pronounced when the defendant's conduct is

54. *Id.* at §46 comment *l* (demonstrating the use of the presence requirement as a limitation on claims in the situation where the number of persons who may suffer emotional distress at the news of an assassination of the president is virtually unlimited).

55. *Id. See, e.g.*, Taylor v. Vallelunga, 171 Cal. App. 2d 107, 109, 339 P.2d 910, 911-12 (1959) (court denied relief to a daughter who witnessed the beating of her father for failure to plead that the defendant knew that the plaintiff was a witness to the battery).

56. RESTATEMENT (SECOND) OF TORTS §46 comment *l*, at 79 (1965).

57. 134 Cal. App. 3d 471, 184 Cal. Rptr. 787 (1982).

58. *Id.* at 483, 184 Cal. Rptr. at 794-95.

59. *Id.* at 484, 184 Cal. Rptr. at 795.

60. *Id.*

61. *See, e.g.*, Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., 48 Cal. 3d 583, 594-95, 770 P.2d 278, 285, 257 Cal. Rptr. 98, 105 (1989) (Arguelles, J., concurring) (interpreting the caveat to section 46 as an invitation to drop the presence requirement); Vescovo v. New Way Enterprises Ltd., 60 Cal. App. 3d 582, 585-88, 130 Cal. Rptr. 86, 87-90 (1976) (holding that a 14 year old daughter, who was not privy to the defendant's act, could recover for the defendant's act of printing of the plaintiff's mother's address in a lewd advertisement, causing 100 persons to enter her property using abusive and threatening language).

merely negligent. In the beginning, the common law courts took the position that imposing liability on a negligent defendant for emotional distress would subject the defendant to unlimited liability for fictitious claims.[62] However, when emotional distress resulted directly from, or manifested itself in, physical injury, the number of actionable claims became limited and many courts felt assured as to the claim's validity. Thus, in some jurisdictions the common law cause of action for the negligent infliction of emotional distress arose, allowing damages when physical impact or injury could be shown to result from the defendant's negligent behavior.[63] However, jurisdictions have been far from uniform in their application of this evolving common law cause of action.[64] In certain exceptional situations, when the circumstances themselves ensure that the emotional distress was not feigned, there has been a tendency to break away from the evolving rule and allow recovery for mental disturbance without impact or injury.[65]

Viewed as a jurisprudential conflict, the impact or injury requirement denied access to a legal remedy for plaintiffs who suffered from genuine emotional distress as a witness of the defendant's conduct.[66] That conflict is a departure from the fundamental principle of justice that for every wrong there is a remedy.[67] In *Crisci v. Security Insurance Co.*,[68] the California Supreme Court expressly rejected the strict application of the common law impact or injury requirement.[69] In *Crisci*, the plaintiff claimed damages for emotional

62. *See* Magruder, *supra* note 18, at 1036. *See also* RESTATEMENT (SECOND) OF TORTS § 436A comment b (1965).

63. *See* W. KEETON, *supra* note 1, § 54, at 362-64; Magruder, *supra* note 18, at 1049.

64. *See, e.g.*, Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931) (allowing the act of fainting after a car collision to satisfy the impact requirement); Kentucky Traction & Term. Co. v. Roman's Guardian, 232 Ky. 285, 23 S.W.2d 272 (1929) (affording relief to a plaintiff only after the showing of a minor burn); Porter v. Delaware L. & W. Ry. Co., 73 N.J. 405, 63 A. 860 (1906) (dust in the eyes qualifying as impact); Morton v. Stock, 122 Ohio St. 115, 170 N.E. 869 (1930) (inhalation of smoke satisfying the impact requirement); Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928) (finding impact where the defendant's horse defacated into the plaintiff's lap).

65. In cases of negligent transmission of telegrams carrying messages of death, courts have been willing to afford recovery for emotional distress. *See* Johnson v. State, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975); Russ v. Western Union Tel. Co., 222 N.C. 504, 23 S.E.2d 681, 683-84 (1943). In cases where the plaintiff has suffered emotional distress resulting from the mishandling of corpses, courts have been willing to afford relief without requiring impact of injury. *See, e.g.*, Chisum v. Behrens, 283 N.W.2d 235 (S.D. 1979).

66. *See* Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d 917, 932-36, 122 Cal. Rptr. 470, 480-83 (1975) (tracking the California case law on the negligent infliction of emotional distress).

67. *See* Crisci v. Security Ins. Co., 66 Cal. 2d 425, 433, 426 P.2d 173, 178, 58 Cal. Rptr. 13, 18 (1967).

68. 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

69. *Id.* at 433-34, 426 P.2d at 179, 58 Cal. Rptr. at 19.

distress associated with the loss of her property and a personal judgment against her which the defendant insurance company was contractually obligated, but refused, to assume.[70] The court reasoned that when an actionable claim has resulted in "substantial damage" apart from emotional distress, the policy considerations supporting the physical impact requirement are greatly reduced.[71] While the significance of this decision is in the court's removal of the impact or injury requirement, the *Crisci* court did not attempt to define the new substantial damage requirement.

In 1975, the substantial damage requirement was clarified in *Jarchow v. Transamerica Title Insurance Co.*[72] In *Jarchow*, the Fourth District Court of Appeals announced that any interference with one's legally protected interests would be sufficient to satisfy the substantial damage requirement.[73] Moreover, the substantial damage need not be compensable, since that would add little to any guarantee of genuineness provided by the substantial damage requirement.[74] In dicta, the *Jarchow* court noted that the California Supreme Court had yet to permit recovery for negligent infliction of emotional distress when mental injury was the only damage, but that endorsement of such action seemed to be the logical end product of the current decisional trend.[75]

Hawaii was the first state to protect the interest in freedom from emotional distress, independent of any physical injury or substantial damage requirement.[76] *Rodrigues v. State*,[77] decided by the Hawaii Supreme Court in 1970, held that a plaintiff was entitled to an independent recovery for emotional harm caused by a defendant's negligence, without having to prove physical impact or substantial damage.[78] It can no longer be said, the court declared, that the advantages gained by courts administering claims of mental distress by using the narrow categories of physical impact or substantial damage

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70. *Id.* at 427-29, 426 P.2d at 175-76, 58 Cal. Rptr. at 15-16.
71. *Id.* at 433-34, 426 P.2d at 179, 58 Cal. Rptr. at 19. Crisci suffered $91,000 in financial injury when the defendant insurer failed to accept a reasonable settlement from plaintiff's tenant. *Id.* The court found this substantial injury justified an accompanying award of $25,000 for emotional distress. *Id. Accord* Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 580, 510 P.2d 1032, 1042, 108 Cal. Rptr. 480, 490 (1973) (awarding the plaintiff emotional distress damages when the defendant insurance company's representative accused the plaintiff of setting fire to his own bar, resulting in substantial economic loss).
72. 48 Cal. App. 3d 917, 122 Cal. Rptr. 470 (1975).
73. *Id.* at 937, 122 Cal. Rptr. at 483-84.
74. *Id.*
75. *Id.* at 937 n.11, 122 Cal. Rptr. at 484 n.11.
76. *See* W. KEETON, *supra* note 1, § 54, at 364.
77. 52 Haw. 156, 472 P.2d 509 (1970).
78. *Id.* at 174, 472 P.2d at 520.

