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Newton v. Kaiser Hospital: Defining the Direct Victim

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Newton v. Kaiser Hospital: Defining the Direct Victim

In *Newton v. Kaiser Hospital*,[1] a father whose son was injured at birth due to a negligent delivery brought an action for negligent infliction of emotional distress against the hospital.[2] The Court of Appeal for the Third District of California held that the father stated a cause of action for emotional distress[3] even though he was not present during the delivery.[4] The court ruled that a duty to both parents arose from the contractual relationship between the hospital and the mother.[5] According to the *Newton* decision, the hospital owed a duty of care to the mother as a party to the contract with the hospital,[6] and to the father as a beneficiary of that contract.[7] The court found that both parents stated claims for negligent infliction of emotional distress as direct victims,[8] a cause of action first set out by the California Supreme Court in *Molien v. Kaiser Foundation Hospitals*.[9] In addition to extending a tort duty to persons not covered by prior case law,[10] the *Newton* court proposed a new basis for defining and limiting the direct victim cause of action.[11]

Part I of this note will examine the legal background of the issues discussed in the *Newton* case.[12] Part II will summarize the facts and

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1. 184 Cal. App. 3d 386, 228 Cal. Rptr. 890 (1986).
2. *Id.* at 387-88, 228 Cal. Rptr. at 890-91. This Note will focus on the father's cause of action. For a discussion of the mother's cause of action see *infra* note 120.
3. *Newton*, 184 Cal. App. 3d at 387-88, 228 Cal. Rptr. at 890-91.
4. *Id.* at 389, 228 Cal. Rptr. at 892.
5. *Id.* at 392, 228 Cal. Rptr. at 894.
6. *Id.*
7. *Id.*
8. *Id.* Direct victims have not yet been clearly defined. *See infra* text accompanying notes 70-80 (discussion of problems in defining direct victim).
9. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).
10. *See infra* text accompanying notes 124-27.
11. *See infra* text accompanying notes 119-23.
12. *See infra* text accompanying notes 15-101.

opinion of *Newton*.[13] Finally in part III, the legal ramifications of the case on the law of emotional distress will be presented.[14]

I. Legal Background

A. Early History

Tort law has traditionally protected interests in property and personal safety, but early courts were reluctant to protect an individual's interest in emotional tranquility.[15] Judicial reluctance to allow recovery for emotional harm was based on concerns about the possibility of false claims, the speculative nature of damages for emotional harm, and the prospect of increased litigation.[16] The development of the law governing negligent infliction of emotional distress reflects a balance between a policy of compensating victims of negligent conduct and the need to rationally limit liability.[17]

When emotional distress resulted from a physical injury caused by a defendant's negligent conduct, courts did allow recovery for the emotional harm as a part of general damages for the physical injury.[18] In the absence of a physical injury or a physical impact on the plaintiff, however, many courts refused to allow recovery for emotional distress or for the physical consequences of the emotional

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13. *See infra* text accompanying notes 102-23.

14. *See infra* text accompanying notes 124-28.

15. "The interest in . . . emotional tranquility . . . is not . . . of sufficient importance to require others to refrain from conduct intended to or . . . likely to cause . . . [emotional] disturbance." Restatement of Torts § 46 comment c (1934). The reluctance to protect the interest in peace of mind from intentional interference is even more pronounced when the interference is merely negligent. W. Prosser, W. Keeton, D. Dobbs, R. Keeton & D. Owens, Prosser and Keeton on the Law of Torts § 54, at 360 (5th ed. 1984) [hereinafter cited as Prosser & Keeton].

16. *See* Mitchell v. Rochester R.R., 151 N.Y. 107, 45 N.E. 354-55 (1896). *See also infra* note 17.

17. *See, e.g.*, Dillon v. Legg, 68 Cal. 2d 728, 730-31, 441 P.2d 912, 914, 69 Cal. Rptr. 72, 74 (1968) (neither the fear of fraudulent claims nor the difficulty of defining the limits of liability "excuses the frustration of the natural justice upon which the mother's claim rests"). Tobin v. Grossman, 24 N.Y.2d 609, 619, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969) (every wrong should have a remedy, but the problem for the law is to limit the legal consequences of wrongs to a controllable degree); Battalla v. State of New York, 10 N.Y.2d 237, 240, 176 N.E.2d 729, 731, 219 N.Y.S.2d 34, 37 (1961) (fraud, extra litigation and speculation are possibilities, but a court of justice should not deny a remedy to all because some claims maybe fictitious).

18. Merrill v. Los Angeles Gas & Elec. Co., 158 Cal. 499, 511, 111 P. 534, 539 (1910) (jury may consider mental suffering endured because of injuries); Malone v. Hawley, 46 Cal. 409, 414 (1873) (in estimating damages jury may consider mental suffering sustained by reason of the injury).

disturbance.[19] Although originally intended to protect against spurious claims,[20] the impact requirement was often reduced to a mere formality when courts began allowing plaintiffs to recover for emotional distress after a trivial impact such as getting dust in the eye,[21] or being jostled or jarred in an automobile accident.[22]

By 1961 most states had recognized that serious emotional distress could occur in the absence of a physical impact and had rejected the impact rule as an arbitrary limitation on recovery.[23] In 1963 the issue came before the California Supreme Court in *Amaya v. Home Ice, Fuel & Supply Co.*[24] The court found that no California cases had ever required application of the impact rule, and refused to adopt such an approach.[25]

