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Negligence—Complaint Alleging Mother's Mental Distress with Physical Manifestations Caused by Witnessing Death of Her Daughter Occasioned by the Alleged Negligence of Defendant Held to State a Cause of Action Even Though Mother Not in Zone of Peril

Jeffrey S. White

his fiduciary duty by using a corporate asset for personal gain? The courts have, and correctly so, prevented further attempts by directors from utilizing corporate inside information by divesting the offenders of their profits. However, the courts mistakenly have placed the legal redress of recovering profits in the hands of the defrauded purchaser. This procedural remedy would apparently be ineffective given the nature of todays security industry. The parties to a stock transaction are generally anonymous as a result of the highly mechanized stock exchanges and the purchaser may never realize that the stock transaction was made on the basis of inside information. Accordingly, the director's unjust enrichment never becomes his "just" demise. It would seem the only *effective* and *practical* means to curtail fraudulent insider trading would be to allow the stockholders, who are generally aware of a director's activity, to bring an action and thereby have the director's profits inure to the corporation.[51] Since the two principal aims in protecting the public investor are to prevent possible abuses by corporate insiders from arising, in addition to, making it facile as possible for offenders to be stripped of their profits,[52] the court's decision would apparently, for the immediate future, insure this desirable policy.[53]

NICHOLAS J. SARGENT

NEGLIGENCE—COMPLAINT ALLEGING MOTHER'S MENTAL DISTRESS WITH PHYSICAL MANIFESTATIONS CAUSED BY WITNESSING DEATH OF HER DAUGHTER OCCASIONED BY THE ALLEGED NEGLIGENCE OF DEFENDANT HELD TO STATE A CAUSE OF ACTION EVEN THOUGH MOTHER NOT IN ZONE OF PERIL

While crossing a street, the plaintiff's infant daughter was struck and injured by the defendant, who was allegedly operating his automobile in a negligent manner. Such injuries proximately caused the decedent's death. The plaintiff, the mother of the decedent, who was sitting on the porch of her home, and the sister of the decedent who was standing on the curb near the point of

51. It could be argued that since the profits would be turned over to the corporate treasury the directors who were guilty of making the profits and then deprived of them nevertheless share in the recovery. However, the pro rata share of the benefit apportionable to the defendant's interest would rarely be sufficient to justify a desire to have the total profit annuled. In the instant case defendants owned, after the sale, 14% of the stock outstanding.

52. *See* Comment, *The Prospects for Rule X-10B-5: An Emerging Remedy for Defrauded Investors*, 59 Yale L. J. 1120, 1156 (1950).

53. This policy, which the *Diamond* court adopts, is not beyond criticism since the defendants in the instant case would be exposed to double liability. Presumably, the purchasers of the stock would be successful in a suit alleging the directors had failed to disclose material information. However, such a dilemma could be resolved by giving precedence to the claim of the purchaser; though there are some legal writers who advocate a double recovery on the theory that a wrong was perpetrated against *both* the corporation and purchaser. *See* Comment, *The Prospects for Rule X-10B-5: An Emerging Remedy for Defrauded Investors*, 59 Yale L. J. 1120, 1140-42 (1950). Compare Stevens, Corporations 701-02 (2d ed. 1949).

impact witnessed the accident. As a result they sustained great emotional shock with accompanying physical pain and suffering. The decedent's mother brought an action for the wrongful death of her daughter; and on behalf of herself and the decedent's infant sister, the plaintiff sued for personal injuries, alleging severe emotional distress occasioned by witnessing the accident. The defendant, after filing his answer, moved for judgment on the pleadings contending that no cause of action was stated in plaintiff's second and third counts with respect to her allegation that she sustained emotional distress, induced solely by the witnessing of negligently caused injury to a third person. Thereafter, the defendant moved for summary judgment on the sister's cause of action. The Superior Court, Sacramento County, denied the defendant's motion for summary judgment as to the infant sister's cause of action. The court sustained defendant's motion for judgment on the pleadings as to the mother's cause of action for personal injuries, while denying the latter motion as to the sister. The mother appealed. The Supreme Court of California reversed in a four to three decision. In overruling *Amaya v. Home Ice, Fuel and Supply Co.*,[1] the court *held* a pleading of negligent infliction of severe emotional distress with physical manifestations by a mother who was present and saw her daughter killed as a result of the defendant's negligence, states a cause of action, notwithstanding that the mother was not within the zone of peril, and did not fear for her own safety. *Dillon v. Legg* 69 Cal. 2d 72, 441 P.2d 912 (1968).

