Recovery Allowed for Physical Damages Arising from Shock of Witnessing Harm to Third Party

John David Craig
Indiana University School of Law

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RECENT DECISION

RECOVERY ALLOWED FOR PHYSICAL DAMAGES ARISING FROM SHOCK OF WITNESSING HARM TO THIRD PARTY

Dillon v. Legg

Until the recent decision of the California Supreme Court in *Dillon v. Legg*¹ American courts consistently had denied that liability may be predicated upon fright or nervous shock induced solely by a plaintiff's witnessing or learning of negligently caused injury to a third person.²

¹ Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
² The law regarding recovery by third party plaintiffs for emotionally induced injuries is peculiar in its evolution. Originally recovery by any party for negligent infliction of emotional harm was barred unless he suffered some physical impact through the negligent act of the defendant, even though serious physical injuries resulted from the shock. Victorian Rys. Comm’rs v. Coults, [1883] 13 A.C. 222. This “impact rule” was abandoned by the English courts in a case in which recovery was allowed for a miscarriage sustained as a result of nervous shock induced by fear of the defendant’s negligently controlled horses. Dulieu v. White & Sons, [1901] 2 K.B. 669. The first American court to abandon the impact requirement was the Supreme Court of Texas, which allowed recovery for a miscarriage induced by nervous shock sustained while witnessing an intentional beating of two Negroes. Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890). Not all American jurisdictions followed the lead of *Hill*. In 1894, New York specifically denied recovery for lack of physical impact. Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896). This doctrine prevailed in New York until 1961 when the Court of Appeals specifically overruled *Mitchell*. Batalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961). Although a majority of the states now have abandoned the impact rule, some have not, including Indiana. Boston v. Chesapeake & Ohio Ry., 223 Ind. 425, 61 N.E.2d 326 (1945) (dictum); Leatherman v. Gateway Transp. Co., 331 F.2d 241 (7th Cir. 1964) (dictum); Note, Damages—Mental Suffering, 15 Ind. L.J. 239 (1940). Pennsylvania has recently reaffirmed the impact requirement. Knaub v. Gotwalt, 422 Pa. 267, 220 A.2d 646 (1966). Its continued vogue has been most notable “in jurisdictions with large cities and their attendant problems of ambulance-chasing attorneys, long delays between the alleged accident and trial, and witnesses perhaps not unduly impressed by the appeal of veracity.” J. Fleming, Introduction to the Law of Torts 52 (1967).

Jurisdictions abandoning the impact rule have instituted in its stead the “zone of danger” requirement. Simply stated, the zone of danger limitation requires that a plaintiff who sustains physical harm as a result of fright or nervous shock must be in such zone of physical peril as to risk harm to his person. Thus, in 1935, in a case where a mother witnessed from an upstairs window an injury to her child in the street below, the court refused recovery squarely on the ground that the mother herself was not threatened with physical injury. Waube v. Warrington, 126 Wis. 613, 258 N.W. 497 (1935). There is also generally a further requirement that the plaintiff’s fear be for himself rather than for another. Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963); Waube v. Warrington, *supra*. This requirement is implicit in some criticism of the zone of danger rule. *E.g.*, the remarks of Lord Atkin in Hambrook v. Stokes, [1925] 1 K.B. 141, 157, quoted in text at note 15, *infra*. However, at least one jurisdiction has held that the impossibility of separating the fear for self from fear for another makes this factor irrelevant. Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933); *cf.* Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (1912), which held that evidence as to peril of the plaintiff’s children was
Recovery had been permitted only where such emotional trauma was relevant in determining the effect of the defendant's negligence on the plaintiff. Some modern courts have allowed recovery in instances causing fear for the plaintiff's personal welfare and fear for another. State ex rel. Gaegler v. Thomas, 173 F. Supp. 568 (D. Md. 1959); Greenberg v. Stanley, 51 N.J. Super. 90, 143 A.2d 588 (1958); Frazee v. Western Dairy Prod. Co., 182 Wash. 578, 47 P.2d 1037 (1935), following Lindley v. Knowlton 179 Cal. 298, 176 P. 440 (1918). One court recently expressed, in dictum, the futility of attempting to distinguish between fear for oneself and fear for another, but held in favor of the plaintiff because she herself was in danger. H.E. Butt Grocery Co. v. Perez, 408 S.W.2d 576 (Tex. Civ. App. 1966). In a few older cases, it appears that recovery may have been granted on the basis of the plaintiff's fear for another person. However, these cases have generally been distinguished by later courts faced with the zone of danger problem. Gulf, C. and S.F. Ry. v. Coopwood, 96 S.W. 102 (Tex. Civ. App. 1906) is distinguishable on the basis that a contractual duty was owed to the plaintiff as a paying passenger of the defendant railroad. See Note, Damages—Mental Anguish, 13 Ind. L.J. 583 (1938). Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (1912) appears to involve fear by the plaintiff for herself as well as for her children. In any event, the issue of fear for a third party was not raised, and the opinion was devoted to the impact rule. Cohn v. Ansonia Realty Co., 162 App. Div. 791, 148 N.Y.S. 39 (1914), involved a plaintiff who fainted from fright on seeing her children in danger and fell into an unguarded elevator shaft. This case has been considered by the New York courts as a variation of the impact rule, with physical injury resulting from fright caused by the negligent act. See Mundy v. Levy Bros. Realty Co., 184 App. Div. 467, 468, 170 N.Y.S. 994, 995 (1918). Rasmussen v. Benson, 135 Neb. 232, 280 N.W. 890 (1938), allowed recovery where the plaintiff apparently feared not only for the effects of negligence on others, but also feared the loss of his dairy business, through the sale of milk after using contaminated cattle feed sold by the defendant. However, until Dillon no American court specifically abandoned the zone of danger requirement in negligence cases. See RESTATEMENT (SECOND) OF TORTS § 313 (1965). See generally on negligent infliction of emotional distress 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1031-39 (1956); W. PROSSER, LAW OF TORTS 346-54 (3d ed. 1964); Goodhart, The Shock Cases and Zone of Risk, 16 MOD. L. REV. 14 (1953).

