Negligent Infliction of Emotional Distress: A Proposal for a Recognized Tort Action

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At the turn of the century, medical science was nascent. Judicial decisions involving alleged negligent infliction of emotional distress reflected this; numerous barriers were constructed for plaintiffs claiming emotional trauma. Because most emotional or mental injuries were, and still are, more subtle than physical injuries, and the prevailing societal norms discouraged lawsuits based on nonphysical injuries, independent claims for emotional distress were denied. If damages were allowed at all, they were considered "parasitic" to another cause of action.¹

Nevertheless, as the twentieth century progressed, courts became more protective of a person's emotional well-being. This concern was a logical reaction to the growing complexities of life. At the turn of the century, people did not race across the sky at breakneck speeds,² nor were their fates controlled by so many unknown variables. Because human existence became increasingly dependent upon machines and other humans, control over one's own life decreased, and inversely, the possibility of human upset increased. Courts recognized that as the responsibility to others increased, so did the legal duty. Many courts now recognize a cause of action for emotional distress. However, the rate of progress in various jurisdictions has been remarkably uneven.³ This awkward advance from considering emotional distress as strictly a parasitic injury, to applying the physical

impact rule, the zone of danger rule, the physical injury rule and beyond, occurred because courts struggled with the underlying policy considerations in extending liability.\(^4\)

This comment will summarize the current explosion of cases and the underlying policy considerations in the bystander and direct victim areas of negligent infliction of emotional distress. The term "bystander" throughout this article refers to those persons who are not immediately threatened with physical danger in contrast to the direct victim who is so threatened. After addressing the most conservative rule, the physical impact rule, the analysis will focus on decisions in jurisdictions which have either adopted the zone of danger rule or have gone beyond it to embrace in one form or another the factors of "proximity," "contemporaneous observance" and "close relationship" to evaluate a bystander’s claim for emotional distress. Although the policy considerations denying liability to bystanders and direct victims who have not suffered a physical injury are giving way to rules based upon the well-settled principles of tort law, Wisconsin continues to cling to these liability-limiting policy considerations. Therefore, this comment will suggest changes in the policy considerations which Wisconsin courts use to deny recovery in bystander and direct victim situations.

I. THE IMPACT RULE

For decades the majority view was that a plaintiff could not recover for negligent infliction of emotional distress absent contemporaneous physical injury or impact.\(^5\) This view required that the plaintiff receive a direct physical injury from the defendant’s negligent act.\(^6\) The impact rule was based upon public policy and judicial practicality.\(^7\) Fear of fictitious claims and an explosion of litigation led courts to

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5. J. Dooley, supra note 3, § 15.05, at 371.


7. J. Dooley, supra note 3, § 15.05, at 372.
require a contemporaneous physical injury. Courts acknowledged that there could be negligent infliction of emotional distress absent a physical injury; however, recovery of damages was not allowed because the courts feared it would be impossible to administer any other rule. In reality, many courts considered psychological injuries to be "too remote and speculative," reflecting a general perception, at least at the turn of the century, that medical science lacked the tools to properly diagnose such damages. However, medical knowledge has advanced in the last half of this century to such an extent that there is less difficulty in establishing the causal relationship between the emotional distress and the injury.

Even though several jurisdictions still cling to the impact rule, for the most part it has been abandoned as courts began to whittle it down to an absurdity in the attempt to find a basis for recovery when just claims were presented. Clearly, the impact rule is destined for legal extinction. However, where the impact rule has been abandoned, the

9. See id.
10. Comment, supra note 1, at 1237.
12. See, for example, Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961) and Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970), where both courts remarked on the advances made in medical science which can be relied upon in establishing the requisite causal connection between the act and the psychological injury. See also Comment, supra note 1, at 1248-51.
14. Impact was found where there was only minor contact, such as the inhalation of smoke, an electric shock, dust in the eye or a circus horse relieving itself onto the plaintiff. J. DOOLEY, supra note 3, § 15.06, at 374.
15. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 1, at 332 (4th ed. 1971). As an example, one case which denied recovery based upon the impact rule is extremely appalling. In Woodman v. Dever, 367 So. 2d 1061 (Fla. Dist. Ct. App. 1979), a child who witnessed an assailant rob and sexually assault his mother in a hotel room did not have a cause of action for his mental injuries since there was no alleged physical "impact" on the child.
zone of danger and physical manifestation rules have developed in its place to guarantee the validity of the plaintiff's claim.

II. Bystander Recovery

A. The Zone of Danger Rule

After many jurisdictions abandoned the impact rule and allowed plaintiffs to recover for fright caused by fear of injury to themselves, many of these same jurisdictions denied recovery where emotional distress was caused by plaintiff's fear for the safety of another. Since Palsgraf v. Long Island Railroad, this physical zone of danger test has been used to determine whether the plaintiff was sufficiently close to the defendant's negligent conduct to impose a duty of care upon the defendant. Under this approach, the concept of a foreseeable zone of danger extended the duty owed only as far as the risk of physical harm. The leading Wisconsin case of Waube v. Warrington expressly adopted the Palsgraf notion of foreseeability as a device to deny bystander claims.