outweigh the accompanying burden placed on the injured plaintiff.[79] Applying general tort principles requiring the defendant to act as a reasonably prudent person toward those who may foreseeably be endangered by the defendant's conduct, the court awarded the plaintiff damages for a breach of the defendant's duty that caused "serious" mental distress to the plaintiff.[80] California would eventually adopt this approach under the direct victim theory, where the plaintiff's emotional distress is a result of the defendant's conduct directed at another.[81]

1. Negligent Infliction of Emotional Distress Resulting From Conduct Directed at a Third Person

It is one thing to say that as to those who are put in peril of physical impact or injury, no impact is required to sustain an action for emotional distress. It is quite another thing to say that those who are out of the field of physical danger should have a protected right to be free from emotional distress occasioned by the peril of others. In the early case of *Waube v. Warrington*,[82] the Wisconsin Supreme Court acknowledged that American law did not protect the right to be free from emotional distress occasioned by harm to third parties.[83] In *Waube*, the plaintiff claimed emotional distress damages as a proximate result of the defendant's negligent driving, which killed the plaintiff's daughter.[84] The court denied recovery at that time, deciding that such an interest is not within the field of legally protected rights.[85]

The Wisconsin Supreme Court recognized that awarding damages to a mere bystander based solely on causation could potentially lead to the imposition of liability against a defendant who did not owe the plaintiff a legally recognizable duty.[86] The court explained that while the plaintiff's emotional distress may have been proximately caused by

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79. *Id.*
80. *Id.* at 174-75, 472 P.2d at 521.
81. *See* Molien v. Kaiser Foundation Hospitals, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). *See also infra* notes 113-128 and accompanying text (delineating the elements of a cause of action under the direct victim theory of *Molien*). Missouri, Ohio, Alabama, Louisiana, and Connecticut are among a handful of courts that have permitted a general negligence cause of action for the infliction of serious emotional distress without regard to physical injury. W. KEETON, *supra* note 1, §54 at 364-65 n. 59.
82. 216 Wis. 603, 258 N.W. 497 (1935).
83. *Id.* at 612, 258 N.W. at 501.
84. *Id.* at 603-04, 258 N.W. at 497.
85. *Id.* at 614-15, 258 N.W. at 501.
86. *Id.* at 612-14, 258 N.W. at 500.

the defendant's negligence,[87] the defendant could not have reasonably anticipated any harm to the plaintiff, and therefore, owed her no duty of care.[88] The court concluded that extending the defendant's duty of care to those who are out of the field of physical danger was both illogical and beyond any social interest.[89] Furthermore, the court reasoned that imposing liability would put an unreasonable burden on society and open the door to fraudulent claims.[90]

The concerns announced in *Waube* are familiar ones. They are part of a re-occurring theme that has hindered the evolution of the emotional distress causes of action from the very beginning.[91] As before, when the genuineness of the claim could be assured by imposing restrictions, courts eventually extended liability. In the third party context, a minority of jurisdictions have done so by simply embracing the physical injury or impact requirement from the two party context, when the defendant has directed his conduct directly at the plaintiff.[92] While awarding emotional distress damages to injured plaintiffs, these jurisdictions deny recovery to a plaintiff witness who was not physically injured by the defendant's negligence.[93] However, a majority of courts recognize that a genuine distress claim can exist in an uninjured bystander situation, and therefore have adopted the zone of danger approach.[94]

In *Amaya v. Home Ice, Fuel & Supply Co.*,[95] the California Supreme Court had adopted the zone of danger standard. The court stated that

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87. *Id.* (citing as incorrectly decided, *Hambrook v. Stokes Brothers*, 1 K.B. 141 (1925), holding the defendant liable for the emotional distress proximately caused the plaintiff, when his truck ran downhill injuring the plaintiff's daughter).

88. *Id.* at 605-06, 258 N.W. at 501 (citing Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99 (1928) (duty of a defendant in a negligence action to a plaintiff is not absolute and shall be limited).

89. *Id.*

90. *Id.*

91. *See supra* notes 23-30 and accompanying text (describing the policy consideration of the past, which barred relief in claims for emotional distress).

92. Ohio, Tennessee, Missouri, Florida, Kentucky, and Georgia have retained the impact rule in this area. Liebson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. FAM. L. 163, 168-72 (1977). *See supra* notes 63-71 and accompanying text (discussing the physical impact or injury requirement).

93. *See, e.g.*, Selfe v. Smith, 397 So. 2d 348, 349-52 (Fla. Dist. Ct. App. 1981) (denying emotional distress damages to a plaintiff passenger in a car collision because the impact rule requires the plaintiff to sustain some physical injury); Carlinville National Bank v. Rhoads, 63 Ill. App. 3d 502, 380 N.E.2d 63 (1978) (widow denied recovery for emotional distress sustained in witnessing the instantaneous death of her husband when struck by the defendant's car in a head-on collision).

94. *See, e.g.*, Delosovic v. City of New York, 143 Misc. 2d 801, 541 N.Y.S.2d 685 (N.Y. Sup. 1989) (allowing plaintiff mother to recover for her emotional distress, having been within the zone of danger when her two sons were struck by a truck while crossing a street).

95. 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

if the plaintiff was within such a close range to the accident that only a "near-miss" situation would avoid physical impact, then a duty of care would be established.[96] While the plaintiff would no longer have to show physical *impact*, the test required proof that the emotional distress caused some physical *injury*.[97] In *Amaya*, the court denied recovery to a physically uninjured mother for emotional distress, when she witnessed a truck run over her seventeen-month-old child.[98] The court concluded that its decision made good sense given the fact that Mrs. Amaya could not have feared for her own safety given her distance from the impact.[99]

One of the criticisms of the zone of danger test is that it often leads to anomalous results by not redressing genuine claims of distress.[100] In an attempt to harmonize genuine claims of mental distress with limited liability for the defendant, the California Supreme Court expressly overruled *Amaya* and developed two diverging theories of recovery, affording relief to innocent plaintiffs located outside of the zone of danger under the bystander proximity theory of *Dillon v. Legg*,[101] or the direct victim theory of *Molien v. Kaiser Foundation Hospitals*.[102]

a. Dillon v. Legg: The Bystander Proximity Theory

In *Dillon v. Legg*, a mother was lawfully crossing the street with her infant and daughter walking in front of her when the defendant, who was driving his car, negligently collided with the infant.[103] The trial court applied the zone of danger test and allowed recovery for the mental distress suffered by the daughter, who was located so close to the infant that she was in fear of her own safety.[104] However, the court denied recovery to the mother, who was just a few feet behind

96. *Id.* at 302-03, 379 P.2d at 517, 29 Cal. Rptr. at 39. *See also* RESTATEMENT (SECOND) OF TORTS § 436 comment f (1965) (embracing the zone of danger standard).

97. *See Amaya*, 59 Cal. 2d at 302-03, 379 P.2d at 517, 29 Cal. Rptr. at 39. *See also* RESTATEMENT (SECOND) OF TORTS § 436A (1965) (embracing the zone of danger approach to the negligent infliction of emotional distress).

98. *Amaya*, 59 Cal. 2d at 298-302, 379 P.2d at 514-16, 29 Cal. Rptr. at 34-36.

99. *Id.* at 304-06, 379 P.2d at 518-19, 29 Cal. Rptr. at 38-39.

