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LIABILITY TO BYSTANDERS FOR NEGLIGENTLY INFLICTED EMOTIONAL HARM—A COMMENT ON THE NATURE OF ARBITRARY RULES

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INTRODUCTION

Negligence is the creation of an unreasonable risk of harm.[1] In determining whether a particular risk is unreasonable, the law has looked only to those consequences that would have been foreseeable to the "reasonably prudent" person at the time the defendant acted.[2] While characterization of conduct as negligent has hinged exclusively on foreseeability, the extent of liability for conduct determined to be negligent has not. Thus, a negligent defendant may be liable for unforeseeable consequences;[3] and, of more relevance to this article, a defendant is not necessarily liable for all foreseeable harm resulting from his negligence. Intra-family immunities,[4] automobile guest laws,[5] lower duties owed by land occupiers to licensees and trespassers,[6] and rules limiting liability for purely pecuniary losses[7] constitute pockets of non-liability for foreseeable harm.

One of the more dramatic trends in tort law in the past two decades has been toward judicial elimination or modification of many of these doctrinal barriers to recovery for foreseeable harm.[8] The common and easy criticism

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1. W. PROSSER, LAW OF TORTS 145 (4th ed. 1971).

2. *Id.* at 150.

3. In some states, the rules of proximate cause extend liability beyond the foreseeable consequences. *See, e.g.*, Petition of Kinsman Transit, 338 F.2d 708 (2d Cir. 1964); Lynch v. Fisher, 34 So. 2d 513 (La. App. 1948); Dellwo v. Pearson, 259 Minn. 452, 107 N.W.2d 859 (1961). Under the generally accepted "thin skull" rule, the defendant does not escape liability just because the extent of the harm to the plaintiff is unforeseeable. *See* W. PROSSER, *supra* note 1, at 261-62.

4. *See, e.g.*, Burns v. Burns, 111 Ariz. 178, 526 P.2d 717 (1974) (husband-wife); Skinner v. Whitley, 281 N.C. 476, 189 S.E.2d 230 (1972) (parent-child).

5. *See, e.g.*, IOWA REV. CODE ANN. § 321.494 (Supp. 1982); UTAH CODE ANN. § 41-9-1 (1970).

6. *See* RESTATEMENT (SECOND) OF TORTS §§ 333, 342, 343 (1965).

7. *See, e.g.*, Stevenson v. East Ohio Gas Co., 73 N.E.2d 200 (Ohio App. 1946).

8. *See, e.g.*, Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974) (recovery for consequential pecuniary loss permitted); Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973) (auto guest statute unconstitutional); Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (classification of entrants on land abolished); Romanik v. Toro Co., 277 N.W.2d 515 (Minn. 1979) (parent-child immunity abrogated); Beaudette v. Frana, 285 Minn. 366, 173 N.W.2d 416 (1969) (husband-wife immunity abrogated).

of these barriers is that they are arbitrary exceptions to the general rule of liability based upon foreseeability. This article examines that criticism as it has been used to support the extension of negligence-based liability for emotional harm to "bystanders"—those not exposed to the risk of physical impact.

Beginning with *Dillon v. Legg*,[9] most courts considering the question have extended negligence liability to bystanders for shock and fright resulting from an accident involving a third person. In so doing these courts have overruled the "zone of danger" rule, which prohibits such recovery unless the plaintiff is within the zone of danger of physical impact. The Supreme Judicial Court of Massachusetts,[10] for example, expressed concern with and condemned what it perceived to be the arbitrariness of the zone of danger rule, asserting "that it is an inadequate measure of . . . reasonable foreseeability [and thus] lacks strong logical support."[11]

The thesis of this article is that, notwithstanding assertions of this sort, the zone of danger rule is no more arbitrary than the bystander recovery rule of *Dillon*. To demonstrate this, I will first discuss what is meant by "arbitrary" when it is used to describe a rule of law. In light of that discussion, the development of the zone of danger rule and of the rule permitting bystander recovery is traced. As will be made clear, if the test is fidelity to foreseeability, both rules are arbitrary; however, this does not necessarily warrant reaffirmation of the zone of danger rule. The arbitrariness of both rules could be eliminated by recognizing a broader tort which would provide recovery generally for negligently inflicted emotional harm. Although a few courts have flirted with the idea of creating such a tort, none has yet made an unequivocal commitment to it. After discussing the reasons that support this judicial caution, I conclude the zone of danger rule strikes the correct balance among the conflicting considerations.

The Nature of Arbitrary Rules

The word "arbitrary" does not have a single meaning when used to describe a rule of law. I will focus on two kinds of arbitrariness peculiarly relevant to the bystander recovery rule. The first occurs because of a dischordance between rule and policy, and the second because of vagueness in the way the rule is stated.

A rule of law may be arbitrary with respect to policy either because it is unsupported by any policy, or because it goes farther than, or not as far as, its underlying policy would suggest. Instances in which a rule is supported by no policy at all must truly be rare and one could almost infer from the existence of such a rule that its maker was insane.[12] This is no doubt why the

9. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

10. Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978).

11. *Id.* at 564, 380 N.E.2d at 1300.

12. Or, perhaps, extraordinarily careless. *See, e.g.*, Justice Powell's dissenting opinion in Schweiker v. Wilson, 450 U.S. 221, 239-40 (1981): "In my view, Congress thoughtlessly has applied a statutory classification developed to further legitimate goals of one welfare program to another welfare program serving entirely different needs. The result is an exclusion of wholly dependent people from minimal benefits, serving no government interest.

"minimum rationality" test, which is used to determine the constitutionality of some statutes, is so porous.[13]

More likely than the total absence of a policy justification for a rule is a rejection of the particular policy offered to support it. The common law process calls for continual re-evaluation of the goals rules are intended to achieve. Subject to the strictures of *stare decisis,* courts often change common law rules when they perceive a marked shift in values[14] or changes in the way that people behave and institutions function.[15] Holmes' famous aphorism that policies existing in the time of Henry IV are inadequate in themselves to support modern rules of law[16] captures the essence of the thought. When judges find old assumptions no longer valid, they often assert the rules based upon those assumptions are not supported by any policy, and are thus arbitrary.[17]

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13. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 974-1000 (1978). The only recent case in which the Supreme Court of the United States has clearly struck down a statute under the minimum rationality approach is United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973). Although the early cases involving classification based upon illegitimacy have minimum rationality overtones, *see, e.g.,* Levy v. Louisiana, 391 U.S. 68 (1968), the recent cases have applied a stiffer standard of constitutional review. *See, e.g.,* Lalli v. Lalli, 439 U.S. 259, 265 (1978) ("classifications based on illegitimacy are not subject to 'strict scrutiny' [but are] nevertheless invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests").

14. *See, e.g.,* Rowland v. Christian, 69 Cal. 2d 108, 118, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968): "[T]o focus upon the status of the injured party as a trespasser, licensee or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values."

15. For example, there is little doubt that liability insurance has influenced in many ways the development of the substantive law of negligence. *See, e.g.,* Williams v. Williams, 369 A.2d 669 (Del. 1976) (parent/child immunity); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961) (governmental immunity); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965) (liability of house builder for defects).

16. Holmes, *The Path of the Law,* 1 B.L. SCH. MAG. 1, 11 (1897):

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

17. *E.g., compare* Ryan v. Towar, 128 Mich. 463, 87 N.W. 644 (1901, *with* Lyshak v City of Detroit, 351 Mich. 230, 88 N.W.2d 596 (1958), both dealing with the liability of landowners to trespassing children. The court in *Ryan* observed:

> There is no more lawless class than children, and none more annoyingly resent an attempt to prevent their trespasses. . . . The remedy which the law affords for the trifling trespasses of children is inadequate. No one ever thinks of suing them, and to attempt to remove a crowd of boys from private premises by gently laying on of hands, and using no more force than necessary to put them off, would be a roaring farce, with all honors to the juveniles.

128 Mich. at 463, 87 N.W. at 645. A much different view was taken in *Lyshak:*

> The courts have increasingly abandoned the position [of *Ryan*], in favor of the position that "[w]e are clothed with a trusteeshp as to the care for those of tender years." . . . We must weigh against the ancient exclusive rights of the landowner the known fact (among others) that although urban children live physically in a world in which

Even if a rule is supported by a currently acceptable policy, it may nonetheless be characterized as arbitrary if it is broader or narrower than the policy suggests it should be. When this occurs, courts are apt to conclude the law is arbitrary because persons in substantially the same position are treated differently, or persons in substantially different positions are treated the same. This partial discontinuity between rule and policy can occur for the same reasons that a total absence of policy support can occur: a supporting policy never existed, or the original values and assumptions about reality have changed. In either event, the rule will be perceived as arbitrary because the lines it draws are unsupported by acceptable policy reasons.

The law relating to contributory negligence is one example of the partial discontinuity between rule and policy. The policies that underlie negligence law have traditionally suggested the plaintiff's own misconduct is relevant to allocation of loss between plaintiff and defendant; but this relevance does not necessarily mean the plaintiff's fault should totally bar recovery. More refined notions of policy suggest the plaintiff's fault should serve to reduce, but not to eliminate, his recovery.[18] While contributory negligence remains relevant to tort liability, the traditional rule with its all or nothing quality is, in the opinion of most current observers, arbitrary because it treats persons differently who ought to be treated alike; for example, plaintiffs who are

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> the stream of traffic has replaced the stream of water, and concrete and asphalt the pasture and meadow, mentally theirs is still a world of fiction and fantasy. . . . [T]he overriding and incontestable principle [is] that the right of a child to life, and life unmaimed, outweighs the landowner's right to the exclusive possession of his property.

351 Mich. at 241-42, 88 N.W.2d at 602 (citations omitted).

Courts are less free in reevaluating the policies underlying legislation, and often assert it is not a proper judicial function to question the wisdom of statutes they are called upon to enforce. But in interpreting statutes, there is no doubt that courts are influenced by their notions of policy furthermore, changing views about modern society can lead courts to strike down as unconstitutional statutes which when passed were of undoubted validity. Laws discriminating on the basis of sex come quickly to mind. *E.g., compare* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) (denial of female to admission to bar constitutional) *with* Stanton v. Stanton, 421 U.S. 7 (1975) (sex based distinction in connection with father's support obligation unconstitutional). In *Bradwell,* a concurring judge stated:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.

83 U.S. (16 Wall.) at 141. Such a view would permit, if not require, many sex based classifications that are no longer appropriate today. As the court in *Stanton* observed:

> No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. . . . The presence of women in business, in the professions, in government and, indeed, in all walks of life . . . is apparent and a proper subject of judicial notice.

421 U.S. at 14-15.

18. *See, e.g.,* Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Schwartz, *Contributory and Comparative Negligence: A Reappraisal,* 87 YALE L.J. 697 (1978).

negligent to a slight degree and those who are not negligent at all. The traditional rule is also considered arbitrary because it treats persons the same who ought to be treated differently by barring recovery for plaintiffs found responsible for 100 percent of the causative negligence as well as those only slightly negligent.

This does not mean, however, that every rule that does not dovetail neatly with an acceptable policy is bad. Most rules reflect more than one societal concern and are the product of more or less conflicting policies. This is particularly true of statutes. The legislative process is designed to produce compromises among conflicting viewpoints; consequently many reformers often feel frustrated because it is almost impossible for ideals to prevail in pure form.[19] For this reason, adjudication has emerged as a potent mechanism for reform. While judges may read opinion polls, they can and do insulate themselves more easily than legislators from the give and take of politics.[20] We expect judicial opinions to be "principled" — to be faithful to an enunciated policy.[21] But even a single judge in determining what the rule for a decision should be may be pulled in conflicting directions, and may adopt a middle-ground rule. There is every reason to believe that when needed to dispose of a case compromises occur on multi-judge benches similar to those in the legislative process.[22] A rule may be considered "unprincipled" and characterized as arbitrary when measured against a single policy, because it is supported by a number of competing and inconsistent policies and represents a compromise

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19. The development of comparative negligence may be an example. Judicially created comparative negligence laws have taken the "pure" form, under which the plaintiff's negligence serves to reduce, but never to eliminate, recovery. Most legislatively enacted comparative fault laws are "modified," under which plaintiffs' contributory negligence, if great enough, may serve to eliminate recovery entirely. *See* Pearson, *Apportionment of Losses Under Comparative Fault Laws — An Analysis of the Alternatives,* 40 LA. L. REV. 343, 352 (1978). Prosser, after asserting the superiority of pure comparative negligence, was moved to comment that modified comparative negligence systems are

> more or less obvious compromises between contesting groups in the legislature which go part of the way along the road to apportionment but endeavor to stop short at some point where the distrust of the jury becomes acute or where agreement can be reached. They are, in other words, political in character, and like most political compromises, they are remarkable neither for soundness in principle nor success in operation.

Prosser, *Comparative Negligence* 51 MICH. L. REV. 465, 484 (1953).

20. This is true to a considerable extent even for elected judges. Such judges often owe their initial selection to the bench to interim appointments, and thereafter are usually elected, and re-elected, as a matter of course. To some extent, elections function as more than rubber stamps, and do play effective roles in judicial selection. The outcomes, however, are more likely to be determined by party politics, as to which the judges are likely to be helpless bystanders, than by the candidates' records. *See* A. VANDERBILT, JUDGES AND JURORS: THEIR FUNCTIONS, QUALIFICATIONS AND SELECTION 1, 37, 40-41 (1956).

21. *See* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 120-21 (1921); Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 15 (1959).

22. *See* Note, *The "Released Time" Cases Revisted: A Study of Group Decisionmaking by the Supreme Court,* 83 YALE L.J. 1202, 1235 (1974) (there are unmistakable signs in Supreme Court opinions that compromise among the Justices occurred).

among them. But this does not mean such a rule ought to be rejected. It means only that there is little ideological purity in the law.

There is one more, and rather peculiar, form of policy-related arbitrariness. There are occasions in which a policy will suggest more than one rule that will satisfy it, with no logical way of choosing between them. Many traffic rules fall into this category. As an initial matter, for example, it would make no difference whether automobiles are to be driven on the right side of the road or the left. A choice, however, had to be made[23] and the choice was essentially an arbitrary one.[24] The same sort of arbitrariness is often involved in age related disabilities. Coming of age involves both biological and sociological processes through which persons gain maturity, if at all, gradually over time. For different persons and for different purposes, the maturation process takes place over different time spans. For legal purposes, however, the transition from childhood to adulthood is instantaneous, and is achieved upon the attainment of an age that is the same for all persons, without regard to biological, emotional or physical maturity.[25] Policy considerations may suggest that within a wide range, one age for the attainment of legal capacity is better than another; for example, that 18 is a more appropriate age for the franchise than 21. But within a narrow range, policy provides no guidance. Eighteen may be a better voting age than 21, but it is not demonstrably better than 18½ or 17½, and the choice within that narrow range is essentially arbitrary.[26]

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23. This is not to suggest the choice was made by someone who sat down, thought about it, and decided we should drive on the right. The ultimate choice no doubt evolved over time.