In the absence of an impact requirement, plaintiffs who were within the "zone of danger" created by the defendant's conduct and were thus put in fear for their own safety could recover for emotional distress even though no direct physical injury or impact occurred.[26]

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19. PROSSER & KEETON, *supra* note 15, § 54, at 363. Under the impact rule, a woman who suffered a miscarriage after being severely frightened by a negligently driven team of horses was denied recovery because the horses had stopped just before touching her. Mitchell v. Rochester R.R., 151 N.Y. 107, 45 N.E. 354 (1896). *See also* Spade v. Lynn & B.R. Co., 168 Mass. 285, 47 N.E. 88 (1897) (in absence of a contemporaneous physical injury, no recovery for mental distress or its physical consequences); Ward v. New Jersey & S.R. Co., 65 N.J. 383, 47 A. 561 (1900) (no recovery for injuries resulting from mere apprehension of personal injury).

20. *Mitchell*, 151 N.Y. at 108, 45 N.E. at 355.

21. *See* Porter v. Delaware, L. R.R., 73 N.J. 405, 63 A. 860 (1906).

22. *See* Zilinsky v. Chimics, 196 Pa. Super. 312, 175 A.2d 351, 354 (1961) (recovery not denied if any impact, "however slight").

23. Battalla v. State of New York, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961). *See also* Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965) (overruled 1900 case requiring impact); Savard v. Cody Chevrolet, 126 Vt. 405, 234 A.2d 656 (1967) (following "modern rule" court rejected impact requirement).

24. 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

25. *Id.* at 299, 379 P.2d at 515, 29 Cal. Rptr. at 35. While courts rejected the need for a direct physical impact as a means of validating claims for emotional distress, they still retained the traditional requirement that the emotional distress be manifested in some physical symptom. PROSSER & KEETON, *supra* note 15, § 54, at 364. *See* Sloane v. Southern Cal. R.R., 111 Cal. 668, 683, 44 P. 320, 323 (1896) (early case allowing recovery when bodily harm resulted from mental suffering caused by negligence); Vanoni v. Western Airlines, 247 Cal. App. 2d 793, 795, 56 Cal. Rptr. 115, 116 (1967) (no recovery for emotional distress unaccompanied by physical harm); Espinosa v. Beverly Hosp., 114 Cal. App. 2d 232, 235, 249 P.2d 843, 845 (1952) (if no physical suffering the law will not support award). In 1980 the California Supreme Court rejected this requirement as an artificial limitation on recovery and expressed the belief that the genuineness of a claim could be found "within the circumstances of a case." Molien v. Kaiser Hosp., 27 Cal. 3d 813, 616 P.2d 916, 167 Cal. Rptr. 831 (1980).

26. *See, e.g.*, Webb v. Francis J. Lewald Coal Co., 214 Cal. 182, 4 P.2d 532 (1932) (woman who was present when car crashed into a store could recover since physical symptoms resulted in part from fear for own safety); Cook v. Maier, 33 Cal. App. 2d 581, 92 P.2d 434 (1934) (plaintiff who feared for her own safety when a car ran onto her land may recover).

Theoretically, if no impact is required, courts could also allow recovery to persons who suffered emotional distress after witnessing an injury to another. However, in *Amaya*, the California Supreme Court applied the "zone of danger" rule and denied recovery to a mother who saw her son killed because she had not been in fear for her own safety.[27] Under this rule a plaintiff could recover for emotional distress suffered as a result of witnessing an injury to another, but only if the plaintiff had also been within the "zone of danger."[28] In *Dillon v. Legg*,[29] California became the first state[30] to allow recovery by a plaintiff who was not endangered by the defendant's conduct and whose emotional distress was due solely to the injury of another.[31]

B. The Bystander Cause of Action

In *Dillon*, the California Supreme Court rejected the "zone of danger" rule and allowed a mere bystander to bring an action.[32] The court held that a mother who had seen her daughter killed in an automobile accident stated a cause of action for emotional distress even though the mother herself had not been endangered by the defendant's negligent driving.[33] In discarding the "zone of danger" requirement as an arbitrary and unsatisfactory limitation on recovery,[34] the *Dillon* court stressed the importance of foreseeability in determining the existence of a duty of care.[35] Thus, in cases in which a defendant's negligence toward one person will foreseeably cause a third person

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27. Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 298, 379 P.2d 513, 514, 29 Cal. Rptr. 33, 34 (1963). *See also* Moore v. Reed, 156 Cal. App. 2d 43, 44, 47, 319 P.2d 80, 81, 82 (1957) (plaintiff who saw husband injured from a location 130 feet from collision was not in zone of danger and could not recover).

28. *See* discussion *infra* note 34.

29. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

30. Nolan & Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583, 583 (1982).

31. *Dillon*, 68 Cal. 2d at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.

32. *Id.*

33. *Id.* at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74.