100. *See, e.g.*, Dillon v. Legg, 68 Cal. 2d 728, 748, 441 P.2d 912, 925, 69 Cal. Rptr.72, 85 (1968) (overruling *Amaya*, and formulating a new model of recovery).

101. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). *See infra* notes 103-112 and accompanying text (discussing the bystander proximity model delineated in *Dillon*).

102. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). *See infra* notes 113-128 and accompanying text (discussing the direct victim model announced in *Molien*).

103. *Dillon*, 68 Cal. 2d at 731, 441 P.2d at 919, 69 Cal. Rptr. at 71.

104. *Id.*

the infant, explaining that the mother was not in the zone of danger.[105] The appellate court affirmed, but the California Supreme Court reversed, granting the mother relief for the mental distress which resulted in physical injury.[106] The court rejected the zone of danger test as an arbitrary determinant of duty, and appeared to return to the concept of foreseeability as determinative of the defendant's duty.[107]

The *Dillon* court announced that foreseeability would be narrowed by three factors: (1) physical proximity; (2) temporal proximity; and (3) relational proximity.[108] The three factors require a court to look beyond the plaintiff's physical nearness to the accident. For instance, the temporal proximity factor requires the court to examine the manner and time period in which the plaintiff learned of the injury to the primary victim.[109] Moreover, the relational proximity factor was designed as a means by which a court would take into account the likelihood of emotional harm when the victim is a close relative of the plaintiff.[110]

Many states have chosen not to adopt the California approach outlined in *Dillon* for fear of unlimited liability, and have instead adopted various modifications of the *Dillon* approach.[111] However,

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

106. *Id.* at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.

107. *See id.* at 747, 441 P.2d at 924, 69 Cal. Rptr. at 85. *But see* Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1420-24 (1961) (looking for a proper formula for determining liability in negligence cases, Professor Green cautions against the use of the "all purpose" foreseeability formula); Green, *The Wagon Mound No. 2—Foreseeability Revisited*, 1967 UTAH L. REV. 197 (suggesting that foreseeability is being overloaded, and that many foreseeable risks do not fall within the scope of any duty owed to the plaintiff); Adams, *Proximate Cause is Too Remote*, 17 S.D.L. REV. 316 (1972) (dismissing foreseeability as determinative and suggesting five factors better used in deciding the extent of the negligent defendant's obligation; the administrative, ethical or moral, economic, preventative, and judicial).

108. *Dillon*, 68 Cal. 2d at 740-41, 441 P.2d at 924, 69 Cal. Rptr. at 85.

109. *See* Annotation, *Immediacy of Observation of Injury as Affecting Right to Recover Damages for Shock or Mental Anguish from Witnessing Injury to Another*, 5 A.L.R. 4th 833 (Supp. 1989) (distinguishing the California cases satisfying the *Dillon* temporal factor where the plaintiff is present at the scene when the injury occurred as opposed to arriving afterwards).

110. *See* Annotation, *Relationship Between Victim and Plaintiff-Witness as Affecting Right to Recover Damages in Negligence for Shock or Mental Anguish at Witnessing Victim's Injury or Death*, 94 A.L.R. 3d 486 (Supp. 1989) (analyzing those California cases satisfying the *Dillon* relational factor as determined by the relationship between the plaintiff and the third party injured by the defendant's tortious act).

111. *See, e.g.*, D'Ambra v. U.S., 354 F. Supp. 810, 820 (D.R.I. 1973) (Rhode Island adding a fourth factor to the Dillon test—foreseeability of the plaintiff's presence); Leong v. Takasaki, 55 Haw. 398, 403-10, 520 P.2d 758, 763-66 (1974) (Hawaii loosely adopting the Dillon factors and rejecting any physical injury requirement); Tobin v. Grossman, 24 N.Y.2d 609, 618-19, 249 N.E.2d 419, 301 N.Y.S.2d 554, 560-61 (1969) (New York refusing to allow recovery for emotional distress to all percipient plaintiff witnesses); Stadler v. Cross, 295 N.W.2d 552, 554-55 (Minn. 1980) (Minnesota retaining the zone of danger test).

Dillon pointed out that strict compliance with its guidelines would serve to limit liability, while redressing genuine claims.[112] In *Thing v. La-Chusa*,[113] the California Supreme Court demanded strict compliance with the *Dillon* guidelines, and refused to allow even the slightest deviation.[114]

b. Molien v. Kaiser Foundation Hospitals: The Direct Victim Theory

In 1980, the California Supreme Court created a major inroad to the lone theory of bystander witness relief for the negligent infliction of emotional distress created by Dillon. In *Molien v. Kaiser Foundation Hospitals*,[115] the plaintiff was not within the bystander witness classification of the *Dillon* factors, when the plaintiff's wife's physician misdiagnosed the plaintiff's wife as having contracted syphilis.[116] The defendant physician advised the plaintiff's wife to inform her husband of the diagnosis, so that he could come in for the necessary blood tests.[117] Because of the nature of this sexually transmitted disease, Mrs. Molien suspected the plaintiff of extramarital sexual activities, which led to marital discord and eventually divorce proceedings.[118] Mr. Molien brought an action against the hospital and the doctor for negligent infliction of emotional distress.[119] The trial court dismissed on the ground that the action failed to meet the *Dillon* test of foreseeability, and the appellate court affirmed.[120]

The California Supreme Court, however, reversed, holding that Mr. Molien was a direct victim of the defendant's negligence because the

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112. *Dillon*, 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.
113. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).
114. *Id.* at 668-69, 771 P.2d at 829-30, 257 Cal. Rptr. at 881. The court denied recovery to a plaintiff mother who appeared on the scene moments after her son was run over by a truck driven by the defendant. *Id.* The court focused on the undisputed fact that the plaintiff was neither present at the time of the accident, nor was she aware that her son was being injured. *Id. See also* Hoyem v. Manhattan Beach City School Dist., 22 Cal. 3d 508, 522, 585 P.2d 851, 859, 150 Cal. Rptr. 1, 9 (1978) (denying recovery for emotional distress suffered by the plaintiff mother in viewing her 10-year-old child in the hospital on the grounds that she lacked physical proximity to the child when he was struck by a motorcycle); Wynne v. Orcutt Union School Dist., 17 Cal. App. 3d 1108, 1111, 195 Cal. Rptr. 458, 459 (1971) (denying emotional distress damages to a mother, after the defendant negligently informed her son of his fatal disease, because the facts did not fit the mold of *Dillon* foreseeability).
115. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).
116. *Id.* at 919-20, 616 P.2d at 814-15, 167 Cal. Rptr. at 832-33.
117. *Id.*
118. *Id.*
119. *Id.* at 918-21, 616 P.2d at 814-15, 167 Cal. Rptr. at 832-33.
120. *Id.*

defendant either assumed a duty when he told the plaintiff's wife to tell her husband of his diagnosis or had a duty imposed by law to warn the plaintiff of his diagnosis.[121] While Mr. Molien clearly did not satisfy the first two *Dillon* criteria requiring physical and temporal proximity, the court announced that a rote application of such guidelines to a case factually dissimilar to *Dillon* is unwarranted.[122] In this manner, *Dillon* was not overruled, but limited to a case in which the plaintiff seeks recovery for damages sustained as a bystander witnessing the injury of a third person. In cases such as *Molien*, a court is required to analyze all the circumstances on a case by case basis to decide liability.

