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After the Impact Rule - Limiting Defendant's Liability in Negligent Infliction of Emotional Distress Cases: Bass v. Nooney Co.

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COMMENTS

AFTER THE IMPACT RULE—LIMITING DEFENDANT'S LIABILITY IN NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CASES: *BASS v. NOONEY CO.*

I. INTRODUCTION

In *Bass v. Nooney Co.*,[1] the Supreme Court of Missouri abandoned the rule that a defendant is not liable for negligence which produces emotional distress unless the plaintiff suffers a contemporaneous physical injury or impact. This "impact rule" was the majority position in the United States in the first part of this century[2] and had been a part of Missouri's jurisprudence since 1881.[3] In *Bass*, however, Missouri joined the mainstream of American jurisprudence by providing judicial protection against a plaintiff's loss of emotional tranquility without requiring contemporaneous physical impact.[4]

Today, with the impact rule discredited and most jurisdictions providing increased protection to emotions, the problem facing the courts is not how to allow a plaintiff to recover for negligently caused emotional distress, but rather how to keep a defendant's liability in such cases within manageable limits. Once the requirement of physical impact is removed, it is often difficult to determine when the defendant has committed a breach of a duty of care to the plaintiff which has resulted in legally cognizable damage.[5] This determination is particularly difficult in "bystander" cases in which the plaintiff's emotional distress is caused by his fear that a third party will be injured by the defendant's negligent con-

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1. 646 S.W.2d 765 (Mo. 1983) (en banc).

2. *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 18.4, at 1032-33 (1956); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54, at 330-31 (4th ed. 1971); *see also infra* text accompanying notes 26-35.

3. *See* Trigg v. Saint Louis, K.C. & N. Ry., 74 Mo. 147 (1881).

4. *See* 2 F. HARPER & F. JAMES, *supra* note 2, § 18.4, at 1034; W. PROSSER, *supra* note 2, § 54, at 332; *see also* Lambert, *Tort Liability for Psychic Injuries: Overview and Update*, 37 ATLA L.J. 1, 1(1978). *See generally* Annot., 64 A.L.R.2D 100 (1959). Currently, only seven jurisdictions retain the impact rule: Arkansas, Florida, Georgia, Indiana, Kentucky, Utah, and the District of Columbia. *See infra* note 33.

5. *See, e.g.*, Robb v. Pennsylvania R.R., 58 Del. 454, 210 A.2d 709 (1965) (plaintiff nearly struck by train because of defendant's negligence); Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965) (plaintiff nearly struck by defendant's negligently driven car); *see also* W. PROSSER, *supra* note 2, § 54, at 328 ("danger of vexatious suits and fictitious claims").

duct or by his shock or mental anguish at witnessing such an injury.[6] This problem of defining the defendant's liability has led courts to substitute for the impact rule some other type of test or requirement to determine when and to whom a defendant will be liable in an emotional distress case.[7]

This comment will focus on two areas: (1) examination of *Bass v. Nooney Co.* and its significance in relation to the standards utilized in other jurisdictions in emotional distress cases; and (2) a detailed survey of the standards currently employed nationally to define a defendant's liability and a plaintiff's right of recovery in negligent infliction of emotional distress cases.

II. Recovery for Negligently Inflicted Emotional Distress in Missouri

A. *Statement of the Case*

On April 6, 1976, Collette Bass was stuck in an elevator located in a building owned and operated by the Nooney Company. Although Bass was freed within thirty minutes, the experience unnerved her to such an extent that the next day she collapsed while riding an elevator in the same building.[8] When Mrs. Bass arrived at a local hospital, she was "hyperventilating, unable to speak above a murmur, was lightheaded and anxious."[9] Bass spent five days in the hospital, during which time she

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6. *See, e.g.*, Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969); Guilmette v. Alexander, 128 Vt. 129, 259 A.2d 12 (1969); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935). In all these cases, the courts denied recovery to a bystander for fear of creating unlimited liability for the defendant. Prosser recognized the problem, noting that "[i]t would be an entirely unreasonable burden on all human activity if the defendant who has endangered one man were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it . . . ." W. Prosser, *supra* note 2, § 54, at 334. *See generally*, Annot., 29 A.L.R.3d 1337 (1970).

7. Today 41 states employ one or more of the following: a) a requirement that the emotional distress manifest itself in contemporaneous or subsequent physical injury; b) a zone-of-danger test which requires that the plaintiff be in danger of physical impact or injury as a result of the defendant's negligent conduct; and/or c) some type of basic foreseeability requirement (different courts provide different guidelines as to when a plaintiff or his injuries are foreseeable). The distinction between the zone-of-danger test and the foreseeability standard is somewhat artificial as many states with the zone-of-danger test claim to have a standard based on foreseeability. They merely define the foreseeable plaintiff as one in the zone of danger or find that plaintiff's injuries are foreseeable only if he is in danger of physical injury. *See infra* text accompanying notes 58-60. The distinction is made in this comment in order to differentiate between those jurisdictions defining foreseeability spatially and those using other guidelines. These tests and requirements are discussed *infra* at text accompanying notes 42-96.

8. Bass v. Nooney Co., 646 S.W.2d 765, 767 (Mo. 1983) (en banc).

9. *Id.* at 767.

experienced acute anxiety, slurred speech, loss of balance, lightheadedness, and inability to sleep. After her release from the hospital, she did not return to work for almost a month and continued to get tense in elevators and while riding in cars.[10]

Bass sued for negligent infliction of emotional distress. The trial court entered a directed verdict for the defendant, and the court of appeals affirmed because the plaintiff had suffered no physical impact at the time of the elevator episode.[11] The Supreme Court of Missouri reversed and remanded.[12]

The Missouri Supreme Court's opinion is interesting, not so much for its rejection of the impact rule[13] as for the test adopted in its place. Most jurisdictions which have abandoned the impact rule still require that the plaintiff suffer emotional distress which manifests itself in contemporaneous or subsequent physical injury in order to recover.[14] The Missouri court, however, found adoption of such a requirement to be merely "the replacement of one arbitrary, artificial rule with another which . . . [is] only somewhat less restrictive."[15] Furthermore, the court noted that it is often difficult, if not impossible, to separate physical injuries from purely mental or emotional injuries.[16] The court therefore decided not to require that the plaintiff suffer a physical injury in order to recover for emotional distress but to allow recovery when the emotional distress is "medically diagnosable" and "of sufficient severity so as to be medically significant."[17] To avoid unduly extending the defendant's liability, the court also laid down the requirement that "the defendant should have realized that his conduct involved an unreasonable risk of causing the [emotional] distress."[18]

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10. *Id.*
11. *Id.*
12. *Id.* at 774.
13. The court considered and rejected three major justifications usually offered in support of the impact rule. Difficulty in proving a causal connection between plaintiff's damages and defendant's act had been overcome, the court felt, by modern advances in psychiactric testing and diagnostic techniques. *Id.* at 769-70. As to the necessity of impact in order to prevent fraudulent claims, the court asserted that the judicial system itself contains sufficient safeguards to prevent such claims while allowing recovery in deserving cases. *Id.* at 770. Finally, the justices were not intimidated by the fear of a "flood of litigation" following abrogation of the impact rule, noting that such a flood had failed to materialize in those jurisdictions which had previously dropped the rule. *Id.*
14. *See infra* text accompanying notes 42-57. This requirement is usually seen as a way to ensure the genuineness of plaintiff's claim. *Bass*, 646 S.W.2d at 770; RESTATEMENT (SECOND) OF TORTS § 436A comment b (1965); *see also* Comment, *Recovery Allowed for Negligently Inflicted Mental Distress Without Requirement of Contemporaneous Physical Injury*, 16 VILL. L. REV. 1011, 1018-20 (1971).
15. *Bass*, 646 S.W.2d at 771.
16. *Id.*
17. *Id.* at 772-73.
18. *Id.* at 772.