When the tort has been intentionally inflicted upon a victim, recovery by a third party frequently has been permitted. RESTATEMENT (SECOND) OF TORTS §§ 46, 312 (1965). The rationale for granting redress centers upon the culpability of the defendant's act, and it has been stated that the jury is ordinarily in a better position to determine whether outrageous conduct results in mental distress than whether the mental distress in turn results in physical injury. From their own experience jurors are aware of the extent and character of the disagreeable emotions that may result from the defendant's conduct. Smith, Relation of Emotions to Injury and Disease, 30 Va. L. Rev. 193 (1944). See also Prosser, Insult and Outrage 44 CALIF. L. REV. 40 (1956). The result in such cases is not unlike the cases of physical injury which rely upon the doctrine of transferred intent, which results in liability where one person intends to harm physically another but harms a third party instead. One case has allowed recovery on this theory for fright caused by a battery committed upon the plaintiff's father. Lambert v. Brewster, 97 W. Va. 124, 125 S.E. 244 (1924). These cases require that the plaintiff be present at the scene and that the presence be known to the defendant. Taylor v. Vallelunga, 171 Cal. App. 2d 107, 339 P.2d 910 (1959). Koontz v. Keller, 52 Ohio App. 265, 3 N.E.2d 694 (1936). Likewise, most cases have limited recovery to members of the immediate family. Contra, Hill v. Kimball, supra; and Rogers v. Williard, 144 Ark. 587, 223 S.W. 15 (1920). The leading Indiana authority in this area is Klein v. Klein, 158 Ind. 602, 64 N.E. 9 (1902).

3. In negligence actions the emotional shock must result in some physical manifestation of illness. All courts who have ruled upon the question of emotional injuries have stressed that mere "hurt feelings" are not significant enough or sufficiently measurable to be considered. In many jurisdictions neurotic reactions, accompanied by severe headaches, dizziness, crying spells, irritability, back pains and similar manifestations, resulting from fright caused by negligence, are regarded as "physical injuries."
the result of harm to the plaintiff or of fear of such harm. The liberality
of the California court in abandoning this requirement that the plaintiff
have been within the "zone of danger" necessitated an overruling of
that court's own logically compelling recent holding in Amaya v. Home
Ice, Fuel and Supply Co. and raises serious questions of the viability
of the general framework of fault principles in providing workable
solutions to questions of tort liability.

In Dillon, the plaintiff personally witnessed the death of her young
daughter when the child was struck by a negligently operated motor
vehicle. The mother alleged that, because of the driver's negligence, she
"sustained great emotional disturbance and shock and injury to her
nervous system which caused her great physical and mental pain and
suffering." The trial court sustained the defendant's motion for judg-
ment on the pleadings since the complaint did not allege that the plaintiff
was in the zone of danger and feared for her own welfare. However, the
trial court overruled the defendant's motion for summary judgment as to
a separate cause of action, brought in behalf of the sister of the deceased,
for alleged shock with resultant physical and mental suffering. The
happenstance of her greater proximity to the point of impact gave rise
to the possibility that she was in the zone of danger and feared for her
own safety. In reversing the lower court, the Supreme Court held that
since the negligent driver should have foreseen the presence of the mother
at the scene of the accident he owed a duty to her, the breach of which

See Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933); Sutton Motor Co. v. Crysel,
289 S.W.2d 631 (Tex. Civ. App. 1956). As early as 1933, definite nervous dis-
turbances or disorders caused by mental shock and excitement were classified as physical
injuries and would therefore support an action for damages for negligence where they
are the proximate result of negligence. Espinosa v. Beverly Hospital, 114 Cal.
App. 2d 232, 249 P.2d 843 (1933). Where infliction of emotional distress
is intentional no resulting bodily harm is necessary. See, e.g., Delta Finance
v. Ganakas 93 Ga. App. 297, 91 S.E.2d 383 (1956); RESTATEMENT (SECOND)
OF Torts § 46 (1965). Such is the case even where the plaintiff is beyond the
zone of danger if he is a member of the victim's immediate family. See note 2 supra.

pregnant, saw her seventeen month old son run over by the defendant's truck. She
alleged that she was standing near her son and witnessed the defendant's negligently
operated truck approaching and shouted warnings, but the defendant failed to stop. She
alleged that as a "direct and proximate result of the defendant's conduct, she suffered
emotional shock which resulted in 'some permanent disability.'" The plaintiff refused
to allege that she feared for her own safety, but rather contended nervous shock was a
direct result of fear for her child.

See the discussion of the necessity of "physical" suffering at note 3 supra.

6. There was conflicting evidence as to whether the sister was on the curb or on
the street. However, the trial court considered the question one of fact determination
and denied the defendant's motion for summary judgment. Id. at 732, 441 P.2d at 915, 69
Cal. Rptr. at 75.
subjected him to liability for her emotional injuries.

In the *Amaya* case, the court provided a comprehensive evaluation of the establishment of duty through foreseeability. A review of decisions in those jurisdictions which had examined the problem produced the conclusion that to attempt to establish a duty flowing from a negligent defendant to an emotionally injured third party witness by stating that the defendant could *foresee* the injury to his victim is a futile task.

The determination that a duty is owed the plaintiff by the defendant is, the court averred, "in the first instance for the court, not for the jury." It is "the fundamental responsibility of the court to declare the law. There is a legal duty on any given set of facts only if the court or the legislature says there is a duty." The court expressed strong approval of an assertion by the New Jersey Supreme Court: "... manifestly, it cannot be conceded that the jury from their inner consciousness may evolve in every variety of tortfeasance a legal duty as the standard of liability." The court reasoned further that duty is not to be equated with foreseeability and quoted Prosser to the effect that

\[\text{duty is only a word with which we state our conclusion that there is or is not to be liability; it necessarily begs the essential question (italics deleted) . . . . [The word] serves a useful purpose in directing attention to the obligation to be imposed upon the defendant rather than the causal sequence of events; beyond that it serves none.}\]

Duty is determined by numerous factors, only one of which is the defendant's foreseeability, with its ultimate determination rooted in the social policy to be served by imposing it.

The court also noted that to submit the issue of duty to the jury after equating duty with foreseeability would engender confusion. The

\begin{itemize}
\item \textbf{8.} Id.
\item \textbf{11.} The determination whether in a specific case the defendant will be held liable to a third person . . . is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm. Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958), quoted in Amaya v. Home, Ice, Fuel & Supply Co., 59 Cal. 2d 295, 309-10, 379 P.2d 513, 521-22, 29 Cal. Rptr. 33, 41-42 (1963).
\end{itemize}
negligence issue is submitted to the jury with instructions couched in
terms of how an ordinarily prudent person would view the "foreseeability
of risk" created by the defendant's conduct. If the issue of the existence
of duty to the particular party harmed is also submitted to the jury
under a foreseeability formula, the jury will in effect be asked to determine
two distinct issues in the case by means of the same test. The suspicion
arises that in this event a jury will become confused sufficiently to ignore
instructions and simply deliver a verdict according to their liking.

Both the Amaya and Dillon opinions recognize the conflicting policy
considerations of providing redress for a valid claim and eschewing
administrative complications. In Amaya the specter of fraudulent claims,
apparently an ever-present concern when a cause of action involves no
impact and revolves around damage to the nervous system; the much
debated difficulty of measuring damages;\(^\text{12}\) the problem of setting limits
upon who may recover; and disproportion between the potentially sizeable
liability imposed and the culpability of the negligent defendant were
deemed preponderant. The consequences of granting redress were thought
too grave.