In *Molien*, the court noted that the significance of *Dillon* was not in its delineation of factors, but rather in its adoption of the general principle of foreseeability.[123] While the *Dillon* court sought to limit the foreseeability principle by applying three factors, the court in *Molien* took no such step. Instead, the *Molien* court reasoned in terms of the probability and predictability that certain negligent conduct would cause emotional distress to the plaintiff.[124] Rationalizing that both Mr. and Mrs. Molien would experience "anticipation" as a result of the defendant's diagnosis, Mr. Molien was characterized as a reasonably foreseeable victim of the defendant's negligence.[125] Therefore, the defendant should have known that his negligence would cause his patient's husband emotional distress.[126]

The negligent examination of Mrs. Molien, and the conduct of directing that her husband be informed, were objectively verifiable actions that served as a measure of the validity of the plaintiff's claim.[127] However, the court also implied, by citing to the case of *Tarasoff v. Regents of University of California*,[128] that even if the doctor did not voluntarily assume a duty by telling the wife to inform her husband, a duty may have been implied by law.[129] In *Tarasoff*, the California Supreme Court had previously established a legally

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121. *Id.* at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.
122. *Id.*
123. *See supra* notes 107-09 and accompanying text (limiting foreseeability with three proximity factors).
124. *Molien*, 27 Cal. 3d at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.
125. *Id.* at 920, 616 P.2d at 815, 167 Cal. Rptr. at 833.
126. *Id. Accord* Marlene F. v. Psychiatric Med. Clinic, 48 Cal. 3d 583, 590 n.5, 770 P.2d 278, 282 n.5, 257 Cal. Rptr. 98, 102 n.5 (1989) (indicating that the liability in *Molien* may have rested on a duty of the defendant imposed by law).
127. *Molien*, 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.
128. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).
129. *Molien*, 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

recognizable duty of a psychologist defendant to warn identifiable third parties of dangers posed by other patients.[130] The supreme court did not identify the basis of the duty in *Molien*, stating only that the plaintiff was a direct victim.[131] Unfortunately, the court did not provide any future guidance as to the application of the direct victim theory in situations factually different from *Molien*.[132]

II. The Case

A. *The Facts*

In 1980, Marlene F., the plaintiff, engaged the services of the Affiliated Psychiatric Medical Clinic (Clinic) to obtain counseling for family emotional problems that existed between her and her son.[133] The Clinic assigned the plaintiff's son to a psychologist, the defendant, who began treating both the plaintiff and her son.[134] After two years of treatment, the plaintiff discovered that her son had been sexually molested by the defendant during individual therapy sessions.[135] The plaintiff confronted the Clinic with this discovery and, although the Clinic subsequently denied any wrongdoing, the Clinic removed the defendant therapist from the case.[136] Consequently, the plaintiff brought suit against the Clinic and the therapist for the negligent infliction of emotional distress, alleging that the molestation caused her serious mental distress.[137]

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130. *Tarasoff*, 17 Cal. 3d at 438-42, 551 P.2d at 345-47, 131 Cal. Rptr. at 25-27.

131. *Molien*, 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

132. Prior to *Marlene F.*, California courts denied recovery unless the parent was a bystander witness to his child's accidental harm. *See, e.g.*, Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977) (expectant father denied recovery for emotional distress when he was asked to leave the delivery room prior to the defendant's negligent act that resulted in a stillbirth); Hair v. County of Monterey, 45 Cal. App. 3d 538, 119 Cal. Rptr. 639 (1975) (denying recovery by parents who only saw the permanent injuries of blindness, brain damage, quadriplegia, and grand mal seizures resulting from defendant's negligent oral surgery); Jansen v. Children's Hospital Medical Center, 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1973) (court refused recovery to a mother who witnessed the slow death of her child when the hospital negligently discharged its obligation to diagnose and treat her daughter).

133. Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., 48 Cal. 3d 583, 585-86, 770 P.2d 278, 279, 257 Cal. Rptr. 98, 99 (1989). Two other mothers who had taken their sons to the Clinic for counseling joined as plaintiffs. *Id.*

134. *Id.* All three children were assigned to the same defendant psychologist. *Id.*

135. *Id.* The other two boys had also been molested. *Id.*

136. *Id.*

137. *Id.* 588, 770 P.2d at 280-81 n.3, 257 Cal. Rptr. at 100-01 n.3. While the mother of

At the trial court level, the defendants successfully demurred to the emotional distress cause of action.[138] On appeal, the court of appeals affirmed on the grounds that the plaintiff had failed to state a claim under either the bystander proximity theory of *Dillon* or the direct victim theory of *Molien*.[139] The California Supreme Court, however, reversed and afforded relief to the plaintiff for emotional distress by expanding the direct victim theory announced in *Molien* to include a parent/child relationship.[140]

B. The Majority Opinion

In an opinion written by Justice Arguelles,[141] the court first discussed the applicability of the bystander proximity theory of *Dillon* to the current case. The majority explained that the *Dillon* approach was only applicable to define a duty of care when the plaintiff sought to recover emotional distress damages suffered as a percipient witness.[142] Because the mother was not a percipient witness of the defendant's conduct, the plaintiff was not allowed recovery under the *Dillon* theory.[143]

The court then discussed the applicability of the direct victim theory of *Molien*. The court recognized that the direct victim theory was not based solely on foreseeability, but rather upon the breach of a duty owed to the plaintiff.[144] Moreover, the court explained that a duty may be either assumed voluntarily, imposed on the defendant as a matter of law, or arise from a relationship between the plaintiff and the defendant.[145]

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the third child did not assert an emotional distress claim for herself, all three mothers brought suit on behalf of their children against the therapist and the Clinic for battery, negligence, and professional malpractice. *Id.*

138. *Id.* at 587, 770 P.2d at 280, 257 Cal. Rptr. at 100.

139. *Id.* The plaintiff did not have any contemporaneous sensory perception, nor physical proximity to the victim when the defendant molested her son, and therefore failed to meet the *Dillon* factors. *Id.* Moreover, the court of appeals did not view the molestation as an act directed at the mothers in such a way that they became reasonably foreseeable victims under the *Molien* approach. *Id. See supra* notes 103-128 and accompanying text (discussing both the *Dillon* and *Molien* models of recovery).

140. *Id.* 590, 770 P.2d at 282, 257 Cal. Rptr. at 102.

141. *Id.* at 585-92, 770 P.2d at 278-83, 257 Cal. Rptr. at 98-103. Justice Arguelles is a retired Associate Justice sitting under assignment by the Chairperson of the Judicial Council. *Id.* The opinion was joined by Justices Mosk, Broussard, and Kaufman. *Id.*

142. *Id.* at 589, 770 P.2d at 281, 257 Cal. Rptr. at 101. *See supra* notes 103-12 and accompanying text (defining the *Dillon* bystander model of recovery).

143. *Marlene F.*, 48 Cal. 3d at 590-91, 770 P.2d at 282, 257 Cal. Rptr. at 102.

144. *Id.* at 590-91, 770 P.2d at 282, 257 Cal. Rptr. 102.