17. See Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). The Molien court indicated that a majority of jurisdictions still adhere to a physical injury rule; however, it rejected such a rule. Id. See infra text accompanying notes 159-64.

18. This zone of danger rule was recognized by the Restatement (Second) of Torts:

(1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor
   (a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and
   (b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.

(2) The rule stated in Subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.

Restatement (Second) of Torts § 313 (1965) (emphasis added).


21. Id.

22. 216 Wis. 603, 258 N.W. 497 (1935).
Since the foreseeability concept was limited solely to the realm of physical injury rather than psychological injury, in determining the scope of duty many valid claims of serious mental injury went uncompensated even though they were induced by a contemporaneous sensory perception of an injury to a third party. Today, even when the plaintiff is within the zone of danger and thereby threatened with physical harm, many courts continue to deny recovery when the emotional distress arises from fear for another's safety. Because of the traditional suspicion of emotional injury, denying recovery in the situation where the plaintiff is within the zone of danger suggests that courts are still more concerned with the foreseeability of the specific nature of the injury rather than the injury itself. The Restatement (Second) of Torts takes a different approach. Section 436 allows recovery when a family member is within the physical zone of danger but his or her emotional distress arises from fear for another. The zone of danger rule is best exemplified by Tobin v.

24. Id. at 11. See, e.g., Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).
26. Section 436 provides in part:

(2) If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to another otherwise than by subjecting him to fright, shock, or other similar and immediate emotional disturbance, the fact that such harm results solely from the internal operation of fright or other emotional disturbance does not protect the actor from liability.

(3) The rule stated in Subsection (2) applies where the bodily harm to the other results from his shock or fright at harm or peril to a member of his immediate family occurring in his presence.

Restatement (Second) of Torts § 436 (1965). See also id. comment (f). The Restatement also contains the following caveat to § 436:

The Institute expresses no opinion as to whether the rule stated in Subsection (2) may apply where bodily harm to the other results from his shock or fright at harm or peril to a third person who is not a member of his immediate family, or where the harm or peril does not occur in his presence.

The approach which denies recovery unless the plaintiff fears for his own safety, at least, rests upon a logical, if not outdated, foundation whereas the Restatement position represents the ultimate in arbitrary line-drawing. The Restatement allows recovery where the person is within the zone of danger; but instead of fearing for his own safety, fears for the safety of another. Yet, if this same person is a few feet away, outside the zone of danger, even though he still fears for the other (the only change in conditions is a few feet), he cannot recover.
A common factual scenario involving bystander recovery claims emerges in Tobin, wherein courts following the Tobin decision and those choosing instead to follow Dillon v. Legg have split in their determination of the outcome. In Tobin a child was struck in the street by a negligent motorist. The mother, who was inside of the house at the time, did not see the accident but heard the screech of the brakes, and noting her child’s absence, went immediately outside and saw her child lying in the street. The New York Court of Appeals noted that unlike the facts of Dillon, where the mother actually witnessed the car strike her child, it could not practically limit its consideration to the facts pleaded before the court. The California Supreme Court in Dillon relied on the proximity to and contemporaneous observance of the accident by the mother, and her close relationship to her daughter to evaluate the foreseeability of the injury and to establish a duty. The Tobin court recognized the role foreseeability played in determining the extent of duty when it stated that it could foresee harm flowing to the mother in this situation. However, it noted that “foreseeability, once recognized, is not so easily limited.”

Essentially, Tobin favored several policy considerations in determining whether the negligent defendant owed the plaintiff-mother any duty of reasonable care. It noted that proof of causation was no longer a major problem since “mental traumatic causation can now be diagnosed almost as well as physical traumatic causation.” Furthermore, the court believed that neither the potential increase in litigation nor an increase in fraudulent claims justified limiting

29. Tobin, 24 N.Y.2d at 612, 249 N.E.2d at 420, 301 N.Y.S.2d at 556. The court was referring to the three guidelines developed in Dillon to aid courts in determining the risk of foreseeable injury which were developed from the facts in Dillon. See infra text accompanying note 66.
30. See Tobin, 24 N.Y.2d at 615, 249 N.E.2d at 442, 301 N.Y.S.2d at 558.
31. See id.
32. Id. at 613, 249 N.E.2d at 421, 301 N.Y.S.2d at 556.
33. See id. at 615, 249 N.E.2d at 422, 301 N.Y.S.2d at 558. “This court has rejected as a ground for denying a cause of action that there will be a proliferation of claims. It suffices that if a cognizable wrong has been committed that there must be a remedy, whatever the burden on the courts.” Id.
liability. *Tobin*, however, confined the duty by considering the potential for unlimited and unduly burdensome liability. The court believed that the potential for unlimited liability existed if duty was based upon a foreseeability test alone since it would compel courts to eventually extend coverage to all relatives and bystanders. The concern over unduly burdensome liability was premised upon a dollars-and-cents argument whereby all motorists would feel the effect in increased insurance premiums.