24. Once the choice was made, however, the decision to adhere to it is not arbitrary. Long term reliance on the decision makes any change costly, therefore, England could not reverse traffic flow to comport with most of the rest of the world without immense cost and disruption.

25. Legal capacity may be attained at different ages for different legal purposes, such as marriage (with or without parental consent), working (with or without a permit), obtaining an automobile operator's license and voting. In this sense, coming of age may be viewed for legal purposes as a process. For each purpose, however, the transition to adulthood is not gradual but is instantaneous upon attainment of the specified age.

26. The discussion in the text has tacitly assumed that a "bright line" approach, as opposed to one under which each person would be tested "on the merits," is necessary with respect to each purpose. To some extent this assumption is not accurate, either as a matter of actual practice or as a matter of legal theory. For example, it is not enough in most states that a person attain a certain age to obtain an automobile operator's license, he must additionally satisfactorily perform on tests of skill and knowledge of the law. These tests measure in an indirect way, driving maturity. In theory, "maturity tests" could be expanded to include other areas. For example, there have been suggestions that persons about to be married demonstrate some marital readiness qualifications. *See* C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 623-26 (2d ed. 1976). One of the more unusual proposals along this line is that for "'parent licensing,'" which would involve comprehensive education and testing. *See* Davids, *New Family Norms*, 8 TRIAL 4 (1972).

The bright line age test for retirement has been successfully attacked in some legislatures *see, e.g.*, the Age Discrimination in Employment Act, 29 U.S.C. § 621 (1976 & Supp. II 1978); FLA. STAT § 112.044 (1981). Constitutional attacks have failed. *See* Vance v. Bradley, 440 U.S. 93 (1979); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

So long as the choice is within whatever range is suggested by policy, the arbitrariness of the rule does not warrant its condemnation.[27]

The second of the two forms of arbitrariness this article addresses stems from the way in which the rule is stated. Although a rule may have a logical nexus to an acceptable policy, and thus is not arbitrary in that sense, it may be stated so vaguely as to provide insufficient guidance to those whose function it is to apply and enforce the rule.[28] Of course, no rule or set of rules is so precise as to eliminate the need for judgment in every case.[29] Vagueness is a relative concept, a matter of more or less, rather than of either/or. The room for discretion may be rather narrow, and the policy underlying the rule may further narrow the range of choice. For example, the rule that children will be held to the adult standard of care when they engage in adult activities[30] furnishes little guidance as to what activities should be categorized as adult. Nonetheless the policies that would lead a court to adopt that rule make clear that driving a motor vehicle on the public highway is an adult activity,[31] while playing catch in the backyard is not. Other activities, such as playing golf[32] or riding a bicycle may not so clearly fall into one category or the other, but a reasoned, and reasonable, decision can be reached even though the judge's own childhood experiences may influence the decision.[33]

As rules become more vaguely stated, however, judges become less confined by rules and their underlying policies. When making a decision under a rule that provides little or no guidance, decision makers will inevitably decide upon whatever basis seems important to them.[34] The decisions will be arbitrary from the viewpoint of all but the decision makers since they will depend not on any generally agreed upon principle, but upon who is making the decision. Perhaps the classic example of this is Judge Andrews' approach

27. Lotteries are an example of an arbitrary means to distribute limited benefits and burdens when no agreement can be reached upon a "fair" method other than random distribution. For example, if two professional sports teams qualify, by virtue of their performance in the past season, for the first draft pick, the team that gets the first pick may be determined by a coin flip, as was done recently in the National Basketball Association draft. *See* N.Y. Times, May 1, 1981, A21, col. 1. A more dramatic example is the recent lottery system for drafting young men into armed forces. *See* 50 U.S.C. App. § 455 (1976). While the ultimate outcome of a lottery is arbitrary in the sense that burdens and benefits are not distributed upon the basis of some predetermined merits, the lottery itself is not an arbitrary device if it is logically connected to the policies which it implements.

28. Enforcement problems also result from vagueness because those who are otherwise willing to conform to a rule cannot do so because they cannot determine with sufficient precision what conduct the rule requires. *See* Henderson & Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands,* 78 COLUM. L. REV. 1429, 1434-38 (1978).

29. *See* Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart,* 71 HARV. L. REV. 630, 661-69 (1958); Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593, 607-15 (1958).

30. *See* RESTATEMENT (SECOND), *supra* note 6, § 283A, comment C.

31. *See, e.g.,* Daniels v. Evans, 107 N.H. 407, 224 A.2d 63 (1966).

32. See Neumann v. Shlansky, 63 Misc. 2d 587, 312 N.Y.S.2d 951 (1970) (playing golf is an adult activity).

33. *See* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 49 (1960).

34. *See generally* Henderson & Pearson, *supra* note 28.

to proximate cause in his dissenting opinion in *Palsgraf v. Long Island R.R.*[35] There is considerable disagreement over the policies supporting the proximate cause limitation on liability, and Judge Andrews' opinion does not specifically offer a policy justification. The overall tone of his opinion, however, suggests the widely accepted rationale of avoiding crushing liability out of proportion to the defendant's wrong.[36] Judge Andrews does not provide meaningful guidelines to determine when the defendant's liability should be cut short. To be sure, the rule stated by Judge Cardozo that proximate cause is to be determined by foreseeability[37] is also imprecise; but like the negligence concept, it does provide some indication of the relevant factors.[38] Although Judge Andrews recognized foreseeability plays a role in the proximate cause issue,[39] he states that foreseeability is not the limit of the defendant's liability. It is, rather, only a factor to be used in setting that limit on a case-by-case basis, and he argues for a "rule" of decision so vague that it is without substantive content:

> What we do mean by the word "proximate" is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. . . .
>
> It is all a question of expediency. There are no fixed rules to govern our judgment. There are simply matters of which we may take account. . . . There is in truth little to guide us other than common sense.[40]

Andrews himself recognized this approach — it does not deserve to be called a rule — is essentially arbitrary.[41]

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35. 248 N.Y. 339, 162 N.E. 99 (1928).

36. *See* F. HARPER & F. JAMES, 2 THE LAW OF TORTS 1132-33 (1956); Seidelson, *Some Reflections on Proximate Cause,* 19 DUQ. L. REV. 1 (1980).

37. For the purposes of this article, it is not necessary to choose between Cardozo's definition of the issue in *Palsgraf* ("The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability." 248 N.Y. at 346, 162 N.E. at 101) and that of Andrews ("We deal in terms of proximate cause. . . ." 248 N.Y. at 348, 162 N.E. at 102). I agree with Andrews, but the vagueness problem does not turn on whether the issue in *Palsgraf* is one of duty or of proximate cause.

38. Sections 292 ad 293 of the RESTATEMENT (SECOND) OF TORTS state generally accepted factors used to determine the existence of negligence. That value judgements must be made does not mean the negligence concept is unprincipled. *See* RESTATMENT (SECOND) *supra* note 6, §§ 292 & 293.

39. 248 N.Y. at 353, 162 N.E. at 104.

40. *Id.* at 352, 354, 162 N.E. at 103-04.

41. *Id.* In defending his approach, Andrews relied upon the then New York rule of Ryan v. New York Central R.R. Co., 35 N.Y. 210 (1866) with respect to liability for fires, although he did not cite that case by name. In *Ryan,* the court ruled that a defendant who negligently started a fire on *A*'s property would not be liable for harm to *B*'s property if the fire spread that far. Andrews felt that the line so drawn was arbitrary. Assuming the *Ryan* rule is arbitrary, its arbitrariness is of a different sort than that which characterizes Andrews' approach to proximate cause. Andrews asserted the *Ryan* rule is arbitrary in that its policy, while supporting a line short of liability for all harm caused by a fire, did not dictate that it necessarily had to be drawn as the *Ryan* court did. (As to this kind of arbitrariness, see *infra* text accompanying notes 23-27.) Even if Andrews' assertion were true,

While arbitrariness as defined in the preceding discussion is not desirable, some arbitrariness is inevitable. Because a rule is in some sense arbitrary is not itself sufficient reason to condemn it. In evaluating the zone of danger rule and the more expansive bystander recovery rule, it will not do simply to condemn one or the other, or both of them, as arbitrary. The perspective from which the charge of arbitrariness is made must be clearly stated, and comparison must be made to the rules offered as alternatives. The next two sections examine the development of the zone of danger and the bystander recovery rules to provide the basis for this comparison.

THE ZONE OF DANGER RULE

The criticism of the zone of danger rule is that it is arbitrary because it does not fully coincide with the policy that negligent defendants should be liable for all harm foreseeably caused by their negligence.[42] To evaluate the merits of this criticism, it is necessary to explore briefly the history of the rule. The story of the development of the zone of danger rule and the rule permitting recovery by bystanders for negligently inflicted emotional harm has been told often enough that it need not be repeated in detail.[43] However, because I take a somewhat different view of that story, certain aspects of it must be reconsidered in relation to the thesis of this article.

My principal criticism of the traditional explanation of the developments in this area is its failure to keep separate analytically two related but nonetheless distinct issues: damages and liability. Damages rules determine the elements of harm for which recovery may be had. Liability rules are the substantive rules pursuant to which recovery may be had for legally recognized harm. Under this analytical scheme, the collateral source rule and rules measuring pain and suffering are damages rules. On the other hand, rules of proximate cause and those establishing the duty of occupiers of land are liability rules.[44] In light of this damages-liability distinction, I will briefly analyze the development of the zone of danger rule.

The legal system only grudgingly has afforded compensation for mental and emotional harm other than for physical pain and suffering.[45] In cases

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Ryan cannot be relied upon to support the legitimacy of a rule the arbitrariness of which stems from vagueness.

42. *See* Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978).

43. *See, e.g.*, Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime"*, 1 U. HAWAII L. REV. 1 (1979); Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute Between California and New York*, 51 ST. JOHN'S L. REV. 1 (1976); Note, *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases*, 35 U. CHI. L. REV. 512 (1968).

44. I recognize that the distinction between damages rules and liability rules might be drawn differently for another purpose, and that even under the distinction I suggest here, some rules might fall into either category. For example, the generally accepted rule barring recovery for "wrongful life," *see, e.g.*, Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979), could be stated as either a damages rule or as one of liability.

45. Physical pain and suffering is a form of mental harm. Traditionally, however, the terms "pain and suffering" have been used to describe sensations stemming directly from a physical injury or condition. "Mental and emotional harm" is a catch-all term covering

of intentional wrongdoing, the law early recognized actions based upon, and permitted recovery for, mental upset.[46] This early law of intentional wrongs, however, was concerned primarily with preserving peace by providing a socially acceptable, non-violent alternative to the "field of honor," rather than with protecting emotional tranquility as such.[47] Peace of the realm rather than peace of mind was the important value at stake. Indeed, for traditional intentional wrongs, proof of actual harm was not required for recovery.[48] While it is fair to say the modern law of intentional wrongs may be less concerned with deterring self-help than the early law, it falls far short of recognizing protection against emotional harm as an end itself. The traditional causes of action still do not require proof of harm as a distinct element.[49] While the RESTATMENT (SECOND) OF TORTS would establish a general tort of intentional infliction of emotional harm, it makes "severe emotional distress" a part of the plaintiff's prima facie case and allows recovery only if such distress was caused "intentionally or recklessly" by "extreme and outrageous conduct."[50] Plaintiffs who successfully establish the liability requirements based upon the defendant's conduct, however, will seldom lose because the emotional distress is not severe enough.[51]

The emphasis upon the defendant's conduct rather than upon the plaintiff's harm in the law of intentional wrongs probably explains why early courts did not draw upon that body of law to provide compensation for emotional harm in negligence cases. Proof of legally recognizable harm has been essential for recovery in negligence from the outset,[52] and courts had to develop rules of damages and liability concerning intangible harm largely from scratch. Although its origins are somewhat murky,[53] recovery for physical pain and suffering associated with and directly caused by an impact resulting in physical injury was easily absorbed into negligence law.[54] Beyond this, however, the early cases evince no neat doctrinal development with respect to emotional harm.

Several early cases specifically limited recovery for intangible harm to physical pain and suffering. For example, in 1858, in *Peoria Bridge Association v.*

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a variety of other sorts of intangible harm. *See* George v. Jordan Marsh Co., 359 Mass. 244, 245 n., 268 N.E.2d 915, 915 n.1. (1971). The particular kind of mental and emotional harm which I discuss is largely that of fright caused by threats to the safety of oneself or to others.

46. One of the earliest tort cases involved such harm. *See* I de S. v. W de S [1348] Y.B. Lib. Ass. Fol. 99, plac. 60.

47. *See* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW, 139-75, 353-78 (5th ed. 1956); Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 194 (1944).

48. *See* W. PTOSSER, *supra* note 1, at 29.

49. This is true even with respect to battery. *See* W. PROSSER, *supra* note 1, at 36.

50. RESTATEMENT (SECOND), *supra* note 6, § 46.

51. This is the impression from reading a sampling of the cases appearing in the appendix to § 46. Indeed, comment j to § 46 makes the outrageousness of the defendant's conduct relevant to the seriousness of the plaintiff's emotional harm. *Id.*

52. *See* W. PROSSER, *supra* note 1, at 143-44.

53. *See* O'Connell & Simon, *Payment for Pain & Suffering: Who Wants What, When & Why?*, 1972 U. ILL. L.F. 1.

54. *See* Morse v. Auburn & Syracuse Ry. Co., 10 Barb. 621 (N.Y. App. 1851).

Loomis,[55] the Supreme Court of Illinois reversed a judgment for the plaintiff based upon jury instructions that the plaintiff could recover for "injury to his person and intellect, and for his sufferings, pain, and danger to his life and loss of time in consequence thereof,"[56] ruling danger to life is not compensable harm.[57] This limited view of recoverable intangible harm was reaffirmed in 1872 when the Illinois Supreme Court stated compensable intangible harm is the "mental emotion arising from a physical injury [and not] mental anguish . . . caused by some mental conception not arising from the physical injury."[58] The Nevada Supreme Court similarly stated there could be compensation for "bodily pain, and so much of mental suffering as may be indivisibly connected therewith [but not] the plaintiff's pain of mind aside and distinct from his bodily suffering."[59]

These cases defined elements of harm for which recovery could, and could not, be had in negligence actions, and thus involved rules of damages. They also explain the development of the requirement that physical impact precede and cause the intangible harm to permit recovery. So long as recovery for intangible harm was limited to physical pain and suffering, some sort of impact with the plaintiff's body was needed. Impact in these cases was not a legal prerequisite for liability; rather it was necessary to produce the kind of tangible and intangible harm which the law recognized as compensable.