B. *Significance of the Decision*

With the *Bass* decision, Missouri became one of only a handful of jurisdictions not requiring a physical injury in order to recover for emotional distress.[19] The foreseeability standard adopted by the court is unusual in that it contains no guidelines by which to judge foreseeability and thus allows a very broad reading of when and under what circumstances a plaintiff's injuries are indeed foreseeable. By contrast, many jurisdictions which purport to have also adopted a basic foreseeability standard qualify that standard by imposing a requirement either that the plaintiff be in danger of physical impact or injury as a result of the defendant's negligent conduct[20] or that a bystander plaintiff actually witness the accident caused by the defendant's negligence and that the party physically injured in the accident be closely related to the plaintiff.[21]

The standard for recovery established in *Bass* is also very liberal in that it does not require any physical manifestation of the emotional distress.[22] Practically every other jurisdiction which has abandoned the impact rule requires a physical manifestation as a prerequisite to the plaintiff's recovery.[23] Since 1975, however, there has been some movement away from this requirement,[24] and with this decision, Missouri joined that modern trend.

Finally, the court's decision in *Bass* is significant because of its possible application beyond the fact situation presented in the case itself. Al-

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19. *See infra* notes 51-57 and accompanying text.

20. This is known as the zone-of-danger test. *See, e.g.*, Towns v. Anderson, 195 Colo. 517, 579 P.2d 1163 (1978) (house blew up while plaintiff standing close by); Orlo v. Connecticut Co., 128 Conn. 231, A.2d 402 (1941) (plaintiff in car with live electric wires "flashing, spitting and hissing" about it. *Id.* at ____, 21 A.2d at 402.); Okrina v. Midwestern Corp., 282 Minn. 400, 165 N.W.2d 259 (1969) (plaintiff standing next to wall of building when it collapsed).

21. *See, e.g.*, Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (mother witnessed daughter's death as result of defendant's negligence); Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981) (plaintiff saw car containing his mother struck by defendant's car); Landreth v. Reed, 570 S.W.2d 486 (Tex. Civ. App. 1978) (plaintiff witnessed sister's death by drowning as result of defendant's negligence).

22. *Bass*, 646 S.W.2d at 772.

23. *See* 2 F. HARPER & F. JAMES, *supra* note 2, § 18.4, at 1031 (1956); Comment, *Maine and Michigan Abolish the "Impact Rule,"* 20 DE PAUL L. REV. 1029, 1045-46 (1971) [hereinafter cited as Comment, *Maine and Michigan*]; Comment, *Recovery Allowed for Mental Distress Absent Both Impact and Fear of Impact*, 46 MISS. L.J. 871, 877 (1975) [hereinafter cited as Comment, *Recovery Allowed for Mental Distress*]; Comment, *supra* note 14, at 1013-14. *See generally* Annot., 64 A.L.R.2D 100 (1959). This is also the view taken by the RESTATEMENT (SECOND) OF TORTS § 436A (1965), which holds that "[i]f the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance."

24. *See infra* notes 47-57 and accompanying text.

though *Bass* is a typical emotional distress case in that the defendant's negligence directly affected the plaintiff, the rule of basic foreseeability and "medically diagnosable" injury promulgated by the court is broad enough to encompass a plaintiff who suffers emotional distress because of his fear that a third party will be injured by a defendant's negligent conduct or because of the plaintiff's shock at witnessing such an injury to an unrelated third party.[25]

III. Survey of National Positions Limiting Defendant's Liability in Negligent Infliction of Emotional Distress Cases

A. *Historical Standards—The Impact Rule*

Historically, the judicial system has afforded little protection to victims of negligently inflicted emotional distress.[26] In the late nineteenth and early twentieth centuries, recovery was allowed in situations in which there had been some physical "impact" upon the plaintiff.[27] The underlying theory seemed to be that the "impact" provided a guarantee that the emotional distress was genuine, thereby keeping the defendant's liability within manageable limits.[28]

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25. The court, in an enigmatic footnote, declines "to discuss the extensive debate and differing rules which [have] developed in the 'bystander' cases . . . ." *Bass*, 646 S.W.2d at 770 n.3. The fact remains, however, that the test adopted in this case, standing alone, would permit such recovery. In fact, the court cites several of the major bystander recovery cases as precedent for its decision. *Id.* at 772. *Cf.* Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976), in which the Washington Supreme Court adopted a test very much like the *Bass* test—foreseeable risk of injury and emotional distress "manifested by objective symptomatology," id. at _____, 553 P.2d at 1103, and specifically refused to rule out its use to permit bystander recovery, leaving the jury to decide if recovery in such a case should be allowed.

26. Recovery has always been allowed, however, where the plaintiff has suffered emotional distress as a result of a bodily injury caused by the defendant's negligence. Such damages are usually called "parasitic," since the real cause of action is the bodily injury. 2 F. Harper & F. James, *supra* note 2, § 18.4 at 1032; W. Prosser, *supra* note 2, § 54, at 330.

27. 2 F. Harper & F. James, *supra* note 2, § 18.4 at 1033; W. Prosser, *supra* note 2, § 54, at 330-31. A detailed discussion of the impact rule is beyond the scope of this article. The rule, however, has been examined extensively by the commentators. *See generally* Goodrich, *Emotional Disturbance as Legal Damage*, 20 Mich L. Rev. 497 (1922); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033 (1936); 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); Comment, *Maine and Michigan*, *supra* note 23; Comment, *Should the Florida Supreme Court Replace the Impact Rule with a Foreseeability Analysis?* 11 Fla. St. U.L. Rev. 231 (1983) [hereinafter cited as Comment, *Florida Supreme Court*]; Comment, *Duty, Foreseeability, and the Negligent Infliction of Mental Distress*, 33 Me. L. Rev. 303 (1981) [hereinafter cited as Comment, *Duty, Foreseeability*]; Comment, *Recovery Allowed for Mental Distress*, *supra* note 23; Comment, *The Impact Rule—Nuisance or Necessity?*, 25 U. Fla. L. Rev. 368 (1973); Comment, *supra* note 14.

28. 2 F. Harper & F. James, *supra* note 2, § 18.4, at 1033; W. Prosser, *supra* note 2, § 54, at 330-31.

Although the rule gained wide acceptance in the United States,[29] it was applied mechanically and often produced exceedingly harsh results.[30] Courts soon began searching for ways to mitigate the harsh results[31] or declined to adopt the rule altogether.[32] As a result, over the last fifty years there has been a distinct movement away from the impact rule, until today only six states and the District of Columbia continue to cling to the rule.[33] However, few courts have been willing to make negligent inflic-

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29. W. PROSSER, *supra* note 2, § 54, at 330-31.

30. *See, e.g.*, Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896) *overruled by* Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961). In *Mitchell*, the defendant's negligently operated horse-drawn trolley charged the terrified plaintiff and finally stopped with the horses' heads on either side of her. Plaintiff fainted and subsequently suffered a miscarriage. The court ruled that because there was no impact, there could be no recovery.