The American law in the field of injury to the nervous system is a "complex admixture of the conservatism of the older English case law and the liberalism of present-day psychiatry, all intertwined with a considerable dash of native aberrational variation."[2] Despite its early recognition in the assault cases,[3] the law has been slow to accept that the interest in peace of mind is entitled to independent legal protection.[4] The early cases refused all remedy for psychic injury unless some already well recognized tort was commited, so that the mental injury could be "parasitic to" the ordinary damages traditionally associated with the tort.[5] Following this, recovery was allowed in special situations

1. 59 Cal. 2d 295, 29 Cal. Rptr. 33, 379 P.2d 513 (1963).

2. McNiece, *Psychic Injury and Liability in New York*, 24 St. John's L. Rev. 1 (1949).

3. *See, e.g.*, I. de S. et ux. v. W. de S. 1348, Y.B. Lib. Assis. f. 99, pl. 60, 1366, Y.B. 40 Edw. III 40, pl. 19.

4. *See generally*, Bohlen and Polikoff, *Liability in New York for the Physical Consequences of Emotional Disturbance*, 32 Col. L. Rev. 409 (1932); Goodrich, *Emotional Disturbance as Legal Damage*, 20 Mich. L. Rev. 497 (1922); Hallen, *Damages For Physical Injuries Resulting From Fright or Shock*, 19 Va. L. Rev. 253 (1933); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033 (1936); Throckmorton, *Damages For Fright*, 34 Harv. L. Rev. 260 (1921). *See also* the summary in the Report of the New York State Revision Commission, *Study Relating to Liability for Injuries Resulting from Fright or Shock*, Leg. Doc. No. 65, (1936).

5. *See, e.g.*, Acadia, California, Ltd. v. Herbert, 54 Cal. 2d 328, 5 Cal. Rptr. 686, 353 P.2d 294 (1960); Easton, v. United Trade School Contracting Co., 173 Cal. 199, 159 P. 597 (1916); Sloane v. Southern California Ry. Co., 111 Cal. 668, 44 P. 320 (1896); Kline v. Kline, 158 Ind. 602, 64 N.E. 9 (1902) (primary injury, assault); Anthony v. Norton, 60 Kan. 341, 56 P. 529 (1899) (primary injury, seduction); Goodill v. Tower, 77 Vt. 61, 58 A. 790 (1904) (Primary injury, false imprisonment); Draper v. Baker, 61 Wisc. 450, 21 N.W.

where mental suffering alone had been caused by an intentional act of an unusually indefensible character.[6] For example, a wife was allowed recovery from a person who brought the dead body of her husband to her home.[7] Liability was imposed in the situation where employees of common carriers intentionally mistreated or insulted passengers.[8] In recognition of the same principle, a number of cases saw fit to apply a similar rule to possessors of land. They allowed recovery for mental suffering caused by an intentional invasion of a real property interest in which plaintiff has a reasonable fear for the health and safety of himself and members of his family.[9]

On the other hand, the courts have been reluctant to permit recovery for interferences with peace of mind that are merely negligent as distinguished from purposeful.[10] However, the plaintiff has been allowed to recover where a physical injury was directly caused by defendant's negligent act, which in turn caused an emotional trauma. For instance, where defendant negligently permitted his dog to bite the plaintiff, the latter was granted damages, not only for the physical injuries caused by the bite, but also for the great fear of contracting rabies which plaintiff subsequently sustained.[11]

Where the physical injury does not precede and in fact lead to the severe emotional distress, many jurisdictions have demanded that some physical impact, however slight, occur on the person before damages will be granted for the emotional trauma. In one of these "impact" states, for example, where a defendant negligently caused dust to fly in the plaintiff's eye, the latter was allowed to recover for the mental distress which ensued, in spite of the fact

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527 (1884) (primary injury, battery). *See generally*, 1 M. Street, *Foundations of Legal Liability* 460, 470 (1906).