Other early cases took a less restrictive view of damages and suggested that some forms of intangible harm other than physical pain and suffering could be recovered in negligence actions. Though the earliest reference to such other intangible harm was vague,[60] courts gradually came to recognize fright, fear for one's own safety, as a discrete element of harm. Certainly by the beginning of this century compensation for that sort of intangible harm was generally accepted.[61] But it was not generally available because the plaintiff needed to show more than that the defendant's negligence had caused the fright. Courts limited recovery for fright to instances in which the plaintiff would be entitled to recovery for pain and suffering, that is, when the plaintiff had suffered an impact.[62] Thus, what had been a factual predicate for recovery for physical pain and suffering became a legal prerequisite for recovery for fright. In short, the impact requirement became a rule of liability.

Why recovery for fright was limited to instances in which there had been an impact is not clear from the early cases,[63] but a tension was created that

55. 20 Ill. 236 (1858).

56. *Id.* at 247.

57. *Id.* at 252.

58. Illinois & St. Louis R.R. Co. v. Stables, 62 Ill. 313, 320-21 (1872).

59. Johnson v. Wells, Fargo & Co., 6 Nev. 558 (1887).

60. *See, e.g.*, Linsley v. Bushnell, 15 Conn. 225 (1842); Worster v. Proprietors of Canal Bridge, 33 Mass. 541 (1893); Canning v. Inhabitants of Williamstown, 55 Mass. 451 (1848).

61. Dulieu v. White & Sons, 2 K.B. 669 (1901). See *infra* text accompanying notes 69-76. *See generally* Smith, *supra* note 47.

62. The leading American case is Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896). Some of the early cases, such as *Mitchell*, required that the plaintiff suffer a "physical injury." It is clear, however, the requirement was a physical injury caused by an impact.

63. *See* Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact*, 50 AM. L. REG. 141 (1902).

did not exist under the rules which permitted recovery only for physical pain and suffering. Under the recovery-for-only-pain-and-suffering rule, liability was co-extensive with damages: whenever the plaintiff suffered physical pain and suffering from a negligently inflicted impact, he could recover for it. But under the rule which permitted recovery for fright, liability and damages rules were out of phase because recovery did not depend solely upon whether the plaintiff actually suffered fright negligently inflicted by the defendant. There had to be an impact as well.

It is not surprising that the impact rule would come to be perceived as arbitrary.[64] If fright is worthy of compensation, a rule which limits such compensation to instances in which there has been an impact is too narrowly stated.[65] Whether the plaintiff has suffered an impact bears little relationship to the harm — a near miss may be as frightening as a direct hit.[66] None of the reasons given at the time for limiting recovery for fright to instances in which the plaintiff suffered an impact[67] would in the long run be persuasive. The discontinuity between the damages rule recognizing fright as an appropriate element of harm and the liability rule limiting recovery to cases involving impact would inevitably doom the rule.[68]

In fact, at the same time the impact rule was gaining acceptance as a liberal rule of damages permitting recovery for fright, it was being rejected by some courts as too restrictive a rule of liability. The early leading case is *Dulieu v. White & Sons,*[69] in which an English court at the turn of the century per-

64. *See* Dulieu v. White & Sons, 2 K.B. 669 (1901).

65. See *supra* text accompanying notes 4-7.

66. The relationship between harm (fright) and impact became even more tenous than the text suggests. Any impact, no matter how insignificant, was sufficient. *See* Zelinsky v. Chimics, 196 Pa. Super. 312, 175 A.2d 351 (1961). In some cases, fright was compensable if it occurred at the same time as the impact, *see, e.g.,* Homans v. Boston Elevated Ry. Co., 180 Mass. 456, 62 N.E. 737 (1902), or even occurred after and was unrelated to the impact. *See, e.g.,* Baltimore & Ohio R.R. Co. v. McBride, 36 F.2d 841 (6th Cir. 1930). In one rather bizarre case, the plaintiff was able to recover even though the impact caused no harm at all, and the emotional harm did not involve fear. *See* Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928), in which the defendant's horse "evacuated his bowels" into the plaintiff's lap, causing her "much embarrassment, mortification, and mental pain and suffering."

67. The reasons are analyzed in Bohlen, *supra* note 63.

68. *See* T. STREET, FOUNDATIONS OF LEGAL LIABILITY 470 (1906):

> A [damage] factor which is today recognized as parasitic will, forsooth, tomorrow be recognized as an independent basis of liability. It is merely a question of social, economic, and industrial needs as those needs are reflected in the organized law. . . . There really seems to be no good stopping place after an element of damage has once been admitted in any guise until it is recognized as an independent basis of liability.

At least four states continue to adhere to the impact rule: Georgia, Florida, Illinois and Kentucky. *See* Howard v. Bloodworth, 137 Ga. App. 478, 224 S.E.2d 122 (1976); Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974);; *In re* Air Crash Near Chicago, Illinois on May 25, 1979, 507 F. Supp. 21 (N.D. Ill. 1980) (applying Illinois law), *aff'd in part and rev'd in part on different grounds,* 644 F.2d 595 (7th Cir. 1981); Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980).

69. 2 K.B. 669 (1901).

ceived that there was no necessary cause and effect relation between impact and fright. According to the court the focus should be on the harm, and not on the impact. If the defendant's negligence produces otherwise compensable harm, including fright, there should be recovery. The court, however, said not all fright is compensable, but only that "which arises from a reasonable fear of immediate personal injury to oneself."[70]

The *Dulieu* court thus altered and refined the law of both liability and damages. The case was expansive in that it freed liability for fright from the requirement of impact, and thus removed the tension inherent in the impact rule's recognition of fright as an appropriate element of damages while restricting recovery for fright to those suffering an impact. The earlier cases did not specifically address whether the plaintiff could recover for fright unrelated to his own safety, becaue that issue was not presented.[71] *Dulieu* at least clarified the law with respect to the kind harm that is compensable.

Later cases generally followed *Dulieu* in limiting damages to fright resulting from threats to the plaintiff's own safety, but these doctrinal developments primarily took the form of liability rules relating to who can recover. This shift in terminology manifested itself in what is now known as the "zone of danger rule" which speaks to whether the plaintiff as such can recover; those within the zone of danger of physical impact can recover for fright, and those outside of it cannot.[72] Even what is now considered the leading zone of danger

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70. *Id.* at 675. In addition to excluding recovery for fear for the safety of others, the court stated, without discussion, that to be compensable the fear for one's own safety must be reasonable. This assertion would appear to contravene the accepted rule that the "defendant takes the plaintiff as he finds him." It may have stemmed from an unarticulated proximate cause analysis: the plaintiff who unreasonably suffers fright without impact is not a foreseeable plaintiff. *See* Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort,* 59 GEO. L.J. 1237, 1256-58 (1971).

71. *See* Green, *"Fright Cases",* 27 ILL. L. REV. 761 (1933). The principal exception is Hambrook v. Stokes Bros., 1 K.B. 141 (1925). Two early American cases did permit recovery for fright resulting from fear for the safety of others. In Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927, *cert. denied,* 177 Ala. 672, 58 So. 1038 (1912), the plaintiff was the mother of two children who were passengers in a runaway buggy. She was frightened for the safety of her children, and later suffered physical illness. The defendant did not assert the plaintiff could not recover because she feared not for her own safety but for that of her children; rather, he argued there could be no recovery for fright, and for any physical injury caused by the fright, unless some physical injury preceded the fright. The court rejected that argument. In Cohn v. Ansonia Realty Co., 162 App. Div. 791, 148 N.Y.S. 41 (1914), the plaintiff was "so overcome by fright that she fainted and fell into the elevator shaft" upon seeing two of her children ascend in an unattended elevator. The court ruled there could be recovery for fright resulting in physical injury. *Cohn* did not discuss whether the impact requirement was met by the contact of the plaintiff with the bottom of the elevator shaft, nor did the defendant apear to raise the issue of whether the plaintiff could recover in any event for the fear for the safety of others. Neither of these two cases has played a significant role in the development of the law.

72. Indeed, those outside the zone of danger of physical harm cannot recover for such harm even if they do suffer it. They are not foreseeable, and under the usual rule, would not be able to satisfy the proximate cause requirement. This was the point of Cardozo's opinion in Palsgraf v. Long Island R.R., 248 N.Y. 339,162 N.E. 99 (1928), although Cardozo eschewed the language of proximate cause in favor of that of duty. *See supra* note 37.

case, *Waube v. Warrington*,[73] retains a strong damages flavor. Although the overall tone of the *Waube* opinion smacks heavily of liability,[74] the rule the court claimed to apply was cast in damages terms. To be recoverable "the emotional distress or shock must be occasioned by fear of personal injury to the person sustaining the shock, and not for fear of injury to his property or to the person of another."[75]

The law of the *Dulieu-Waube* line of cases developed an internal consistency missing in the impact rule. Under the latter rule, fright became a recoverable element of damages, but only by those who suffered an impact — an event that bore no necessary relationship to the existence of harm. The impact rule was inconsistent with the policy that supports recovery for fear for one's own safety, and this internal inconsistency made the impact rule arbitrary as I use the term here.[76] On the other hand, the zone of danger rule neatly dovetails liability and damages. Fear for one's own safety is legally recognized harm and those within the zone of danger of physical impact that foreseeably suffer fear can recover for it. When so viewed the zone of danger is not arbitrary at all.

The preceding analysis, however, does not address the concern of courts abandoning the zone of danger rule that the rule is arbitrary because it is an inadequate measure of reasonable foreseeability.[77] The zone of danger rule, like the impact rule, does not purport to compensate all foreseeable emotional harm negligently inflicted. As I discuss later, if the law ought to provide such compensation, then of course its failure to do so is arbitrary.[78] The next section demonstrates the bystander recovery rule also does not impose liability to the full extent of foreseeability. Thus, if the zone of danger rule is arbitrary because it inadequately measures reasonable foreseeability, so too is the bystander recovery rule because it shares that characteristic. Furthermore, the bystander recovery rule reintroduces the type of arbitrariness of the impact rule: discontinuity between the liability and damages.

The Bystander Recovery Rule

The first American case permitting recovery by a plaintiff not within the zone of danger for fright-related emotional harm is *Dillon v. Legg*.[79] In this case, the plaintiff alleged she saw the defendant negligently strike her daughter with his automobile, and as a result she suffered "great emotional disturbance

73. 216 Wis. 603, 258 N.W. 497 (1935).

74. "The problem must be approached at the outset from the viewpoint of the duty of defendant. . . . The right of the [plaintiff] to recover must be based, first, upon the establishment of a duty on the part of the defendant." *Id.* at 605, 258 N.W. at 497-98.

75. *Id.* at 608, 258 N.W. at 499.

76. See *supra* text accompanying notes 17-22.

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

78. See *infra* text accompanying notes 148-211.

79. 68 Cal. 2d 728, 441 P.2d 912 69 Cal. Rptr. 72 (1968). Two earlier American cases permitted recovery for physical harm resulting from fear for the safety of others, but the propriety of such recovery was not put in issue by the defendants in either case. *See supra* note 71.

and shock and injury to her nervous system."[80] Rejecting the zone of danger rule, the California court held that the plaintiff stated a cause of action, and could recover upon proof that her shock caused her physical injury. In so doing, the court expanded the rules of both damages and liability. The court recognized fear for the safety of others as appropriate damages.[81] The court also permitted liability for one outside the zone of danger of physical impact. The court adopted these changes because of what it characterized as the "hopeless artificiality"[82] of the zone of danger rule. As already indicated, the zone of danger rule may be "artificial" or arbitrary because it does not establish liability solely upon the basis of foreseeability. Some foreseeable plaintiffs suffering foreseeable harm will not be able to recover. In this section, I discuss whether the bystander-recovery rule of *Dillon* and its progeny represents an improvement over the zone of danger rule. I believe that it is not an improvement, but instead represents a step backward.

Any attempt to compare the zone of danger rule to the bystander recovery rule is confronted at the outset with uncertainty as to what the latter rule is. The cases permitting recovery by bystanders for negligently inflicted emotional harm are not uniform in their approaches. This uncertainty orginated in the *Dillon* case, and has persisted in later opinions from California and other states. *Dillon* suggests three possible rules: the plaintiff can recover in negligence for emotional harm if he was subjected to a reasonably foreseeable risk of such harm; the plaintiff can recover, even though he was reasonably foreseeably subjected to the risk of such harm, only if he can meet an additional set of doctrinal barriers to recovery; or the plaintiff can recover for such harm if he can persuade the court justice requires that he recover. Of the three, only the first is faithful to foreseeability as the standard of recovery.

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80. 68 Cal. 2d at 730, 441 P.2d at 912, 69 Cal. Rptr. at 74.

81. A few cases have permitted recovery for fear for the safety of another by one in the zone of danger of physical impact, *see* Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933), or who actually suffered a physical impact, *see* Greenberg v. Stanley, 51 N.J. Super. 90, 143 A.2d 588 (1958), *modified on other grounds,* 30 N.J. 485, 153 A.2d 833 (1959). It is clear that neither of these allow the general recovery of fear for the safety of others. *Bowman* was limited to its facts in Resavage v. Davis, 199 Md. 479, 86 A.2d 879 (1952). The court in *Greenberg* specifically recognized the impact rule as limiting recovery for fear for the safety of others, as well as for one's own safety, to those suffering a physical impact. This incongruity between liability and damages rules in these cases is in large measure explained by the courts' concern with the difficulty in apportioning damages. As stated by the court in *Bowman,* and quoted in *Greenberg:* "There was no basis to differentiate the fear caused the plaintiff for himself and for his children, because there is no possibility of division of an emotion which was instantly evoked by the common and simultaneous danger of the three." 164 Md. at 403, 165 A. at 184. Section 436 of the RESTATEMENT (SECOND) OF TORTS also would permit recovery for fear for safety of another by one in the zone of danger, but only for any bodily harm resulting from the fear, and not for the fear itself. The RESTATEMENT (SECOND) does not distinguish between fear for safety of oneself and of others, but approaches the matter as one of legal cause: "When such a duty is violated, the defendant is not relieved of liability for the bodily harm to the plaintiff which in fact results, by reason of the unusual and unforeseeable manner in which it is brought about." RESTATEMENT (SECOND), *supra* note 6, § 436 comment f.

82. 68 Cal. 2d at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.

The second, like the zone of danger rule, will sometimes cut off liability short of foreseeability. The third hardly deserves to be called a rule at all.

Some passages in *Dillon* when viewed in isolation, support the conclusion that foreseeability is to be the exclusive test of liability. The court at several points referred to foreseeability as the preferred limit upon liability, stating the decision should turn on a case-by-case analysis of what was reasonably foreseeable, "excluding the remote and unexpected."[83] But read as a whole, it seems clear the court made no single-minded commitment to foreseeability. The court stated that foreseeability is "the chief element" in determining the existence of duties, and for that reason it is "of prime concern in every case."[84] Additionally, the court observed "no immutable rule can establish the extent of [the defendant's] obligation for every circumstance of the future."[85]

Whatever doubt the *Dillon* opinion created as to whether or not liability is determined solely by foreseeability has been resolved by later California cases. These cases clearly reject foreseeability as the sole test of liability for emotional harm negligently inflicted upon bystanders.[86] Which of the other two alternatives California and the other states have adopted is not as clear.