The *Tobin* court believed that the policy limitations it adopted capped the defendant's liability at the only manageable point. The *Dillon* guidelines did not sufficiently serve the purpose of limiting liability since in the *Tobin* case, the mother was not a witness to the accident, nor could the court justify limiting liability to the mother alone, without including other family members. Finally, the *Tobin* court observed that even Professor Prosser — a scholar who favored extension of liability — admitted that the *Dillon* standards were arbitrary.

Since the *Tobin* decision, New York has expressly reaffirmed its holding in cases such as *Howard v. Lecher*. However, the New York court did allow bystander recovery

34. See id. "Similarly, [this court] has rejected the argument that recognizing a right of recovery may increase the number of fraudulent claims . . . ." Id.

35. See id. at 616, 249 N.E.2d at 423, 301 N.Y.S.2d at 559.

36. See id.

37. See id. at 617, 249 N.E.2d at 423, 301 N.Y.S.2d at 559.

38. See infra text accompanying note 66.


40. Admittedly such restrictions are quite arbitrary, *have no reason in themselves*, and would be imposed only in order to draw a line somewhere short of undue liability; but they may be necessary in order not to "leave the liability of a negligent defendant open to undue extension by the verdict of sympathetic juries, who under our system must define and apply any general rule to the fact of the case before them."


41. 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977). In *Howard* the court denied parents recovery for emotional distress caused by their physician's negligence in failing to diagnose that the parents were carriers of Tay-Sachs disease which caused the birth defects in their child.
for a worker’s compensation claim\textsuperscript{42} and for emotional distress, absent any subsequent physical manifestation, where the plaintiff was a direct victim of the defendant’s negligence and there was proof that the psychic injury was genuine.\textsuperscript{43} The battle lines have now been drawn in New York between a plaintiff’s attempt to be classified as a direct victim of the defendant’s negligence, which would permit a cause of action without proof of physical injury, and defendant’s attempt to portray the plaintiff as a bystander.\textsuperscript{44} Outside of New York, states that have adopted the Tobin rationale to deny recovery for bystanders are Arizona, Illinois, Louisiana, Minnesota, North Dakota and Tennessee.\textsuperscript{45} In Connecticut\textsuperscript{46} and Washington,\textsuperscript{47} the courts’ stance on the issue is unclear.


\textsuperscript{43} See Johnson v. State, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975), where defendant hospital erroneously informed the daughter of a patient that the patient had died. The court held that the hospital violated a duty owed to the daughter and was liable for the resulting psychological harm. See also Johnson v. Jamaica Hosp., 95 A.D.2d 598, 467 N.Y.S.2d 634 (N.Y. App. Div. 1983), where the plaintiff’s child was kidnapped from the plaintiff’s hospital. However, for an apparently inconsistent ruling, see Vaccaro v. Squibb Corp., 52 N.Y.2d 809, 418 N.E.2d 386, 436 N.Y.S.2d 871 (1980).


\textsuperscript{46} In Connecticut, the lower courts were divided. Compare D’Amicol v. Alvarez Shipping Co., 31 Conn. Supp. 164, 326 A.2d 129 (Conn. Super. Ct. 1973) where recovery was allowed under Dillon, with McGovern v. Piccolo, 33 Conn. Supp. 225, 372 A.2d 989 (Conn. Super. Ct. 1976) which denied bystander recovery. Then, in the Connecticut Supreme Court decision of Amadio v. Cunningham, 182 Conn. 80, 438 A.2d 6 (1980), the court, without clearly deciding which route to follow, denied recov-
In 1935, the Wisconsin Supreme Court in *Waube v. Warrington*[^48] embraced the *Palsgraf* foreseeability theory and justified its denial of the bystander claim by stating that imposing liability on the defendant would be out of proportion to his culpability; it would place an unreasonable burden on users of the highway; and it would open the courts to a flood of fraudulent claims with no rational stopping point.[^49] The denial of recovery to a bystander was affirmed in *Klassa v. Milwaukee Gas Light Co.*[^50] In *Klassa* the defendant's employees negligently caused a minor explosion in the plaintiff's basement. The plaintiff's children were in the basement but the jury located the plaintiff in the backyard, outside of the zone of danger. The supreme court refused to overrule the zone of danger rule established in *Waube*. However, the court corrected the *Waube* decision's reliance on *Palsgraf* to support the denial of liability.

Since 1931, in *Osborne v. Montgomery*,[^51] Wisconsin has recognized that in order for an act to be negligent, it must involve a foreseeable risk of harm.[^52] Except in the *Waube* case, Wisconsin has not limited the concept of duty to specific plaintiffs.[^53] Yet *Waube* involved a situation similar to *Tobin* where the risk of psychological harm to the mother was clearly foreseeable.[^54] Judge Andrews, in his *Palsgraf*

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[^48]: 216 Wis. 603, 258 N.W. 497 (1935). In *Waube*, the plaintiff, through her front window, witnessed her young child being struck and killed by a negligent driver. The plaintiff later died as a result of the emotional trauma.