34. *Id.* at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75. The court stated that the arbitrary nature of the zone of danger rule was particularly evident in *Dillon*. Application of the rule would have allowed recovery to the victim's sister, who may have been within the zone of danger, while the mother, who was approximately 15 feet away from the sister and not in the zone, would have been denied a cause of action. The court did not consider this difference in location to be a reasonable basis for granting or denying recovery. *Id.*

35. *Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80. The court restated the basic tort principle that "[i]n the absence of overriding policy considerations . . . foreseeability of risk is of . . . primary importance in establishing the element of duty." *Id.* at 739, 441 P.2d at 919, 69 Cal. Rptr. at 79.

emotional distress, the defendant may also be liable to the third person.[36] The court set out three factors to be used as guidelines for determining the foreseeability of harm.[37] The risk of serious emotional harm would be reasonably foreseeable if the plaintiff was closely related to the victim,[38] the plaintiff was located near the scene of the accident,[39] and the plaintiff's distress resulted from the direct emotional impact of a sensory and contemporaneous observance of the accident.[40]

Two characteristics of the bystander cause of action are worth emphasizing. First, the cause of action is derivative in nature. The plaintiff suffers emotional distress solely because another person has been injured by the defendant's negligent conduct.[41] Second, plaintiffs must establish themselves as percipient witnesses by proving a sensory and contemporaneous awareness of the accident or the negligent conduct which caused the injury.[42] In 1980, when confronted with a plaintiff who did not meet the percipient witness requirement of the bystander cause of action, the California Supreme Court established

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36. *See id.*

37. *Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

38. *Id.* For examples of how the California courts have interpreted the close relationship requirement, see Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977) (cause of action to spouse); Vasquez-Gonzalez v. Superior Court, 186 Cal. App. 3d 1507, 231 Cal. Rptr. 458 (1986) (cause of action to children who saw grandmother killed); Kriventsov v. San Rafael Taxicabs, 186 Cal. App. 3d 1445, 229 Cal. Rptr. 1445 (1986) (uncle who lived with nephew can state cause of action since members of extended family living in same household develop requisite emotional relationship); Mobaldi v. Regents of Univ. of Cal., 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976) (cause of action to foster mother).

39. *Dillon*, 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

40. *Id.* Although the court introduced these three requirements as guidelines, they have sometimes been applied in a rigid and technical manner, leading to inconsistent and unsatisfactory results. *See, e.g.*, Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977). In *Justus*, the father was present during the delivery of a stillborn child. *Id.* at 585, 565 P.2d at 135, 139 Cal. Rptr. at 110. He saw the prolapsed cord, and knew the life of the fetus was threatened, but was denied recovery because he did not witness the moment of death and because he did not realize death had occurred until he was informed by the physician. *Id.* at 585, 565 P.2d at 136, 139 Cal. Rptr. at 111. *Compare id. with* Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977). The court in *Krouse* held that a husband stated a cause of action for emotional distress even though he did not see his wife hit by the defendant's car. *Id.* at 76, 562 P.2d at 1031, 137 Cal. Rptr. at 872. The husband established a nonvisual perception of the accident since he was in the driver's seat, knew his wife was standing outside the car removing groceries from the back seat, and saw the defendant's car approaching her location at a fast rate of speed. *Id. See* Ochoa v. Superior Court, 39 Cal. 3d 159, 182-90, 703 P.2d 1, 17-22, 216 Cal. Rptr. 661, 676-82 (1985) (Bird, C.J., dissenting) (discussing general dissatisfaction with the percipient witness requirement). *See also* Diamond, Dillon v. Legg *Revisited: Toward A Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477 (1984).

41. *Dillon*, 68 Cal. 2d at 733, 441 P.2d at 916, 69 Cal. Rptr. at 76.

42. *Id.* at 741, 441 P.2d at 920, 60 Cal. Rptr. at 80.

the direct victim cause of action as an alternative theory[43] of recovery for negligent infliction of emotional distress.[44]

C. The Direct Victim Cause of Action

1. Molien v. Kaiser Hospital

In *Molien v. Kaiser Hospital*[45] the California Supreme Court held that Molien stated a cause of action for negligent infliction of emotional distress as a direct victim of the defendant's negligence.[46] Molien brought an action against Kaiser for emotional distress after his wife was negligently misdiagnosed as having syphilis. Kaiser required Mrs. Molien to inform her husband so he could be tested for the disease.[47] The tests showed that Molien did not have syphilis.[48] The couple suffered marital difficulties and emotional distress as a result of the incorrect diagnosis.[49] The supreme court rejected the defendant's argument that the plaintiff failed to state a cause of action merely because he was not present when the defendant announced the erroneous diagnosis.[50]

In characterizing Molien as a direct victim of the hospital's negligence, the California Supreme Court once again stressed the importance of foreseeability.[51] The court held that an erroneous diagnosis of syphilis would foreseeably cause emotional distress to a patient's spouse as well as to the patient.[52] The court reasoned that since the disease is normally transmitted only by sexual relations, "both husband and wife would experience anxiety, suspicion and hostility when confronted with . . . evidence of a . . . noxious infidelity."[53] Because the misdiagnosis created a foreseeable risk of emotional harm to Mr. Molien, the defendant's duty to exercise care in diagnosing Mrs.

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43. One California judge suggests that the direct victim concept enunciated in *Molien* is not new, but is a restatement of the traditional tort principle that individuals owe a duty of care to those who are injured by their negligent conduct when the risk of harm is reasonably foreseeable. Wiggins v. Royale Convalescent Hosp., 158 Cal. App. 3d 914, 922, 206 Cal. Rptr. 2, 7 (1984) (Soneshine, J., dissenting).

44. Molien v. Kaiser Hosp., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

45. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

46. *Id.* at 923, 616 P.2d at 816, 167 Cal. Rptr. at 834.

47. *Id.* at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.

48. *Id.*

49. *Id.* at 920, 616 P.2d at 814, 167 Cal. Rptr. at 832.

