

Torts: Negligence: Recovery for Emotional Trauma

Robert C. Roth

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Conclusion

It seems that the court in *Rice* has inadvertently eliminated the rule that restricts the scope of cross-examination and by implication has adopted Rule 105 of the Model Code of Evidence.²³ This rule makes the scope of cross-examination a matter of the trial court's discretion. Adoption of Rule 105 should allow an orderly trial without placing a restriction on the extent of the witness' admissible testimony on either direct or cross-examination. The rule also preserves our partisan witness form of advocacy. Such preservation is necessary because the adoption of the wide-open type of cross-examination would in effect eliminate the normal rules of evidence as to the foundation for competency, the partisan witness rule and the order of trial. The state's witness becomes a witness for both the prosecution and the defense.²⁴

LESLIE J. MLAKAR

Torts—Negligence—Recovery for Emotional Trauma: In *Dillon v. Legg*,¹ a mother brought a negligence action against the driver of an automobile that struck and killed her infant daughter. She alleged that because she had witnessed the accident, and because she had feared for the safety of her child, she sustained great emotional disturbance, shock, and injury to her nervous system. The trial court granted summary judgment in favor of the defendant. The issue presented on appeal to the state supreme court was whether tort liability may be predicated on emotional trauma and attendant bodily illness that have been induced by apprehension of negligently caused danger or injury to a closely related person. In a 4 to 3 decision, the supreme court recognized the mother's cause of action.

With one exception,² the courts since 1930 have denied recovery un-

²³ MODEL CODE OF EVIDENCE rule 105 (1942):

The judge controls the conduct of the trial to the end that the evidence shall be presented honestly, expeditiously and in such form as to be readily understood, and in his discretion, among other things . . .

(h) to what extent and in what circumstances a party cross-examining a witness may be forbidden to examine him concerning material matters not inquired about on a previous examination by the judge or by the adverse party . . .

²⁴ In *Neider v. Spoehr*, 41 Wis. 2d 610, 165 N.W.2d 171 (1969), a civil case handed down after the *Rice* decision, the supreme court ruled that the scope of cross-examination was a matter of the trial court's discretion. In *Boller v. Cofrances*, 42 Wis. 2d 170, 166 N.W.2d 129 (1969), another civil case, the court expressly adopted Rule 105(h) of the Model Code of Evidence. The court indicated that the rule should be applied in both civil and criminal trials.

¹ 68 Cal. 2d 766, 441 P.2d 912, 69 Cal. Rptr. 72 (1968)

² In *Rasmussen v. Benson*, 133 Neb. 449, 275 N.W. 674 (1937), *aff'd on rehearing*, 135 Neb. 232, 280 N.W. 890 (1938), the plaintiff was sold poisoned feed for his dairy cows. He suffered a mental breakdown and eventual death induced by his fear for the safety of those to whom he had sold milk. The high degree of care imposed on those who handle poison, as well as a product liability aspect, diminishes the applicability of the case to automobile fact situations.

der similar circumstances.³ Indeed, a caveat to Section 313 in the First Restatement of Torts (1934) seemed to favor recovery for a parent or a spouse,⁴ but in 1960 the ALI bowed to the overwhelming case law and removed the caveat, substituting a definite rule of nonliability.⁵ But the determination of the possible effect *Dillon* will have on tort law, and the cogency of its reasoning, require that its reasoning be compared with the cases holding to the contrary.

Writing for the majority, Justice Tobriner postulated that the refusal to impose liability in the cases before *Dillon* was attributable to late nineteenth-century concepts of duty. But, "[D]uty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."⁶ Thus refusal to recognize a duty in particular instances was based on a fear that courts would be flooded with fraudulent and indefinable claims.