The Dillon opinion commenced its attack upon the illogic of the
 zone of danger rule by centering on the facts at bar upon which the sister
 of the deceased could base a cause of action for emotional trauma while
 her mother, though just as severely harmed, could not. This factual
framework provided a perfect exposition of what the opinion alluded to
as the "hopeless artificiality" of the rule. In addition it was observed
that the concept of a "zone of danger" is premised upon the reasonable
fear of impact; thus the concept seems anachronistic in a jurisdiction
which abandoned the "impact" rule many years ago.\(^\text{13}\)

Although no American court had ruled that emotionally induced
physical injury, precipitated by a negligent act, was compensable if the
plaintiff was not present within the zone of danger, the court noted that
recovery upon such grounds was not totally without precedent. Ham-

\(^{12}\) See note 28 infra.
\(^{13}\) Cook v. Maier, 33 Cal. App. 2d 581, 92 P.2d 434 (1939). See Magruder,
Mental and Emotional Disturbances in the Law of Torts, 49 Harv. L. Rev. 1032, 1039
(1936):

Once accepting the view that a plaintiff threatened with an injurious impact
may recover for bodily harm resulting from shock without impact, it is easy to agree . . .
that to hinge recovery on the speculative issue [of] whether the parent was shocked through fear for herself or for her children "would be
discreditable to any system of jurisprudence." The outer-most limits of liability
in [these cases] has not yet been marked out, and cannot be determined on
purely logical considerations.
brook v. Stokes initiates a line of authority in England allowing a cause of action for harm arising from fear for another. In Hambrook, a mother died from nervous shock as a result of viewing a runaway vehicle rushing down a hill and fearing for the safety of her children whom she believed to be in its path. Whether she was in the area of probable physical harm was not considered relevant. The court reasoned that the defendant, having failed to secure his vehicle, had breached a duty to all users of the highway and consequently was responsible for any harm directly flowing from that breach. The only limitation suggested by the English court was that the mother’s fear must have resulted from her own perception of the likelihood of injury to her children, not from information learned from others. The British court in Hambrook centered upon the preeminence of “natural justice” over the illogic of the zone of danger rule:

[The rule] would result in a state of the law in which the mother shocked by fright for herself would recover, while a mother shocked by her child being killed before her eyes could not, and in which a mother traversing the highway with a child in her arms would recover if shocked by fright for herself, while if she could be cross-examined into the admission that the fright was really for the child, she could not. Such distinctions would be discreditable to any system of jurisprudence in which they formed a part.15

The Dillon opinion while alluding to “natural justice,” omits this language from Hambrook. The position taken would have been more compelling were it included. Rather, the court challenged the logic of the rule by quoting from Professor Prosser:

All ordinary human feelings are in favor of (the mother’s) action against the negligent defendant. If a duty to her requires that she herself be in some recognizable danger, then it has been properly said that when a child has been endangered, it is not beyond contemplation that the mother will be somewhere in the vicinity and will suffer serious shock.16

In Dillon the court set forth a conceptual rationale for abandoning

14. [1925] 1 K.B. 141. Some dissatisfaction with the result in Hambrook was expressed in Bourhill v. Young, [1943] A.C. 92, but it was not overruled and is now firmly established in British law. The development of English law in this area is discussed in text at note 41 infra.
the rule. Focusing upon duty as the sole alleged defect in an otherwise sufficient complaint the court, again quoting Prosser, noted that to say there is no duty in such cases begs the essential question of whether the plaintiff's interests are entitled to legal protection against the defendant's conduct and that "duty" is a shorthand statement of a conclusion, rather than an aid to analysis. The court thus remained in apparent agreement with its prior assertions in Amaya that the concept is not sacrosanct in itself, but only an expression of the sum of those considerations of policy which leads the law to say that a particular plaintiff is entitled to protection.

Ultimately, however, the court seems to have equated duty with foreseeability: "It is the risk reasonably to be foreseen which defines the duty that is owed." According to the court, the extent of liability is determined by the fact that "[i]n order to limit the otherwise potentially infinite liability which would follow every negligent act, the law of torts holds a defendant amenable only for injuries to others which to the defendant at the time were reasonably foreseeable."

It would seem that two types of risk may be foreseeable—risk of actual physical impact and the risk that persons not physically imperiled will be subject to mental anguish. The resultant suffering is nonetheless real in the latter case and recovery should be granted if the defendant should foresee that fright may result which would be sufficient to cause substantial injury to one normally constituted. This result is much like that obtaining in cases where the damage caused by the defendant is extended to the plaintiff by the foreseeable acts of third persons, the foreseeable intervention of forces of nature, or the plaintiff's own