6. *See, e.g.*, Emmke v. De Silva, 293 Fed. 17, (8th Cir. 1923); State Rubbish Collectors' Ass'n. v. Siliznoff, 38 Cal. 2d. 330, 338, 240 P.2d 282 (1952); Emden v. Vitz, 88 Cal. App. 2d. 313, 319, 198 P.2d 696, 700 (1948); Deevy v. Tassi, 21 Cal. App. 2d 109, 130 P.2d 389 (1942); Restatement of Torts, § 48 (1960).

7. Price v. Yellow Pine Paper Mill Co., 240 S.W. 588 (Tex. Civ. App. 1922).

8. *See, e.g.*, Cole v. Atlanta & W.P.R. Co., 102 Ga. 474, 31 S.E. 107 (1897); Knoxville Traction Co. v. Lane, 103 Tenn. 376, 53 S.W. 557 (1899); May v. Shreveport Traction Co., 127 La. 420, 53 So. 671 (1902); Chamberlain v. Chandler, 3 Mason 242, 5 Fed. Cas. No. 2, 575, (CC Mass., 1823).

9. *See, e.g.*, Acadia, California, Ltd. v. Herbert, 54 Cal. 2d 328, 5 Cal. Rptr. 686, 353 P.2d 294 (1960); Kornoff v. Kingsburg Cotton Oil Co., 45 Cal. 2d 265, 271, 288 P.2d 507 (1955); Herzog v. Grosso, 41 Cal. 2d 219, 225, 259 P.2d 429 (1953); Anderson v. Souza, 38 Cal. 2d 825, 838, 243 P.2d 497 (1952); Alonso v. Hills, 95 Cal. App. 2d 778, 214 P.2d 50 (1950). *See generally*, Fleming, An Introduction to the Law of Torts (1967) 54; Restatement of Torts (1960) § 929 clause (C) and comment (G); § 47(2) and comment (C).

10. For a generalized discussion of the objections voiced by courts refusing to allow recovery, *see* Burdick, *Tort Liability For Mental Disturbance and Nervous Shock*, 5 Col. L. Rev. 179 (1905); Smith, *Relation of Emotions to Injury and Disease: Legal Liability For Psychic Stimuli*, 30 Va. L. Rev. 193 (1944); Throckmorton, *Damages For Fright*, 34 Harv. L. Rev. 260 (1921); Wilson, *The New York Rule as to Nervous Shock*, 11 Corn. L.Q. 512 (1926).

11. Serio v. American Brewing Co., 141 La. 290, 74 So. 998 (1917). *See also*, Ferrara v. Galluchio, 5 N.Y.2d 16, 176 N.Y.S.2d 996 (1958) (anxiety over possibility of cancer developing from x-ray burn).

that there were no other physical injuries.[12] The majority of courts, however, hold that where mental anguish is severe and is itself the cause of subsequent physical injury plaintiff may recover, as long as he was directly threatened, notwithstanding the absence of contemporaneous impact.[13]

More problems arise where the mental distress is caused by the defendant's conduct which is not directed at the plaintiff, but at a third person. Generally, plaintiff is allowed recovery for mental distress caused by the defendant's intentional attack on a third person.[14] However, courts have placed many limitations upon recovery in such situations: the plaintiff must be present at the time of the attack,[15] and the defendant must know of the plaintiff's presence.[16] In the cases wherein recovery has been granted, the plaintiff has almost always been a close relative of the person intentionally attacked; but such a close relationship of the plaintiff-bystander to the victim has not been established as an indispensable requirement for recovery.[17] Where plaintiff is emotionally shocked by the sight of an intentional tort, the grounds upon which the courts have predicated recovery have been that defendant's intention to harm the third party has been transferred to plaintiff;[18] that the mental distress was substantially certain to follow from defendant's act;[19] and that the wrongdoer should

12. Porter v. Delaware & W.R.R., 73 N.J. 405, 63 A. 860 (1906). *See also*, Kentucky Traction & Term. Co. v. Roman's Guardian, 232 Ky. 285, 23 S.W.2d 272 (1929) (trifling burn); Morton v. Stack, 122 Ohio 115, 170 N.E. 869 (1930); Hess v. Phila. Transp. Co., 358 Pa. 144, 56 A.2d 89 (1948) (slight electric shock).