50. *Id.* at 921, 616 P.2d at 815, 167 Cal. Rptr. at 833.

51. *Id.* at 922, 616 P.2d at 816, 167 Cal. Rptr. at 834.

52. *Id.* at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.

53. *Id.*

Molien extended to Mr. Molien as well.[54] The *Molien* court did not clearly define a standard for determining when a plaintiff may state a cause of action as a direct victim, other than to suggest that a direct victim is a person whose injury is foreseeable.[55] In *Ochoa v. Superior Court*,[56] the California Supreme Court addressed the problem of defining a direct victim and distinguishing this class of plaintiffs from bystanders.

2. Ochoa v. Superior Court

In *Ochoa*, the plaintiff sued the County of Santa Clara for negligent infliction of emotional distress following the death of her son, Rudy.[57] Rudy was incarcerated in the county's juvenile facility at the time he became ill.[58] Despite the boy's worsening condition and Mrs. Ochoa's repeated requests, the medical staff refused the plaintiff permission to seek alternate health care for her son.[59] Mrs. Ochoa was distressed because of her son's condition and because she felt his medical needs were being ignored.[60] Rudy died three days after becoming ill.[61]

In her action against the county, the plaintiff alternatively pleaded causes of action under both *Dillon* and *Molien*.[62] The trial court sustained demurrers to both claims.[63] In response to the plaintiff's request for a writ of mandate, the California Supreme Court held that Mrs. Ochoa could state a cause of action under *Dillon*.[64] The court then distinguished the case from *Molien*. Justice Broussard, in dicta,[65] explained that in *Ochoa* the defendant's negligent conduct

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54. *Id.*

55. Nolan & Ursin, *Negligent Infliction of Emotional Distress* in 1 CALIFORNIA TORTS § 5.04(4)(b) (Levy, Sachs & Golden, eds. 1986) [hereinafter cited as 1 CALIFORNIA TORTS].

56. 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985). For a discussion of *Ochoa* see Note, Ochoa v. Superior Court of Santa Clara County: *New Grounds or Old Guidelines?*, 17 PAC. L.J. 1027 (1986).

57. *Ochoa*, 39 Cal. 3d at 163, 703 P.2d at 3, 216 Cal. Rptr. at 663.

58. *Id.*

59. *Id.*

60. *Id.* at 164, 703 P.2d at 3, 216 Cal. Rptr. at 663.

61. *See id.* at 163-64, 703 P.2d at 3-4, 216 Cal. Rptr. 663-64.

62. *Id.* at 165, 172, 703 P.2d at 4, 9, 216 Cal. Rptr. at 664, 669.

63. *Id.* at 164, 703 P.2d at 4, 216 Cal. Rptr. at 664.

64. *Id.* at 665. *See supra* notes 32-42 and accompanying text (discussion of the *Dillon* cause of action).

65. In his concurrence, Justice Grodin points out that the discussion of the direct victim cause of action is dicta since the majority found that the plaintiff stated a cause of action under *Dillon*. *Ochoa*, 30 Cal. 3d at 178, 703 P.2d at 14, 216 Cal. Rptr. at 674 (Grodin, J., concurring).

was directed primarily toward Rudy and not his mother.[66] In the words of the court, Mrs. Ochoa had merely "looked on as a helpless bystander."[67] Justice Broussard explained that in *Molien*, however, the defendant's negligent conduct was directed toward Mr. Molien,[68] since the physician required Mrs. Molien to inform her husband of the diagnosis and directed Mr. Molien to submit to tests for the disease.[69] While Chief Justice Bird, in her dissent, suggests that this analysis narrowly construes *Molien* and would virtually limit the direct victim cause of action to the facts of *Molien*,[70] the California Supreme Court has not explicitly defined the direct victim or delineated the scope of this cause of action.

3. *Defining Direct Victims: The Problem*

The *Molien* court characterized a direct victim as a person whose injury was reasonably foreseeable.[71] The absence of a more specific definition resulted in conflicting decisions at the appellate level.[72] Some courts applied the broad foreseeability language of *Molien* to justify extending a duty of care to persons who would have previously been denied recovery,[73] while other courts declined to extend *Molien* beyond its facts and adhered to the stricter standards of *Dillon*.[74] This conflict reveals the confusion created by the *Molien* decision, or more specifically, by the use of a general foreseeability standard to define the direct victim.[75] Since bystanders, according to *Dillon*,

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66. *Ochoa*, 39 Cal. 3d at 172, 703 P.2d at 10, 216 Cal. Rptr. at 670.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 190, 703 P.2d at 22, 216 Cal. Rptr. at 682 (Bird, C.J., dissenting).
71. *See supra* notes 45-56 and accompanying text (discussion of *Molien* cause of action).
72. *See* Newton v. Kaiser Hosp., 184 Cal. App. 3d 386, 390, 228 Cal. Rptr. 890, 892 (1986) (lack of definition has led to conflicting decisions at the appellate court level).
73. *See, e.g.*, Accounts Adjustment Bureau v. Cooperman, 158 Cal. App. 3d 844, 848-49, 204 Cal. Rptr. 881, 884 (1984) (parents have cause of action under *Molien* against psychologist who misdiagnosed child since parents distress foreseeable as a matter of law); Sesma v. Cueto, 129 Cal. App. 3d 108, 116, 181 Cal. Rptr. 12, 16 (1982) (father not present at delivery of stillborn child may state cause of action as direct victim since under principle of foreseeability negligent conduct directed to patient is also directed to spouse).
74. *See* Wiggins v. Royale Convalescent Hosp., 158 Cal. App. 3d 914, 917-18, 206 Cal. Rptr. 2, 3-4 (1984) (wife who did not witness injury to husband in convalescent home may not state cause of action as direct victim since her action is derived from injury to husband and defendant's conduct not directed toward her); Cortez v. Macias, 110 Cal. App. 3d 640, 649-50, 167 Cal. Rptr. 905, 909-10 (1980) (mother who did not witness death of child in hospital emergency room did not state cause of action as direct victim since *Molien* did not overrule *Justus* (for discussion of *Justus* see *supra* note 40)).
75. *See* 1 CALIFORNIA TORTS, *supra* note 55, § 5.04(4)(b).