[^49]:  See *id.* at 613, 258 N.W. at 501.

[^50]: 273 Wis. 176, 77 N.W.2d 397 (1956).

[^51]: 203 Wis. 223, 234 N.W. 372 (1931).


[^53]:  *Id.* at 457 n.33.

[^54]:  See *Tobin v. Grossman*, 24 N.Y.2d 609, 615, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558 (1969), wherein the court admitted that psychological harm to the plaintiff-bystander was foreseeable.
dissent, would limit liability by factoring foreseeability into the determination of causation. Wisconsin, however, has eliminated foreseeability from the determination of proximate cause. Therefore, if duty and breach are found and there is no break in the chain of causation, the Wisconsin defendant is liable for all the consequences of his or her act. Because of this approach, Wisconsin courts rely solely on public policy to limit the defendant’s scope of liability. Recognizing the inconsistency between the Waube adoption of Palsgraf as the liability-limiting device and the usual Wisconsin approach, the court in Klassa reaffirmed Waube by stating that, in fact, the Waube decision was grounded upon the public policy criteria mentioned above.

B. Dillon Foreseeability Test

The most compelling case for the abolition of the “zone of danger” rule involves parents who suffer severe emotional distress as a result of witnessing a traumatic injury inflicted upon their child. The first Restatement of Torts contained a caveat addressing the issue of whether parents or a spouse outside the zone of danger may recover for harm suffered as a result of witnessing an injury to a child or the other spouse. Professor Prosser noted that “it has properly been said that when a child is endangered, it is not beyond contemplation that its mother will be somewhere in the vicinity, and will suffer serious shock.” Although the legal theorists supported recovery, the Restatement (Second) of Torts contained no such caveat because at the time of adoption there was an absence of case law supporting bystander recovery for parents.

56. Comment, supra note 52, at 459.
57. Id. See Hartridge v. State Farm Mut. Auto. Ins. Co., 86 Wis. 2d 1, 12, 271 N.W.2d 598, 603 (1978) (listing the six public policy grounds which may be used to deny liability once negligence is established).
58. Klassa, 273 Wis. at 182-83, 77 N.W.2d at 401.
59. See RESTATEMENT OF TORTS § 313, at 851 (1934).
1. The *Dillon* Decision

Since the second *Restatement*, much has happened in the area of bystander recovery. The leading case allowing the claim of a bystander is the 1968 California Supreme Court decision *Dillon v. Legg*. In *Dillon* it was alleged that the mother, who was not in the zone of physical danger, and one of her daughters, who was arguably within the zone of danger, witnessed an accident in which another daughter was struck and killed by a negligent driver. Finding a cause of action, the court emphasized the primary importance of the foreseeability of risk in establishing a duty owed to the plaintiff in the absence of overriding policy considerations. The *Dillon* court recognized the role of public policy in the formulation of an obligation of duty when it acknowledged that duty is but “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.” However, the court believed that neither fear of fraudulent claims nor unlimited liability justified denial of liability.

Like the court in *Tobin*, the *Dillon* court remarked that fear of fraudulent claims should not deny an entire class of claims. Regarding the fear of unlimited liability, the *Dillon* court stated that this did not justify denial of liability either; but the court adopted several now famous guidelines to aid lower courts in determining the degree of foreseeability:

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 the plaintiff from the sensory and contempo-

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64. *Dillon*, 68 Cal. 2d at 734, 441 P.2d at 916, 69 Cal. Rptr. at 76 (quoting W. Prosser, supra note 15, at 332-33).

65. *Dillon*, 68 Cal. 2d at 736-37, 441 P.2d at 917-18, 69 Cal. Rptr. at 77-78. The court also noted that to deny liability upon fear of fraudulent claims would assume that juries would be unable to distinguish between fictitious and bona fide claims. *Id.*
raneous 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.66

Once the Dillon court overcame objections to liability based upon the policy considerations, it was able to find a cause of action. Duty was based upon the foreseeability of the risk incurred. With the aid of the Dillon guidelines, lower courts were left to determine whether a duty existed on a case-by-case basis.67

Since the Dillon decision, the courts in California have retreated from its liberal interpretation of liability. With three guidelines to aid its analysis, the Dillon decision emphasized foreseeability in determining the scope of duty.68 However, possibly rising to the challenge issued in Tobin of not being able to control the extent of liability under the Dillon guidelines, decisions since Dillon have construed the guidelines as strict requirements needed to establish a cause of action.