145. *Id.*

In *Marlene F.*, the plaintiff, as well as the child, were patients of the defendant. When the defendant undertook to treat both the plaintiff and her son for the discord between them, a duty to the plaintiff was established by the creation of a therapeutic relationship.[146] Furthermore, counseling was directed not at the plaintiff and son individually, but within the context of the family unit.[147] The court concluded that in these circumstances a professional psychologist should have known that his sexual molestation of the son would cause severe emotional distress to his mother.[148] The court ultimately held that the molestation of the son breached the therapist's duty of care to the plaintiff.[149]

C. Concurrence by Justice Arguelles

In addition to the majority opinion, Justice Arguelles wrote separately to suggest that liability should be imposed for the intentional, as opposed to negligent, infliction of emotional distress.[150] This suggested basis of liability arose from finding that the plaintiff's complaint alleges the essential elements of severe mental disturbance caused by the extreme and outrageous conduct of the therapist, which was undertaken with reckless disregard of causing such distress to the plaintiff.[151] Recognizing that the conduct of the defendant was not directed at the plaintiff, but rather at the son, Justice Arguelles turned to the Restatement's formulation of the intentional infliction of emotional distress tort in the third party context.[152]

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146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 592, 770 P.2d at 283, 257 Cal. Rptr. at 103.
150. *Id.* at 598, 770 P.2d at 288, 257 Cal. Rptr. at 108 (Arguelles, J., concurring). This concurring opinion was joined by Justice Mosk, who wrote the majority opinion in *Molien*. *Id. See* Molien v. Kaiser Foundation Hospitals, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). In California, the court is not limited to the plaintiff's theory of recovery in testing the sufficiency of the complaint against a demurrer; consequently Justice Arguelles articulates a second theory on which the plaintiff may succeed, but which was not as widely accepted as the majority opinion indicates. *See* 4 WITKIN, CAL. PROCEDURE, PLEADING § 367 at 420-21 (3d ed. 1985 & Supp. 1989) (indicating that California has rejected the doctrinal theory of the pleading as incompatible with the long departed notion of holding the plaintiff strictly to the form of action). As a result, courts are not limited to plaintiff's theory of recovery in testing the sufficiency of the complaint against a demurrer, but instead must determine if the factual allegations of the complaint are adequate to state a cause of action under any legal theory. *Id.*
151. *Marlene F.*, 48 Cal. 3d at 598-99, 770 P.2d at 288, 257 Cal. Rptr. at 98 (Arguelles, J., concurring).
152. *Id.*

Justice Arguelles noted that section 46(2) of the Restatement requires that the potential plaintiff be present at the time the defendant encounters the third party, as a means of verifying the authenticity of the plaintiff's claim.[153] Recognizing that the plaintiff in *Marlene F.* was not present at the time of the molestation, Justice Arguelles advocated dropping the presence requirement when, as here, the extreme and outrageous conduct arises from an abuse of a position of authority.[154] Justice Arguelles reasoned that when abuse of such authority arises in a relationship of trust, the outrageousness of the conduct is compounded, and the presence requirement is no longer necessary to limit the universe of potential claimants.[155] In addition, Justice Arguelles reasoned that the therapist's peculiar knowledge of the son and the plaintiff, combined with the very nature of the act of molestation, provided added justification for dropping the presence requirement and affording the plaintiff relief for intentional infliction of emotional distress.[156]

D. Concurrence by Justice Eagleson

Concurring in the judgment, Justice Eagleson wrote separately to express his disagreement with the majority's use of the *Molien* direct victim theory as an independent cause of action.[157] Justice Eagleson stated that in *Molien* there was no professional relationship between the defendant and the plaintiff when the defendant negligently mis-

153. *Id.* at 594-95, 770 P.2d at 285-86, 257 Cal. Rptr. at 95-96 (Arguelles, J., concurring). *See* RESTATEMENT (SECOND) OF TORTS § 46 (2) (1965). *See also supra* notes 52-56 and accompanying text (explaining in detail the Restatement approach to intentional infliction of emotional distress in the third party context).

154. *Marlene F.*, 48 Cal. 3d 596, 770 P.2d at 286, 257 Cal. Rptr. at 106 (Arguelles, J., concurring). The Restatement (Second) of Torts indicates that there may be circumstances when presence at the encounter may not be required in order to recover for the emotional distress that is likely to follow. RESTATEMENT (SECOND) OF TORTS § 46 comment l (1965).

155. *Marlene F.*, 48 Cal. 3d 596, 770 P.2d at 286, 257 Cal. Rptr. at 106 (Arguelles, J., concurring). The opinion looks closely at two cases in which the respective courts explicitly recognized that the presence requirement could be dropped due to the profound and extreme emotional consequences that stemmed from the abuse of a relationship of trust. *Id.* (citing Delia S. v. Torres, 134 Cal. App. 3d 471, 483-84, 184 Cal. Rptr. 787, 794-95 (1982) (court allowed recovery to a husband not present when his wife was raped by a close friend) and Nancy P. v. D'Amato, 401 Mass. 516, 517 N.E.2d 824, 828 (1988) (court dropped the presence requirement when a trusted adult neighbor sexually abused a young child and the custodial parent was not present)).

156. *Marlene F.*, 48 Cal. 3d at 597-98, 770 P.2d at 287, 257 Cal. Rptr. at 107 (Arguelles, J., concurring).

157. *Id.* at 599-601, 770 P.2d at 288-89, 257 Cal. Rptr. at 108-09 (Eagleson, J., concurring). This concurrence was joined by Chief Justice Lucas and Justice Panelli. *Id.*

diagnosed the plaintiff's wife.[158] The defendant subsequently assumed a duty to the plaintiff when the defendant directed that his diagnosis of the sexually transmitted disease be communicated to the plaintiff.[159] Following this interpretation, Justice Eagleson stated that the *Molien* court appeared to justify recovery by a plaintiff when he was victimized directly by the defendant and the threat of a disease, as opposed to creating an independent cause of action for the emotional distress alone.[160] Justice Eagleson concluded that, since the psychotherapist did not direct his conduct at the plaintiff, the application of *Molien* was inappropriate when the only injury alleged is emotional distress.[161]

Having distinguished *Molien*, Justice Eagleson then discussed the applicability of a cause of action for professional malpractice.[162] Justice Eagleson stated that since the plaintiff was a patient of the defendant therapist, a duty arises to refrain from conduct that may foreseeably aggravate or worsen the condition sought to be treated.[163] Justice Eagleson concluded that, because sexual misconduct with another family member who is also under treatment by the therapist will inhibit the therapist's ability to treat the plaintiff, the defendant's misconduct constituted professional malpractice, and the plaintiff could recover for the defendant's negligence.[164]

III. Legal Ramifications

Read most narrowly, *Marlene F.* represents simply an expansion of *Molien* and the direct victim theory to a parent-child relation-

158. *Id.*

159. *Id.* However, the majority suggested that a duty may have been imposed by law, given the nature of the sexually transmitted disease and the duty to warn identifiable third parties. *Id.* at 590 n.5, 770 P.2d at 282 n.5, 257 Cal. Rptr. at 102 n.5 (citing Tarasoff v. Regents of University of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976)).

160. *Id.* at 599-601, 770 P.2d at 288-89, 257 Cal. Rptr. at 108-09 (Eagleson, J., concurring).

161. *Id.*

162. *Id* at 600-01, 770 P.2d at 289, 257 Cal. Rptr. at 109 (Eagleson, J., concurring).