17. Id. 332-33.
19. Dillon v. Legg, 68 Cal. 2d 728, 739, 441 P.2d 912, 919, 69 Cal. Rptr. 72, 79 (1968). The court also cites 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1018 (1956): [Liability depends upon whether] the offending conduct foreseeably involved unreasonably great risk of harm to the interest of someone other than the actor. . . . [T]he obligation to refrain from . . . particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous. Duty, in other words, is measured by the scope of the risk which negligence foreseeably entails.
20. E.g., Shafer v. Keeley Ice Cream Co., 65 Utah 46, 234 P. 300 (1925). The defendant's agents continued to throw free candy to a crowd from a parade float although it caused a scramble among spectators. The plaintiff, a bystander, was knocked down and hurt in one of the scrambles.
21. E.g., Milwaukee and St. P. Ry. v. Kellogg, 94 U.S. 469 (1876), A fire was negligently started on the defendant's steamboat and was spread by a brisk wind to the defendant's elevator on the shore, and from there to the plaintiff's saw mill several hundred feet from the elevator.
foreseeable response. In each instance there is a foreseeable reaction to the defendant’s act which extends the damage and liability to the plaintiff. Thus, in the rescuer cases, the courts readily find duty, basing it upon the natural reaction of the plaintiff to a third party’s distress. Since it is certainly as natural a consequence for a mother to suffer emotional distress upon witnessing the killing of her child, it can be argued that it is inconsistent to find a duty in one instance and not in the other. It must be noted, however, that the usefulness of drawing logical analogies is limited by the likelihood that policy considerations may vary with the facts of each type of case.

According to the court, what is reasonably foreseeable in third party emotional danger cases must be adjudicated upon a case-by-case basis. The standard to be employed to determine foreseeability will entail a finding of what the reasonably prudent man should have perceived. The courts may then be left to fashion the area of liability, excluding the remote and unexpected. In Dillon the court reasoned that a negligent driver who causes the death of a young child may reasonably foresee that the mother might be near and might suffer emotional trauma upon witnessing the accident. Thus, the court established the possible existence of duty.

The court next proceeded to examine the policy considerations which have compelled prior decisions. The court reasoned that to deny that juries are capable of weeding the fraudulent from the meritorious claim is to deny that courts are capable of performing their appointed tasks. Moreover, the possibility of fraud exists to some degree in all cases, but this possibility does not prove a present necessity to abandon the principles of foreseeability, proximate cause and consequential injury which generally govern tort law. Conceding that tort law is not mathematically precise, the difficulties of adjudication should, nevertheless, not frustrate the principle that there must be a remedy for every substantial wrong. Fraud could as easily exist where the plaintiff claims fear for himself, a

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22. E.g., the rescuer cases, such as Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921). The plaintiff was injured while seeking to rescue a relative who had been thrown negligently from a train. Cf. Cohn v. Ansonia Realty Co., 162 App. Div. 791, 148 N.Y.S. 39 (1914). The plaintiff fainted from fright on seeing her children in danger and fell into an unguarded elevator shaft. The presence of the physical impact sustained a cause of action.

23. Wagner v. International Ry., 232 N.Y. 176, 180, 133 N.E. 437, 438 (1921): Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It regards them as normal. It places their effects within the range of the natural and probable.


25. See J. FLEMING, INTRODUCTION TO THE LAW OF TORTS 179 (1957) for a rejection of the analogy to the rescue cases.
claim for which liability has long been allowed in California. Emotional distress which is intentionally inflicted constitutes an independent tort and the possibility of fraudulent collection for injuries in these instances is as great as in the negligent infliction cases. Also, "suffering" is a compensable item of damages when "parasitic to" a physical tort; but "mental suffering" is clearly less capable of objective measurement than the physical disabilities precipitated by the emotional injury sustained in the case in question. Finally, given rapid increases in medical knowledge, and recognition of this fact by many courts, there is little question that the court correctly concluded that emotional trauma cases are proper for adjudication. However, since recovery had been denied in Amaya and other cases in part because of the fear of unmeasurable claims, the court might have set forth more authority to substantiate its conclusion.

The court contended that the difficulty of establishing guidelines in the future cannot justify denial of a deserved remedy. Formulation of guidelines was not deemed impossible, and in fact an attempt at formulation was made. The court mentioned a non-exhaustive list of considerations which can be balanced in determining what a tortfeasor reasonably may foresee: physical proximity of the plaintiff to the scene of the accident; whether shock results from direct sensory impact upon the plaintiff from observance of the accident as contrasted with learning of it after its occurrence; and the intimacy of the relationship between the plaintiff and the victim. With these elements as a guide, a court will then be free to analyze all circumstances in its determination. Conceding the general nature of these guidelines, the court noted that general guidelines have been offered without disastrous results in analogous areas of the law such as the open car, negligent draftsmanship and products liability cases. It is the court's premise in Dillon that guidelines can