Initially, the California courts did not limit themselves to a rigorous interpretation of the Dillon guidelines.69 However, in order to limit recovery, these courts eventually fell prey to a game of semantics and inference in interpreting Dillon, especially the “sensory and contemporaneous” factor.70 In borderline recovery cases, California courts now

66. Id. at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.
67. See id. at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81. In a parting blow to the zone of danger rule, the Dillon court observed that the facts before it demonstrated the artificiality of that rule since the surviving daughter, who was arguably within the zone of danger, would have a cause of action, while the mother, who was located only several yards away, would not. The court also found the rule illogical since California had previously rejected the “impact” rule and the zone of danger was a mere extension of that rule since it required fear of impact. Id. at 753, 441 P.2d at 915, 69 Cal. Rptr. at 75.
68. See Nolan & Ursin, supra note 63, at 589.
69. Id. at 589-90.
70. The most litigated Dillon guideline is the “sensory and contemporaneous observance of the accident.” Two decisions which indicate the flexibility originally intended by this particular Dillon guideline are Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977), and Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969). In Krouse, the plaintiff was seated in the driver’s seat of a parked car. His wife was removing groceries from the back seat when the defendant driver smashed into the car, killing plaintiff’s wife. In response to the plaintiff’s claim
have to jump through formalistic reasoning hoops in order to allow recovery. Not only have California courts strictly construed the "sensory and contemporaneous" guideline, they now also require that the occurrence causing the emotional distress be a sudden event. In light of the California case law for emotional injury under Dillon, the court noted that "direct emotional impact... from sensory and contemporaneous observance" did not require visual perception of the impact causing the injury. Krouse, 19 Cal. 3d at 76-78, 562 P.2d at 1031, 137 Cal. Rptr. at 872-73. The court concluded that the plaintiff must have perceived that his wife was struck because "he knew her position an instant before the impact, observed defendant's vehicle approach... and realized that defendant's car must have struck her." Id. at 76, 562 P.2d at 1031, 137 Cal. Rptr. at 872. In Archibald the court extended recovery to a mother who did not actually witness the accident but saw the child moments after the accident. Archibald's holding was later explained by an appellate court which inferred that Mrs. Archibald must have heard the explosion from the accident and therefore she experienced a contemporaneous sensory perception. Jansen v. Children's Hosp. Medical Center, 31 Cal. App. 3d 22, 224-25, 106 Cal. Rptr. 883, 885 (1973). Because of this limitation placed upon the Archibald holding, later cases have been able to deny recovery where a mother arrived on the scene of the accident minutes after its occurrence. See, e.g., Arauz v. Gerhardt, 68 Cal. App. 3d 937, 137 Cal. Rptr. 619 (1977). Recovery was also denied where parent-plaintiffs were following the defendant's car in which their daughters were riding up a winding road when the parents pulled around a bend in the road only to see the defendant's car wrapped around a telephone pole. See Parsons v. Superior Court, 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978).

A cause of action was allowed where a mother heard someone yell, "[i]t's Danny," whereupon she ran to the neighbor's yard only to see her son being pulled from the pool. Nazaroff v. Superior Court, 80 Cal. App. 3d 553, 559, 145 Cal. Rptr. 657, 659 (1978). In order to find a contemporaneous observation, the court, however, had to state that the plaintiff envisioned the scene of the accident when she heard the scream. Id. at 566, 145 Cal. Rptr. at 664. This hoopjumping was required because of the Justus decision, which will be discussed infra text accompanying notes 74-80. The Nazaroff decision is inconsistent with Arauz v. Gerhardt, 68 Cal. App. 3d 937, 137 Cal. Rptr. 619 (1977), which denied recovery where the parents arrived upon the scene minutes after the accident. If, instead of being alerted by the scream of the person finding the body, the mother in Nazaroff discovered the body herself at that same moment of the scream, the impact could not be considered contemporaneous under Arauz. Again, assuming this hypothetical, Nazaroff is also inconsistent with the later decisions of Parsons v. Superior Court, 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978), and Cortez v. Macias, 110 Cal. App. 3d 640, 167 Cal. Rptr. 905 (1980), where the court denied a mother's cause of action where she left her child, who was being treated in the hospital due to her physician's negligence, to pay the bill, only to return minutes later and find the child dead. Further, in a case similar to Nazaroff, recovery was denied where a playmate of the victim ran into the house to tell the parent-plaintiffs that their son had been electrocuted. Hathaway v. Superior Court, 112 Cal. App. 3d 728, 169 Cal. Rptr. 435 (1980).

71. See Jansen v. Children's Hosp. Medical Center, 31 Cal. App. 3d 22, 224-25, 106 Cal. Rptr. 883 (1973), where a mother watched her child slowly die in the hospital due to an alleged negligent diagnosis by her physician. See also Ochoa v. Superior Court, 143 Cal. App. 3d 611, 191 Cal. Rptr. 907 (1983) for a similar holding. The outcome of
experience with the *Dillon* guidelines, a summation and interpretation of the guidelines is appropriate. Besides being located at or near the scene of the accident or sudden occurrence, the plaintiff must experience a sensory perception of the event, although not necessarily visual, that has an emotional impact greater than that which would otherwise be experienced by any parent or close relation who has not observed the accident or sudden occurrence, but who instead learned of the event later.