This uncertainty as to the content of the bystander recovery rule stems from a statement in *Dillon* that there are three guidlines to the determination of the extent of the defendant's duty: whether the plaintiff was located near the scene of the accident, or was a distance away from it; whether the shock resulted from a direct emotional impact upon the plaintiff caused by sensory and contemporaneous observance of the accident, or from learning of the accident from others after its occurrence; and whether the plaintiff and the victim were closely related, or were either unrelated or only distantly related.[87] It is unclear how the court intended these "guidelines" to function as limits on liability.

If these factors were to function as doctrinal barriers, each one would have to be satisfied in order to recover for foreseeable harm. A majority of the California cases affirm this doctrinal use and a brief review of some of them demonstrates the remorselessness of this approach. Most of these cases involve the requirement that the plaintiff be at the scene and witness the accident. For example, in *Jansen v. Children's Hospital Medical Center*,[88] the plaintiff al-

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

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

85. *Id.* at 741, 441 P.2d at 921, 69 Cal. Rptr. at 80. The court also asserted the liability issue will be resolved by judges, and not by the jury to whom the foreseeability issue is normally given. *Id.* One California intermediate appellate court specifically ruled that the defendant's liability presents an issue for the court and not for the jury. *See* Mobaldi v. Board of Regents, 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976).

84. One commentator has criticized *Dillon* for just that reason — it does not go far enough. *See* Comment, *Fear for Another: Psychological Theory and the Right to Recovery*, 1969 LAW & SOC. ORD. 420 (the lines drawn by *Dillon* are arbitrary in light of current psychological theory). Even Prosser, an early advocate of expansion of liability beyond the zone of danger, recognized both the need for limits short of foreseeability, and that any such limits would be "quite arbitrary." *See* W. PROSSER, *supra* note 1, at 335.

87. 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

88. 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1973).

leged the defendants had negligently diagnosed and treated her five year old daughter, causing daughter to die a slow and painful death which the plaintiff witnessed. In upholding the defendant's demurrer to a *Dillon* count in the complaint, the court observed that *Dillon* contemplates a "sudden and brief event"[89] which the plaintiff must actually witness. Here, the plaintiff's allegations were doubly inadequate because the "[f]ailure of diagnosis is, of course, not an event which itself can be perceived by the layman,"[90] and the plaintiff witnessed only the consequennces of the tortious act, and not the act itself. The court did recognize "the often agonizing effects upon a survivor of the slow decline and death of a loved one,"[91] but viewed recovery in this case as an extension of liability unwarranted by *Dillon*. In a similar case,[92] the plaintiff's child became blind and suffered brain damage, quadraplegia and seizures after undergoing oral surgery performed by the defendant. The court rejected the plaintiff's *Dillon* claim because she was in the waiting room of the defendant's office while the surgery was being performed, and ruled that "damages [which] are claimed to flow from knowledge of an unobserved tort" are not recoverable.[93]

In Justus v. Atchison,[94] each of two plaintiffs alleged that he was present in delivery room where his wife was giving birth to their child, and that as a result of malpractice, his child died while he watched. In ruling that neither plaintiff met the *Dillon* requirement, the California court stated recovery "requires more than mere physical presence" when the accident took place, and to be compensable the shock must come from a "direct emotional impact" caused by a "sensory and contemporaneous observance of the accident."[95] In applying *Dillon* to the facts of *Justus*, the court observed the "event was by its very nature hidden from his contemporary perception."[96] Though present and anxious about the disturbing crisis witnessed in the delivery room, each plaintiff would have no way of knowing the fetus had died until so informed by the doctor. The impact derived not from what he saw and heard during the attempted delivery, but from what he was told after the fact.[97]

89. *Id.* at 24, 106 Cal. Rptr. at 884.
90. *Id.* at 24, 106 Cal. Rptr. at 885.
91. *Id.*
92. Hair v. County of Monterey, 45 Cal. App. 3d 538, 119 Cal. Rptr. 639 (1975).
93. *Id.* at 543, 119 Cal. Rptr. at 642.
94. 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977).
95. *Id.* at 584, 565 P.2d at 135, 139 Cal. Rptr. at 110.
96. *Id.* at 584-85, 565 P.2d at 135-36, 139 Cal. Rptr. at 110-11.
97. *Id.* The court gave an additional, and somewhat unusual reason for denying liability:

> By its nature the *Dillon* cause of action presupposes that the plaintiff was an involuntary witness to the accident. Yet here, although the complaints are silent on the point, we must assume that each husband was in the delivery room by his own choice. . . . We do not go so far as to invoke the doctrine of assumption of risk; but the ever-present possibility of emotional distress dissuades us from extending the *Dillon* rule into the operating amphitheater in these circumstances.

Id. at 585, 565 P.2d at 136, 139 Cal. Rptr. at 111. The implications of this reasoning are intriguing, but it was ignored, except by a dissenting judge in a later case in which the plaintiff was present at the delivery of his child and observed its death. *See* Austin v. Regents of the Univ. of Cal., 89 Cal. App. 3d 354, 152 Cal. Rptr. 420 (1979).

The California cases have not limited this present-at-the-scene-and-witnessing-the-accident requirement to medical malpractice cases, which typically do not involve sudden events which lay persons are capable of understanding. Recovery was denied a mother who came upon the scene of an automobile accident involving her son about three minutes after its occurrence.[98] The court ruled the plaintiff was "not near enough to the scene to have any sensory perception of the impact," and, quoting from *Dillon,* observed that any impressions were not "caused by the 'direct emotional impact [of her] sensory and contemporaneous observance of the accident.' "[99] Similarly, a father who came upon the wrecked automobile containing his two daughters within a "few moments" of the accident could not recover upon his *Dillon* claim because under the "uncontradicted facts there has been no showing that [the plaintiff] *saw, heard, or otherwise sensorily perceived* the injury producing event."[100] In another California case[101] the parents of a child electrocuted because of the defendant's alleged negligence could not recover because they did not see the electrocution take place, although the accident occurred outside the house occupied by the plaintiffs, and they saw their son in his death throes minutes after the electrocution.[102]

Clearly, all these cases involve harm that a jury would be permitted, if not required, to find was foreseeable. Perhaps recognizing this, other California cases have been less doctrinaire in applying the present-at-the-scene-and-witnessing-the-accident guidelines. For example, in the first of the *post-Dillon* California cases, *Archibald v. Braverman,*[103] the plaintiff alleged the defendant negligently furnished her thirteen-year old son with a quantity of gunpowder which exploded and injured him. The plaintiff came upon the scene moments after the explosion, and upon seeing her son's condition, "suffered severe fright, shock, and mental illness requiring institutionalization."[104] Reading *Dillon* more expansively than had the previously discussed cases, the court reversed summary judgment for the defendant and ruled that the "nearness" requirement is satisfied if the plaintiff is close enough to arrive at the scene "within moments" of the accident. The sensory and contemporaneous observance requirement is satisfied if the "shock [is] fairly contemporaneous with the accident rather than [following it] when the plaintiff is informed of the whole matter at a later date."[105] The court quite correctly observed "the shock of seeing a child severely injured immediately after the tortious event may be just as profound as that experienced in witnessing the accident itself."[106]

98. Arauz v. Gerhardt, 68 Cal. App. 3d 937, 137 Cal. Rptr. 619 (1977).

99. *Id.* at 949, 137 Cal. Rptr. at 627.

100. *Id.* at 512, 146 Cal. Rptr. at 498. In Hoyem v. Manhattan Beach City School Dist. of Cal., 22 Cal. 3d 508, 585 P.2d 851, 150 Cal. Rptr. 1 (1973), the court summarily rejected the claim of a woman based upon seeing her child in the hospital several hours after the accident.

101. Hathaway v. Superior Court, 112 Cal. App. 3d 728, 169 Cal. Rptr. 435 (1980).

102. *Id.* at 734, 169 Cal. Rptr. at 440.

103. 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969).

104. *Id.* at 256, 79 Cal. Rptr. at 725.

105. *Id.* at 253, 79 Cal. Rptr. at 723.

106. *Id.* Some of the later California cases have attempted to distinguish *Archibald* on

The Supreme Court of California recently dispensed with a narrow reading of *Dillon* in *Krouse v. Graham*.[107] The court held although the plaintiff did not see his wife struck by defendant's automobile,

> he fully perceived the fact that she had been so struck, for he knew her position an instant before the impact, [and] observed the defendant's vehicle approach her at a high speed on a collision course. . . . Clearly, under such circumstances [plaintiff] must be deemed a percipient witness to the impact causing [his wife's] catastrophic injuries."[108]

The California courts have also been ambivalent toward the third of the three *Dillon* guidelines, involving the relationship between the plaintiff bystander and the primary victim. The California Supreme Court has interpreted the guideline as including only husband-wife and parent-child relationships, and thus was not satisfied by a plaintiff who was the "live-in lover" of the primary victim.[109] The court has been less rigorous with respect to the parent-child relationship, allowing recovery when the plaintiff was the primary victim's foster mother.[110] The child, three and one-half years old at the time of the accident, had lived with the plaintiff from the time he was five months old. The court held that the close relationship guideline of *Dillon* was satisfied, observing that it is "the emotional attachments of the family relationship and not the legal status that is determinative."[111]

Not surprisingly, cases from other states that have abandoned the zone of

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the ground that it could be assumed the plaintiff heard the explosion injuring her son, and thus had a "sensory perception" of the accident. *See, e.g.*, Jansen v. Children's Hospital Medical Center, 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1973). But even if the plaintiff had heard the explosion, there is no basis for assuming that she associated it with her son, and it is clear her injuries stemmed from her visual observation of him after the accident. There is no doubt the court in *Archibald* simply did not require "contemporaneous sensory perception" of the accident.

In Nazaroff v. Superior Court, 80 Cal. App. 3d 553, 145 Cal. Rptr. 657 (1978), the court followed the *Archibald* reasoning in also reversing a summary judgment that had been entered for the defendent. The facts assumed by the court for the purpose of testing the propriety of summary judgment were that the plaintiff mother was looking for her three year old son, Danny. She was standing in front of the defendant's house when she heard the latter's daughter shout, "It's Danny." The plaintiff alleged that she then knew that her son had gotten into the defendant's swimming pool and was hurt. She ran to the pool and saw someone pulling Danny from it. Danny died three days later.

107. 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977).

108. *Id.* at 76, 562 P.2d at 1031, 137 Cal. Rptr. at 872.

109. *See* Drew v. Drake, 110 Cal. App. 3d 555, 168 Cal. Rptr. 65 (1980). On this score, *Drew* is consistent with the earlier case of Tong v. Jocson, 76 Cal. App. 3d 603, 142 Cal. Rptr. 726 (1977), which held that loss of consortium actions cannot be maintained with respect to an engaged couple living together at the time of the accident.

110. *See* Mobaldi v. Regents of Univ. of Cal., 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976). The court's insistence upon an emotional attachment of a family relationship makes clear that foreseeability is not the test. As Professor Goodhart observed in *The Shock Cases and Area of Risk*, 16 MOD. L. REV. 14, 25 (1953), "it is a gloomy view of human nature which suggests that the sight of the death or injury of someone [other than a husband, wife or child] cannot create such a shock."

111. 55 Cal. App. 3d at 582, 127 Cal. Rptr. at 726.

danger rule reflect ambivalence toward the circumstances under which recovery is permitted. Some, like *Jansen*[112] and *Justus*,[113] appear to have adopted a relatively rigid set of doctrinal requirements for bystander recovery. The Supreme Court of Iowa,[114] for example, expanded the three *Dillon* guidelines to additionally require that the bystander and victim must be related within the second degree of consanguinity or affinity, and that the plaintiff did in fact reasonably believe the accident would kill or seriously injure the victim.[115]

Other cases, like *Archibald*[116] and *Krouse*,[117] exhibit considerable flexibility with respect to the relationship of the plaintiff both to the scene of the accident and to the primary victim. In *Landreth v. Reed*,[118] the plaintiff recovered for emotional harm caused by observing unsuccessful attempts to resuscitate her daughter after she drowned in the defendant's swimming pool. The plaintiff did not see the drowning, but did watch the life saving efforts in a room near the pool. The Texas court ruled "actual observance of the accident is not required if there is otherwise an experiential perception of it, as distinguished from a learning of it from others after the occurrence," and stated the plaintiff was "so close to the reality of the accident as to render her experience an integral part of it."[119] The Supreme Court of New Hampshire relied in part upon *Landreth* in upholding the complaint in *Corso v. Merrill*.[120] The plaintiffs, husband and wife, alleged that they were in their home when the wife heard a "terrible thud" outside the house, and looked out to see their daughter lying injured in the street. The husband did not hear the thud, but did hear his wife scream that their daughter had been hit by an automobile and then ran outside to see his daughter. The court ruled the husband, as well as the wife, could recover because they were "relatively close . . . in both time and geography [to] the negligent act. . . ."[121]

In both *Landreth* and *Corso*, the plaintiffs arrived at the scene shortly after the accident while the primary victims were still there. But in Massachusetts, such close proximity in time and space apparently is not required. In *Ferriter v. Daniel O'Connell's Sons, Inc.*,[122] the court reversed summary judgment against the plaintiffs whose claim for emotional harm was based upon seeing their husband and father in the hospital some time after the accident that caused his injuries. "A plaintiff who rushes onto the accident scene and finds

112. 31 Cal. App. 3d at 22, 106 Cal. Rptr. at 883. *See supra* notes 88-91 and accompanying text.

113. 19 Cal. 3d at 564, 565 P.2d at 122, 139 Cal. Rptr. at 87.

114. Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981).

115. *Id.* at 108. *See also* Amodio v. Cunningham, 182 Conn. 80, 438 A.2d 6 (1980), in which the court refused to take a stand on *Dillon*, but asserted that under *Dillon*, the plaintiff could not have recovered in any event because the death did not occur simultaneously with the negligent act. *Id.* at 92-93, 438 A.2d at 12.

116. 275 Cal. App. 2d 253, 79 Cal. Rptr. at 723.

117. 19 Cal. 3d at 59, 562 P.2d at 1022, 137 Cal. Rptr. at 863.

118. 570 S.W.2d 486 (Tex. Civ. App. 1978).

119. *Id.* at 490.

120. 119 N.H. 647, 406 A.2d 300 (1979).

121. *Id.* at 657, 406 A.2d 306.

122. 413 N.E.2d 690 (Mass. 1980).

a loved one injured," the court observed, "has no greater entitlement to compensation for that shock than a plaintiff who rushes to the hospital."[123]

Relatively few cases have involved the issue of whether the plaintiff has a sufficiently close relationship to the primary victim to permit recovery. In one such case[124] the court stated the plaintiff must be related to the primary victim within the second degree of affinity or consanguinity. On the other hand, another court ruled a ten-year-old plaintiff stated a claim for emotional harm caused by witnessing an accident involving his father's stepmother.[125]

The law of recovery by bystanders for negligently inflicted emotional harm is, to state the obvious, uncertain. It is fairly clear that most courts, including those of California, reject foreseeability as the sole basis of liability.[126] The plaintiffs in *Jansen*[127] and *Justus*,[128] are just as foreseeable as the plaintiff in *Dillon*,[129] yet they could not recover because each failed in some respect to fit squarely within the *Dillon* guidelines. If one were to focus upon these cases, it would appear that *Dillon* set up a tripartite test which is rigidly applied to bar recovery by otherwise foreseeable plaintiffs.