are foreseeable victims, the *Molien* cause of action would appear to encompass bystanders.[76] *Dillon*, however, was not overruled by *Molien*,[77] thus the two causes of action must coexist. If the two causes of action coexist, a bystander would be defined as a person who meets the *Dillon* requirements, and a direct victim would be anyone else whose emotional distress is foreseeable.[78] This unsatisfactory result leaves two questions unanswered. What, if anything, defines or characterizes the class of direct victims that would distinguish them from bystanders and justify allowing this class to state a cause of action without having to meet the requirements of *Dillon*? Second, given the acknowledged need to prevent the unlimited expansion of liability,[79] is there a principled basis for limiting the direct victim class? In *Ochoa*, the California Supreme Court suggested that persons may not qualify as direct victims unless the defendant's conduct is directed toward them.[80] The Third District Court of Appeal has developed a theory which defines this elusive class of plaintiffs in terms of contractual relationships and does so in a manner which clearly delineates the limits of the direct victim cause of action.

4. *Direct Victims Defined by Contract: A Solution*

The theory which the Third District Court of Appeal eventually applied in *Newton v. Kaiser Hospital*,[81] was first developed by that court in a 1984 case, *Andalon v. Superior Court*.[82] In *Andalon* the court, noting the lack of guidelines for determining the existence of a direct victim cause of action, turned to an earlier theory of duty,[83] established by the California Supreme Court in *Biakanja v. Irving*.[84] In *Biakanja*, the California Supreme Court held that a notary public who negligently prepared a will was liable to the intended beneficiary

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76. *Id.*

77. *See, e.g., Ochoa*, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (court still applying *Dillon* requirements).

78. *See* 1 CALIFORNIA TORTS, *supra* note 55, § 5.04(4)(b).

79. *See* PROSSER & KEETON, *supra* note 15, § 54. *See also Dillon*, 68 Cal. 2d at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74 (proper guidelines can indicate the extent of liability for future cases); *Ochoa*, 39 Cal. 3d at 179, 703 P.2d at 14, 216 Cal. Rptr. at 674 (Grodin, J., concurring) (*Dillon* guidelines used as a means of guarding against unwarranted extensions of liability).

80. *See supra* text accompanying notes 65-69 (*Ochoa* court discusses direct victim cause of action).

81. 184 Cal. App. 3d 386, 228 Cal. Rptr. 890 (1986).

82. 162 Cal. App. 3d 600, 208 Cal. Rptr. 899 (1984).

83. *Id.* at 609, 208 Cal. Rptr. at 903.

84. 49 Cal. 2d 647, 320 P.2d 16 (1958).

of the will for the losses which resulted when the will was found to be invalid.[85] According to the court, when an agreement contemplates a direct benefit to particular persons, those individuals are foreseeable victims of negligent performance and a duty should extend to those persons despite their lack of privity.[86] Although the *Biankanja* "contract" rationale has been used to establish a duty of care to plaintiffs for pure economic harm,[87] the *Andalon* court used the analysis to establish a duty to plaintiffs who suffer emotional distress as a result of medical malpractice.[88]

In *Andalon*, the plaintiff's wife gave birth to a child with Down's Syndrome.[89] The complaint alleged that the physician negligently failed to inform Mrs. Andalon about a diagnostic procedure which would have detected the presence of the genetic defect.[90] Both parents brought actions for negligent infliction of emotional distress following the birth of the baby.

Since the plaintiffs could not recover under *Dillon*,[91] the court considered the direct victim cause of action,[92] and applied the *Biak-*

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85. *Id.* at 651, 320 P.2d at 19.

86. *Id.* at 650-51, 320 P.2d at 19.

87. *See, e.g.*, J'aire v. Gregory, 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979) (general contractor who contracted with lessor liable to lessee for economic losses due to contractor's negligent delay); Connor v. Great Western Sav. & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968) (construction lender on housing development had duty to subsequent home purchasers); Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961) (attorney liable to beneficaries for economic loss due to negligently drawn will). For a discussion of tort duty for economic harm, see Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513 (1985).

88. *Andalon*, 162 Cal. App. 3d 600, 610, 208 Cal. Rptr. 899, 904. Courts have been reluctant to hold physicians liable for breach of contract, reasoning that doctors do not warrant or guarantee successful results. *See* Gault v. Sideman, 42 Ill. App. 2d 96, 191 N.E.2d 436 (1963) (physician only undertakes to give his best judgment and skill; application of ordinary rules of contract law to contract between physician and patient is unjustified). Liability for emotional harm under the theory developed by the Third District Court of Appeal, however, is not for a breach of contract. Under this theory the contract serves only to establish a duty in tort to parties or beneficiaries of the contract. Newton v. Kaiser Hosp., 184 Cal. App. 3d 386, 392, 228 Cal. Rptr. 890, 894 (1986). The plaintiff must still establish a prima facie case of negligence.