27. E.g., Alsteen v. Gehl, 21 Wis. 2d 349, 359, 124 N.W.2d 312, 317 (1963):
Psychiatry and clinical psychology, while not exact sciences can provide sufficiently reliable information, relating to the extent of psychological stress and to the causal relationship between the injury and the defendant's conduct, to enable a trier of fact to make intelligent evaluative judgments on a plaintiff's claim.
29. The prototype of the "open car" case is the suit against the owner of a vehicle for injury or damage to the plaintiff by a third party who has commandeered the vehicle as a consequence of the owner's carelessness in leaving the keys inside. Richardson v. Ham, 44 Cal. 2d 772, 285 P.2d 269 (1955). The general "guidelines", if the term is at
successfully curtail what was termed in Amaya "the fantastic realm of infinite liability."80

The dissenting justices in Dillon challenged the guidelines as overly vague and general and declared that "upon analysis their seeming certainty evaporates into arbitrariness and inexplicable distinctions appear."81 Answers to some of the dissent's further objections, such as the question arising if the plaintiff is honestly mistaken as to the existence or seriousness of the victim's injury, can be found in the application of ordinary tort principles. If the defendant in fact has been negligent toward the victim, the plaintiff's reasonable misapprehension as to the extent of injury should not bar his recovery. There is merit, however, in the dissent's disparagement of the guidelines. The majority seemingly implied in its requirement of a "close relationship" between the plaintiff and the victim that the relationship be familial, thus providing little assistance where the relationship is distant or informal, but very close on an emotional level. This factor also fails to deal with a situation where the defendant's act is such that a normal person might suffer severe shock though unrelated in any way with the victim.82 Similarly the requirement of contemporaneous observance of the accident seems unduly confining. As the dissenting judges noted:

Indeed, what is the magic in the plaintiff's being actually present? Is the shock any less real if the mother does not know of the accident until her injured child is brought into her home?

all applicable, can be said to provide only that each case must be considered on its facts to determine if the defendant's conduct is so unreasonable as to constitute a foreseeable risk to the injured plaintiff. Courts have held a negligent draftsman of a document executed for the benefit of a third party beneficiary liable to the beneficiary. Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961). The cases eliminate the requirement of privity between the draftsman and the foreseeably injured beneficiary. It may be noted that these cases are exceptions to the general rule as to professional representation as expounded by Judge Cardozo in Ultramares v. Touche, Niven & Co., 255 N.Y. 170, 174 N.E. 441 (1931). The products liability cases find their most articulate expression in Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). The essence of this decision is that a manufacturer may be held liable to the ultimate consumer absent any privity of contract. The "guidelines" are that the defendant manufacturer is strictly liable in tort if he distributes a "defective product, inherently dangerous."

32. Cf. Chadwick v. British Transp. Comm'n, [1967] 2 All E.R. 945 (Q.B.). The plaintiff was allowed recovery for emotional distress and physical illness resulting from rescue work at a particularly gruesome train wreck, although acquainted with no one on the train. See 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1039 (1956), where it is suggested that recovery might be allowed in such cases applying general principles of duty and negligence, and that "mechanical rules of thumb at variance with these principles do more harm than good."
On the other hand, is it any less real if the mother is physically present at the scene but is nevertheless unaware of the danger or injury to her child until after the accident has occurred?\(^3\)3

The dissenting judges also quite appropriately challenged the interpretation given by the majority to the affirmative defense of contributory negligence. The latter stated categorically that the contributory negligence of the victim of the accident will defeat recovery by the plaintiff. This position is clearly contrary to existing California law regarding imputation of contributory negligence—the relationship of itself furnishes no basis for imputation of contributory negligence,\(^4\)4 although the result may be an unhappy extension of liability where the defendant is no more culpable than the original victim.

Even if one accepts the court's estimate of the feasibility of guidelines, there remains the task of inquiring into the soundness of the reasoning employed to justify this departure from established law. As an initial point, it may be stated that the court has succumbed to the pitfall of confusing policy ends with negligence principles. Under Dillion a person has a right to be free from certain invasions of his emotional security. In effect the opinion recognized that there exists a zone of emotional danger wherein persons suffering harm may be entitled to redress for their injury. Concurrently, it was recognized that the intimate nature of the parent-child relationship is such that there exists a common or commingled fear wherein fear for one's child is scarcely distinguishable from fear for oneself. Thus, a parent who witnesses his child harmed suffers a common fear sufficient to place him within the zone of emotional danger. To this point the opinion is on firm ground.\(^5\)5 However, the court's rationale in establishing duty through the concept of foreseeability is less creditable.