There are the other cases in which courts have not applied such a rigid test. But even those cases do not suggest that foreseeability is the only barrier

123. *Id.* at 697.

124. Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981).

125. Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974).

126. An exception appears to be Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976), in which the defendant drove her automobile into the plaintiff's house. The plaintiff was in a different part of the house, and according to the court, was not in danger of being struck. The plaintiff testified that after the accident, she was concerned about the defendant, a long time neighbor who was known by the plaintiff to have had some physical problems. She also testified she was upset about the damage to her home, and was concerned about her husband's safety, who also was in the house at the time of the accident. The plaintiff suffered some heart problems, which medical testimony linked to the accident. The trial judge instructed the jury that the plaintiff could not recover for any harm resulting from the above concerns. The Supreme Court of Washington held the instructions were incorrect in this regard, ruling the plaintiff could recover if her harm were found to be foreseeable. The court did state that the plaintiff could recover only if her reaction was "normal," because in its view this is a requirement of foreseeability. *See supra* note 70. A reasonable guess is that the Supreme Court of Washington will retreat from this position, as has the Supreme Court of Hawaii. See *infra* text accompanying notes 204-07.

Montinieri v. Southern New England Tel. Co., 175 Conn. 337, 398 A.2d 1180 (1978) is another somewhat puzzling case perhaps explainable because of its procedural context. The trial judge instructed the jury the plaintiffs could recover for emotional harm without impact only if the defendant could have foreseen that such harm would result. *Id.* at 341, 398 A.2d at 1183. The jury returned a verdict for the defendant, and the plaintiffs appealed, arguing that if the plaintiffs were in the zone of danger of physical harm, they could recover, apparently without regard to foreseeability. *Id.* at 341-42, 398 A.2d at 1183. The Supreme Court of Connecticut affirmed the judgment for the defendant, ruling the jury instructions were correct. While the court asserted its recognition of the need for limits upon recovery for emotional harm, it was unnecessary for the court to go beyond the affirmance of the judgment below to dispose of the case. *Id.* at 345-46, 398 A.2d at 1184.

127. 31 Cal. App. 3d 22, 106 Cal. Rptr. 883.

128. 19 Cal. 3d at 564, 565 P.2d at 122, 139 Cal. Rptr. at 87.

129. The differences in treatment of the plaintiffs in the California cases cannot be explained by the different juries. In California, whether a plaintiff comes within the scope of *Dillon* always presents an issue of law for the judge to resolve. *See supra* note 85.

to recovery. The Supreme Court of California in *Krouse* blurred the *Dillon* guidelines by fudging their application, rather than by expressly abandoning them.[130] Even the Supreme Judicial Court of Massachusetts, which has gone about as far as any court[131] in escaping the *Dillon* shackles, retained some doctrinal leash on itself. In *Dziokanski v. Babineau,*[132] which was decided just two years before and approved by *Ferriter,* the court said liability should be determined by examining a number of factors in each situation, "such as, where, when, and how the injury to the third person entered into the consciousness of the claimant, and what degree there was of familial or other relationship between the claimant and the third person."[133] The court further asserted it makes no difference whether these factors are considered policy limitations on the scope of foreseeability or as factors determining the reasonable scope of foreseeability itself.[134] Notwithstanding the court's assertion, there is a significant difference between characterizing relevant factors as policy limitations upon the scope of liability or as factors to guide the fact finder in determining foreseeability. The difference, of course, is whether the court stands ready to deny recovery even if a jury could find the plaintiff to have been a foreseeable victim of emotional harm.[135]

If bystander recovery depends neither upon foreseeability nor upon precise satisfaction of the three *Dillon* guidelines, then upon what does it depend? It may be that what has emerged is an open-ended take-into-account-all-the-circumstances rule, to determine whether, based on those circumstances, the plaintiff ought to recover. Under such a rule, a court might balance the strength of one factor in the plaintiff's case with a weakness in another. For

130. *See supra* notes 107 & 108 and accompanying text.

131. With the exception of the Supreme Court of Washington. *See supra* note 126.

132. 375 Mass. 555, 380 N.E.2d 1295 (1978).

133. *Id.* at 568, 380 N.E.2d at 1302.

134. *Id.* It is interesting to observe that the Massachusetts court, contrary to those in California, *see supra* note 85 and accompanying text, suggests a role for the jury in setting the limits of liability. It is also interesting to speculate what the instructions to juries in close cases might be.

135. The court's discussion of the facts alleged in *Babineau* suggests foreseeability is not the sole factor in determining liability. In this case, complaints were filed on behalf of the estates of the mother and father of a young girl injured in an automobile accident involving the defendants. The complaint by the mother's estate alleged she went to the scene of the accident, saw her injured daughter, and, as a result of the shock, died while accompanying her daughter to the hospital. The court held this clearly stated a cause of action. The complaint on behalf of the father's estate alleged his death was caused by his reaction to what happened to his daughter and wife. While concluding it was improper for the trial judge to dismiss this action as well, the court was much more guarded in its language, observing it did "not know where, when, or how Mr. Dziokanski came to know of the injury to his daughter and the death of his wife." *Id.* at 569, 380 N.E.2d at 1303. It is difficult to see how these questions would be relevant were foreseeability the sole issue.

In *Ferriter,* the plaintiffs first saw their husband-father at the hospital after the accident. The court overruled summary judgment for the defendant, and in comparing the facts to those of *Babineau,* stated, "[s]o long as the shock follows closely on the heals of the accident, the two types of injury are equally foreseeable." 413 N.E.2d at 697. Had the court in these two cases been committed to foreseeability, the point could have been made much more forthrightly.

example, a mother might be able to recover though she was not at the scene, but persons bearing a more remote relationship to the primary victim might have to be at, or very near, the scene. There is language in *Dillon* supporting such a rule,[136] but later cases have neither explicitly nor implicitly adopted it.

Perhaps what has evolved is even more vague. Consistent with both judicial rejection of "hopelessly artificial" barriers to recovery and judicial refusal to go the full reach of foreseeability, it may be that courts have adopted a very open-ended rule under which the plaintiff's right to recover will be determined by an individualized consideration of all the facts of each case. The *Dillon* court asserted that "no immutable rule can establish the extent of [the defendant's] obligation for every circumstance of the future,"[137] and that the "fixing of obligation, intimately tied into the facts, depends upon each case."[138] The search would be for the "deserving plaintiff," perhaps one whose injuries were not "too remote" from the defendant's negligence. The attributes of a deserving plaintiff could not completely be defined ahead of time — but a court will know one when it sees one.[139]

This, of course, is not so much a "rule"[140] as it is an approach, and it borrows heavily from Judge Andrews' dissent in *Palsgraf*.[141] "There are no fixed rules to govern our judgment," he said, "[t]here are simply matters of which we may take account."[142] Although the three *Dillon* guidelines are relevant in all cases, enough courts have blurred the edges of the guidelines so as to suggest that such an approach may indeed be in operation. No court has yet openly committed itself to such an approach, but the more indistinct the *Dillon* guidelines become, the closer courts come to that approach.[143]

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136. "[O]bviously defendant is more likely to foresee that a mother who observes an accident affecting her child will suffer harm than to foretell that a stranger witness will do so. Similarly, the degree of foreseeability of the third person's injury is far greater in the case of his contemporaneous observance of the accident than that in which he subsequently learns of it. The defendant is more likely to foresee that shock to the nearby, witnessing mother will cause physical harm than to anticipate that someone distant from the accident will suffer more than a temporary emotional reaction. All these elements, of course, shade into each other. . . ." 68 Cal. 2d at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.

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

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

139. *Cf.* Jacobellis v. Ohio, 378 U.S. 184 (1964) (Stewart, J., dissenting): "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not it." *Id.* at 197.

140. See *supra* text accompanying notes 28-41.

141. 248 N.Y. at 348, 162 N.E. at 102 (Andrews, J., dissenting).

142. *Id.* at 352, 162 N.E. at 103-04.

143. In a different context, a Massachusetts Supreme Judicial Court justice came close to openly advocating such an approach. In dissenting from the court's refusal to include trespassers within the category of entrants to whom landowners owe a duty of reasonable care in Soule v. Massachusetts Elec. Co., 378 Mass. 177, 390 N.E.2d 716 (1979), Judge Kaplan stated:

> [A rule which abolishes the invitee-licensee-trespasser distinction] may conjure up in some minds the spectre of an armed robber recovering damages for injuries suffered by him in tripping over a rug while engaged in his criminal adventure. It can

It should now be obvious that whatever the rule is permitting recovery by bystanders for negligently inflicted harm, it is, from a purely arbitrariness perspective, no less arbitrary than the zone of danger rule it replaces. The zone of danger rule, to be sure, only imperfectly implements notions of foreseeability; however, it is also clear the bystander recovery rule is no improvement in this respect.[144] None of the formulations suggested in the preceding discussion purports to be based solely upon foreseeability. Furthermore, the last suggested approach, which attempts to identify and compensate the "deserving plaintiff," presents an additional element of arbitrariness. It is too vague to permit principled decision making. Judges will inevitably decide cases based largely upon their own subjectivities and over a range of cases will necessarily make arbitrary assessments of the "merits" of the claims.[145]

Finally, the bystander recovery rule reintroduces a form of arbitrariness the zone of danger rule had eliminated: discontinuity between the rule of damages and the rule of liability. Although the zone of danger rule is not fully consistent with liability based upon foreseeability, it is internally consistent in that those suffering cognizable harm, fear for their own safety, are able to recover for it. Under any form of the bystander recovery rule which courts appear to have adopted, however, the rule of damages and the rule of liability do not coincide. While fear for the safety of others is recognized as an appropriate element of damages, not all who foreseeably suffer that kind of harm can recover for it.[146] Thus, to the extent the criticism of the zone of danger rule is

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be predicted flatly that that would not occur if the court should adopt quite frankly the position I espouse. The robber would be denied recovery, but not for the reason that the common law called him a "trespasser;" rather it would be for good and sufficient functional reasons that appeal to common sense.

Id. at 188, 390 N.E.2d 722-23.

144. It has been asserted that any rule which expands liability is better for just that reason. *See, e.g.*, Wyman v. Wallace, 91 Wash. 2d 317, 588 P.2d 1133 (1979). In refusing to abolish the cause of action for alienation of affections the court observed: "Rather than abolishing causes of action, this court has been at the forefront in adopting new remedies and expanding tort liability." *Id.* at 320, 588 P.2d 1134-35. However, upon reconsideration after a change in the personnel, the court did abolish the tort. Wyman v. Wallace, 94 Wash. 2d 99, 615 P.2d 452 (1980). Professor Hirschoff captured the essence of the thought in his observation, in *Recent Developments in the Law of Torts — Introduction,* 51 IND. L.J. 463 (1976), that society seems to have developed an attitude of "intolerance of bad luck, to the extent that [victims of the affluent society] are thought not only to need but to deserve compensation." *Id.* I agree liability should be as close to the limit of foreseeability as is justifiable. Later in this article I address the argument that the bystander recovery rule is better than the zone of danger rule, apart from the arguments from the arbitrariness perspective, see *supra* text accompanying notes 148-60, and conclude that it is not.

145. See *supra* text accompanying notes 28-41.

146. In California, at least, there is an additional element of arbitrariness in damages. While the Supreme Court of California sometimes recognizes shock from witnessing the accident or its immediate aftereffects as compensable, it has specifically stated other sorts of intangible harm suffered by the bystander, such as anger and grief, are not compensable although such harm would seem to be as foreseeable as shock. *See* Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977). Interestingly, one commentator has urged that grief should be *the* harm for which compensation is provided. *See* Leibson, *Re-*

based upon its arbitrary preclusion from recovery for some foreseeable victims, the bystander recovery rule in any of the forms adopted by courts is open to the same criticism.[147]

Having demonstrated that the bystander recovery rule is no improvement over the zone of danger rule if arbitrariness is the measure of acceptability, and even represents a step backward, I suppose I could rest my case. But as I indicated in the first section of this article, some arbitrariness in the law is inevitable. I observed it is not enough to assert that a rule is arbitrary and leave it at that. I next consider reasons other than those related to arbitrariness which might make the bystander recovery rule better than the zone of danger rule.

THE BYSTANDER RECOVERY RULE — A BROADER PERSPECTIVE

Prosser may very well have been right when he claimed "[a]ll ordinary human feelings are in favor of [a] mother's action against the negligent defendant."[148] It is not enough, however, to rest the affirmative case for bystander recovery for negligently inflicted emotional harm upon the sympathy inherent in a *mother's* case. In this section, I consider whether a more solid base is available.

It is necessary to this discussion to conclude, even if tentatively, the content of the bystander recovery rule. Most courts appear to have adopted some form of the three *Dillon* guidelines, requiring the plaintiff to be at the scene, observe the accident and have a close family relationship to the primary victim. Some courts have relaxed the guidelines, no doubt because they see the inherent arbitrariness. But no court has openly avowed the Judge Andrews' "it's all 'practical politics'" approach, and it is unlikely any would do so. This would be too open ended or "lawless," for all but the most free-spirited of courts. The following discussion assumes a rule with real substantive content based upon the *Dillon* guidelines.

I will address in turn two rather different arguments that might be made on behalf of the bystander recovery rule, apart from the arbitrariness already discussed. First, even if the law ought not to compensate generally for the negligent infliction of emotional harm, the harm suffered by bystanders is uniquely deserving of compensation. Second, while the rule is not itself supportable in principle, it represents an important and appropriate step toward creating a broader tort of negligent infliction of emotional harm.

I do not dispute that a mother who watches her daughter being severely injured has a special claim to our collective sympathy. But it does not follow that this sympathy should be translated into a money judgment in a tort ac-

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covery of Damages for Emotional Distress Caused by Physical Injury to Another, 15 J. FAM. L. 163 (1976-77).

147. I realize Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976), would base liability essentially upon foreseeability. But that is a maverick case, and has attracted little recognition.

148. W. PROSSER, *supra* note 1, at 334. The *Dillon* court began its opinion with this quote.

tion against a negligent defendant. Indeed, it is because the mother's claim to our sympathy is so strong that money damages seem so inappropriate.