13. The leading cases upholding the majority position are: Penick v. Mirro, 189 F. Supp. 947 (E.D. Va. 1960); Lindley v. Knowlton, 179 Cal. 298, 176 P. 440 (1918); Cook v. Maier, 33 Cal. App. 2d 581, 584, 92 P.2d 434 (1939); Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941); Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933); Green v. T.A. Shoemaker and Co., 111 Md. 69, 73 A. 688 (1909); Chuichiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 A. 540 (1930); Battalla v. State, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961), *overruling* Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896); Simone v. Rhode Island Co., 28 R.I. 186, 66 A. 202 (1907); Houston Electric Co. v. Dorsett, 145 Tex. 95, 194 S.W.2d 546 (1946); St. L. S.W. Ry. of Texas v. Alexander, 106 Tex. 518, 172 S.W. 709 (1915); Bowles v. May, 159 Va. 419, 166 S.E. 550 (1932); Cherry v. Gen. Petroleum Corp., 172 Wash. 688, 21 P.2d 520 (1933); Pankopf v. Hinkly, 141 Wisc. 146, 123 N.W. 625 (1909).

14. *See, e.g.*, Young v. Western and Atlantic R.R., 39 Ga. App. 761, 148 S.E. 414 (1929); Hill v. Kimball 76 Tex. 210, 13 S.W. 59 (1890); Jeppsen v. Jensen, 47 Utah 536, 155 P. 429 (1916).

15. *See, e.g.*, Knox v. Allen, 4 La. App. 233 (1926) (later discovery of attack on child); Ellsworth v. Massacar, 215 Mich. 511, 184 N.W. 408 (1921) (later discovery of attack on husband); Koontz v. Keller, 52 Ohio App. 265, 3 N.E.2d 694 (1936) (discovery of body of murdered sister). *See generally*, Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1044, (1936); Murray, *Negligently Inflicted Mental Distress: The Question of Bystander Recovery*, 14 Buffalo L. Rev. 499 (1965).

16. *See, e.g.*, Phillips v. Dickerson, 85 Ill. 11 (1877) (plaintiff in another room); Reed v. Ford, 129 Ky. 471, 112 N.W. 600 (1908) (near but not known to be there); Hutchinson v. Stern, 115 App. Div. 791, 101 N.Y.S. 145 (4th dept. 1906) (present and nearby but not in sight).

17. Rogers v. Willard, 144 Ark. 587, 223 S.W. 15, 11 A.L.R. 1115 (1920); Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890); *See infra* note 25.

18. Lambert v. Brewster, 97 W. Va. 124, 125 S.E. 244 (1924).

19. *See, e.g.*, Rogers v. Willard, 144 Ark. 587, 223 S.W. 15, 11 A.L.R. 115 (1920) (quarrel in presence of pregnant woman); Jeppsen v. Jensen, 47 Utah 536, 155 P. 429 (1916) (assault upon plaintiff); *See generally*, Note, U. Ill. Law Forum 535 (1961).

reasonably have foreseen that one observing his act would suffer mental anguish.[20] In most of these intentional tort bystander situations, stress is laid upon the moral turpitude of the defendant's act, and the plaintiff's recovery for mental distress is a kind of punitive damage.[21]