31. The most popular method for circumventing the rule was to find that almost anything qualified as impact. *See, e.g.*, Interstate Life and Accident Co. v. Brewer, 56 Ga. App. 599, 193 S.E. 458 (1937) (insurance agent struck plaintiff's body with a coin); Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928) (defendant's horse defecated into plaintiff's lap); Kisiel v. Holyoke St. Ry., 240 Mass. 29, 132 N.E. 622 (1921) (slight jar); Bendenk v. Saint Louis Pub. Serv. Co., 285 S.W.2d 609 (Mo. 1955) (slight bruise); McCardle v. George B. Peck Dry Goods Co., 271 Mo. 111, 195 S.W. 1034 (1917) (elevator struck bottom with thud); Proter v. L.W.R.R., 73 N.J.L. 405, 63 A. 860 (1906) (dust in eyes); Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930) (inhalation of smoke). Obviously such trivial impacts do nothing to ensure the genuineness of the emotional distress and therefore do not support one of the underlying rationales for the impact rule.

32. *See, e.g.*, Sloane v. Southern Cal. Ry., 111 Cal. 668, 44 P. 320 (1896); Purcell v. Saint Paul City R.R., 48 Minn. 134, 50 N.W. 1034 (1892).

33. ARKANSAS: The rule was apparently adopted in Saint Louis, I.M. & S.R. Co. v. Bragg, 69 Ark. 402, 64 S.W. 226 (1901) (plaintiff claimed injury to health from fright resulting from being put off train some distance from depot at night). The rule apparently remains law in Arkansas today. In Beaty v. Buckeye Fabric Finishing Co., 179 F. Supp. 688 (E.D. Ark. 1959), a federal district court stated that "[i]t is a well settled principle of Arkansas law that no recovery can be had for negligently inflicted mental anguish . . . unless the same is produced by a physical injury, and that rule extends to physical symptoms resulting from emotional shock . . . ." *Id.* at 697. The required impact, however, may be slight or even constructive. *See* Butler County Ry. v. Exum, 124 Ark. 229, 187 S.W. 329 (1916) (impact found in tobacco smoke touching plaintiff's body).

FLORIDA: The rule was embraced in International Ocean Tel. Co. v. Saunders, 32 Fla. 434, 14 So. 148 (1893), and, despite dissatisfaction in the lower courts, continues to be good law today. *See, e.g.*, Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974) (confirming the validity of the impact rule), *rev'g* 271 So. 2d 466 (Fla. Dist. Ct. App. 1972) (rejecting the impact rule). The rule may soon change; the question of whether Florida should retain the rule was recently certified to the state supreme court. Champion v. Gray, 420 So. 2d 348 (Fla. Dist. Ct. App. 1982). It should be noted that Florida does not apply the impact rule when the emotional distress was intentionally inflicted, when the defendant acted maliciously, or in products liability cases. Comment, *Florida Supreme Court*, *supra* note 27, at 237-38.

GEORGIA: Adopted in Chapman v. Western Union Tel. Co., 88 Ga. 763, 15 S.E. 901 (1892),the impact rule, despite differing opinions in the lower courts, continues to be the law today. *Compare* Usry v. Small, 103 Ga. App. 144, 118 S.E.2d 719 (1961) (no impact required) *with* Strickland v. Hodges, 134 Ga. App. 909, 216 S.E.2d 706 (1975) (impact rule retained except for special situations such as a "willful" act directed towards plaintiff). The rule in practice seems to be that a plaintiff can recover for emotional distress caused by

tion of emotional distress an independent tort by merely applying basic negligence principles to determine when and under what circumstances a defendant will be liable.[34] Instead, even after abandoning the impact rule, most jurisdictions have continued to follow some type of mechanical rule when making a determination of liability.[35]

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simple negligence only if the emotional distress is "accompanied by physical injury or pecuniary loss." Hall County Memorial Park, Inc. v. Baker, 145 Ga. App. 296, ____, 243 S.E.2d 689, 691 (1978). Such a rule, of course, precludes any bystander recovery. *See* Howard v. Bloodworth, 137 Ga. App. 478, 224 S.E.2d 122 (1976).

INDIANA: The rule was adopted in Kalen v. Terre Haute & I. R.R., 18 Ind. App. 202, 47 N.E. 694 (1897) and, except for intentional inflictions of emotional distress, continues to be the law today. The impact itself, however, need not be the actual cause of the emotional distress. *See* Kroger Co. v. Beck, 176 Ind. App. 202, 375 N.E.2d 640 (1978) (plaintiff's throat pricked by a hypodermic needle in a piece of meat held to satisfy the impact requirement).

KENTUCKY: In Kentucky Traction & Terminal Co. v. Roman's Guardian, 232 Ky. 285, 23 S.W.2d 272 (1929), the court declared that there can be no recovery for fright or its physical consequences without impact. Kentucky will, however, recognize even a slight impact as sufficient to support the cause of action as long as the mental distress is related to and a direct, natural result of the physical impact. Deutsch v. Shein, 597 S.W.2d 141, 146 (Ky. 1980) (x-ray of the plaintiff without testing her for pregnancy found to be sufficient impact).

UTAH: In Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961), the Utah court held that only intentionally inflicted emotional distress was actionable without bodily impact or physical injury. This continues to be the law today. Reiser v. Lenner, 641 P.2d 93, 100 (Utah 1982) ("It is well established in Utah that a cause of action for emotional distress may not be based upon mere negligence."). The rule has also been applied to prevent bystander recovery. *See* Madison v. Deseret Livestock Co., 574 F.2d 1027 (10th Cir. 1978) (applying Utah law).

WASHINGTON, D.C.: In Perry v. Capital Traction Co., 32 F.2d 938 (D.C. Cir. 1929), *cert. denied*, 280 U.S. 577 (1929), the court held that there could be no recovery for injury "brought about solely by a nervous shock or fright." 32 F.2d at 939. The court in Garber v. United States, 578 F.2d 414 (D.C. Cir. 1978), affirmed that this rule is still the law today.

Idaho is sometimes labeled an impact rule state. *See* Winter, *A Tort in Transition: Negligent Infliction of Mental Distress*, 70 A.B.A. J. 62, 64 (Mar., 1984). The case law, however, is less than clear on this point. In Summers v. Western Idaho Potato Processing Co., 94 Idaho 1, 479 P.2d 292 (1970), the court declared that there was no common law right of recovery for "purely emotional trauma, negligently caused" *Id.* at ____, 479 P.2d at 293. The court went on to note that some jurisdictions had extended a right of recovery for negligently inflicted emotional distress "only so far as to allow recovery where there were physical manifestations of the injury." *Id.* at ____, 479 P.2d at 293. Because the case was brought under a workers' compensation scheme which precluded such recovery, the court failed to indicate if Idaho would allow recovery for physical manifestations of negligently inflicted emotional distress in a non-workers' compensation context. *Id.* at ____, 479 P.2d at 293. Nine years later, however, in Hatfield v. Max Rouse & Sons Nw., 100 Idaho 840, ____, 606 P.2d 944, 955 (1980), the Idaho Supreme Court declared the holding of *Summers* to be that there could be no recovery for negligently inflicted emotional distress "in the absence of physical causes *or manifestations*" (emphasis added). If by this the court meant that there *could* be recovery when the emotional distress is accompanied by physical manifestations, Idaho cannot be seen as an impact rule state.

34. *See supra* notes 20-21 and accompanying text.

35. "[T]he retreat from the 'impact rule' has been marked by rear-guard actions in which other mechanical rules have cut off duty short of the full range of the reasonably foreseeable." 2 F. HARPER & F. JAMES, *supra* note 2, § 18.4, at 1036.