89. *Andalon*, 162 Cal. App. 3d at 604, 208 Cal. Rptr. at 900.

90. *Id.* at 611, 208 Cal. Rptr. 905.

91. Since the injury in question occurred at conception, the plaintiffs could not establish a sensory perception of the event. *Id.* at 609 n.4, 208 Cal. Rptr. at 903 n.4.

92. In *Andalon* the court was faced with a factual situation similar to that of *Molien*. Plaintiffs were both husbands whose wives had doctor-patient relationships with the defendants. Each husband's theory of recovery was based on the defendant's malpractice. The malpractice in each case affected the couple's reproductive relationship. In both cases, the defendant's conduct violated a personal interest of the husband. The *Andalon* court considered the injury to Mr. Molien and to Mr. Andalon to be direct or nonderivative in nature. The court stated that the defendant's conduct "directly implicated the interests of Mr. Molien" and that the harm to Mr. Molien was "not merely derivative of Mrs. Molien's injury," specifically referring to Mr. Molien's fear that he might also have syphilis. *Id.* at 610-11, 208 Cal. Rptr. at 904-

anja analysis. The court suggested that Mr. Andalon[93] was a third party beneficiary to a contract between the defendant and Mrs. Andalon.[94] As a member of the reproductive unit,[95] the plaintiff had a personal interest in the reproductive choice the test results would have provided.[96] He suffered emotional distress because he was deprived of that choice, not just because his wife and child suffered.[97]

The court concluded that the doctor owed a duty of care to Mr. Andalon because there was a nexus between the end and aim of the contractual relationship and a significant personal interest of the plaintiff.[98] According to the court, Mr. Andalon was "manifestly a direct beneficiary of the tort-duty imposed by the doctor-patient relationship."[99] The court suggested that the existence of a contractual relationship not only justifies the extension of a duty to the beneficiary,[100] but also that such a relationship can serve as a rational basis for defining the limits of the direct victim cause of action.[101] *Newton* applied and extended the theory developed in *Andalon*.

II. The Case

A. *The Facts*

Rebecca Nowlin[102] was under the care of Kaiser Hospital during the delivery of her son, James Newton.[103] Since birth James has

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05. The court implied that the nonderivative nature of the injury is a distinguishing characteristic of the direct victim cause of action. The California Supreme Court, however, did not explicitly make this distinction in *Molien*. In fact, the analysis centered on the emotional harm that arose from the social and psychological implications which the disease carries. No explicit mention was made of the apprehension Mr. Molien might have felt about his own health. *See supra* notes 51-53 and accompanying text (discussion of *Molien*). The analysis by the *Molien* court, however, is not inconsistent with the concept of a nonderivative cause of action since Mr. Molien would have suffered emotional harm from the misdiagnosis even if for some reason his wife had not suffered an injury.

93. The court had little trouble finding that the doctor owed a duty to Mrs. Andalon. *See Andalon*, 162 Cal. App. 3d at 611, 208 Cal. Rptr. at 905. The discussion, therefore, centered on the issue of whether the defendant owed a duty to Mr. Andalon. *See id.* For a discussion of the duty owed to mothers, see *infra* note 120.

94. *Andalon*, 162 Cal. App. 3d at 611, 208 Cal. Rptr. at 905.

95. In discussing the significance of the father's status as a member of the reproductive unit, the court did not go into detail but simply stated that "[t]he burdens of parental responsibility fall directly upon his shoulders." *Id.*

96. The court noted that only a woman has a legally enforceable right to make the final choice regarding reproductive options, but found that Mr. Andalon could state a cause of action if he could show that he would have been consulted by his wife regarding the decision. *Id.* at 612 n.7, 208 Cal. Rptr. at 905 n.7.

97. *Id.* at 611, 208 Cal. Rptr. at 905. Mr. Andalon's cause of action is not derivative. *See supra* note 92 (nonderivative causes of action in *Molien* and *Andalon*).

98. *Andalon*, 162 Cal. App. 3d at 611, 208 Cal. Rptr. at 905.

99. *Id.*

100. *Id.*

101. *Id.* at 610, 208 Cal. Rptr. at 904.

102. Mr. and Mrs. Newton were divorced and Mrs. Newton remarried. Telephone inquiry,

suffered from a permanent and irreparable paralysis of the upper arm known as Erb's Palsey.[104] The condition allegedly resulted from the negligent application of forceps during James' delivery at the defendant's medical facility.[105] The use of forceps and the resulting injury could have been avoided if the medical staff had performed a cesarean section rather than a vaginal delivery.[106] The mother, Mrs. Nowlin, was unconscious during the delivery[107] and the father, Robert Newton, was not present.[108] The parents brought a medical malpractice action against Kaiser Hospital on their own behalf for the emotional distress they suffered as a result of James' injury.[109]

The trial court sustained a demurrer to the plaintiff's cause of action for negligent infliction of emotional distress on the grounds that the plaintiffs did not witness the negligent conduct and were therefore unable to state a cause of action under *Dillon*.[110] On appeal, the court cited *Andalon* as authority in holding that each plaintiff stated a cause of action as a direct victim.[111] The judgment of dismissal was reversed and the case was remanded with instructions to vacate the order of dismissal and enter an order overruling the demurrer.[112]