So long as future courts are directed by the principle of foreseeability and are limited by the guidelines advanced, the goal of "natural justice"

33. Dillon v. Legg, 68 Cal. 2d 728, 750, 441 P.2d 912, 926, 69 Cal. Rptr. 72, 86 (1968) (dissenting opinion). See also the dissenting opinion of Evatt, J., in Chester v. Waverly Corp., 62 Commw. L.R. 1 (High Ct. Austl. 1939), who extensively discusses these questions while objecting to the majority's holding that a mother could not recover for shock suffered on seeing her son's body recovered from a waterfilled ditch after a harrowing search.

34. The dissenters cited B. WITKIN, SUMMARY OF CALIFORNIA LAW § 341 (1960) and RESTATEMENT (SECOND) OF TORTS § 488 (1965) for this proposition. Where the plaintiff's spouse is one of the negligent parties, recovery may be barred, not on the basis of the relationship, but because the right to damages is community property. McFadden v. Santa Ana, O. & T. St. Ry., 87 Cal. 464, 25 P. 681 (1891); Basler v. Sacramento Gas & Elec. Co., 158 Cal. 514, 111 P. 530 (1910).

35. The law has recognized other special relationships as deserving of protection. For example, the law of consortium is a recognition that destruction of marital entitlements is subject to special redress. See Annot., 23 A.L.R. 2d 1378-97 (1952).
for which the court strived may in many instances not be realized. The central problem was recognized in *Amaya*:

>[C]ompelling moral and socio-economic reasons . . . require that a negligent defendant's liability have some stopping point. None has yet been proposed that would be fair to all concerned, and the failings of (proposed) limitations suggests that the quest may be an inherently fruitless one.\(^{36}\)

This criticism emphasizes the peril of attempting to formulate a rule of law within the context of negligence principles when the conventional system will not absorb the shift smoothly. This difficulty could have been circumvented. When "social justice" is the desired goal, social policy should be the principle by which it is attained. Conceding that the need for redress to the plaintiff transcends the increased liability which the defendant must assume, the *Dillon* decision should have been premised on the proposition that the cogent necessities of providing recompense to an injured party dictate that a negligent defendant owes a duty to an emotionally traumatized plaintiff as a matter of social policy. There is ample reasoning to support this position,\(^{37}\) and it is much in harmony with the conclusion reached in both *Dillon* and *Amaya* that duty is only an expression of the sum of those considerations of policy which result in granting some interest protection.

Once negligence has been established with respect to the party physically imperiled no further attention should be focused on what the tortfeasor might have foreseen had he given conscious thought to his conduct immediately prior to the accident. If the concept of foreseeability is to have any relevance, the presence at the scene of impact of an individual bearing a particular relationship to the injured party should be accepted as given and the determination of foreseeability of injury to the former should commence from that point. The jury could be instructed that as a matter of law a duty was owed every person present at the scene of the tragedy who might reasonably be expected to suffer trauma. Here, factors such as personal relationship and physical proximity can


\(^{37}\) The case of *Greenman v. Yuba Power Products Co.*, 59 Cal. 2d 57, 379 P.2d 897, 27 Cal. Rptr. 697 (1963), is particularly in point. Faced with the problem of circumventing the many-faceted problem of privity of contract which had perplexed courts since the decision of *Winterbottom v. Wright*, 152 Eng. Rep. 631 (1842), the California Supreme Court cut through the maze and rested its decision on "strict liability in tort." A reading of *Greenman* clearly demonstrates that the California court based its conclusion on the social policy factors which dictated that redress to the plaintiff consumer transcend the necessity of maintaining the legal abstraction of privity of contract.
have application while the somewhat senseless inquiry as to the probability that a parent or an acquaintance will or will not be present or that persons will be within close or distant proximity will be avoided.

Mere physical causation should not result in recovery in cases of undue sensitivity; it should be emphasized that emotional distress must be a reasonable response. The suggested procedure would eliminate the plaintiff with the *eggshell soul*, and would present to the collective judgment of the jury the propriety of any award. The jury would be allowed to weigh medical testimony and all other factors surrounding the event to determine how a *reasonable plaintiff* would have reacted in similar circumstances. This question is distinct from that of the measurement of physical damages flowing from the emotional distress once liability is found. At that point the maxim that the defendant takes his victim as he finds him would rule. Here the question parallels that which is the only relevant inquiry in the classic case of the hemophiliac—has a negligent act in fact occurred as to this plaintiff?

According to the dissenting opinion, a decision of such far reaching consequences should be undertaken by a legislative body rather than by the courts: “[If we] are now to be faced with the concept of potentially infinite liability beyond any rational relationship to . . . culpability, then surely the point has been reached at which the legislature should reconsider the entire subject and allow all interests affected to be heard.”