Because the defendant is less at fault when his conduct is merely negligent, those shocked at witnessing his activity have a remedy only if they can satisfy certain arbitrary "tests."[22] Where there is no impact, recovery is almost always denied.[23] The "fear for another" rule is another obstacle which the emotionally traumatized bystander must overcome: recovery is denied when the plaintiff's fear is for a third person rather than for himself.[24] The majority of courts utilize the zone of peril rule and bar recovery if plaintiff has been in no potential danger of harm from impact.[25] One case in which the latter rule is applied is *Amaya v. Home Ice, Fuel and Supply Co*,[26] which serves as an illustration of the countervailing policy factors that lead to this restriction. There, a mother saw her child run down by the defendant's negligently driven vehicle and ex-

20. Watson v. Dilts, 116 Iowa 249, 89 N.W. 1068 (1902); Duncan v. Donnell, 12 S.W.2d 811 (Tex. Civ. App. 1929). *See generally*, Hallen, *Damages for Physical Injuries Resulting From Fright or Shock*, 19 Va. L. Rev. 253, 265-66 (1933).

21. *See generally*, Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. Pa. L. Rev. 586 (1933), and cases cited *supra* notes 14-21.

22. *See, e.g.*, Murray, *Negligently Inflicted Mental Distress: The Question of Bystander Recovery*, 14 Buff. L. Rev. 499 (1965).

23. *See, e.g.*, Amaya v. Home Ice, Fuel and Supply Co. 59 Cal. 2d. 295, 29 Cal. Rptr. 33, 379 P.2d 513 (1963); Jelley v. La Flame, 108 N.H. 471, 238 A.2d 728 (1968); Barber v. Pollock, 104 N.H. 379, 187 A.2d 788 (1963); Waube v. Warrington, 216 Wisc. 603, 612-613, 258 N.W. 497, 500-501 (1935). *See generally* 18 A.L.R.2d 220 (1947).

24. *See, e.g.*, Mahoffey v. Official Detective Stores, Inc., 210 F. Supp. 251 (W.D. La., 1962); Beaty v. Bucheye Fabric Finishing Co., 179 F. Supp. 688 (D.C. Ark., 1959); Webb v. Francis J. Lewald Coal Co., 214 Cal. 182, 4 P.2d 532 (1931); Lindley v. Knowlton, 179 Cal. 298, 176 P. 440, (1918); Vanoni v. Western Airlines, 247 Cal. App. 2d 793, 56 Cal. Rptr. 115 (1967); Clough v. Steen, 3 Cal. App. 2d 392, 39 P.2d 889 (1934); Strazza v. McKittrack, 146 Conn. 714, 156 A.2d 149 (1959); Southern R.R. Co. v. Jackson, 146 Ga. 243, 91 S.E. 28 (1916); Sherwood v. Ticheli, 10 La. App. 280, 120 So. 107 (1927); Ellsworth v. Massacar, 215 Mich. 511, 184 N.W. 408 (1921); Bosley v. Andrews, 393 Pa. 161, 142 A.2d 253 (1958); Taylor v. Spokane P. & S. Ry., 67 Wash. 96, 120 P. 889 (1912); Waube v. Warrington, 216 Wisc. 603, 258 N.W. 497 (1935).

25. *See, e.g.*, Amaya v. Home Ice, Fuel and Supply Co., 59 Cal. 2d. 295, 29 Cal. Rptr. 33, 379 P.2d 513 (1963); Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Bowman v. Willaims, 164 Md. 397, 165 A. 182 (1933); Cote v. Litawa, 96 N.H. 174, 71 A.2d 792 (1950); Curray v. Journal Pub. Co., 41 N.M. 318, 68 P.2d 168 (1937); Waube v. Warrington, 216 Wisc. 603, 258 N.W. 497, 98 A.L.R. 394 (1935); Hay or Bourhill v. Young (1941) Sess. Cas. 395, *aff'd*, (1943) A.C. 92. *Contra*, Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (1912); Haight v. McEwen, 43 Wisc. 2d 582, 251 N.Y.S. 839 (Sup. Ct. 1964). Regardless of the test employed, the status of the bystander is all important. Those people who are unrelated to the victim have almost always been denied recovery. Although, in those jurisdictions which require that the plaintiff be within the zone of danger, once the relationship of the plaintiff to the victim has been established, the plaintiff need not allege specific, serious, physical manifestations of the emotional shock in order to maintain a cause of action. *See, e.g.*, Webb v. Francis J. Lewald Coal Co., 214 Cal. 182, 4 P.2d 532 (1931) (nervousness, sleeplessness and loss of weight); Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, 44 P. 320 (1896) (insomnia and paroxysms); Paul v. Rodgers Bottling Co., 183 Cal. App. 680, 6 Cal. Rptr. 867 (3d Dist., 1960) (nausea and diarrhea); Emden v. Vitz, 88 Cal. App. 2d 313, 198 P.2d 696 (1948) (upset to glandular condition); Madeiros v. Coca Cola, 57 Cal. App. 2d 707, 135 P.2d 676 (1943) (vomiting and causing recurrence of ulcer).