From the plaintiff's perspective an award of compensatory tort damages is reconstructive; its purpose is to restore the plaintiff to his pre-accident condition.[149] If this is so, it is not clear why there should be compensation for intangible harm. If physical pain is severe enough to disable the plaintiff from working, he is entitled to damages for his impaired earning capacity. If medical treatment is necessary to reduce pain, the plaintiff can recover medical expenses. But why compensate the plaintiff for intangible harm as such, when to do so will not move him any closer to his pre-accident condition? Is there any justification for providing such compensation? For some kinds of intangible harm, the answer is "yes," as such compensation may offset the pain, even if it does not reduce it.[150] Assume pain could be objectively measured, and that a plaintiff will permanently suffer ten units of pain which money damages will not reduce to less than ten units. Although the pain is irreducible, the plaintiff can use money to purchase units of pleasure to offset the pain. If the plaintiff with ten units of pain were awarded sufficient damages to purchase ten units of pleasure, for example, an annual Bermuda vacation, the award would improve the plaintiff's pain to pleasure ratio. Ten units of pain is still ten units of pain, but it will be easier to bear in Bermuda.

But the same pain offset will not work in the paradigm case of the mother watching her daughter being injured. Mere money is least likely to offset pain in precisely the case in which the claim to sympathy is strongest, that of the mother or other close relative of the victim at the scene and observing the accident.[151] What makes Mrs. Dillon's fear for her daughter's safety such an

149. *See* F. HARPER & F. JAMES, *supra* note 36, at 1301. The problems involved in implementing this principle are discussed in Leubsdorf, *Remedies for Uncertainty*, 61 B.U.L. REV. 132 (1981). Damages have a different function if viewed in terms of their impact upon defendants. See *infra* text accompanying notes 154-60.

150. *See* D. DOBBS, REMEDIES 550 (1973). Although, as Professor Dobbs recognizes, that is not the measure of recovery for pain and suffering. *Id.*

151. I realize I may be mixing apples and oranges when comparing compensation for future pain and suffering with that for past shock. As the Supreme Court of California made clear in Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977), the element of harm to be compensated is shock at witnessing the accident, rather than anger the plaintiff currently feels toward the defendant, or grief the plaintiff feels because of the loss of the primary victim. Thus, except in unusual cases in which the shock has long-lasting physical effects, or mental effects beyond the memory of the event, compensation will be for harm already suffered. In this respect, the analogy to compensation for past pain and suffering seems more apt, as compensation for past intangible harm would not alter the pain-pleasure ratio. Either of two conclusions might follow from this: shock should be compensated on the same basis as past pain and suffering, and without reference to notions of pain-pleasure balance sheets; or there should be no compensation for past pain and suffering or past shock. Focusing on the appropriateness of compensation, it can be argued the latter conclusion should be adopted. From the plaintiff's perspective, compensation for past pain and suffering has the appearance of a windfall. This is particularly true when the person suffering the pain is dead at the time of the award, and the persons who actually receive the money are the beneficiaries in a wrongful death action. *See* Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219, 222 (1953); Morris, *Liability for Pain and Suffering*, 59 COLUM. L. REV. 476, 479 (1959).

intense emotional experience is her daughter's irreplaceability. It is hard to imagine that a mother would find solace in a money judgment for the shock of seeing her daughter being killed or seriously injured. Indeed, those bystanders most likely to offset pain with money damages would be total strangers to the primary victim, who present the weakest case for our sympathy.[152] Perhaps a person with an aching back would feel better on a sunny beach, but would Mrs. Dillon? Only in a society that views money as a substitute for everything would the bystander recovery rule find justification in the pain offset analysis.[153] In spite of the sympathy we feel for bystanders, the harm they

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There are two reasons, however, why this distinction between past and future pain and suffering should not be drawn. First, a system in which damages are largely fixed at the time of the accident could hardly tolerate a rule permitting recovery only for intangible harm suffered in the future. Such a rule would pressure plaintiffs to settle early, and defendants to stall. Whether and how much recovery could be had would not depend solely on how much pain the plaintiff suffered, but also on the fortuitous event of when the award was made. Assuming the less serious cases are settled sooner than the more serious, those who suffer less intangible harm might well as a class end up getting more compensation for the harm they do suffer. Second, and more importantly, some plaintiffs may well have expended their own funds to "accumulate pleasure" to offset the pain. If so, compensation to them would be justifiable. It ought to make no difference that a particular plaintiff made no such expenditures, as he may have been stoic, impecunious, or just thrifty, but the loss was there nonetheless.

152. One would also think that a relatively weak case for sympathy is when the "primary victim" is real or personal property. Yet in Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970), the plaintiff homeowners were compensated for their emotional harm resulting from the negligent destruction of their new home. The case makes sense from a pain offset point of view because the money damages allow the plaintiffs to buy an even more expensive home. Because their home is so easily replaced they are hardly comparable to Mrs. Dillon.

153. This analysis has implications for other forms of intangible harm, such as loss of consortium. Interestingly, the Supreme Court of California recognized this in a case in which it denied recovery by nine children for the loss of consortium of their injured mother. Borer v. American Airlines, 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977). The court observed:

> Loss of consortium is an intangible, nonpecuniary loss; monetary compensation will not enable plaintiffs to regain the companionship and guidance of a mother; it will simply establish a fund so that upon reaching adulthood, when plaintiffs will be less in need of maternal guidance, they will be unusually wealthy men and women. To say that plaintiffs have been "compensated" for their loss is superficial; in reality they have suffered a loss for which they can never be compensated; they have obtained, instead, a future benefit essentially unrelated to that loss.

Id. at 447, 563 P.2d at 862, 138 Cal. Rptr. at 306.

In Shockley v. Prier, 66 Wis. 2d 394, 225 N.W.2d 495 (1975), on the other hand, the court permitted a similar loss of consortium action. The action was brought by the parents of a child allegedly blinded by the defendants' negligence. The court explained: "In the case at bar one needs little imagination to see the shattering effect that Paul's blindness will have on the relationship between him and his parents. The loss of the enjoyment of those experiences normally shared by parents and children need no enumeration here." *Id.* at 401, 225 N.W.2d at 499. The court's statement is no doubt true, but would money damages serve to replace the game of catch the parents cannot play with Paul in the backyard? Perhaps it would be more accurate to characterize the plaintiff's action in *Shockley* as one for negligently inflicted self-pity.

One would think the same spirit of the *Borer* decision would lead the court to reject

suffer is not, when compared to other kinds of intangible harm, uniquely appropriate for compensation through money damages.

If from the bystander's perspective there is no compelling policy reason for compensation, is there support for compensation if the focus is shifted to the defendant? In support of liability it may be argued liability can function to punish the defendant. It is understandable that the plaintiff would seek revenge against the negligent defendant.[154] There are two reasons, however, why punishment ought not to serve as a policy base for bystander liability. The most obvious is that punishment is not an appropriate goal of negligence law. Punishment, as an end itself is only recognized in torts involving intent or extreme recklessness rather than negligence;[155] awarding punitive damages reflects the quality of the defendant's conduct and state of mind rather than the particular consequences. There is nothing about the conduct of those who negligently cause emotional harm to bystanders, as opposed to other kinds of harm, which makes that conduct uniquely deserving of punishment.[156]

A second argument for imposing liability relates to deterrence. While the shock at seeing a close family member being severely injured or killed, recognized by the bystander recovery rule may be inherently non-compensable, it is nonetheless a loss that perhaps should be considered in a deterrence analysis of tort law. Deterring accident costs is, of course, a proper goal of negligence law.[157] If the harm can be characterized as an accident cost, deterrence theory would suggest that it be reflected in how much the defendant should pay.[158]

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actions for loss of consortium in the husband-wife context. However, the *Borer* court specifically adhered to its earlier acceptance of the wife's action in Rodriguiz v. Bethlehem Steel Corp., 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974).

154. If my argument that the harm bystanders suffer is inherently non-compensable is accepted, then the plaintiff's desire for revenge may explain why such suits are brought at all. Another explanation may lie in the role of the plaintiff's lawyer. Bystander suits will usually be brought in conjunction with actions by the primary victim, to whom the bystander will ordinarily be related. Under these circumstances, the bystander's lawyer may play an important role in the decision to pursue the claim.

155. *See* K. REDDEN, PUNITIVE DAMAGES 76 (1980).

156. At least two recent cases have permitted bystander recovery in products liability cases, which strongly suggests that punishment is not the purpose of permitting recovery. *See* Shepard v. Superior Court, 76 Cal. App. 3d 16, 142 Cal. Rptr. 612 (1977); Walker v. Clark Equip. Co., 320 N.W.2d 561 (Iowa 1982). Both cases involved negligent design, and thus may not stand for the proposition that recovery will be permitted in cases involving liability without fault. But the *Walker* court specifically stated bystander recovery should not depend upon whether the plaintiff's theory is negligence, on the one hand, or breach of warranty or strict liability on the other.

157. "Apart from the requisites of justice, I take it as axiomatic that the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents." G. CALABRESI, THE COST OF ACCIDENTS 26 (1970).

158. Some observers, however, have used economic analysis to suggest intangible non-pecuniary harm ought not be an element of damages at all. *See e.g.*, Seffert v. Los Angeles Transit Lines, 56 Cal. 2d 498, 364 P.2d 337, 15 Cal. Rptr. 161 (1961) (Traynor, J., dissenting):

> [Damages for pain and suffering] become increasingly anamolous as emphasis shifts in a mechanized society from ad hoc punishment to orderly distribution of losses through insurance and the price of goods or of transportation. Ultimately such losses are borne by a public free of fault as part of the price for the benefits of mechanization.

If such harm is not compensated, the deterrent potential of negligence law is underrealized.[159] While there may be merit to this argument,[160] like that relating to punishment, it does not furnish a basis for treating bystanders' emotional harm differently from other kinds of emotional harm. It certainly does not support limiting damages to those bystanders who can satisfy the three *Dillon* guidelines.

I have argued so far there are no persuasive policy reasons why among those who suffer negligently inflicted emotional harm bystanders alone should recover. There are no redeeming virtues in the bystander recovery rule which make it preferable to the zone of danger rule or justify it as a stopping place. Instead of a stopping place, the rule may be a stepping stone from which the law will develop a broader tort encompassing all those who suffer foreseeable emotional harm. I address briefly whether such a tort should be recognized in the balance of this section.

If such a broad tort were to develop, bystanders certainly would fall within its ambit. Extending liability to the limit of foreseeability would be a dramatic development indeed. No court has evinced an interest in,[161] and few commentators have argued for,[162] the creation of such a tort. But in an era of expanding tort liability, that issue should be addressed here.

Arguments are certainly available which support recognizing the tort of negligent infliction of emotional harm. The most obvious is that such harm is often foreseeable and that tort should compensate all foreseeable harm. Indeed, the law recognizes, and compensates most forms of intangible harm in at least some circumstances. Money damages usually help offset the pain, even if it cannot reduce it.[163] More importantly, to the extent intangible harm is in fact a cost of accidents, that cost should be recognized legally if the full deterrent potential of negligence law is to be realized.[164] But as I suggested in the earlier discussion of arbitrariness, a rule is not necessarily bad because it does

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Id. at 511, 364 P.2d at 345, 15 Cal. Rptr. at 169. *See also* Jaffee, *supra* note 151; Peck, *Compensation for Pain: A Reappraisal in Light of New Medical Evidence*, 72 MICH. L. REV. 1355 (1974). Others, as might be expected, disagree. *See* G. CALABRESI, *supra* note 157, at 211-225. Calabresi would limit damages for intangible harm to those for pain and suffering and "loss of dignity," and would exclude "sentimental" damages.

159. A similar argument has been made in support of the collateral source rule. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 153 (2d ed. 1977).

160. *See* Landes & Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 917-18 (1981).

161. Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976), appears to adopt a bystander recovery rule based upon foreseeability, but there is no indication that the Supreme Court of Washington would take the next step and recognize a broader tort of negligent infliction of emotional harm. Whether Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980), is such a case is not clear. *See infra* notes 181-86 and accompanying text.

162. *See* Comment, *supra* note 70; Comment, *supra* note 86 (arguing for the creation of such a tort).

163. Although, as I earlier argued, the pain offset analysis does not apply to bystanders who can recover under *Dillon*. See *supra* text accompanying notes 151-53. However, were a court to create the broader tort, it is inconceivable that such bystanders would be excluded from recovery.

164. See *supra* text accompanying notes 157-60.

not precisely reflect a single policy. Other acceptable policies may require some compromise.

My argument against the tort of negligent infliction of emotional harm is not that emotional harm is an inappropriate element of compensation. Rather, my position is based essentially upon process grounds. It is not unusual for modern courts to deprecate process arguments in torts cases. The Supreme Court of California in particular has manifested great confidence in the judicial system's ability to cope with any process problems arising from newly created liability rules. The court reacts to any argument not going to the substantive merits as an attack on its "judgehood," as an accusation that, were it to accept the process argument, to that extent it could not dispense justice. The *Dillon* court asserted, to deny liability "in the most egregious case of them all: the mother's emotional trauma at the witnessed death of her child, must necessarily [lead the court to] question . . . the viability of the judicial process for ascertaining liability for tortious conduct itself."[165] Viewed in this way, process challenges to rules which expand liability must be given short shrift. First and foremost, one must stand up and be a judge, mustn't one? But the court overstated the threat to its integrity. Indeed, the threat to judicial integrity is greater when courts fail to listen to and carefully evaluate process reasons why a general tort of negligent infliction of emotional harm ought not to be created.

Courts have traditionally shaped the substantive law of tort with an eye toward the number of plaintiffs that would have causes of action based upon a single wrongful act.[166] The concern was expressed in one case as the "mass of litigation which might very well overwhelm the courts."[167] The sheer number of cases that can arise out of a single transaction and the consequent drain on judicial resources is a legitimate concern. At a time of increasing demand upon judicial resources, the litigation-increasing potential of any change in the law should not be ignored. Furthermore, there may be substantial procedural difficulties presented by many potential plaintiffs. If separate actions are brought, difficult questions of the effect of the judgment in one case upon the claims of others may be presented.[168] A class action will often prove impractical; and even if they all do join, each plaintiff will have a unique damages case which would no doubt confuse the jury and waste time for the plaintiffs' lawyers who would attend the whole trial but be concerned with only their own clients.[169]

165. 68 Cal. 2d at 747, 441 P.2d at 925, 69 Cal. Rptr. at 85.

166. *See, e.g.*, Stevenson v. East Ohio Gas Co., 73 N.E.2d 200 (Ohio App. 1946); Ryan v. New York Central R.R. Co., 35 N.Y. 210 (1866); Winterbottom v. Wright, 10 M. & W. 109 (Exch. 1842).

167. Stevenson v. East Ohio Gas Co., 73 N.E. 2d at 203 (Ohio App. 1946).

168. While plaintiffs will not be bound by findings of no negligence in suits to which they are not parties, they may be able to take advantage of a finding of negligence, and preclude the defendant from relitigating that issue. *See* Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979). The problems involved in the "offensive" use of collateral estoppel are discussed in *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 1, 219-28 (1979); Note, *Mutuality of Estoppel and the Seventh Amendment: The Effect of* Parklane Hosiery, 64 CORNELL L. REV. 1002 (1979).