B. The Opinion

The Court of Appeal for the Third District reviewed *Dillon* and *Molien*.[113] The court noted that since the California Supreme Court had not defined "direct victim" in *Molien*, the difficult task of distinguishing between bystanders and direct victims and of establishing limits to the direct victim class had been left to the lower courts.[114] Justice Sparks, writing for the majority, noted the resulting conflict in the appellate courts.[115] Justice Sparks declined to resolve

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office of D. deVries, attorney for the plaintiff (Dec. 1986) (notes on file at *Pacific Law Journal*). The court refers to the former Mrs. Newton as Mrs. Nowlin.

103. Newton v. Kaiser Hosp., 184 Cal. App. 3d 386, 388, 228 Cal. Rptr. 890, 891 (1986).
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 389, 228 Cal. Rptr. at 892.
108. *Id.*
109. *Id.* at 388, 228 Cal. Rptr. at 891. The parents also brought an action against Kaiser Hospital on behalf of James for the injury he sustained at birth. *Id.*
110. *Id.* at 389, 228 Cal. Rptr. at 892.
111. *See id.* at 391-92, 228 Cal. Rptr. at 893-94.
112. *Id.* at 393, 228 Cal. Rptr. at 894.
113. *Id.* at 389-90, 228 Cal. Rptr. at 892.
114. *Id.* at 390, 228 Cal. Rptr. at 892.
115. *See supra* text accompanying notes 71-74.

this conflict, however, because he found that the issues raised by *Newton* could be decided by reference to the court's prior decision in *Andalon*.[116]

The *Andalon* decision, the court explained, was an attempt to provide a rational basis for delineating the *Molien* direct victim cause of action by analyzing the concept of a direct victim under a theory set out in *Biakanja*.[117] According to the court, *Biakanja* held that the duty of care for a tortious breach of contract extends to the third party beneficiaries of that contract.[118] The *Newton* court therefore held that a duty to both parents arose out of the contract between Kaiser and Mrs. Nowlin.[119] The defendants owed a duty to Mrs. Nowlin because she was a party to the contract.[120] Citing *Andalon* and by implication *Biakanja* as authority, the court found that a duty also extended to Mr. Newton who, as a member of the reproductive unit, was a third-party beneficiary to the contract.[121]

In the final paragraph of the decision the *Newton* court, in very broad language, states that a "duty of care may arise from contract even though there would otherwise be none . . . Kaiser's contract [with Mrs. Nowlin] was the source of its duty and a determination of foreseeability is unnecessary to establish a duty of care."[122] Ac-

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116. *Newton*, 184 Cal. App. 3d at 391, 228 Cal. Rptr. at 893.

117. *Id.*

118. *Id.*

119. *Id.* at 392, 228 Cal. Rptr. at 894.

120. *Id.* The court of appeal had little trouble finding that Mrs. Nowlin was a direct victim since she was not only a party to the contract for the care of the baby, but was also a patient of the defendant. *Id. See* Johnson v. Superior Court, 123 Cal. App. 3d 1002, 177 Cal. Rptr. 63 (1981). In *Johnson* the court states that the mother's relationship with the baby during pregnancy and childbirth is sufficiently close to make emotional harm to the mother a foreseeable result of harm to the baby, and the emotional distress should therefore be compensable as part of the mother's malpractice action. *Id.* at 1007, 177 Cal. Rptr. at 65. Thus the significance of *Newton* is the extension of a duty of care to fathers and, by implication, to mothers who are not themselves patients of the defendant.

121. *Newton*, 184 Cal. App. 3d at 392, 228 Cal. Rptr. at 894.

122. *Id.* The language the court uses here is broad and suggests that the contract itself is the basis of the duty. However, the rationale of *Andalon* and *Biakanja* suggests that the contract gives rise to a duty because it establishes the foreseeability of harm to the victim. Furthermore, the court cited Eads v. Marks, 39 Cal. 2d 807, 249 P.2d 257 (1952), for the proposition that a contract will give rise to a tort duty where a duty would not otherwise exist. *Newton*, 184 Cal. App. 3d at 392, 228 Cal. Rptr. at 894. But in *Eads*, the contract gave rise to a duty because the agreement established the foreseeability of an otherwise unforeseeable harm. *See Eads*, 39 Cal. 2d at 812, 249 P.2d at 260-61. In *Eads*, the parents had a contract with the defendant milk company to deliver milk to their home. The parents explained that they were concerned about the safety of their young son and requested that the delivery man not leave the glass milk bottles on the porch. Despite the agreement, the bottles were left on the porch. The child dropped one and seriously injured himself. The court held that the defendant owed a duty of care to the child because he was a third-party beneficiary to the

cording to this court, only in the absence of a contractual relationship should plaintiffs have to establish the foreseeability of the emotional harm by meeting the requirements set out in *Dillon*.[123]

III. Legal Ramifications

The *Newton* decision represents a significant extension of prior case law. The *Newton* court allowed a father to recover[124] for emotional distress even though he was not a percipient witness to his son's injury.[125] Mr. Newton, like Mrs. Dillon, suffered only because of an injury to another person. Unlike Mrs. Dillon, however, Mr. Newton did not experience the traumatic impact of witnessing the injury to his child.[126]

Although the court characterizes Mr. Newton as a direct victim, the holding extends a duty beyond the limits for direct victims suggested in *Ochoa* since there is no indication that the defendant's conduct was ever directed toward Mr. Newton. *Newton* also represents an extension of the direct victim cause of action since Mr. Newton's claim is essentially derivative, while the claims of Mr. Molien and Mr. Andalon were based on the violation of their own personal interests.[127] Mr. Molien feared for his own health and his marriage, while Mr. Andalon was deprived of a reproductive choice. On the other hand, Mr. Newton suffered emotional distress solely because his child was injured by the defendant's negligent conduct.