The California Supreme Court in *Justus v. Acthison* strictly interpreted the *Dillon* guidelines and led to the stampede of cases denying recovery. In *Justus* a father was in the delivery room during the alleged negligent delivery of his child. The father's complaint stated that he witnessed the manipulation of the fetus by the doctors, the emergency procedures performed on his wife in connection with the attempted cesarean section, and the pain and trauma suffered by his wife. Finally, he alleged that he was present when the attending physician announced the death of the fetus. The court denied the father's cause of action for emotional distress. The court noted that it had no doubt that the scene induced a "growing sense of anxiety on the plaintiff's part." However, that anxiety did not ripen into a "disabling shock which resulted from the death of the fetus until he was actually informed of that event by the doctor; prior to that moment, as a passive spectator he had no way of knowing that the fetus had died." In other words, "he had been

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the *Jansen* case is difficult to rationalize with *Mobaldi v. Board of Regents of Univ. of Calif.*, 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976). The *Mobaldi* court allowed recovery when a child screamed and convulsed in the arms of her mother and eventually was rendered brain-damaged after being given the wrong intravenous solution. In both *Mobaldi* and *Jansen* the mothers were unaware of the negligence at the time. In both cases, the mothers observed the unexpected deterioration of their children. The only difference is that in *Mobaldi* it took place over a much shorter period of time. In noting this discrepancy, the court in *Arauz v. Gerhardt*, 68 Cal. App. 3d 937, 946-47, 137 Cal. Rptr. 619, 625 (1977), explained that the *Jansen* time restriction was related to the purpose for the *Dillon* guidelines, which was to avoid unlimited liability.


75. *Id.* at 585, 565 P.2d at 136, 139 Cal. Rptr. at 111.

76. *Id.*
admitted to the theater, but the drama was being played on a different stage."77 The plaintiff failed to establish a direct emotional impact caused by a sensory and contemporaneous observation of the injury to the fetus in the mother's uterus. Yet the Dillon standard asks whether the emotional distress resulted from the "contemporaneous observance of the accident."78

The California courts have taken the guidelines proposed by Dillon to aid in the determination of the degree of foreseeability and have transformed them into an inflexible duty-limiting device. One commentator has even suggested that Justus reformulated Dillon and that, regardless of foreseeability, the plaintiff has no cause of action unless certain requirements are met.79 The Justus court also may have added another requirement to the Dillon criteria. The Justus court noted that the Dillon cause of action presupposes an involuntary spectator. However, the plaintiff in Justus was voluntarily present in the delivery room and the court remarked that he should have been prepared for the possibility of unpleasantness and complications.80 This emotional unpreparedness standard has been advocated as a replacement for the Dillon formulation.81

While they have succeeded in limiting liability under the Dillon guidelines, the California courts may have over-reacted to early criticism of the Dillon formulation and now have adopted an inflexible approach to bystander recovery. However, the Dillon guidelines still represent the best approach since they balance the plaintiff's right to recovery against public policy concerns. Since the Dillon decision,

77. Id. at 584, 565 P.2d at 135, 139 Cal. Rptr. at 110.
78. 68 Cal. 2d 728, 740, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968). See also Nolan & Ursin, supra note 63, at 595.
79. Nolan & Ursin, supra note 63, at 595. Besides a strict construction of the Dillon factors, this commentator noted the additional requirement that the plaintiff immediately understand the seriousness of the injury suffered by the third party. Id.
80. 19 Cal. 3d at 585, 565 P.2d at 136, 139 Cal. Rptr. at 111. Accord Cortez v. Macias, 110 Cal. App. 3d 640, 649-50, 167 Cal. Rptr. 905, 910 (1980). See also Nolan & Ursin, supra note 63, at 597. In Cortez, the court followed Justus and denied the existence of a cause of action where the mother, whose child was in the hospital due to the negligence of her physician, left the child's room to pay the bill. When she returned the child was dead.
many jurisdictions have recognized the inherent fairness of its approach.

2. Jurisdictions Following Dillon

Since the *Dillon* decision, a large percentage of the jurisdictions that have considered the bystander issue have adopted or modified the *Dillon* approach. In *D'Ambra v. United States* 82 a mother witnessed a United States postal truck strike and kill her child. Initially, suit was brought in the federal district court where, after adopting the *Dillon* criteria, the court added a fourth element requiring that the plaintiff's presence also be foreseeable along with the foreseeability of her mental injury. 83 In 1975, the Rhode Island Supreme Court affirmed this decision and addressed the policy issues which have been used to deny the existence of a duty. 84 The court concluded that the crucial issue of unlimited liability was adequately addressed by the *Dillon* criteria. 85 The court added that additional factors, depending on the circumstances of the case, may also limit liability. 86

In 1979, the Pennsylvania Supreme Court in *Sinn v. Burd* 87 also abandoned the zone of danger rule in favor of the *Dillon* foreseeability test. The court reasoned that the emotional impact on a parent who witnesses the death of a child was "as great and as legitimate" as the apprehension of

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83. See *D'Ambra v. United States*, 354 F. Supp. 810, 819 (D.R.I. 1973). Because the question was one of first impression in Rhode Island, the district court held that a cause of action existed under the *Dillon* criteria. The court offered the following guidelines to help in the determination of the additional presence requirement:

(1) The age of the child; (2) the type of neighborhood in which the accident occurred; (3) the familiarity of the tortfeasor with the neighborhood; (4) the time of day; and (5) all other circumstances which would have put the tortfeasor on notice of the likely presence of a parent.