B. *Current Standards for Limiting a Defendant's Liability*

The traditional justifications given for the impact rule were that impact helped prove proximate cause,[36] that it helped eliminate fictitious claims by insuring the genuineness of the plaintiff's injuries,[37] and that abandoning the rule would result in a tremendous increase in litigation.[38] There also seemed to be an underlying fear that even legitimate claims of negligently inflicted emotional distress "would impose an impossibly high standard of conduct and make the burden of liability too great."[39] Courts and commentators alike have attacked the validity of the first three justifications many times over.[40] However, the fourth justification, that of somehow restricting defendant's liability to keep it within manageable limits, remains a problem today.[41]

1. Requirement that Plaintiff Suffer Contemporaneous or Subsequent Physical Injury.

One way the courts have dealt with the problem of preventing unlimited liability has been to require that the plaintiff's emotional distress manifest itself in either a contemporaneous or subsequent physical injury.[42] This requirement is generally seen as an effective way to ensure the genuineness of the plaintiff's injuries, eliminating false claims and thereby protecting deserving plaintiffs while at the same time not unduly extending defendants' liability.[43]

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36. *See, e.g.*, Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896), *overruled by* Battlla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

37. *See, e.g.*, Spade v. Lynn & B.R.R. Co., 168 Mass. 285, 47 N.E. 88 (1897).

38. *See, e.g., id.*

39. 2 F. HARPER & F. JAMES, *supra*, note 2, § 18.4, at 1033 (1956).

40. *See, e.g.*, W. PROSSER, *supra* note 2, § 54, at 327.

41. *Id.* at 334; Comment, *Negligent Infliction of Mental Distress: Reaction to* Dillon v. Legg *in California and Other States*, 25 HASTINGS L. J. 1248, 1250 (1974) [hereinafter cited as Comment, *Negligent Infliction*]; Comment, *Duty, Foreseeability, supra* note 27, at 308. *See generally* cases cited *supra* note 6.

42. *See* Annot., 64 A.L.R.2D 100, 115-19 (1959) (noting that no courts at that time had allowed recovery for mental distress unconnected either with an independently actionable tort or with a contemporaneous or subsequent physical injury). *Cf. infra* notes 45-50 and accompanying text. Prosser states that "[t]he temporary emotion of fright, so far from serious that it does no physical harm, is so evanescent a thing, so easily counterfeited, and usually so trivial, that the courts have been quite unwilling to protect the plaintiff against mere negligence . . . ." W. PROSSER, *supra* note 2, § 54, at 329.

43. *See, e.g.*, Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 926-28, 616 P.2d 813, 818-19, 167 Cal. Rptr. 831, 835-37 (1980); Orlo v. Connecticut Co., 128 Conn. 231, ———, 21 A.2d 402, 405 (1941). *See also* RESTATEMENT (SECOND) OF TORTS § 436A comment b (1965); Comment *Florida Supreme Court, supra* note 27, at 248; Comment, *Negligent Infliction of Emotional Distress Absent Physical Impact or Subsequent Physical Injury*, 47 Mo. L. REV. 124, 126 (1982).

One of the major problems with a requirement of physical injury before there can be

Most jurisdictions have allowed recovery, assuming all other rules and requirements are met, where the plaintiff's emotional distress manifests itself in some subsequent physical injury.[44] Some courts, however, have refused to stray far from the original impact rule and require that the plaintiff's emotional distress manifest itself in a *contemporaneous* physical injury.[45] Such a rule is virtually indistinguishable from the impact rule

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recovery for emotional distress is drawing the distinction between a physical injury and a mental one. This distinction is often difficult to make, and courts requiring a physical injury have not been uniform in their determination of what constitutes a physical injury. *Compare* Green v. T.A. Shoemaker & Co., 111 Md. 69, 73 A. 688 (1909) (plaintiff's "nervous prostration" found to be physical injury) *with* Cosgrove v. Beymer, 244 F. Supp. 824 (D. Del 1965) (dizziness, nervousness, and headache held not to constitute physical injury). *See generally* Annot., 64 A.L.R.2D 100, 104-05 (1959). The Restatement would accept long continued nausea, headaches, or dizziness as physical injury and would even recognize as physical injury such clearly mental manifestations as repeated hysterical attacks. The Restatement suggests that the final determination should be made by the medical profession rather than the law. RESTATEMENT (SECOND) OF TORTS § 436A comment c (1965).

44. Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916); Keck v. Jackson, 122 Ariz. 114, 593 P.2d 668 (1979); Sloane v. Southern Cal. Ry., 111 Cal. 668, 44 P. 320 (1896); Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941); Robb v. Pennsylvania R.R., 58 Del 454, 210 A.2d 709 (1965); Hatfield v. Max Rouse & Sons Nw., 100 Idaho 840, 606 P.2d 944 (1980); Clemm v. Atchison, T. & S.F. Ry., 126 Kan. 181, 268 P. 103 (1928); Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970) (later overruled on the physical manifestation requirement in Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433 (Me. 1982)); Green v. T.A. Shoemaker & Co., 111 Md. 69, 73 A. 688 (1909); Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978); Daley v. La Croix, 384 Mich. 4, 179 N.W.2d 390 (1970); Purcell v. Saint Paul City Ry., 48 Minn. 134, 50 N.W. 1034 (1892); First Nat'l Bank v. Langley, 314 So. 2d 324 (Miss. 1975); Cashin v. Northern Pac. Ry., 96 Mont. 92, 28 P.2d 862 (1934); Hanford v. Omaha & C.B. St. Ry., 113 Neb 423, 203 N.W. 643 (1925); Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 A. 540 (1930); Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965); Aragon v. Speelman, 83 N.M. 285, 491 P.2d 173 (1971); Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); Neiderman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970); Simone v. Rhode Island Co., 28 R.I. 186, 66 A. 202 (1907); Mack v. South-Bound R.R., 52 S.C. 323, 29 S.E. 905 (1898); Memphis St. Ry. v. Bernstein, 137 Tenn. 637, 194 S.W. 902 (1917); Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890); Savard v. Cody Chevrolet, Inc., 126 Vt. 405, 234 A.2d 656 (1967); Hughes v. Moore, 214 Va. 27, 197 S.E.2d 214 (1973); Frazee v. Western Dairy Prods., 182 Wash. 578, 47 P.2d 1037 (1935); Lambert v. Brewster, 97 W. Va. 124, 125 S.E. 244 (1924); Colla v. Mandella, 1 Wis. 2d 594, 85 N.W.2d 345 (1957).

45. NORTH CAROLINA: In Williamson v. Bennett, 251 N.C. 498, ____, 112 S.E.2d 48, 52 (1960), the court required that either physical impact *or* genuine physical injury take place "coincident in time and place with the occurrence producing the mental stress . . . ." In North Carolina, however, the contemporaneous physical injury need not be a visible, such as a broken arm. Crews v. Provident Fin. Co., 271 N.C. 684, ____, 157 S.E.2d 381, 386 (1967) ("nervousness requiring bed rest brought on by acute attack of angina and increased blood pressure constituted physical injury").