163. *Id.*

164. *Id.* The concurring opinion cites the same case as the majority for the notion that abuse in a relationship of trust gives rise to foreseeable emotional distress. *Id.* The majority, however, read this opinion as supporting an independent cause of action for the negligent infliction of emotional distress. *Id.* at 591, 770 P.2d at 282-83, 257 Cal. Rptr. at 102-03. Justice Eagleson interpreted that opinion to support a claim for professional malpractice. *Id.* at 599, 770 P.2d at 282-88, 257 Cal. Rptr at 102-08 (Eagleson, J., concurring) (citing Richard H. v. Larry D., 198 Cal. App. 3d 591, 596, 243 Cal. Rptr. 807, 809 (1988)) (allowing the plaintiff husband of a couple consulting a psychotherapist for marital counseling to pursue an action for professional malpractice and negligent infliction of emotional distress upon discovering that the doctor was engaging in sexual relations with the plaintiff's wife).

ship.[165] Read more critically, *Marlene F.* creates an unworkable model of recovery for future claims of negligent infliction of emotional distress. In its precedential analysis, the *Marlene F.* court acknowledged that the court's prior position, both in *Dillon* and in *Molien*, did not purport to create a cause of action for negligent infliction of emotional distress based solely upon the foreseeability that serious emotional distress might result from a defendant's conduct.[166] Rather, emotional distress damages are recoverable in a negligence action only when the emotional distress results from the breach of a duty owed to the plaintiff.[167] By characterizing the plaintiff in *Marlene F.* as a "direct victim," the court sacrificed any substantial duty requirement that the direct victim theory of *Molien* encompassed, and opened the door to unlimited liability to all foreseeable plaintiffs who may suffer emotional distress. It is critical, therefore, to take a closer look back at the manner in which the *Molien* court fashioned its direct victim theory of recovery.

A. Should Marlene F. be a "Direct Victim"?

In the process of concluding that Marlene F. should be a direct victim, a majority of the California Supreme Court overlooked some of the fundamentals on which the direct victim theory is apparently based. Recall that in *Molien*, it was the characterization of the uninvolved plaintiff as a direct victim that enabled the court to find a duty owed by the defendant, so that emotional distress damages could be recovered.[168] Given that the *Molien* opinion did not delineate any standards by which the existence of that duty may be determined, it became difficult to define the limits of such an approach.[169]

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165. *See supra* note 128 and accompanying text (indicating an unwillingness to afford protection outside of the bystander-witness theory when a parent-child relationship is involved).

166. *Marlene F.*, 48 Cal. 3d at 588-89, 770 P.2d at 282, 257 Cal. Rptr. at 102.

167. *Id.*

168. Molien v. Kaiser Foundation Hospitals, 27 Cal. 3d 916, 923, 616 P.2d 813, 816-17, 167 Cal. Rptr. 831, 834-35 (1980).

169. *See* Andalon v. Superior Court, 162 Cal. App. 3d 600, 609-10, 208 Cal. Rptr. 899, 904-05 (1984) (indicating that *Molien* had failed to provide delimiting criteria to determine when a plaintiff is a direct victim of negligent conduct); Newton v. Kaiser Foundation Hospitals, 184 Cal. App. 3d 386, 391, 228 Cal. Rptr. 890, 892-93 (1986) (predicting that the failure to provide concrete examples of when a plaintiff is a direct victim would lead to an endless quest for foreseeability). *See also* Comment, Newton v. Kaiser Hospital*: Defining the Direct Victim*, 18 PAC. L. J. 1303 (1987) (discussing the lack of set standards within the direct victim model and the future of the negligent infliction of emotional distress cause of action).

The *Molien* opinion itself contains two possible rationales for creating a duty, neither of which exists in *Marlene F.* First, a duty may have arisen by the defendant's simple act of instructing his patient to inform the plaintiff of his negligent diagnosis.[170] This is a very simple explanation for making the plaintiff a direct victim, since the defendant directed that the plaintiff be informed.[171] Alternatively, a duty may have been imposed on the defendant by law.[172] In citing to *Tarasoff v. Regents of University of California*,[173] the *Molien* court implied that the defendant might have had a duty to warn the plaintiff even if he had not voluntarily assumed such a duty.[174] In *Tarasoff*, the California Supreme Court had previously established a duty to protect identifiable third party victims from the dangers posed by a physician's patient.[175] Applying *Tarasoff*, the *Molien* court could have imposed a duty on the defendant to protect the

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170. *Molien*, 27 Cal. 3d at 923, 616 P.2d at 816-17, 167 Cal. Rptr. at 834-35.

171. *Accord* Ochoa v. Superior Court, 39 Cal. 3d 159, 172-73, 703 P.2d 1, 9-11, 216 Cal. Rptr. 661, 669-71 (1985) (in rejecting the plaintiff's direct victim cause of action, the supreme court stated that the theory of *Molien* applies only where the defendant's tortious conduct is directed at both the plaintiff and the primary victim). This may, however, be considered only dicta since the majority found that the plaintiff stated a cause of action under the bystander approach of *Dillon*. *Id.* at 178, 703 P.2d at 14, 216 Cal. Rptr. at 674 (Grodin, J., concurring). Chief Justice Bird suggested that the majority's analysis of the *Molien* cause of action is very narrow and would effectively limit the direct victim cause of action to the facts of *Molien*. *Id.* at 190, 703 P.2d at 22, 216 Cal. Rptr. at 682 (Bird, C.J., dissenting).

172. The Third District Court of Appeals has developed its own basis for imposing a duty on a defendant under the direct victim theory of *Molien*, based on an earlier theory of duty established by the California Supreme Court in *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958). In *Biakanja*, the California Supreme Court delineated several factors to consider in the determination of a defendant's duty to a third person not in privity of contract. *Biakanja*, 49 Cal. 2d at 650, 320 P.2d at 19. Those factors include the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm, the closeness in connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm. *Id. See, e.g.*, Newton v. Kaiser Hospital, 184 Cal. App. 3d 386, 228 Cal. Rptr. 890 (1986) (allowing recovery for the emotional distress suffered by a father, who was the third party beneficiary of a contract for the delivery of his son, who suffered from Erb's Palsey resulting from the negligence of the defendant in his application of forceps during the child's delivery); Andalon v. Superior Court, 162 Cal. App. 3d 600, 208 Cal. Rptr. 899 (1984) (holding the defendant liable to foreseeable third party beneficiaries of a contract by allowing a father to recover emotional distress damages as a direct victim when he was not informed of a diagnostic procedure which could have detected the presence of Down's Syndrome before his child was born). *See also* Green, *supra* note 106 (indicating a need to consider other factors in determining liability other than simply foreseeability). While it appears that Marlene F. stood in the third-party beneficiary position of a contract with the psychotherapist and family unit, the California Supreme Court did not consider the third district's approach in adopting *Biakanja's* duty analysis. Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., 48 Cal. 3d 583, 588-92, 770 P.2d 278, 278-83, 257 Cal. Rptr. 98, 98-103 (1989).

173. 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976).