It seems clear, however, that legislative inaction has not prevented courts from promulgating rules equally as revolutionary as that rendered by the *Dillon* court. It is not at all clear that the “potentially infinite liability” envisioned by the dissenting judges will result from the *Dillon* court’s decision. The experience of the English courts since *Hambrook v. Stokes* is especially instructive. *Hambrook*, unlike *Dillon*, did not propose guidelines for future cases but suggested only the limitation that the mother must have herself perceived the likelihood of injury to her children. In later cases, the English courts have relied solely on the test of foreseeability in determining whether a duty exists toward the plaintiff. Despite this lack of supposed guidelines, liability has not been greatly expanded. In fact until a recent decision, the English courts have been quite restrictive.

The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.
41. *Boardman v. Sanderson*, [1964] 1 W.L.R. 1317 (C.A.). The plaintiff was paying a bill in a service garage when he heard the scream of his young son, who had
in finding liability to third parties.\textsuperscript{42} The most liberal extension of liability allowed recovery to a plaintiff who had not seen the negligent act and was not acquainted with any of the victims.\textsuperscript{43} However, the case involved a rescue worker at a catastrophic train wreck and there was considerable testimony as to the particularly gruesome experiences undergone by the plaintiff.

Also, at least one jurisdiction, New South Wales, Australia, has passed legislation allowing recovery for mental shock suffered by members of the injured party’s family.\textsuperscript{44} Fleming, commenting upon such legislation, says, \textit{“Drastic as this measure may seem, the absence of any serious increase in litigation should give pause to those who have been wont to predict the direct results accompanying any easing of the common law conditions of recovery.”}\textsuperscript{45}

In final analysis it may be that the likelihood of \textquoteleft \textquoteleft potential limitless liability\textquoteright \textquoteright is somewhat less than is thought in some quarters. Fleming’s study of cases in the emotional trauma area demonstrates what he chooses to call \textquoteleft \textquoteleft the confirmed judicial bias against claims for other than external injuries.\textquoteright \textquoteright Perhaps juries share this same reluctance. Thus, \textit{Dillon} notwithstanding, it is possible that \textquoteleft \textquoteleft . . . the law will long remain committed to some marked disparity in the range of protection afforded for mental suffering in contrast to external injuries.\textquoteright \textquoteright Perhaps the floodgates have not been opened after all. Only future decisions will provide the answer. All that is now certain is that the California experience will be closely scrutinized by those judges of other appellate courts who may ultimately be called upon to emulate what appears to be a broad scale

accompanies him to the garage. He stepped out of the office and saw his son’s foot caught under the wheel of the defendant’s car. The court found a duty to near relatives of the victim whom the defendant knew to be within earshot and likely to come upon the scene if injury befell him.

\textsuperscript{42} See, e.g., King v. Phillips, [1953] 1 Q.B. 429 (C.A.). The plaintiff heard a scream and ran to her window where she saw a taxi, about eighty yards away, slowly backing over her son’s tricycle, although she did not see her son. She ran quickly downstairs and met her son who was running home only slightly harmed. She suffered shock and required doctor’s care. The court refused to find it foreseeable that the slow backing of a taxi would cause someone emotional distress.


\begin{quote}
The liability of any person in respect of injury caused . . . by an act, neglect or default by which any other person is killed, injured or put in peril, shall extend to include liability for injury arising wholly or in part from mental or nervous shock sustained by (a) a parent or husband or wife of the person so killed, injured or put in peril; or (b) any other member of the family of the person so killed, injured or put in peril within the sight or hearing of the member of the family.
\end{quote}

\textsuperscript{45} J. Fleming, \textit{Introduction to the Law of Torts} 164 (1957) (emphasis added).

\textsuperscript{46} Id. 163.

\textsuperscript{47} J. Fleming, \textit{Introduction to the Law of Torts} 54 (1967).
effort by their liberal brethren to abolish arbitrary restrictions on the time-honored test of foreseeability.  

John David Craig

48. Such a trend seems evident in view of the recent decisions of the California Supreme Court in Rowland v. Christian, 68 Cal.2d 700, 443 P.2d 561, 69 Cal. Rptr. 708 (1968); and Connor v. Great Western Savings and Loan —Cal.2d—, —P.2d—, 73 Cal. Rptr. 369 (1969). In the former the court held that a possessor of land would be liable for injuries incurred by a party while on the premises if the possessor had not acted reasonably in view of the probability of injury to others regardless of whether the victim would have been considered an invitee, licensee or trespasser under the rules which had previously bound the courts. In the latter the court held that a lender could be liable to the purchaser of a defectively constructed residence where the borrower's weak capital structure made it foreseeable that he would cut corners in constructing the residence. The policy of deterring undesirable practices was explicitly held to prevail over the doctrine of privity.