26. 59 Cal. 2d 295, 29 Cal. Rptr. 33, 379 P.2d 513 (1963).

perienced severe shock at the occurrence. The Supreme Court of California, in denying recovery to the mother reasoned that the defendant owed no duty to prevent emotional shock to the plaintiff, and that rational results could only be achieved by balancing the individual's interest in mental security against the countervailing interests of social policy. Under the heading of "Administrative Factors,"[27] the court cited the problem of setting limits to such liability in the bystander situation. Under the heading of "Socio-Economic and Moral Factors,"[28] the court expressed a fear that an extension of liability to spectators who were not themselves in danger would place an unreasonable burden upon users of the highway. In addition, the court believed that the liability of the actor in this situation would be out of proportion to the culpability of the negligent tort-feasor.[29]

In *Dillon*, the court characterizes the series of abandonments of the various "rules" in California as an indication of the weakness of artificial abstractions which bar recovery. That is, the courts originally denied all recovery for emotional trauma. Subsequently, relief was given for such an injury only if physical impact occurred. Following this, the courts required that the plaintiff-mother must fear for her own safety before she could recover for fear for her children's safety. Finally, the zone of peril requirement was imposed.[30]

The court acknowledges that past American decisions have barred the mother's recovery in similar situations. The grounds for these past holdings are first, the absence of a required duty of care of the tort-feasor to the mother, and second, that the imposition of such a duty upon the tort-feasor would invite fraudulent claims, thus exposing the courts to the impossible task of defining the extent of the tort-feasor's liability. The *Dillon* court concludes that neither of these objections excuses the frustration of "natural justice" upon which the mother's claim rests.[31] To grant the decedent's sister relief while denying it to the mother merely because of the happenstance that the sister was a few yards closer to the accident illustrates the "hopeless artificially" of the zone of danger rule.[32] Recognizing that impact is not necessary for recovery in California, the court infers that the zone of danger concept must inevitably collapse. This is because the only reason for the requirement of the plaintiff's presence in that zone lies in the fact that the one within it will fear the danger of impact.

In rebutting the *Amaya* argument that recovery in this type of case would flood the courts with fraudulent and indefinable claims, the court in *Dillon* points out that neither fear is justified.[33] The majority indicates that it is not necessary to deny recovery upon a legitimate claim because other ones may be

27. *Id.* at 299, 379 P.2d at 522.
28. *Id.* at 300, 379 P.2d at 524.
29. *Id.* at 301, 379 P.2d at 525.
30. Dillon v. Legg, 69 Cal. Rptr. 72, 84, 441, P.2d 912, 914 (1968).
31. *Id.* at 72, 441 P.2d at 912.
32. *Id.*
33. *Id.* at 77, 441 P.2d at 917.

fraudulent, and a denial of liability to a whole class of claims is not warranted by the mere existence of the possibility of specious suits.[34] To disallow all such claims is an admission that the courts are incapable of ferreting out the meritorious from the fraudulent in particular cases. The opportunities for fraud or collusion are just as great in cases where California courts had heretofore allowed recovery, but whatever the possibilities of fraudulent claims of physical injury by witnesses, there is a high probability that a mother who sees her child killed will suffer physical injury from shock. The court concludes that a mother who is present and sees her daughter killed as a result of the defendant's negligence may recover for severe emotional distress with accompanying physical manifestations even though the mother is out of the zone of danger.