OKLAHOMA: Oklahoma *appears* to require a contemporaneous physical injury. In Belt v. Saint Louis & S.F. Ry., 195 F.2d 241, 243 (10th Cir. 1952), the federal appeals court stated that emotional distress "must be a part of the physical suffering and inseparable therefrom, as where the mental anguish is superinduced by physical hunger pains." In Saint Louis & S.F. Ry. v. Keiffer, 48 Okla. 434, ____, 150 P. 1026, 1028 (1915), the court declared that there can be no recovery for emotional distress "which is not produced by, connected with,

and is thus open to the same basic criticism as the impact rule—that its results will be unduly harsh.[46]

In 1970, in *Rodrigues v. State*,[47] Hawaii became the first state to abandon completely any requirement of physical injury in an action for negligent infliction of emotional distress. In *Rodrigues*, the plaintiff's new house was flooded because of defendant's negligent maintenance of a drainage ditch.[48] While admitting potential problems of proof and difficulty in limiting the defendant's liability, the court recognized the plaintiff's right to be free from the negligent infliction of *serious* emotional distress regardless of the presence or absence of physical injury.[49] The court defined serious mental distress as distress which "a reasonable man, normally constituted, would be unable to adequately cope with . . . ."[50]

Several other jurisdictions have followed suit and abandoned the requirement of physical manifestations of the emotional distress.[51] Four reasons are generally given for this liberalization of the rules for recovery. First, the requirement of a physical manifestation is said to be overinclusive because it allows recovery for trivial emotional distress which is accompanied by physical symptoms.[52] Second, the rule is said to be underinclusive because it denies recovery for serious emotional distress which does not produce physical symptoms.[53] Third, requiring physical injury

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or the result of physical suffering or injury . . . ."

OREGON: In Rostad v. Portland Ry., Light & Power Co., 101 Or. 569, 201 P. 184 (1921), the Oregon court required that emotional distress be accompanied by physical injury. The court in Melton v. Allen, 282 Or. 731, 580 P.2d 1019 (1978), affirmed that this requirement is the law, the only exception being for outrageous conduct by the defendant.

SOUTH DAKOTA: In Sternhagen v. Kozel, 40 S.D. 396, 167 N.W. 398 (1918), the court required that physical injury accompany fright before recovery will be allowed. This continues to be the rule today. Chisum v. Behrens, 283 N.W.2d 235 (S.D. 1979).

46. The only appreciable difference between the two rules is that, under the contemporaneous physical injury requirement, it is not necessary that the impact or injury *precede* the emotional distress. It does not matter whether the physical injury causes the emotional distress or is caused by it. Comment, *Duty, Foreseeability*, *supra* note 27, at 304; *see* Williamson v. Bennett, 251 N.C. 498, 112 S.E.2d 48 (1960); Sternhagen v. Kozel, 40 S.D. 396, 167 N.W. 398 (1918).

47. 52 Hawaii 156, 472 P.2d 509 (1970).

48. *Id.* at _____, 472 P.2d at 513.

49. *Id.* at _____, 472 P.2d at 520.

50. *Id. Accord* Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974).

51. *See, e.g.* Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980); Montinieri v. Southern New England Tel. Co., 1975 Conn. 337, 398 A.2d 1180 (1978); Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433 (Me. 1982); Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983) (en banc); Portee v. Jaffee, 84 N.J. 88, 417 A.2d 251 (1980); Schultz v. Barberton Glass Co., 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983); Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979).

52. *Molien*, 27 Cal. 3d at 928-29, 616 P.2d at 820, 167 Cal. Rptr. at 838; *Culbert*, 444 A.2d at 437.

53. *Molien*, 27 Cal. 3d at 928-29, 616 P.2d at 820, 167 Cal. Rptr. at 838; *Culbert*, 444 A.2d at 437.

"encourages extravagant pleading and distorted testimony."[54] Finally, some courts are now convinced that medical science is able to prove psychic injury even in the absence of physical injury.[55] Those jurisdictions which have dispensed with the requirement of physical manifestations of the emotional distress, generally limit the defendant's liability by requiring that the psychic injury be serious[56] and foreseeable.[57]

2. Requirement that the Plaintiff Be Within the Zone of Danger.

Many jurisdictions, upon abandoning the impact rule, have substituted for it a definition of liability based on the plaintiff's presence within the zone of physical danger created by the defendant's negligent act.[58] These courts also generally require that the plaintiff, while in this "zone of danger," suffer the emotional distress as a result of fear for his own safety rather than for the safety of another.[59] The zone-of-danger test is seen by

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54. *Molien*, 27 Cal. 3d at 928-29, 616 P.2d at 820, 167 Cal. Rptr. at 838; *Culbert*, 444 A.2d at 437; *see Bass*, 646 S.W.2d at 772.

55. *See, e.g., Sinn*, 486 Pa. at ____, 404 A.2d at 679. *But see Bass*, 646 S.W.2d at 771 ("difficult if not impossible to separate physical from . . . purely mental and emotional reaction.").

56. *See, e.g., Molien*, 27 Cal. 3d at 929-30, 616 P.2d at 819, 167 Cal. Rptr. at 839; *Leong*, 55 Hawaii at ____, 520 P.2d at 764; *Rodrigues*, 52 Hawaii at ____, 472 P.2d at 520; *Culbert*, 444 A.2d at 437; *Bass*, 646 S.W.2d at 772; *Portee*, 84 N.J. at ____, 417 A.2d at 527; *Schultz*, 4 Ohio St. 3d at ____, 447 N.E.2d at 113; *Sinn*, 486 Pa. at ____, 404 A.2d at 683.

57. *See e.g., Molien*, 27 Cal. 3d at 922-23, 616 P.2d at 816-17, 167 Cal. Rptr. at 834-35; *Leong*, 55 Hawaii at ____, 520 P.2d at 765; *Rodrigues*, 52 Hawaii at ____, 472 P.2d at 521; *Culbert*, 444 A.2d at 435; *Bass*, 646 S.W.2d at 772; *Portee*, 84 N.J. at ____, 417 A.2d at 525; *Sinn*, 486 Pa. at ____, 404 A.2d at 684-85.

58. Keck v. Jackson, 122 Ariz. 114, 593 P.2d 668 (1979); Towns v. Anderson, 195 Colo. 517, 579 P.2d 1163 (1978); Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941); Robb v. Pennsylvania R.R., 58 Del. 454, 210 A.2d 709 (1965); Rickey v. Chicago Transit Auth., 98 Ill.2d 546, 457 N.E.2d 1 (1983); Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Okrina v. Midwestern Corp., 282 Minn. 400, 165 N.W.2d 259 (1969); Fournell v. Usher Pest Control Co., 208 Neb. 684, 305 N.W.2d 605 (1981); Jelley v. LaFlame, 108 N.H. 471, 238 A.2d 728 (1968), *overruled by* Corso v. Merrill, 119 N.H. 647, 406 A.2d 300 (1979); Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965); Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969); Whetham v. Bismarck Hosp., 197 N.W.2d 678 (N.D. 1972); Neiderman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970); Simone v. Rhode Island Co., 28 R.I. 186, 66 A. 202 (1907); Trent v. Barrows, 55 Tenn. App. 182, 397 S.W.2d 409 (1965); Houston Elec. Co. v. Dorsett, 194 S.W.2d 546 (Tex. 1946); Savard v. Cody Chevrolet, Inc., 126 Vt. 405, 234 A.2d 656 (1967); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935); *see* Rogers v. Hexol, Inc., 218 F. Supp. 453 (D. Or. 1962); Bourgue v. American Mut. Liab. Ins. Co., 345 So. 2d 237 (La. Ct. App. 1977); Cashin v. Northern Pac. Ry., 96 Mont. 92, 28 P.2d 862 (1934); Mack v. South-Bound R.R., 52 S.C. 323, 29 S.E. 905 (1898). This is also the rule adopted by the RESTATEMENT (SECOND) OF TORTS §§ 313, 436 (1965).