169. The difficulties associated with class actions in which individualized damage

The geographic risk of physical impact caused by the defendant's negligence in most cases is quite limited, which accordingly limits the number of people subjected to that risk. There is no similar finite range of risk for emotional harm. This is particularly true as bystanders who suffer emotional harm need not be at the scene to be foreseeable. Of course, a single bus, train, or airplane accident can involve dozens of victims; but these are not typical cases. If they were, the common law torts process certainly would have evolved differently.[170]

A second reason for proceeding cautiously with recognition of the tort of negligent infliction of emotional harm is the significance of the harm.[171] The torts process protects important interests even if in any particular case the plaintiff's legally cognizable harm appears relatively insignificant. Indeed, as has already been observed, early tort law developed as a means of keeping the "King's peace" by providing an alternative to private retaliation.[172] Such use of the torts process generally involved cases of intentional wrongdoing by the defendant, with nominal and punitive damages available to plaintiffs to furnish an incentive to sue when actual harm is small or nonexistent. In negligence cases, however, compensation rather than vindication is the goal. Consequently, negligence actions have not traditionally provided compensation for emotional harm because the typical claim is trivial.[173] Persons with small

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calculations are necessary and discussed in *Developments in the Law — Class Actions,* 89 HARV. L. REV. 1318, 1516-36 (1976). Some state courts have been reluctant to permit class actions for damages. *See* F. JAMES & G HAZARD, CIVIL PROCEDURE 509-10 (2d ed. 1977)..

170. In addition to the grounds just discussed, a reason often advanced for denying liability is the potential disproportion between the defendant's wrong and the amount of damages he may be called upon to pay. *See supra* note 36. The thought is that it is better to spread the loss among the many plaintiffs rather than to concentrate it upon the one defendant. With respect to some kinds of harm, such as economic loss, the argument may have validity. *See* Probert, *Negligence and Economic Damage: The California-Florida Nexus,* 33 U. FLA. L. REV. 485, 489-90 (1981). While a large number of trivial claims may expose defendants to substantial liability for emotional harm, I doubt that in most cases the total exposure would be so large as to be fairly characterized as disproportionate to fault.

171. I realize that technically the following discussion of the typical triviality of emotional harm raises issues of substantive, rather than process, policy. But the plaintiff is not likely to perceive the argument that *he* ought not to recover because emotional harm in most cases is trivial as addressing the substantive merits of his claim. Thus, the issues here can be comfortably talked about in connection with the other more clearly process issues.

172. See *supra* text accompanying note 47.

173. Although written primarily about the intentional infliction of emotional harm, the Magruder's observations in *Mental and Emotional Disturbance in the Law of Torts,* 49 HARV. L. REV. 1033 (1936) are apt here:

> [I]t is nevertheless true that the common law has been reluctant to recognize the interest in one's peace of mind as deserving of general and independent legal protection, even as against intentional invasions. Conceivably a principle might have been developed that mental distress purposely caused is actionable unless justified, thus casting upon the dependant the burden of establishing some privilege by way of rebutting the prima facie liability. That this was not done is hardly to be ascribed to any inherent difficulty in assessing damages. . . . Rather it was due to policy considerations of a different sort. Adoption of the suggested principle would open up a wide vista of litigation in the field of bad manners, where relatively minor annoyances had better be dealt with by instruments of social control other than the law. . . . Furthermore, in an ad hoc manner, and perhaps not very scientifically, the

claims are, of course, entitled to compensation if they suffer the kind of harm which the law otherwise compensates. The minor physical injury, with perhaps a few dollars in medical expenses and a day or two of missed work, is as compensable as paraplegia. But the paradigm case with which the torts process is concerned involves harm of sufficient magnitude to warrant the maintenance of the process.[174]

Any attempt to compensate typically trivial harm through negligence actions would be unwise for two reasons. First, much of the cost associated with claims are borne not just by plaintiffs, but by defendants and the public as well. Those who suffer even trivial harm have limited incentives not to pursue their claims, if there is a plausible case for liability, and the small claim may be worth something in the settlement process for the very reason it is small: it would cost the defendant, or his insurer, more to fight it than it would to pay the plaintiff.[175] A second, and perhaps more important, reason is that no significant long term reallocation of losses would occur. All of us suffer, and inflict, such harm at one time or another. Thus, shifting losses through the torts process would make most of us plaintiffs one day and defendants another. In the end, we would not be better off than if the losses had not been shifted at all,[176] and we would be collectively worse off because of the transaction costs involved. Indeed, there would be pressure on those otherwise not inclined to pursue trivial claims to make up for their losses as defendants. Certainly, what would appear to be trivial harm to the neutral eye shows up often enough to suggest that persons suffering such harm cannot be relied upon to forego their claims.[177]

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courts have in large measure afforded legal redress for mental or emotional distress in the more outrageous cases, without formulating too broad a general principle.

Id. at 1035.

174. *See* F. HARPER & F. JAMES, *supra* note 36, at 1032. The desire to eliminate small claims resulting from automobile accidents from the normal torts process was a significant factor in the adoption of some no-fault automobile plans. *See* Pinnick v. Cleary, 360 Mass. 1, 271 N.E.2d 592 (1971).

175. According to some commentators, this has resulted in "overcompensation" of those with small claims, as the smaller the claim, the higher the compensation as a ratio to economic loss. *See, e.g.,* Bombaugh, *The Department of Transportation's Auto Insurance Study and Auto Accident Compensation Reform,* 71 COLUM. L. REV. 207, 214 (1971).

176. Since here I am writing of typically trivial claims, liability insurance would make no difference. Presumably, most plaintiffs would be insured as defendants, and would have to pay the higher premiums resulting from the recognition of such claims.

177. *See, e.g.,* Morgan v. Pistone, 25 Utah 2d 63, 475 P.2d 839 (1970) (plaintiff sued, and lost, for a minor touching arising out of a back yard squabble); Robinson v. Providence Mausaleum, Inc., 359 So. 2d 1317 (La. Ct. App. 1978) (plaintiff awarded $100 in damages after defendant mistakenly put casket with body of her husband in wrong cemetary plot, and she viewed the casket in "wet and muddied" condition for an hour while correct plot was being readied); Corso v. Crawford Dog & Cat Hosp., 87 Misc. 2d 530, 415 N.Y.S.2d 182 (Civ. Ct. N.Y.C. 1979) (plaintiff awarded $700 in damages after defendant mistakenly put a dead cat in casket intended to contain body of plaintiff's deceased dog). These cases did not involve actions based upon negligently inflicted emotional harm, but were brought under other well recognized torts: *Morgan,* battery; *Robinson,* mishandling of a corpse; and *Corso* extended the latter theory to include mishandling of corpses of beloved household

Related to trivial quality of the typical claims for emotional harm is difficulty of determining their genuineness. Courts have given this reason over the years for refusing to recognize emotional harm as an independent element of recoverable harm. Because emotional harm is often not objectively verifiable, it is easily faked, and even more easily exaggerated.[178]

There have been suggestions that these process objections could be met by rules permitting recovery in the most deserving cases but limiting liability in a way that would satisfy the objections to liability based solely upon foreseeability. These rules would permit recovery if the plaintiff suffered physical injury as a result of the emotional harm, if the emotional harm was serious, if the emotional harm was a normal reaction, or if the harm caused economic loss. I do not believe that any of these limitations is a workable and acceptable compromise.

Most courts expanding liability to bystanders have required that the emotional harm cause physical injury, as did the California court in *Dillon*. The difficulty with this is in defining "physical injury," for it is a concept capable of manipulation by the plaintiff. In one recent case, the plaintiff satisfied the

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pets. These cases do illustrate, however, that self-screening is not a reliable method of keeping the trivial out of courts.

Implicit in this discussion is the assumption most cases of negligently inflicted emotional harm would be trivial. I admit to an inability to demonstrate empirically the truth of this assumption, and I doubt that proof either way could be established. *But see* Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433 (Me. 1982), which demonstrates the triviality of claims we can expect. The plaintiff's claim for emotional harm stemmed from observing her child, when eating baby food supplied by the defendants, choke, gag and spit up a hard substance.

178. Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1258-59 (1971). In arguing for full legal recognition of mental distress as compensable harm, the author of this comment asserts that medical testimony can be an important device in making sure that malingerers are detected. That, however, assumes that doctors who testify are neutral and singlemindedly pursue the "truth." However, there is real doubt that that is an accurate view of medical testimony. *See, e.g.*, Ford & Holmes, *The Professional Medical Advocate*, 17 SW. L.J. 551 (1963); Peck, *Impartial Medical Testimony—A Way to Better and Quicker Justice*, 22 F.R.D. 21 (1959). The pressure on experts to "sell" their testimony may be even greater if expert witnesses are paid on a contingent fee basis. *See Model Rules of Professional Conduct, Rule* 3.7 (Discussion Draft 1980). Thus, most plaintiffs could be expected to reach the jury, under circumstances in which the jury would have little guidance to enable it to rationally choose between the conflicting expert testimony. *See* Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981). In discussing recovery for negligently inflicted emotional harm, Rabin observed:

> The reasons given for denying recovery . . . seem to express genuine judicial concerns. Judges worried about detecting "pure" emotional distress cases where the court had neither the hard evidence of a stillborn child nor righteous indignation against an intentional wrongdoer. Particularly in the former instance, they expressed a concomitant fear of unleashing a mass of cases. The specter of highly speculative jury verdicts probably also cast a pall.

Id. at 949.

Furthermore, most cases involving emotional harm, like most personal injury cases, would be resolved by settlement. Given the recognized difficulties of proof even the malingerer will have a case on damages that will be worth something.

physical injury requirement with proof that she "has withdrawn from normal socialization, was for a period of nine months following the accident unable to function as she did previously, and continues in a state of depression."[179] Playing games with the concept of physical injury is understandable. The harm that concerns the law is *emotional* — after all, the name of the tort is "negligent infliction of *emotional* harm." It is illogical therefore to require as a matter of substantive policy that the plaintiff suffer anything other than emotional harm. Viewed this way, the physical harm requirement is arbitrary, and it is understandable that when faced with concrete facts in real cases courts strain to find the requisite physical harm. This presents a situation similar to the impact rule, under which even trivial impacts could support recovery for fright.[180] The rule requiring consequential physical harm appears to be as unstable as the impact rule, and is thus not likely to survive as a substantial limit on liability.[181] Indeed, the Supreme Court of California recently abandoned the requirement of physical harm in *Molien v. Kaiser Foundation*[182] asserting it "encourages extravagant pleading and distorted testimony,"[183] and "with a little ingenuity" physical consequences can be found in any case of mental suffering.[184]

Although the typical case of negligently inflicted emotional harm may be trivial, some instances of serious harm do occur. If there were satisfactory bases for sorting out the serious from the trivial, this objection would be met. In theory it might be possible to build a requirement of serious harm into the rule, as the RESTATEMENT (SECOND) OF TORTS does in connection with the tort of intentional infliction of emotional harm. As indicated earlier, however, that requirement has not played an important role in cases that have purported

179. Thoms v. McConnell, 45 Mich. App. 647, 207 N.W.2d 140, 145 (1973). In the hands of a creative and sympathetic judge, very little in the way of emotional reaction would escape being characterized as physical harm. *See also* Towns v. Anderson, 195 Colo. 517, 579 P.2d 1163 (1979); Daley v. LaCroix, 384 Mich. 4, 179 N.W.2d 390 (1970). In Vance v. Vance, 286 Md. 490, 408 A.2d 728 (1979), the court explained that "physical injury" for these purposes is not limited to "an external condition or . . . a pathological or physiological state." *Id.* at 500, 408 A.2d at 733. Nor is it limited to "its ordinary dictionary sense," *id.;* rather it exists whenever the injury "is capable of objective determination." *Id.* at 500, 408 A.2d at 734. *See also* the typically colorful opinion of Justice Musmanno dissenting in Knaub v. Gotwalt, 422 Pa. 267, 273, 220 A.2d 646, 648 (1966).

180. *See supra* note 66.

181. RESTATEMENT (SECOND) *supra* note 6, §§ 312 & 313 would establish a tort for the negligent infliction of emotional distress, but only the extent that the distress results in "illness" or "bodily harm," and then would only compensate such illness or harm, and not the distress as such. (It is not clear, however, if any pain and suffering resulting from the illness or bodily harm would be compensable.) The illness and bodily harm concepts are as easily manipulative as is physical injury. Furthermore, this limited tort is unlikely to commend itself to courts moved primarily by the emotional impact upon the plaintiff. The *Dillon* court for example, described "the mother's emotional trauma at the witnessed death of her child" as the "most egregious case of them all," and unlikely to be inclined to deny recovery from the very harm it was most concerned with. 68 Cal. 2d at 747, 441 P.2d at 925, 69 Cal. Rptr. at 85.

182. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

183. *Id.* at 929, 616 P.2d at 820, 167 Cal. Rptr. at 838.

184. *Id.* (quoting 64 A.L.R.2d 100, 117 n.18).

to apply it[185] and with good reason. The difficulties in measuring the severity of the harm for purposes of calculating damages pale when compared to those involved in making the severity of the harm an either/or test of liability, under which the plaintiff would have to establish a threshold level of severity in order to recover at all. If physical injury is considered too plastic to function as a test of liability in *Molien*, "seriousness" is certainly no less malleable or less capable of manipulation.[186]

It is difficult to imagine how a set of rules could be developed and applied on a case-by-case basis to distinguish severe from nonsevere emotional harm.[187] Severity is not an either/or proposition; it is rather a matter of degree. Thus, any attempt to formulate a general rule would almost inevitably result in a threshold requirement of severity so high that only a handful would meet it, or so low that it would be an ineffective screen. A middle-ground rule would be doomed, for it would call upon courts to distinguish between large numbers of cases factually too similar to warrant different treatment. Such a rule would, of course, be arbitrary in its application.

Some courts have required that the emotional harm must be such as would

185. See *supra* text accompanying note 50-51.

186. A recent example of the emptiness of the seriousness requirement is Campbell v. Animal Quarantine Station, 63 Hawaii 587, 632 P.2d 1066 (1981). The Supreme Court of Hawaii has previously ruled that negligently inflicted emotional harm must be serious to be recoverable, in Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970). In *Campbell*, the court affirmed judgment for the emotional harm suffered by five plaintiffs resulting from the death of the family dog in individual amounts of $150 and $275 (these figures were taken from Note, *The Animal Quarantine Station: Negligent Infliction of Mental Distress*, 4 HAWAII L. REV. 207, 208 n.11 (1982)). It is thus somewhat surprising that the court in *Molien* substituted "seriousness" for physical injury as the liability screen in that case. The Supreme Court of Maine also rejected physical injury in favor of seriousness as a limit on liability. *See* Culbert v. Sampson's Supermarkets Inc., 444 A.2d 433 (Me. 1982).