³ *Rogers v. Hexol, Inc.*, 218 F. Supp. 453 (D. Ore. 1962); *Beaty v. Buckeye Fabric Finishing Co.*, 179 F. Supp. 688 (E.D. Ark. 1959); *Jennings v. United States*, 178 F. Supp. 516 (D. Md. 1959), *vacated on other grounds*, 291 F.2d 880 (4th Cir. 1961); *Maury v. United States*, 139 F. Supp. 532 (N.D. Cal. 1956); *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963); *Reed v. Moore*, 156 Cal. App. 2d 43, 319 P.2d 80 (1957); *Kelly v. Fretz*, 19 Cal. App. 2d 356, 63 P.2d 914 (1937); *McCullough v. Orcutt*, 14 Ill. App. 2d 503, 145 N.E.2d 109 (1957); *Warr v. Kemp*, 208 So. 2d 570 (La. App. 1968); *Duet v. Cheramie*, 176 So. 2d 667 (La. App. 1965); *LaPlace v. Minks*, 174 So. 2d 895 (La. App. 1965); *Johnston v. Fidelity Nat'l Bank*, 152 So. 2d 895 (La. App. 1963); *Vinet v. Checker Cab Co.*, 140 So. 2d 252 (La. App. 1962); *Resavage v. Davies*, 199 Md. 479, 86 A.2d 879 (1959); *Barber v. Pollock*, 104 N.H. 379, 187 Ad2d 788 (1963); *Cote v. Litawa*, 96 N.H. 174, 71 A.2d 792 (1950); *Tobin v. Grossman*, 55 Misc. 2d 304, 284 N.Y.S.2d 997 (Sup. Ct. 1967); *Robbins v. Castellani*, 37 Misc. 2d 1046, 239 N.Y.S.2d 53 (Sup. Ct. 1962); *Lahann v. Cravotta*, 228 N.Y.S.2d 371 (Sup. Ct. 1962); *Kalina v. General Hosp.*, 31 Misc. 2d 18, 220 N.Y.S.2d 733 (Sup. Ct. 1961); *Smith v. Incorporated Village of Plandome*, 28 Misc. 2d 793, 213 N.Y.S.2d 119 (1961); *All v. John Gerber Co.*, 36 Tenn. App. 134, 252 S.W.2d 138 (1952); *McMahon v. Bergeson*, 9 Wis. 2d 256, 101 N.W.2d 63 (1960); *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935).

Two cases decided in 1968 also denied liability. *Jelly v. Laflame*, 108 N.H. 471, 238 A.2d 728 (1968), was decided four months before the decision in *Dillon*. *Tobin v. Grossman*, 30 App. Div. 2d 229, 291 N.Y.S.2d 227 (1968), was decided seven days after *Dillon*. *Jelly* followed the basic reasoning of prior decisions such as *Barber v. Pollock*, *Cote v. Litawa*, *Amaya v. Home Ice, Fuel & Supply Co.*, and *Waube v. Warrington*, *supra*. The court in *Tobin* refused to discuss the reasoning underlying its decision and referred the reader to the majority opinion in *Amaya*.

⁴ "The Institute expresses no opinion as to whether an actor whose conduct is negligent as involving an unreasonable risk of causing bodily harm to a child or spouse is liable for an illness or other bodily harm caused to the parent or spouse who witnesses the peril or harm of the child or spouse and thereby suffers anxiety or shock which is the legal cause of the parent's or spouse's illness or other bodily harm." RESTATEMENT OF TORTS § 313 at 851 (1934).

⁵ "Thus, where the actor negligently runs down and kills a child in the street, and its mother, in the immediate vicinity, witnesses the event and suffers severe emotional distress resulting in a heart attack or other bodily harm to her, she cannot recover for such bodily harm unless she was herself in the path of the vehicle, or was in some other manner threatened with bodily harm to herself otherwise than through the emotional distress at the peril to her child." RESTATEMENT (SECOND) OF TORTS § 313, comment *d* at 114 (1965).

⁶ 441 P.2d at 916, 69 Cal. Rptr. at 76.

The *Dillon* court clearly recognizes the possibility of fraud in many attempts to recover for bodily injury sustained as a result of the apprehension of danger or injury to another, though it found no such problem in the case before it. Relief was granted to the plaintiff-mother regardless of any possible future administrative problems. "Courts must depend upon the efficacy of the judicial processes to ferret out the meritorious from the fraudulent in particular cases."⁷ "Yet we cannot let the difficulties of adjudication frustrate the principle that there be a remedy for every substantial wrong."⁸

But in handling the second ground for refusal to recognize a duty in given cases, indefinable claims (*i.e.*, an inability to place limitations on liability), the majority looked to foreseeability, declaring it, at one point, to be the chief element in determining whether the defendant owed a duty to the plaintiff⁹ and, at another point, actually equating it with duty.¹⁰ Once the subtle transition from foreseeability to duty was made, the necessity of setting out policy guidelines was avoided and the court could then proceed at once to establish the determinants of foreseeability.¹¹ Quoting from Prosser that, "When a child is endangered, it is not beyond the contemplation that its mother will be somewhere in the vicinity and will suffer serious shock,"¹² the majority contended that traditional limitations on liability—*i.e.*, necessity of presence within the zone of danger and fear for one's own safety—were arbitrary. Because it is logical that a mother will be in the proximity of her infant child and may suffer physical harm should she witness the child's injury or death, such events should be reasonably foreseeable by the ordinary man. If this is so, it may be questioned why courts have found it necessary to use somewhat arbitrary standards, resulting from their fear of fraudulent and indefinable claims, in determining liability.