The decision in *Newton* has significant consequences. If a duty arises from the contractual relationship, then all parents who contract with physicians for the care of their children may have actions for negligent infliction of emotional distress if the child is injured as a result of the contracting physician's negligence. Under *Newton*, lia-

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contract between the parents and the defendant. The duty arose because the contract had made the risk of harm to the child foreseeable. *Id.* In *Newton*, the court stated that the existence of a contract makes a determination of foreseeability unnecessary. *Newton*, 184 Cal. App. 3d at 392, 228 Cal. Rptr. at 894. In view of the underlying rationale of the cases cited by the court, the court may be saying that the contract establishes the foreseeability and makes further foreseeability analysis unnecessary.

123. *Newton*, 184 Cal. App. 3d at 392, 228 Cal. Rptr. at 894. In a footnote, the *Newton* court suggests that since the defendant in *Ochoa* had no contract with the mother or the son, the defendant's duty to Mrs. Ochoa arose only under *Dillon*. *Id.* at 392 n.5, 228 Cal. Rptr. at 894 n.5.

124. *Newton*, 184 Cal. App. 3d at 387-88, 228 Cal. Rptr. at 890-91.

125. *Id.* at 389, 228 Cal. Rptr. at 892.

126. *See id.*

127. *See supra* text accompanying notes 95-97; *see also supra* note 92 (discussion of nonderivative nature of *Molien* and *Andalon* claims).

bility for the emotional distress of parents might also extend to other medical and nonmedical professionals whose negligent conduct results in an injury to a child.[128] At the same time the theory would deny recovery to individuals whose emotional distress may be foreseeable but who cannot establish the existence of a contractual relationship with the defendant.

Conclusion

In *Newton v. Kaiser Hospital*, the California Court of Appeal for the Third District ruled that parents whose child was injured at birth as a result of a negligent delivery could bring a cause of action against the hospital for negligent infliction of emotional distress even though neither parent qualified as a percipient witness under *Dillon*. The court found that a duty to both parents arose from the contract between Kaiser and the mother, and allowed them both to state a cause of action for emotional distress under *Molien*. Under *Newton*, the class of direct victims would include only those persons who can establish a contractual relationship with the defendant, either as a party or a beneficiary. Persons who cannot establish a contractual

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128. The "contract" language in the *Newton* opinion suggests a broad holding applying to all contracts. The rationale of the cases cited by the court as authority and other language used by the court, however, seem to suggest a narrower interpretation. The cases suggest that the underlying relationships and expectations of the parties are important in establishing a duty. For example, the court in *Andalon* speaks of "a direct beneficiary of the tort-duty imposed by the doctor-patient relationship" and "the duty to Mr. Andalon arose out of the doctor patient relationship." *Andalon*, 162 Cal. App. 3d at 611, 612, 208 Cal. Rptr. at 905, 906. In *Newton*, the court speaks of the obstetrician-patient relationship and of the plaintiffs as direct victims of the negligent execution of this relationship. *Newton*, 184 Cal. App. 3d at 392, 228 Cal. Rptr. at 894. Thus the holding in *Newton* may be confined to doctor-patient relationships. *Molien, Andalon*, and *Newton* were all malpractice actions. The court in *Andalon* specifically stated that their analysis served to place the *Molien* cause of action into a medical malpractice setting. *Andalon*, 162 Cal. App. 3d at 610, 208 Cal. Rptr. at 904. Unique expectations may attach to the doctor-patient relationship which are not found in other contractual relationships. Furthermore, *Molien, Andalon*, and *Newton* all involved the reproductive relationship. *Newton* focuses on the parent-child aspect of that relationship. Extending a duty to parents who entrust the care of their children to physicians may not be unreasonable when the physicians accept the responsibility knowing the parents will depend on them to provide the medical care which the parents are unable to provide. Under these circumstances, some measure of obligation running directly to the parents may well be within the contemplation of the contracting parties. One court has already rejected the application of *Newton* in an action brought by a wife whose husband died as a result of malpractice. *See* Kossel v. Superior Court, 186 Cal. App. 3d 1060, 1068-69, 231 Cal. Rptr. 183, 188 (1986). In denying recovery to the wife, the court pointed out that her injuries did not flow from the reproductive life of the couple. *Id.* However, despite the importance of the underlying relationships and expectations, it is clear that under *Newton* a doctor-patient relationship will not give rise to a duty to parents in the absence of a contract. *See supra* note 123 (Mrs. Ochoa not a direct victim under *Newton*).

relationship would be barred from recovery unless they can establish a cause of action as a percipient witness under *Dillon*. The *Newton* decision may extend recovery for emotional distress to all parents whose children are injured as a result of medical malpractice, except for those relatively rare instances when the medical care is not rendered under a contract with a parent.

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