*Id.* at 820.

84. The court grouped the policy issues into three categories: moral, economic and administrative. The court stated that imposition of liability under the facts of this case would not be so fantastic or freakish as to constitute a moral outrage. As to economic and administrative concerns, these items, in themselves, should not bar recovery. *D'Ambra*, 114 R.I. at __, 338 A.2d at 528-30.
85. See *id.* at __, 338 A.2d at 531.
86. *Id.*
87. 486 Pa. 146, 404 A.2d 672 (1979) (plurality opinion). Again, the factual scenario was that of a mother witnessing her child being struck by a negligent motorist.
EMOTIONAL DISTRESS

fear of impact under the zone of danger rule. The court went on to discuss and refute several policy arguments against bystander recovery. Concerning the central issue of unlimited and unduly burdensome liability, the Sinn court noted that duty is an elastic notion based upon the sum of policy considerations which, in turn, depend on the values of the community, and that imposing liability is not unreasonable if society favors such a position. Sinn also refuted the Tobin position that expansion of liability would be tantamount to creating a new duty. Rather, it would broaden the scope of recognized damages flowing from the negligent conduct. To alleviate fears that plaintiffs could recover for inconsequential shock or that defendants would be responsible for distress suffered by the most sensitive members of the community, Sinn required that proof of serious mental distress be proven by the reasonable person standard. Furthermore, in order to circumscribe the area of liability, the court would apply the three factors of Dillon to determine whether the injury was foreseeable.

88. Id. at __, 404 A.2d at 677.
89. The court rejected the argument that medical science is unable to establish a causal link between psychological damage and the negligent act. Id. at __, 404 A.2d at 678. The court also dismissed the argument that to allow recovery would open the door to fraudulent claims and result in a flood of litigation. Id. at __, 404 A.2d at 679-80.
90. See id. at __, 404 A.2d at 681-82 (citing Prosser, Palsgraf Revisited, 52 Mich. L. Rev. 1, 14-15 (1953)). Under this modern notion of duty, if society deems it appropriate that someone be responsible for the harm, then a duty is created to refrain from inflicting that harm.
91. See Sinn, 486 Pa. at __, 404 A.2d at 683.
92. See id. at __, 404 A.2d at 683. See also Leong v. Takasaki, 55 Hawaii 398, 408, 520 P.2d 758, 764 (1974).
93. See Sinn, 486 Pa. at __, 404 A.2d at 685. Subsequent to the Sinn decision, the Pennsylvania Supreme Court did not allow a cause of action for emotional distress where the plaintiff was not present at the scene of the accident. See Yandrich v. Radic, 495 Pa. 243, 433 A.2d 459 (1981). The Yandrich court denied recovery where a father saw his son for the first time in the hospital after the accident. The plaintiff argued that the Dillon line of liability was arbitrary and that the harm was no less foreseeable than if the plaintiff had been present at the accident. The court concurred, but declined to extend liability into the "realm of uncertainty." Id. at __, 433 A.2d at 461. Three dissenting justices would have allowed the cause of action. See id. at __, 433 A.2d at 461 (Flaherty, J., dissenting).
94. 84 N.J. 88, 417 A.2d 521 (1980). The facts of Portee were quite gruesome. The plaintiff's young son had become trapped between the elevator door and the wall.
Similarly, in the 1980 decision of *Portee v. Jaffee*, the New Jersey Supreme Court abandoned the zone of danger rule in favor of a modified, stricter form of the *Dillon* criteria. The court required that an intimate family relationship exist and that plaintiff's claim be allowed only where the victim died or suffered serious injury. Next, the plaintiff must observe the death or injury at the site of the accident. Finally, the court would require that the plaintiff suffer severe emotional distress. All criteria were designed to limit liability and guarantee the authenticity of a plaintiff's emotional distress claim.

While *D'Ambra*, *Sinn* and *Portee* are the most frequently cited decisions after *Dillon* in the area of bystander recovery, Michigan and Texas were the first jurisdictions to follow *Dillon*. Other jurisdictions have also recently adopted the *Dillon* approach. In *Corso v. Merrill*, for example, the New Hampshire Supreme Court adopted the *Dillon* foreseeability requirements and allowed the mother to recover after she heard a thud, looked outside and saw her daughter lying in the street. In *Culbert v. Sampson's Supermarkets, Inc.* the

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of the elevator shaft. The child screamed and flailed his arms for several hours as firefighters frantically worked to set the child free. The child, however, eventually died. His mother witnessed the entire scene.