Certainly the *Dillon* court's dismissal of fraudulent and indefinable claims as impediments to relief was persuasive, but the force of its logic is somewhat diminished when contrasted with the reasoning in *Amaya v. Home Ice, Fuel & Supply Co.*,¹³ a case explicitly overruled by *Dillon*. While the majority in *Dillon* stated that, "the interests of meritorious plaintiffs should prevail over alleged administrative diffi-

⁷ *Id.* at 918, 69 Cal. Rptr. at 78.

⁸ *Id.* at 919, 69 Cal. Rptr. at 79.

⁹ *Id.* at 920, 69 Cal. Rptr. at 80.

¹⁰ *Id.*

¹¹ "(1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a 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." *Id.*

¹² W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 55 (3d ed. 1964).

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

culties,"¹⁴ *Amaya* had held that "[J]ustice exists only when it is effectively administered,"¹⁵ and once this was realized, "[W]e may be more comfortable in admitting that it is impossible to provide a remedy for every wrong."¹⁶ If this shows the *Dillon-Amaya* contrast as to fraudulent claims, with indefinable ones the *Dillon* court made foreseeability the limiting factor, as noted above, thereby avoiding the broad policy considerations that it called "fixed categories," or "immutable rules." Under this approach, an inevitable question arises whether these policy considerations will be considered, anyway—at least subjectively—by judges deciding future cases under the foreseeability test. Thus whether foreseeability is equated with duty or is considered as an element of duty, it is perhaps necessary for any modern court to examine such policy considerations as a concomitant to affording recovery.

In *Amaya*, foreseeability is but one of several relevant factors in the determination of duty. "The degree of certainty between the defendant's conduct, and the policy of preventing future harm,"¹⁷ are all important in such determination. The narrow approach taken by the *Dillon* court in failing to discuss any policy considerations other than the two-part administrative problem is evident in its treatment of the classic Wisconsin case denying recovery in this area, *Waube v. Warrington*.¹⁸ Placing what is perhaps undue emphasis on the fraudulent claim aspect of *Waube*, the court in *Dillon* failed to note the other policy considerations discussed by the Wisconsin court, for *Waube* clearly indicated that fear of fraudulent claims was only one of numerous considerations in balancing the social interests involved.

[T]he liability imposed by such a doctrine is wholly out of proportion to the culpability of the negligent tort-feasor, would put unreasonable burdens upon the users of the highway, open the way to fraudulent claims, and enter a field that has no sensible or just stopping point."¹⁹

Indeed, it does not seem likely that *Waube* would have been followed as authority for thirty-three years in Wisconsin and other jurisdictions, including California, solely because of its weight as precedent or on the basis of its stand against fraudulent claims.

The *Dillon* court was also somewhat deceptive in tracing the development of California law in the area of recovery for emotional trauma. It interpreted the California case of *Lindley v. Knowlton*²⁰ as holding that, "a mother could recover for fear for her children's

¹⁴ 441 P.2d at 918, 69 Cal. Rptr. at 78.

¹⁵ 379 P.2d at 520, 29 Cal. Rptr. at 40.

¹⁶ *Id.*

¹⁷ 379 P.2d at 522, 29 Cal. Rptr. at 42.

¹⁸ 216 Wis. 603, 258 N.W. 497 (1935).

¹⁹ *Id.* at 613, 258 N.W. at 501.

²⁰ 179 Cal. 298, 176 P. 440 (1918).

safety if she simultaneously entertained a personal fear for herself."²¹ This is clearly not the holding. As correctly pointed out by the *Dillon* dissent, *Lindley* "[H]eld only that liability may be predicated upon fright and consequent illness induced by the plaintiff's reasonable fear for her own safety, even when the plaintiff may also have feared for the safety of her children."²² The majority in *Dillon* also apparently misinterpreted the case of *Reed v. Moore*,²³ which did not hold that "[T]he mother need only be in the 'zone of danger' to recover for emotional trauma . . .,"²⁴ but, rather, "[A] wife who was outside of the zone of danger but witnessed a collision in which her husband was injured could not recover."²⁵