174. *Molien*, 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

175. *Tarasoff*, 17 Cal. 3d at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20.

plaintiff from the possibility of contracting syphilis.[176] Whether the duty was assumed by the defendant or imposed on him by law, Mr. Molien established himself as a direct victim of the defendant's conduct, and liability attached for the emotional distress he suffered.[177]

In *Marlene F.*, however, neither theory accurately fits the facts. First, the defendant never voluntarily assumed a duty to protect the mother from his injurious conduct aimed at the son. On the contrary, the defendant intentionally withheld all information from the mother so as to prevent her from learning of the molestation.[178] Moreover, no evidence exists that the defendant ever took affirmative steps in directing that the plaintiff be told of his lewd and lascivious conduct in treating her son.[179]

As far as a duty to warn imposed by law, none could exist. In *Tarasoff*, it was the plaintiff who was in imminent danger of her assailant when the psychologist examined the defendant and created a duty to warn the plaintiff of the possible attack.[180] In *Molien*, it was again the plaintiff who was potentially in danger of contracting syphilis when the physician examined the plaintiff's wife and created a duty to warn the plaintiff of his diagnosis.[181] In *Marlene F.*, however, the plaintiff was not in a similar position. Unlike the psychologist's patient in *Tarasoff* or Mrs. Molien in *Molien*, the plaintiff's son posed no threat of physical danger to her. *Tarasoff* and *Molien* both involved threats to plaintiffs from someone in a position similar to that of the son. In contrast, the danger upon which Marlene F. bases her emotional distress claim derives solely from the conduct of the defendant and not that of the plaintiff's

176. The *Tarasoff* facts have previously been applied to the *Dillon* line of cases. *See, e.g.*, Hedlund v. Superior Court of Orange County, 34 Cal. 3d 695, 669 P.2d 41, 194 Cal. Rptr. 805 (1983). The related cause of action in *Hedlund* was the emotional distress suffered by the son of a murder victim after witnessing the shooting of his mother by a patient of the defendant. *Id.* at 704-05, 669 P.2d at 46, 194 Cal. Rptr. at 810. The son's life was spared when his mother threw herself over him to shield him from the attack. *Id.* It was clear in *Hedlund* that the defendant psychotherapist failed to fulfill his duty to warn the identifiable victim that a patient had threatened to kill her. *Id.* While the duty to warn did not run to the son per se, the failure to warn created a duty to those persons who may be foreseeably injured within the *Dillon* guidelines of proximity. *Id.* at 706-07, 669 P.2d at 46-47, 194 Cal. Rptr. at 811.

177. *Molien*, 27 Cal. 3d at 923, 616 P.2d at 816-17, 167 Cal. Rptr. at 834-35.

178. *Marlene F.*, 44 Cal. 3d at 584, 770 P.2d at 279, 257 Cal. Rptr. at 99.

179. *Id.*

180. *Tarasoff*, at 430-32, 551 P.2d at 339-41, 131 Cal. Rptr. at 19-21.

181. *Molien*, at 918-20, 616 P.2d at 814-15, 167 Cal. Rptr. at 832-33.

son.[182] Under this theory of liability, the plaintiff's relationship to her son is immaterial and Marlene F. should not qualify as a direct victim.[183]

Without a duty established between Marlene F. and the defendant, the plaintiff should not be considered a direct victim of the defendant's act. While the court repeatedly admitted that it was foreseeable that Marlene F. would suffer emotional distress, the court's classification of her status as a direct victim undermines the viability of such a limit on recovery as utilized in *Molien*.

B. Did the Court Create a New Duty?

In the *Marlene F.* opinion, the court announced a third situation from which a duty may attach and provide a basis for emotional distress damages. That duty may arise out of a special relationship between the defendant and the plaintiff.[184] One of the most distinguishing facts of *Marlene F.* is that the plaintiff and the defendant were already associated with one another in a professional context before the plaintiff suffered emotional distress.[185] This relationship does not exist in either the *Molien* or *Dillon* lines of cases.

From this relationship, the court announced that it took no dramatic step in ruling that liability may attach for the *foreseeable* emotional distress a mother will suffer upon learning that her psychotherapist sexually molested her son.[186] While the court may not have taken any dramatic steps forward, they did, however, take a few steps backward. Previously, the court announced that recovery for negligent infliction of emotional distress based solely upon the

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182. This assumes that the defendant did not threaten the plaintiff with the same intimate sexual conduct he performed with the plaintiff's son.

183. For a discussion concerning the impact of the mother-son relationship as a basis for liability, *see infra* notes 179-186 and accompanying text. As far as a duty to warn based solely on the threat of a family member suffering emotional distress, courts have held that such a relationship does not itself constitute a basis for liability. *See* Holiday v. Jones, 215 Cal. App. 3d 102, 111-12, 264 Cal. Rptr. 448 (1989) (denying the emotional distress claim of children who witnessed their father's incarceration for murder, when the plaintiffs had no contractual or other relationship with the defendant). In *Holiday*, the father's conviction was reversed on the ground that his defense counsel was incompetent, and subsequently, the father filed an action against the defendant for professional negligence and on behalf of his children for their emotional distress. *Id.* at 105, 264 Cal. Rptr. at 449.

184. Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., 48 Cal. 3d 583, 590, 770 P.2d 278, 282, 257 Cal. Rptr. 98, 102 (1989).

185. *Id.* at 585, 770 P.2d at 279, 257 Cal. Rptr. at 99.

186. *Id.* at 591, 770 P.2d at 281-82, 257 Cal. Rptr. 101-02 (citing Richard H. v. Larry D., 198 Cal. App. 3d 591, 596, 243 Cal. Rptr. 807, 809 (1988)).

foreseeability of harm would not be allowed.[187] Yet, because the mother was also a the defendant's patient, the foreseeability of her emotional distress, in the court's view, served as a basis for liability. Stated in this fashion, the court raises the issue as to whether the plaintiff's emotional distress would be any less foreseeable if she had not been a patient of the defendant.

In the majority opinion, the court relied on the case of *Richard H. v. Larry D.*[188] in fashioning relief for Marlene F. based on her relationship to the defendant.[189] In *Richard H.*, emotional distress damages were awarded to a patient of the defendant psychiatrist, who had sexual relations with the patient's spouse.[190] The court's use of this case is unclear. *Richard H.* may indicate, for example, a willingness on the part of the court to award emotional distress damages based on the existence of two separate relationships, that of the plaintiff to the defendant, and the plaintiff to the victim.[191] Yet this proposition would deny recovery to a mother who learns of her child's molestation at school, since aside from the child's school attendance, she would not have established a relationship with the school or the hypothetical defendant teacher.[192]

Alternatively, *Richard H.* may indicate a willingness on the part of the court to award emotional distress damages based entirely on the relationship of a plaintiff who is known to the defendant and the foreseeability that the plaintiff will suffer genuine emotional distress. The difficulty with this proposition is that it may sometimes lead to an illogical result. For instance, this standard would create liability of a physician to a patient for emotional distress damages when a completely unrelated patient is negligently treated, based on the defendant's preexisting relationship with the plaintiff. In either of these two situations, creating a duty based on the relationship between a defendant and the plaintiff does not appear to be a feasible alternative. A duty arising in this manner denies redress where a

187. *Id.* at 590-91, 770 P.2d at 282, 257 Cal. Rptr. 102. *See also* Thing v. LaChusa, 48 Cal. 3d 644, 668, 771 P.2d 814, 829, 257 Cal. Rptr. 865, 880 (1989) (expressing concern over the potential costs associated with using foreseeability in establishing a duty, indicating that, "on a clear judicial day, courts can foresee forever").