In dismissing the objection that there would be an inability to fix guidelines for recovery on the different facts of future cases, should recovery be allowed in the instant case, the court recommends specific guidelines to be followed in the emotionally shocked bystander situation.[35] One of the prime tasks of the court in a particular case is to establish the defendant's duty toward the plaintiff, by measuring the foreseeability of the risk. The court states that the degree of foreseeability should be determined by such factors as the distance of the plaintiff from the point of impact, whether the plaintiff personally witnessed the accident or whether he was subsequently told about it, and the relationship of the plaintiff to the victim. By analogy, the court cites cases similar to the present in which limits of liability have been drawn, and general guidelines have been applied without "opening the floodgates." Such cases include the "open car" cases, wherein defendant has left his keys in his car which is subsequently stolen by a thief who accidentally collides with plaintiff, and the English decisions in which the facts are substantially the same as instant case but recovery is allowed.

Other jurisdictions might well consider what has transpired in this area in California. Specifically, New York courts should give serious consideration to the reasoning in *Dillon* in light of there own decisions. Although prior to *Battalla v. New York*,[36] the state had denied recovery to parents for mental suffering caused by witnessing a child's illness or injury, *Battalla* recognized the freedom from emotional trauma as a legally protected interest.[37] In the latter case the plaintiff was not a bystander but was the party immediately threatened with bodily harm. With respect to bystanders, the New York decisions presently conflict on the extent of liability for negligently caused mental anguish. Some earlier decisions held that plaintiff must be in the zone of danger as a prerequisite to

34. *Id.* at 78, 441 P.2d at 917.

35. *Id.* at 80, 441 P.2d at 920.

36. 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961), *overruling* Mitchell v. Rochester R. Co., 151 N.Y. 107, 45 N.E. 354 (1896).

37. *Id.* at 239, 219 N.Y.S.2d at 36.

recovery,[38] while a recent New York Supreme Court decision, *Haight v. McEwen*,[39] refused to hold that the zone of danger marked the limits of the defendant's duty to safeguard others from mental distress occasioned by defendant's negligence. Since the authorities cited in *Haight* do not support the holding in that case,[40] the decision was not the culmination of a judicial trend. It appears that the court in the *Haight* case decided to abandon the prior "rules" which barred the mother's recovery in the emotionally shocked bystander situation. Since Dillon also represented an abandonment of prior California law, it appears that New York is likely to follow California.

The grounds upon which the New York courts bar recovery in the bystander situation, fear of flood of fraudulent claims and lack of duty, are similar to those stated in the decisions which preceded *Dillon* and are likewise patently weak.

Following the traditional concept of duty,[41] the plaintiff should be compensated for her loss where fault is shown. To state that a defendant owes no duty to a plaintiff who is outside the zone of danger is to state a conclusion of social policy, but in determining a suitable social policy, one must consider the plaintiff's interests. One such interest is mental tranquility. Studies have shown that acute fear upon seeing one's child seriously injured is as substantial an injury as any physical trauma.[42] Given the seriousness of such emotional injuries it is

38. *See, e.g.*, Kalina v. General Hospital of Syracuse, 31 Misc. 2d 18, 220 N.Y.S. 733 (Sup. Ct. 1961), *aff'd*, 18 App. Div. 2d 757, 230 N.Y.S. 2d 808 (4th Dept., 1962), *aff'd* 13 N.Y.2d 1023, 195 N.E.2d 309, 245 N.Y.S.2d 599 (1963); Balestro v. Prudential Ins. Co. of America, 126 N.Y.S.2d 792 (Sup. Ct. 1953), *aff'd* 283 App. Div. 794, 128 N.Y.S.2d 295 (2d Dept., 1954), *aff'd* 307 N.Y. 709, 121 N.E.2d 537 (1954); Roher v .N.Y., 279 App. Div. 1116, 112 N.Y.S.2d 603 (3d Dept. 1952); Berg v. Baum, 224 N.Y.S.2d 974 (Sup. Ct. 1962); Blessington v. Autry, 105 N.Y.S.2d 953 (Sup. Ct., 1951).