59. *See, e.g., Whetman*, 197 N.W.2d at 684 (no recovery for mother who saw nurse drop her baby); Shelton v. Russell Pipe & Foundry Co., 570 S.W.2d 861 (Tenn. 1978) (no recovery for father who suffered emotional distress as a result of daughter's injuries); Klassa v. Milwaukee Gas Light Co., 273 Wis. 176, 77 N.W.2d 397 (1956) (plaintiff could not recover for shock or fright which was solely the result of fear for safety of two sons); RESTATEMENT

the courts as a way to avoid some of the arbitrariness of the old impact rule while at the same time restricting the defendant's liability to a class of plaintiffs whose injuries are reasonably foreseeable.[60]

In practice, the zone of danger standard has alleviated some of the inequities of the impact rule. Unlike the impact rule, the zone-of-danger test allows recovery when the plaintiff is endangered but is not touched[61] and also allows recovery for a bystander within the zone who fears for his own safety.[62] Since the exact extent of the zone is decided on a case-by-case basis, the courts are freed from a mechanical application of the standard.[63]

Unfortunately, the zone-of-danger test, like the impact rule, is an arbitrary line drawn to restrict recovery for policy reasons and, as such, is capable of producing harsh and seemingly capricious results.[64] Courts frequently use the rule to deny recovery to a bystander not located within the zone of danger,[65] arguing that to allow recovery outside the zone would be to invite unlimited liability with no reasonable circumscription.[66] These courts are generally of the view that the application of basic negligence principles with an emphasis on foreseeability would not be suf-

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(SECOND) OF TORTS § 313 comment d (1965).

60. *See, e.g., Resavage*, 199 Md. at _____, 86 A.2d at 880-83; Stadler v. Cross, 295 N.W.2d 552, 554 (Minn. 1980).

61. *See, e.g.*, cases cited *supra* note 58.

62. *See, e.g., Keck*, 122 Ariz. 114, 593 P.2d 668; *Rickey*, 98 Ill. 2d 546, 457 N.E.2d 1; *Bowman*, 164 Md. 397, 165 A. 182; *Niederman*, 436 Pa. 401, 261 A.2d 84; *see also* RESTATEMENT (SECOND) OF TORTS § 436(3) (1965).

63. *See, e.g., Rickey* 98 Ill. 2d 546, 457 N.E.2d 1 (case remanded for a determination of whether plaintiff, riding an ordinary escalator, was within zone of danger).

64. It was just such a result that prompted the California Supreme Court to abandon the zone-of-danger rule. Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal Rptr. 72 (1968); *see infra* notes 72-77 and accompanying text.

65. *See, e.g.*, Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Stadler v. Cross, 295 N.W.2d 552 (Minn. 1980); Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969); Whetham v. Bismarck Hosp., 197 N.W.2d 678 (N.D. 1972); Shelton v. Russell Pipe Foundry Co.,, 570 S.W.2d 861 (Tenn. 1978); Guilmette v. Alexander, 128 Vt. 116, 259 A.2d 12 (1969); Grimsby v. Samson, 85 Wash. 2d 52, 530 P.2d 291 (1975); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).

66. *Resavage*, 199 Md. at _____, 86 A.2d at 882 (liability "can neither justly nor expediently be extended . . . ."); *Stadler*, 295 N.W.2d at 554 ("[A] person's liability for the consequences of her or his actions cannot be unlimited."); *Tobin*, 24 N.Y.2d at 616, 249 N.W.2d at 424, 301 N.Y.S.2d at 555 ("The problem for the law is to limit the legal consequences of wrongs to a controllable degree."); *Whetham*, 197 N.W.2d at 683 (recovery presents "the problem of the defendant's unlimited liability"); *Shelton*, 570 S.W.2d at 866 (It would be "unjust" to impose such liability upon defendant "who is guilty only of negligence rather than intentional wrongdoing."); *Guilmette*, 128 Vt. at _____, 259 A.2d at 15 ("Recovery must be brought within manageable dimensions."); *Grimsby* 85 Wash. 2d at _____, 530 P.2d at 294 ("[T]here appears to be no rational way to restrict the scope of liability."); *Waube*, 258 N.W. at 500 (Recovery "would constitute an unwarranted enlargement of the duties of users of the highway.").

ficient to keep liability within manageable dimensions.[67]

Despite its shortcomings, the zone-of-danger test is now the majority position[68] since most courts consider it to be an adequate balance between the necessity of limiting the defendant's liability and the need to allow deserving plaintiffs to recover.[69] Nevertheless, there is a rapidly developing trend, especially in bystander cases, to dispense with the restrictive zone-of-danger foreseeability standard[70] and instead to utilize a more liberal test of foreseeability based on spatial considerations and other factors, such as sensory observation of the accident caused by the defendant's negligence and the relationship between the plaintiff and the victim.[71]

3. Requirement of Basic Foreseeability—Bystander Cases.

In 1968 California became the first state to abandon the zone-of-danger restriction and allow recovery by a bystander outside the zone. In *Dillon v. Legg*,[72] a mother, who was outside the zone of danger, witnessed her daughter's death caused by the defendant's negligent act and sued for emotional distress and resulting physical injuries.[73] Another daughter, who also witnessed the accident and suffered emotional distress and physical injuries, was within the zone of danger.[74] Thus under California's zone-of-danger rule, the sister could recover, while the bystander-mother could not.[75] Such a capricious result was intolerable to the court. Therefore, it ruled that the defendant was indeed liable to the mother.[76]

The court substituted the basic negligence principle of reasonable foreseeability for the zone-of-danger limitation. Realizing, however, that recovery for negligent infliction of emotional distress presents a greater po-

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67. In *Tobin*, the New York court observed that

> [t]he problem of unlimited liability is suggested by the unforeseeable consequences of extending recovery for harm to others than those directly involved in the accident. If foreseeability be the sole test, then once liability is extended the logic of the principle would not and could not remain confined. It would extend to older children, fathers, grandparents, relatives, or others *in loco parentis*, and even to sensitive caretakers, or even any other affected bystanders.

24 N.Y.2d at 616, 249 N.E.2d at 423, 301 N.Y.S.2d at 559. *See also Resavage*, 199 Md. at ——, 86 A.2d at 882; *Stadler*, 295 N.W.2d at 555.

68. *See* jurisdictions and cases cited *supra* note 58.

69. *See, e.g., Tobin*, 24 N.Y.2d at 615-18, 249 N.E.2d at 422-24, 301 N.Y.S.2d at 558-61.

70. *See* Lambert, *supra* note 4; Comment, *Duty, Foreseeability, supra* note 27.

71. *See, e.g., Dillon*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72. *See generally* Annot., 5 A.L.R.4TH 833 (1981); Annot., 94 A.L.R.3D 486 (1979); Annot., 29 A.L.R.3D 1337 (1970).

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

73. *Id.* at 728, 441 P.2d at 912, 69 Cal. Rptr. at 72.

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

75. California had adopted the zone-of-danger rule seven years earlier in Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

76. *Dillon*, 68 Cal. 2d at ——, 441 P.2d at 925, 69 Cal. Rptr. at 85.

tential for infinite liability than do other torts, the court set up a three-part test to aid in the determination of whether a defendant should have reasonably foreseen injury to a particular plaintiff. The court looked to:

> (1) Whether plaintiff was located near the scene of the accident as contrasted with . . . [being some] distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.[77]

Initially, the *Dillon* approach received a less-than-enthusiastic response outside California.[78] Since 1973, however, the liberal approach typified by *Dillon* has gained support, and today twelve states, including California, allow a bystander plaintiff outside the zone of danger to recover for negligently inflicted emotional distress.[79]

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77. *Id.* at ____, 441 P.2d at 920, 69 Cal. Rptr. at 80. The second factor, requiring "sensory and contemporaneous observance of the accident", has been modified to allow recovery where there was no *visual* perception of the accident. Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977) (plaintiff's wife struck by defendant's car; plaintiff did not see the impact but "fully perceived" it as he knew wife's position the instant before impact and saw the car approaching her at high speed).