188. 198 Cal. App. 3d 591, 243 Cal. Rptr. 807 (1988).

189. *Marlene F.*, 48 Cal. 3d at 591, 770 P.2d at 283, 257 Cal. Rptr. at 103.

190. *Richard H.*, 198 Cal. App. 3d at 596, 243 Cal. Rptr. at 809.

191. *Marlene F.*, 48 Cal. 3d at 591, 770 P.2d at 283, 257 Cal. Rptr. at 103 (1989).

192. *But cf.* Phyllis P. v. Superior Court, 183 Cal. App. 3d 1193, 1196, 228 Cal. Rptr. 776, 778 (1986) (holding the defendant school liable to a plaintiff parent for the emotional distress suffered in connection with an assaulat upon the plaintiff's daughter by a classmate, of which the school had prior knowledge).

plaintiff suffers genuine emotional distress, and awards damages in cases which the California Supreme Court had previously determined to be "out of bounds."

C. Was the Defendant Negligent?

One of the basic principles in a negligent infliction of emotional distress cause of action is that there must be negligent conduct on the part of the defendant. Under negligence principles, there must be some conduct which a reasonably prudent person would not undertake.[193] In *Marlene F.*, the defendant's conduct was not negligent. He intentionally molested the son, and subsequently did not disclose his conduct to the plaintiff, Marlene F.

In Justice Arguelles' concurring opinion, he indicates that the defendant's conduct meets all of the criteria for an intentional infliction of emotional distress cause of action.[194] However, Justice Arguelles' argument is faced with the limited circumstances in which recovery is permitted for the emotional distress suffered by a plaintiff who is not the immediate target of the defendant's conduct. Recall that recovery in the third party context has been limited by the imposition of a presence requirement, which serves to limit the claims by outside parties who were not present during the defendant's tortious conduct.[195] In looking to the Restatement for guidance, it appears that reliance on the presence requirement is justified only where historical policy considerations would question the validity of a cause of action.[196] Where the historical policy considerations are greatly reduced, the arbitrary barrier created by the presence requirement does not serve a useful function.[197] Given the factual circumstances existing in *Marlene F.*, the presence requirement should have

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193. *See* W. KEETON, *supra* note 1, § 32, at 173-75.

194. *Marlene F.*, 48 Cal. 3d at 592-93, 770 P.2d at 284-85, 257 Cal. Rptr. at 104-05 (Arguelles, J., concurring) (describing the psychotherapist's conduct as extreme and outrageous, and exercised in reckless disregard of the probability of causing emotional distress to Marlene F.). *See supra* notes 49-61 and accompanying text (describing the prima facie elements for the intentional infliction of emotional distress cause of action).

195. *See* RESTATEMENT (SECOND) OF TORTS § 46(2) (1965). *See also supra* notes 52-56 and accompanying text (describing the limitation imposed by the presence requirement).

196. *See supra* notes 23-30 and accompanying text (describing the policy considerations of unlimited liability and fictitious claims that served to impede the development of the emotional distress torts).

197. *See* State Rubbish Collector's Ass'n. v. Siliznoff, 38 Cal. 2d 330, 338-39, 240 P.2d 282, 286-87 (1952) (rejecting the requirement of physical injury where the genuineness of the claim may be ascertained).

been dropped, because of the high level of assurance that the court had as to the validity of Marlene F.'s claim.

There are two factual circumstances that provide this high level of assurance. These circumstances do not require the court to take any dramatic steps in fashioning a new model of recovery. The first is the relationship of trust that existed between the plaintiff and the defendant prior to his molestation of the plaintiff's son. As Justice Arguelles points out, the abuse of this relationship of trust compounds the outrageousness of the conduct and makes less essential the presence requirement.[198] By previously establishing a relationship with the defendant, the interests of the plaintiff are known to the defendant when he commits the tort. The purpose of the presence requirement is satisfied by the defendant's association with the plaintiff prior to the contemplation of the defendant's act. Allowing recovery without the plaintiff's presence does not create the fear of unlimited liability for the defendant.

The second factual circumstance that exists in *Marlene F.* is the plaintiff's relationship to the primary victim. This factual circumstance addresses the second major historical policy consideration: the genuineness of the claim. While it may safely be assumed that a witness who is present during the defendant's tortious conduct toward a third person would suffer emotional distress, it would appear equally logical that close family members of the victim who are not present will suffer to the same degree, if not greater.[199]

With the assurances brought about by the relationship of the plaintiff to the defendant, and the plaintiff to the primary victim, the presence requirement serves as an arbitrary barrier, barring relief to a limited number of individuals suffering from genuine emotional distress. Advocating the dropping of this arbitrary barrier in light of the facts in *Marlene F.* is not without merit. Fashioning relief for Marlene F. in this manner maintains the integrity of the standards set forth in *Dillon* and *Molien* for cases involving the negligent infliction of emotional distress to plaintiffs other than the primary victim. Moreover, dropping the presence requirement would create

198. *Marlene F.*, 48 Cal. 3d at 595-96, 770 P.2d at 286, 257 Cal. Rptr. at 106 (Arguelles, J., concurring).

199. *Cf.* Dillon v. Legg, 68 Cal. 2d 728, 741, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968) (using the degree to which the plaintiff and the victim were related as a factor to determine the foreseeability of harm); Rowland v. Christian, 69 Cal. 2d 108, 112-13, 443 P.2d 561, 565-66, 70 Cal. Rptr. 97, 103-04 (1968) (using the degree of certainty that the plaintiff suffered injury as a factor to determine the liability of the defendant in a negligence action).

an expansion within the law of intentional torts which would redress genuine claims of emotional distress intentionally inflicted.

IV. CONCLUSION

In *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*, the California Supreme Court awarded damages on the grounds of negligent infliction of emotional distress to a plaintiff who was neither present during the defendant's tortious conduct, nor established as a direct victim of the defendant's conduct. After *Marlene F.*, the likelihood that the direct victim theory first announced in *Molien v. Kaiser Foundation Hospitals* will be read narrowly is remote. Plaintiffs, who were previously denied emotional distress damages because they could not establish conduct directed at them by the defendant, may now state a cause of action. The ramifications of expanding the direct victim theory, are the flooding of courts with fictitious and trivial claims, and subjecting the defendant to unlimited liability: historical policy considerations which previously served to impede the evolution of the emotional distress torts.

The facts of *Marlene F.* lend support, however, to the adoption of a new approach to the intentional tort of emotional distress. Where the plaintiff's prior relationship both with the defendant and the primary victim serve to compound the outrageousness of the conduct, the court should not be burdened with the arbitrary presence requirement when ascertaining the validity of the distress claim. While this approach is embraced solely by a concurring opinion in a California Supreme Court decision, concurring opinions with the foundational support advocated in this casenote have played an important role in the future of California's case law.[200]

Michael A. Sitzman

200. *See* Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. 2d 453, 461, 150 P.2d 436 (1944) (Traynor, J., concurring) (advocating the adoption of a strict products liability theory in assessing liability for an exploding carbonated beverage bottle). In 1963, Justice Traynor wrote for the majority of the court in the case of Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), in which he delineated his strict products liability theory from *Escola* and formed the basis for products liability in California.