187. Of course, "arbitrary" lines could be drawn to separate severe injury from nonsevere, although for emotional harm that might be difficult to determine. For the reasons stated earlier, requiring physical harm would not do it. See *supra* text accompanying notes 179-82. Some states that have adopted no-fault automobile insurance statutes bar tort claims for less severe injuries. A typical provision of such statutes gears the tort exemption for pain and suffering to medical expenses. For example, the Massachusetts statute permits recovery in tort if such expenses exceed $500. *See* MASS. GEN LAWS, ch. 231, § 6D (Supp. 1981). The $500 figure is arbitrary in one sense because that amount cannot be proven to have a more logical relation to the severity of the harm than, for example $475 or $525. Given the desire to link seriousness with medical expenses, $500 is within the range of rational choice. *See* Pinnick v. Cleary, 360 Mass. 1, 271 N.E.2d 592 (1971). See also *supra* text accompanying notes 23-27.

In some statutes, the tort exemption for pain and suffering is less precise, and difficulties discussed in the text can be expected. The Michigan statute precludes tort recovery for noneconomic harm unless "the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MICH. STAT. ANN. § 24.13135 (Supp. 1981-82). Michigan cases have held that whether an injury is "serious" is one of fact for the jury, unless the trial judge determines that it "is so minor that it fails to reach the threshold of serious impairment." Brooks v. Reed, 93 Mich. App. 166, 171, 286 N.W.2d 81, 83 (1979). Although not every plaintiff will get to the jury under this statute *see, e.g.*, Hermann v. Haney, 98 Mich. App. 445, 296 N.W.2d 278 (1980), some Michigan intermediate appellate courts have made it clear that the injury must be minor indeed to keep the case from the jury. *See* Watkins v. City Cab Corp., 97 Mich. App. 723, 296 N.W.2d 162 (1980).

have been suffered by a "normal" person under the circumstances.[188] It is not entirely clear, however, what function the normality requirement serves. Though it may divide unforeseeable plaintiffs from the foreseeable,[189] it adds nothing of substance to the existing rules of negligence liability, which do not compensate unforeseeable plaintiffs, even if they suffer physical harm. On the other hand, the normality requirement may relate to damages rather than to liability, and may limit the kind of damages which an otherwise foreseeable plaintiff may recover.[190] This would constitute a substantial departure from the traditional damages rule.[191] In either event, the requirement is not likely to screen out many cases. The normality rule is as difficult to apply to concrete cases as are the "serious" or "physical" injury rules. Rarely, if ever, could the normality of the plaintiff's harm be tested by a motion to dismiss the complaint, and only the most unusual cases will fail to survive a motion for a directed verdict.

The last of the suggested limitations on liability for negligently inflicted emotional harm I discuss is Professor Miller's assertion that damages should be limited to economic loss.[192] His concern with liability based upon foreseeability is not with process problems, but with the possibility that the total damages would be disproportionate to the defendant's fault.[193] Limiting damages in this way would also ameliorate process objections. If damages for intangible harm provide the incentive to pursue small claims,[194] it would be expected that by removing the right to recover for such harm, the trivial claims would not be pursued. Clearly this is true for claims procedurally separate from those of the primary victims. For any one event, it would reduce the number of claims brought and the incidence of fraudulent claims. Thus, Professor Miller's proposal would appear to be an acceptable compromise of the conflicting policies: it both compensates foreseeable plaintiffs and avoids the process difficulties involved in permitting recovery.

There are two reasons why his proposal is unlikely to have much appeal. First, liability for economic loss only will not add much to existing compensation regimes. Personal medical insurance and employment sick leave benefits are widely available and compensate economic loss in all but rare cases of disabling harm. Of course, it may be worth recognizing a right to recover in such cases, but the class of persons who suffer negligently inflicted emotional harm would gain little from Miller's proposal.[195] But even if courts

188. *See* Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979); Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976); Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974); Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970).

189. The *Hunsley* court viewed the normality requirement as one relating to foreseeability. 87 Wash. 2d 424, 553 P.2d 1096 (1976).

190. The cases from Hawaii and Pennsylvania seem to fit into this category. *See supra* note 188.

191. *See supra* note 3.

192. *See* Miller, *supra* note 43, at 41-46.

193. *See supra* note 170.

194. The smaller claims tend to be overcompensated, when measured by the ratio of recovery to economic loss. *See supra* note 175.

195. Professor Miller's proposal, however, may add the potential for double recovery

were persuaded that enough economic loss is presently uncompensated to justify the tort, it would still be unresponsive to the primary concern of the *Dillon* court, which was bystander emotional harm, not economic loss. Such courts are unlikely to ignore the very harm that would lead them to recognize the tort.[196] A court not sufficiently moved by the bystander's emotional harm to permit recovery, is also not likely to adopt Professor Miller's rule, since to do so would involve a novel approach to damages.

For whatever reasons, courts have not recognized emotional harm as an independent basis of recovery in negligence. Admittedly there are pockets of liability for negligently inflicted emotional harm. It might perhaps be asserted those pockets are sufficiently large so that, rather than exceptions to a general rule of non-liability, together they constitute a broad rule of liability to which instances of non-liability are the exceptions. If this were the case, as a practical matter it would be but a short step to complete recognition of the tort of negligent infliction of emotional harm. But such is not the case. Apart from the zone of danger rule, most pockets of liability, such as the negligent handling of corpses,[197] arise out of relationships that precede the act which causes the emotional harm.[198] Pre-existing relationships also furnish the basis for the expanding liability of insurance companies to insureds for emotional harm caused by negligently handling claims.[199]

There are other cases, to be sure, which are not so easily explainable upon the pre-existing relationship basis. In *Johnson v. New York*,[200] for example, the defendant hospital erroneously told the plaintiff that her mother, a patient in the hospital, had died. The court of appeals held the plaintiff could recover for the emotional harm she suffered when she learned the truth. How-

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under the collateral source rule. He also argues that compensating economic loss will increase the deterrence capability of negligence law. *See supra* note 115, at 41. It will, but I suspect not by much. If I am right that most small claims will not be pursued at all because they will not be worth it, only the economic loss from the more serious but relatively fewer cases will be imposed upon defendants.

196. *See supra* note 181.

197. *See* W. PROSSER, *supra* note 1, at 329-30.

198. Another category in which some courts have imposed liability for negligent infliction of emotional harm involves the transmission of telegrams. *See id.* at 329. Liability of the telegraph company to the recipient does not depend upon the existence of a contract between the company and the recipient, which furnishes the basis of liability in connection with the mishandling of corpse cases, (although the recipient of a telegram might be viewed as a third party beneficiary). However, the adverse emotional impact which an inaccurate message may cause is more likely to be felt by the recipient than the sender. When the recipient suffers emotional harm, the sender is unlikely to suffer economic loss which would furnish the basis for an action against the company. Courts may feel that actions for emotional harm are needed to provide an important incentive to telegraph companies to be accurate. However, that most states do not impose such liability against telegraph companies may be explained by the conclusion that there is no sufficient pre-existing relationship.

199. *See, e.g.*, Silberg v. California Life Ins. Co., 11 Cal. 2d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974) (medical insurance); Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967) (liability insurance); Mustachio v. Ohio Farmers Ins. Co., 44 Cal. App. 3d 358, 118 Cal. Rptr. 581 (1975) (fire insurance); Seaton v. State Farm Life Ins. Co., 75 Mich. App. 252, 254 N.W.2d 858 (1977) (life insurance).

200. 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975).

ever, the basis of the decision is unclear. The court's assertion that the "key to liability . . . is the hospital's duty, borne or assumed, to advise the proper next of kin of the death of a patient,"[201] and its reliance upon the negligent mishandling of corpse cases, suggests some sort of relationship between the plaintiff and the hospital preceded the erroneous message, although none in fact existed. Relying again on the mishandling of corpse cases, the court observed serious mental harm was especially likely in this case. While this might indicate a receptivity to a broader tort, the court specifically adhered to its earlier rejection of *Dillon*.[202]

At one time, it appeared that the Supreme Court of Hawaii would recognize emotional harm as an independent basis of negligence liability. The court had ruled that there is a general tort duty "to refrain from the negligent infliction of serious mental distress."[203] It did not take the court long, however, to retreat. The court later affirmed summary judgment for the defendants in a wrongful death action in which it was alleged that the decedent's death was caused by his learning of the death of his daughter and granddaughter in an automobile accident.[204] That accident occurred in Hawaii, but the decedent learned of the deaths by telephone while he was in California. The court affirmed because the decedent was not "within a reasonable distance from the scene of the accident."[205]

Molien may have come closest to establishing a generic tort for negligent infliction of emotional harm.[206] The plaintiff's claim was based upon emotional harm he suffered after a doctor employed by the defendant erroneously told his wife she had syphilis. In overruling the trial judge's dismissal of the suit, the court distinguished *Dillon* as involving injury to "a percipient witness to the injury of a third person.[207] "Here, by contrast," the court stated, "plaintiff

201. *Id.* at 380, 334 N.E.2d at 591, 372 N.Y.S.2d at 639.

202. *See* Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1967). The Court of Appeals of New York is ambivalent even in cases involving pre-existing relationships. *See* Howard v. Lecher, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977), in which the plaintiffs, husband and wife, sued the defendant physicians for negligently failing to inform them when the wife was pregnant that the child might be born with Tay-Sachs disease. The court held the plaintiffs could not recover for their emotional distress from watching their child slowly die. The court viewed the result as being dictated by *Tobin*.

203. Rodrigues v. State, 52 Hawaii 156, 172, 472 P.2d 509, 520 (1970). It is not clear what effect the court intended to give to the word "serious." The court stated later in the opinion "serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Id.* at 173, 472 P.2d at 521. This may mean nothing more than that a sub-normal person is not foreseeable. However, if the court intended to establish an independent requirement that the harm be serious, as opposed to nonserious, given the court's loose definition a jury question is likely to be created in most cases. As stated earlier, the requirement of serious harm will not function as an effective screen. See *supra* text accompanying note 50.

204. Kelly v. Kokua Sales & Supply, Ltd., 56 Hawaii 204, 532 P.2d 664 (1975).

205. *Id.* at 209, 532 P.2d at 676. The Hawaiian cases are discussed in Miller, *supra* note 43.

206. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

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

was himself a direct victim of the assertedly negligent act. . . . Because the risk of harm to him was reasonably foreseeable we hold, in negligence parlance, that under these circumstances defendants owed plaintiff a duty to exercise due care in diagnosing the physical condition of his wife."[208] Whether this presages a firm and lasting commitment to independent protection of emotional tranquility is impossible to say. Certainly, the court's distinction between the facts of *Molien* and those of *Dillon* is analytically unsound. The plaintiff in *Molien* was no more of a direct victim of the doctor's misdiagnosis of his wife than Mrs. Dillon was of the defendant-driver who hit her daughter.[209] Furthermore, as *Dillon* made clear bystander recovery is based upon a direct wrong, not only to the primary victim, but to the bystander as well.[210] Thus, a tension exists between the two cases which will have to be resolved.[211]

CONCLUSION

Although foreseeability has generally been considered a requisite for recovery from a negligent defendant,[212] it has never been sufficient in and of itself. Other policy considerations often have been important enough to justify non-liability for foreseeable consequences in some circumstances. Therefore, an exception to liability based upon foreseeability should not be characterized as arbitrary solely because it is an exception. Rather, there must be an assessment of the policies underlying the exception and of how closely the exception fits the policy offered to support it.

The law has never imposed liability for emotional and mental harm to the full extent of foreseeability. Many reasons have been offered to support

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208. *Id.* at 923, 616 P.2d at 816, 167 Cal. Rptr. at 834-35.

209. *See* Cimino v. Milford Keg, Inc., 431 N.E.2d 920 (Mass. 1982), which stated that "emotional distress is a wrong to the plaintiff distinct from that done to the . . . primary victim." *Id.* at 927. A *post-Molien* California case, however, relied on the direct-indirect distinction in denying recovery to parents who did not actually see the accident that resulted in the death of their son. *See* Hathaway v. Superior Court, 112 Cal. App. 3d 728, 169 Cal. Rptr. 435 (1980).

210. The *Dillon* court characterized the plaintiff's action as "secondary" when stating the claim would be barred if the primary victim could not recover because of his contributory negligence. The action for emotional harm is derivative in the same sense actions for wrongful death and loss of consortium are because contributory negligence of the primary victim usually will bar recovery. The court's view of the bystander's emotional harm as direct is made clear in its discussion of *Dillon* in Rodrigues v. Bethlehem Steel Corp., 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974).

211. It would be odd indeed that the court which carved out a segment of bystanders suffering emotional harm from all those suffering such harm for special favorable treatment would later, under a broader tort, preclude the *non-Dillon* bystanders from recovering just because they are bystanders. In at least one other context, the Supreme Court of California has backed off from a ringing commitment to compensability for foreseeable intangible harm by refusing to extend the right to recover for loss of consortium to the parent-child context; *see* Borer v. American Airlines, Inc., 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977), and in Baxter v. Superior Court, 19 Cal. 3d 461, 563 P.2d 871, 138 Cal. Rptr. 315 (1977), although it had recently reaffirmed this right in the husband-wife context. *See* Rodrigues v. Bethlehem Steel Corp., 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974).

212. *But cf.* Shavell, *An Analysis of Causation and the Scope of Liability in the Law of Torts*, 9 J. LEGAL STUD. 463 (1980).

limiting liability for emotional harm, and I have argued that valid policy reasons support the judicial reluctance to create a broad tort of negligent infliction of emotional harm. Thus, the zone of danger rule is not arbitrary simply because it precludes recovery for emotional harm in some instances. If it is arbitrary for that reason then so is the bystander recovery rule, for that rule also fails to fully implement foreseeability. Although both rules fail in this respect, there is a basis for choosing between the two.

I have argued the zone of danger rule is preferable because it has an internal consistency that the bystander recovery rule does not. Under the former rule, those persons who suffer the kind of harm the rule recognizes, fear for one's own safety, can recover for it from the negligent defendant. Under the latter rule, however, many plaintiffs who foreseeably suffer the kind of harm the rule recognizes, fear for the safety of others as well as for one's self, cannot recover from the negligent defendant. Thus, the courts that discarded the zone of danger rule for the bystander recovery rule to escape arbitrariness have in reality taken a significant step in the wrong direction.

Whether the courts can live with the bystander recovery rule as adopted by *Dillon* is unclear. The demise of the impact rule occurred not just because it was too restrictive a rule of liability. It made no sense once fear for one's own safety was recognized as a valid element of damages. If fear for the safety of others is a valid element of damages, then the liability limitations of the bystander recovery rule similarly make no sense. If courts are unlikely to take the next step of creating a generic tort for the negligent infliction of emotional harm, and I believe they neither will nor should, the choice then is between the bystander recovery rule and the zone of danger rule. It may be too much to except courts that have listened to the siren call of *Dillon* to reverse themselves. But courts that have not departed from the zone of danger rule should not do so on the basis that it is less arbitrary than the bystander recovery rule.