A recent decision by a California Court of Appeal extended liability even further by reversing a summary judgment for defendant where plaintiff arrived at the scene of the accident ten minutes after its occurrence. Nevels v. Yeager, 152 Cal. App. 3d 162, ____, 199 Cal. Rptr. 300, 305 (1984) (*Dillon* guidelines met "when a close relative arrives at the scene of an accident soon after its occurrence, so that the scene is substantially as it was at the instant of the accident and sees the victim, who has suffered severe injury with all its attendant gore, and suffers shock therefrom . . . .).

78. The doctrine was considered and rejected in New York in Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969), and in Vermont in Guilmette v. Alexander, 128 Vt. 116, 259 A.2d 12 (1969). *See supra* notes 65-67 and accompanying text. *See generally* Comment, *Negligent Infliction*, *supra* note 41.

79. Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974); Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981); Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433 (Me. 1982); Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1245 (1978); Toms v. McConnell, 45 Mich. App. 647, 207 N.W.2d 140 (1973); Corso v. Merrill, 119 N.H. 647, 406 A.2d 300 (1979); Portee v. Jaffee, 84 N.J. 88, 417 A.2d 521 (1980); Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979); D'Ambra v. United States, 114 R.I. 643, 338 A.2d 524 (1975) (Rhode Island retains the zone-of-danger requirement for non-bystander cases; bystander recovery is considered an exception to the general rule); Landreth v. Reed, 570 S.W.2d 486 (Tex. Civ. App. 1978); Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976). The law in Connecticut on this point is somewhat confused. In Strazza v. McKittrick, 146 Conn. 714, 156 A.2d 149 (1959), the court appeared to adopt a zone-of-danger test and in dictum announced that there could be no bystander recovery for emotional distress caused by the sight of injury to another. *Id.* at ____, 156 A.2d at 152. In D'Amicol v. Alvarez Shipping Co., 31 Conn. Supp. 164, 326 A.2d 129 (Conn. Super. Ct. 1973), however, a state superior court adopted the *Dillon* standard word for word. Three years later, another superior court in McGovern v. Piccolo, 33 Conn. Supp. 225, 372 A.2d 989 (Conn Super. Ct. 1976), returned to the standard established in *Strazza*.

Six of these states have adopted the *Dillon* definition of foreseeability, or some slight modification thereof, as the limitation on the defendant's liability.[80] For example, Iowa has modified the basic *Dillon* test to require that (1) the bystander and the victim be husband and wife or related within the second degree of consanguinity or affinity; (2) the bystander have reasonably believed that the victim was going to be seriously injured or killed; and (3) the bystander suffer serious emotional distress.[81]

Four states have adopted standards more liberal than the *Dillon* standards. In *Leong v. Takasaki*,[82] Hawaii permitted recovery by a bystander who was not a blood relative of the victim.[83] Rather than restrict the defendant's liability by setting out factors which define foreseeability, the Hawaii court merely applied basic negligence principles and held that a defendant is liable "when it is reasonably foreseeable that a reasonable plaintiff-witness to an accident would not be able to cope with the mental stress engendered by such circumstances . . . ."[84] The Court of Appeals of Michigan declined to adopt any standard, noting that "devising one hard and fast rule for limiting bystander recovery . . . would be difficult and complex if not impossible."[85] The court decided instead to resolve each case on its own facts.[86] Rhode Island rejected a straight foreseeability approach in favor of determining liability "by balancing the social interests involved in order to ascertain how far defendant's duty and plaintiff's right may justly and expediently by extended."[87] In *Hunsley v.*

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80. Barnhill, 300 N.W.2d at 108 (modified *Dillon* test; *see infra* text at note 81); *Culbert*, 444 A.2d at 436 (*Dillon* factors); *Dziokonski*, 375 Mass. at ____, 380 N.E.2d at 1302 (*Dillon*, plus "substantial physical injury . . . caused by defendant's negligence"); *Corson*, 119 N.H. at ____, 406 A.2d at 304-06 (balancing danger of unlimited liability with plaintiff's serious emotional injury; balance can be maintained by "carefully defining the foreseeability factors," using *Dillon*. *Id.* at ____, 406 A.2d at 304.); *Portee*, 84 N.J. at ____, 417 A.2d at 528 (*Dillon*, plus "severe" emotional distress); *Sinn*, 486 Pa. at ____, 404 A.2d at 685-86 (*Dillon* factors); *Landreth*, 570 S.W.2d at 489-90 (*Dillon* factors). Texas, like California has relaxed the "contemporaneous observance of the accident" requirement. *See* Bedgood v. Madalin, 589 S.W.2d 797, 802-03 (Texas Civ. App. 1979). The *Dziokonski* Court noted, with unusual candor, that

> It does not matter in practice whether these factors are regarded as policy considerations imposing limitations on the scope of reasonable foreseeability . . . or as factors bearing on the determination of reasonable foreseeability itself. The fact is that, in cases of this character, such factors are relevant in measuring the limits of liability for emotionally based injuries resulting from a defendant's negligence.

Dziokonski, 375 Mass. at ____, 380 N.E.2d at 1302.

81. Barnhill v. Davis, 300 N.W.2d at 108.

82. 55 Hawaii 398, 520 P.2d 758 (1974).

83. *Id.* at ____, 520 P.2d at 760.

84. *Id.* at ____, 520 P.2d at 765. *Cf.* Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970).

85. Toms v. McConnell, 45 Mich. App. 647, ____, 207 N.W.2d 140, 144 (1973).

86. *Id.* at ____, 207 N.W.2d at 145.

87. D'Ambra v. United States, 114 R.I. 643, ____, 338 A.2d 524, 528 (quoting Waube v. Warrington, 216 Wis. 603, 613, 258 N.W. 497, 501 (1935)).

Giard,[88] the Supreme Court of Washington emphasized foreseeability but declined to adopt any particular foreseeability test.[89] The court noted that the "very concept of negligence provided the primary boundaries" on the defendant's liability.[90] The positions adopted in these four states represent the outermost limits of the defendant's liability now recognized in emotional distress cases.[91]

4. Requirement of Basic Foreseeability—Non-Bystander Cases.

Negligent infliction of emotional distress has traditionally been a tort to which basic negligence principles are not applied unless supplemented by some artificial limit on liability such as impact, physical manifestations of the distress, zone of danger, or specific guidelines for determining foreseeability. In certain fact situations, however, courts have been willing to apply basic tort principles without fear of unlimited liability. Traditionally, these "special circumstance" cases have concerned the negligent transmission of telegraph messages[92] or the negligent mishandling of a corpse.[93] What these cases appear to have in common is a strong likelihood, indeed almost a certainty, that the negligence will produce genuine, severe emotional distress.[94]

Some courts have been willing to extend the type of treatment given the "special circumstance" cases to other situations in which the plaintiff clearly deserves to recover but is not placed in any physical danger and at

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88. 87 Wash. 2d 424, 553 P.2d 1096 (1976).

89. *Id.* at _____, 553 P.2d at 1103.

90. *Id.* at _____, 553 P.2d at 1103.

91. Attempts to extend the defendant's liability to a plaintiff who was not present at the scene of the accident but who later learned of the victim's injury have been unsuccessful. *See* Kelly v. Kokua Sales & Supply, Ltd., 56 Hawaii 204, 532 P.2d 673 (1975) (plaintiff learned of death of family members over the phone and shortly thereafter suffered a fatal heart attack as a result of severe emotional distress). *But cf.* Prince v. Pittston Co., 63 F.R.D. 28 (S.D. W. Va. 1974) (summary judgment improper where plaintiffs claimed severe emotional distress despite their absence from the scene of the tortious activity).