In fashioning its decision, the majority in *Dillon* avoids the discussion of certain basic policy considerations. One such consideration concerns the culpability of the tortfeasor. While stating that the defendant's liability and fault must be adjudicated, *Dillon* never effectively confronts the conclusion found in *Waube*, and quoted in *Amaya*, that "The liability doctrine is wholly out of proportion to the culpability of the negligent tortfeasor."²⁶

A second area neglected by the decision is its economic impact upon society. The danger exists that courts, confronted with difficult cases, will open wide avenues of recovery before the ability of society to pay is critically evaluated. As society increases in size and complexity, it is arguable that the number of accidents will also increase. While the question whether such increased activity should be burdened with the extended liability *Dillon* imposes can be given the possible answer of expanded insurance coverage, such a solution raises two further questions: what are the limits of policy coverage required to meet this expanded coverage and can society afford to pay the premiums that will be involved?

A third area that the court in *Dillon* fails to discuss is the prophylactic effect of the decision. Exactly how will Mrs. Dillon's recovery decrease the number of such accidents in the future? If the case really has no tangible preventative value, perhaps a more skeptical appraisal of *Dillon's* expanded liability is necessary.

In conclusion, it is very possible that justice now demands that a mother's right to be free from emotional disturbance and bodily injury, resulting from fear for her child's safety, needs protection. But to support her recovery in the light of extremely strong precedent to the contrary requires that any theory granting such recovery be but-

²¹ 441 P.2d at 925, 69 Cal. Rptr. at 85.

²² *Id.* at 927, 69 Cal. Rptr. at 87 (dissenting opinion).

²³ 156 Cal. App. 2d 43, 319 P.2d 80 (1957).

²⁴ 441 P.2d at 925, 69 Cal. Rptr. at 85.

²⁵ *Id.* at 927, 69 Cal. Rptr. at 87 (dissenting opinion).

²⁶ 379 P.2d at 525, 29 Cal. Rptr. at 45.

tressed by an opinion containing thorough and convincing reasoning.²⁷ Manipulation of "traditional words" is no replacement for critical analysis. The *Dillon* majority's avoidance of cogent policy considerations is a principal weakness and the decision may very likely be of little aid to future plaintiffs in similar factual circumstances.

ROBERT C. ROTH

Constitutional Law: Fair Labor Standards Act: Maryland v. Wirtz—In *Maryland v. Wirtz*,¹ the State of Maryland was joined by twenty-seven other states and one school district in bringing an action to enjoin the Secretary of Labor from enforcing the 1961 and 1966 amendments to the Fair Labor Standards Act of 1938.² The Act was passed to impose, *inter alia*, minimum wage and maximum hour working conditions for employees engaged in interstate commerce. The Congress, under the power of the Commerce Clause of the Constitution,³ extended coverage of the Act to all employees "engaged in commerce or in the production of goods for commerce."⁴ At the time the 1938 Act was passed Congress excluded from the definition of interstate commerce employer, "the United States or any State or political subdivision of a State."⁵ In 1966 the Act was amended and coverage was extended to all employees of any "enterprise" engaged in commerce or the production of goods for commerce.⁶ This new feature of the Act became known as the "enterprise concept." In *Wirtz v. First State Abstract & Insurance Co.*,⁷ the Supreme Court classified employees as being subject to the "enterprise concept" if their activities were "directly and vitally related to interstate commerce."⁸ In *Wirtz v. Charleston Coca-Cola Bottling Co.*,⁹ enterprise was defined as:

[T]he related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more

²⁷ The majority in *Dillon* declared that contributory negligence of the injured daughter would have defeated the mother's claim. Was the majority declaring that contributory negligence can be imputed from a child to its mother? If so, this is a revolutionary change in tort law—especially so, since the court little discussed its merits. Alternatively, was the majority stating that the mother's injury was a part of the child's cause of action? The opinion provides little in the way of a correct interpretation.

¹ 392 U.S. 183 (1968).

² Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (1964).

³ U.S. CONST. art. I, § 8.

⁴ Fair Labor Standards Act, U.S.C. § 203(s) (1964).

⁵ *Id.* § 203(d).

⁶ Fair Labor Standards Act, 29 U.S.C. § 206(a) (1964), *as amended*, (Supp. II, 1966).

⁷ 362 F.2d 83 (8th Cir. 1966).

⁸ *Id.* at 87.

⁹ 237 F. Supp. 857 (E.D. S.C. 1965), *rev'd* 356 F.2d 428 (4th Cir. 1966).