39. 43 Misc. 2d 582, 251 N.Y.S.2d 839 (Sup. Ct. 1964).

40. In the *Haight* case, which presented the same fact situation as that in *Dillon*, the court based its decision on four prior cases: *Manbrook v. Stokes Bros.* (1925) 1 K.B. 141 in which recovery was allowed only because the mother was within the zone of danger, although she felt no danger for herself and could easily have ducked into an alley; *Battalla v. State of New York* 10 N.Y. 2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961), wherein the plaintiff was in the zone of peril and was not a bystander; *Kalina v. General Hospital of City of Syracuse*, 31 Misc. 2d 18, 220 N.Y.S.2d 733 (Sup. Ct. 1961), *aff'd*, 18 N.Y.2d 757, 235 N.Y.S.2d 808, (4th Dept. 1962), *aff'd.* 13 N.Y.S.2d 1023, 245 N.Y.S.2d 599 (1963), 195 N.E.2d 309, wherein the plaintiff alleged no physical manifestations, and the tort relied on was assault and battery, an intentional wrong; and *Amaya v. Home Ice, Fuel and Supply Co.* 23 Cal. Rptr. 131 (Dist. Ct. App. 1962) which was subsequently reversed, 59 Cal. 2d 295, 29 Cal. Rptr. 33, 379 P.2d 513 (1963).

41. Some writers contend that we are presently witnessing a shift in the underlying justification of tort liability from fault to rational notions of duty and its role in determining liability have been discredited. Under this theory the plaintiff in the bystander situation should be allowed to recover once the genuineness of her injury is established, without regard to whether the plaintiff was negligent. *See generally*, Comment, *Negligent Infliction of Mental Distress: The Question of Bystander Recovery*, 14 Buffalo L. Rev. 499 (1965).

42. *See* Goodrich, *Emotional Disturbance as Legal Damage*, 20 Mich. L. Rev. 497, 501 (1921).

> Fear then is a physical thing. It has been demonstrated as a fact that in a state of fear we have (to paraphrase Crile) (I) A mobilization of the energy giving compound of the brain cells, evidenced by an increase of the Nissl substance, (a volatile combination of certain elements of the brain cells and adrenalin) and a later disappearance of the substance and deterioration of the cells; (II) increased

by no means unreasonable to impose a duty upon a defendant who causes such damage, in spite of the fact that the injured party is outside the zone of danger.

As to the concern over opening the door to limitless claims, a survey of English cases which have allowed recovery in situations analogous to *Dillon* has revealed that this "floodgate" claim is groundless. In fact, the number of cases which have arisen since such a cause of action was recognized "can be counted on the fingers of a single hand."[43]

Courts in other jurisdictions should progress beyond the arbitrary results[44] of the "zone of *physical* danger" formula and extend duty to encompass a "zone of *mental* danger." By extending this sphere of recovery and by establishing flexible guidelines in the emotionally shocked bystander situation more rational and certainly more just results will be achieved.

JEFFREY S. WHITE

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output of adrenalin, of thyroid secretion, of glycogen, and an increase in the power of oxydation in the muscles; (III) accelerated circulation and respiration with increased body temperatures; and (IV) altered metabolism.

But see Smith, *Relation of Emotions to Injury and Disease: Legal Liability For Psychic Stimuli*, 30 Va. L. Rev. 193, 303-06 (1944) a study of 301 cases involving injuries allegedly caused by psychic stimuli wherein it is concluded: (1) that a majority of persons claiming injury from psychic causes possessed subnormal resistance to such stimuli; (2) that in only 55 of the 301 cases surveyed could we say that actual causation was proven by a preponderance of substantial and credible evidence, and (3) that hence the skeptical courts were correct in doubting whether accurate criteria of proof existed in this field to make administration of a remedy feasible.

43. *See* Goodhart, *The Shock Cases and Area of Risk*, 16 Mod. L. Rev. 14, 24 (1953).

44. *See Supra*, note 32 and accompanying text.