92. *See, e.g.*, Francis v. Western Union Tel. Co., 58 Minn. 252, 59 N.W. 1078 (1894). *See generally* Comment, *Telegraphs and Telephones—Telegraph Company Liable for Mental Anguish Resulting from Non-Delivery*, 29 NEB. L. REV. 481 (1950).

93. *See, e.g.*, Sandford v. Ware, 191 Va. 43, 60 S.E.2d 10 (1950). *See generally* Annot., 48 A.L.R.3D 261 (1973); Annot., 17 A.L.R.2D 770 (1951). It should be noted that in both the telegraph cases and the corpse cases, recovery for mental anguish usually requires a showing of willful, wanton, or malicious conduct on the part of the defendant. *See* Comment, *supra* note 92, at 481-82; Annot., 48 A.L.R.3D at 270.

94. *See e.g.*, Allen v. Jones, 104 Cal. App. 3d 207, 163 Cal. Rptr. 445 (1980), in which the defendant mortuary lost the cremated remains of the plaintiff's brother while shipping them to Illinois. The court noted that "mental distress is a highly foreseeable result of such conduct. . . . [T]he nature of the wrongful conduct . . . provides sufficient assurance of the genuineness of a claim for emotional distress." *Id.* at 214-15, 163 Cal. Rptr. at 450. *See also* W. PROSSER, *supra* note 2, § 54, at 330; RESTATEMENT (SECOND) OF TORTS § 436(1) (1965).

no time fears for his own safety or the safety of another.[95] The assumption seems to be that in a situation where the plaintiff's resulting severe emotional distress is a virtual certainty, no artificial limitations are necessary to restrict liability.[96] In other words, the damage is highly foreseeable.[97] In cases following this reasoning, the courts have employed general negligence standards, with major emphasis on foreseeability as the appropriate method for limiting defendant's liability.

IV. Conclusion

The last 100 years have seen a definite trend toward greater judicial protection for the plaintiff's interest in emotional tranquility. Courts have moved from the restrictive position of denying recovery for negligent infliction of emotional distress[98] to the more liberal approach of allowing bystander recovery under certain circumstances. This movement, however, has been anything but smooth and uninterrupted. Fearing that the defendant's liability cannot be kept within manageable limits, courts have lumbered from one arbitrary limitation to another, searching for an equitable balance between the plaintiff's interest in recovering for emotional harm and society's interest in avoiding any undue extension of liability. Thus, courts have burdened this cause of action with such limitations as the requirement of impact,[99] the requirement of physical manifestations of injury,[100] the zone-of-danger test,[101] and restrictive definitions of what

95. *See* cases cited *infra* note 97.

96. It should be noted, however, that some jurisdictions, even in these cases, still require physical manifestations of the emotional distress. *See* Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970); Daley v. La Croix, 384 Mich. 4, 179 N.W.2d 390 (1970); Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976); *see also* cases cited *infra* note 97.

97. *See, e.g.*, Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (plaintiff's wife incorrectly diagnosed as having syphilis); Montinieri v. Southern New England Tel. Co., 175 Conn. 337, 398 A.2d 1180 (1978) (defendant telephone operator gave out unlisted address resulting in plaintiff and his family being taken hostage); Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970) (plaintiff's new house extensively damaged by flood negligently caused by defendant on the day plaintiff was to move in); Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970) (plaintiff found an unpackaged prophylactic in his soft drink); Daley v. La Croix, 384 Mich. 4, 179 N.W.2d 390 (1970) (defendant negligently drove his car into plaintiff's house); First Nat'l Bank v. Langley, 314 So. 2d 324 (Miss. 1975) (plaintiff's bank deposit hung up in night depository slot for several weeks with plaintiff unable to convince defendant bank to search for it); Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 A. 540 (1930) (defendant, knowing that steam pressure gauge in room where plaintiff worked had exploded several times before, failed to repair guage); Johnson v. State, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975) (plaintiff incorrectly informed of mother's death by hospital); Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976) (defendant negligently drove his car into plaintiff's house).

98. Damages for emotional distress have always been available, however, when parasitic to some other actionable tort. *See supra* note 26.

99. *See supra* notes 26-35 and accompanying text.

100. *See supra* notes 42-46 and accompanying text.

constitutes reasonable foreseeability.[102] In general, courts have been reluctant to make negligent infliction of emotional distress a fully independent tort by giving it the same treatment afforded other negligence actions—the unfettered application of basic negligence principles.

The Missouri decision of *Bass v. Nooney Co.*[103] is a sharp break with this tradition and represents the direction in which the law concerning negligent infliction of emotional distress appears to be moving. In the last fifteen years, two distinct trends have developed. First, the requirement that the emotional distress manifest itself in physical injury shows signs of weakening.[104] To date, six states have abandoned this requirement and recognized purely mental disturbance as a basis for legally cognizable damage. In *Bass*, Missouri joins this small but important liberalizing trend. Second, there is a general retreat from the arbitrary and artificial tests for determining liability toward the application of basic tort principles. Bystander recovery is a movement in this direction although there is still some tendency to restrict foreseeability in these cases to specific factual circumstances.[105] The trend away from arbitrary and artificial restrictions is most apparent in the expansion of the "special circumstance" cases in which courts *are* willing to employ basic negligence standards, free from any restrictive guidelines, in making a determination of liability.[106] These trends are represented in the approach taken by Missouri in *Bass v. Nooney Co.*[107]

In fact, the decision in *Bass* goes one step further. Whereas the traditional "special circumstance" cases[108] and their modern counterparts[109] involve situations in which the plaintiff's severe emotional distress is not just reasonably foreseeable but a virtual certainty, such was not the case in *Bass*. The plaintiff in *Bass* was trapped in an elevator for thirty minutes,[110] an occurrence which many might consider more of an annoyance than the infliction of severe emotional distress. Clearly, such a situation does not rise to the same level as that of a mortuary's losing the corpse of a family member[111] or of a person finding an unpackaged prophylactic in a soft drink.[112] Yet the *Bass* court applied the same unlimited negligence

101. *See supra* notes 58-67 and accompanying text.
102. *See supra* notes 71-81 and accompanying text.
103. 646 S.W.2d 765 (Mo. 1983) (en banc).
104. *See supra* notes 47-57 and accompanying text.
105. *See* cases cited *supra* notes 72, 80.
106. *See supra* notes 92-97 and accompanying text.
107. 646 S.W.2d at 772.
108. *See supra* notes 92-94 and accompanying text.
109. *See* cases cited *supra* note 97.
110. *Bass*, 646 S.W.2d at 767.
111. *See, e.g.*, Allen v. Jones, 104 Cal. App. 3d 207, 163 Cal. Rptr. 445 (1980).
112. Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970).

principles employed by other courts in "special circumstance" cases.[113] The court gave independent legal protection to the plaintiff's interest in emotional tranquility and left the determination of when that interest has been violated to be made on a case-by-case basis. In short, the Missouri court recognized negligent infliction of emotional distress as an independent tort. With this bold step, it has fulfilled the prediction in *Dillon v. Legg*[114] that "artificial islands of exceptions [to the application of basic tort principles], created from the fear that the legal process will not work, usually do not withstand the waves of reality and, in time, descend into oblivion."[115]

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113. *Bass*, 646 S.W.2d at 772.
114. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
115. *Id.* at ____, 441 P.2d at 925, 69 Cal. Rptr. at 85.