95. See id. at _, 417 A.2d at 526-27. The *Portee* court noted that, in its opinion, the intimate family relationship was the most important of the *Dillon* factors since it usually assured that a deep emotional injury was inflicted.

96. *Id.* at _, 417 A.2d at 527. The court noted that discovery of a serious injury to an immediate family member would always threaten a person's emotional well-being; however, it was believed that only a witness at the scene of the accident would suffer a traumatic sense of loss that would inflict that higher degree of serious emotional distress. *Id.* at _, 417 A.2d at 527. Since *Portee*, one case, Mercado v. Transport of N. J., 176 N.J. Super. 234, 422 A.2d 800 (1980), has allowed recovery where a parent came upon the scene shortly after the accident. Another case, Bischoff v. Kohlrenken, 185 N.J. Super. 548, 449 A.2d 1347 (1982), however, disallowed recovery where the parent saw his child for the first time after the accident in the hospital.


100. 444 A.2d 433 (Me. 1982). The court noted that the "zone of danger test... represents a narrow and rigid limit on liability which seems to us far more arbitrary and unjust than the... foreseeability rule adopted by... *Dillon*." *Id.* at 436.
Maine Supreme Court adopted the _Dillon_ foreseeability approach and noted that unlike their application by its California counterpart, the three factors should not be applied rigidly.\(^\text{101}\) In 1981, when the Iowa Supreme Court adopted _Dillon_ in _Barnhill v. Davis_,\(^\text{102}\) it determined that the _Dillon_ guideline of "closely related" required that the plaintiff and the victim be related within the second degree of consanguinity.\(^\text{103}\) In addition, the court placed further limits on the _Dillon_ cause of action by adopting similar standards to those adopted in _Portee_. The court required that a reasonable person in the plaintiff's position would believe, and the plaintiff actually did believe, that the victim would be seriously injured and as a result of that belief, the plaintiff suffered severe emotional distress.\(^\text{104}\) In Illinois, a recent court of appeals decision repudiated the impact rule and adopted the _Dillon_ approach, however, this decision was reversed by the Illinois Supreme Court in favor of the zone of danger rule.\(^\text{105}\)

Mississippi, Montana, New Mexico and Ohio are the most recent state courts to adopt the _Dillon_ approach to duty in bystander cases;\(^\text{106}\) the Missouri,\(^\text{107}\) as well as Nevada,\(^\text{108}\)

\(^{101}\) See id. at 437.

\(^{102}\) 300 N.W.2d 104 (Iowa 1981). Plaintiff was followed by his mother in her car. When plaintiff pulled through an intersection and pulled over to wait for his mother, he saw her get hit in the intersection. The mother received a slight bruise, but because of the incident, the plaintiff alleged serious emotional distress manifested by subsequent physical injuries.

\(^{103}\) See id. at 108.

\(^{104}\) See id.


\(^{106}\) See, e.g., _Entex, Inc. v. McGuire_, 414 So. 2d 439, 444 (Miss. 1982); _Versland v. Caron Transport_, 671 P.2d 583, 586-87 (Mont. 1983) (also requiring death or serious injury to the victim); _Ramirez v. Armstrong_, ___ N.M. __, 673 P.2d 822 (1983) (adopting a modified, stricter _Dillon_ approach requiring intimate family relationship, a direct emotional impact from contemporaneous sensory perception and, similar to _Portee_, an injury to or death of the victim; a physical manifestation is also required). See also _Paugh v. Hanks_, 6 Ohio St. 3d 72, __, 451 N.E.2d 759, 766-67 (1983), where the court noted that with the second _Dillon_ factor, a contemporaneous observance, it would not be necessary to see the accident since hearing it would suffice. This view is consistent with the present California approach. See _supra_ notes 70-71 and accompanying text. As for the third _Dillon_ factor, whether the plaintiff and victim are closely related, the court stated that a strict blood relationship is not required. Id. at __, 451 N.E.2d at 766-67. See also _Versland_, 671 P.2d at 587.

\(^{107}\) In _Bass v. Nooney Co._, 646 S.W.2d 265 (Mo. 1983), the court abrogated the impact rule in favor of allowing recovery, even absent physical manifestation of the
courts appear to be on the verge of adopting the *Dillon* guidelines.

3. Beyond *Dillon*

Several jurisdictions have gone beyond the *Dillon* foreseeability guidelines in bystanders cases. In *Leong v. Takasaki* the Hawaii Supreme Court held that the plaintiff, who was walking across the road with his foster grandmother, could recover for emotional distress after he witnessed a negligent motorist strike and kill his grandmother. The Hawaii court had previously held that there was a duty to refrain from negligent infliction of emotional distress. The *Leong* decision further refined this cause of action. It rejected the *Dillon* guidelines for establishing foreseeability of the injury because it considered those guidelines arbitrary. Instead, the court held that trial courts must find as a matter of law that conduct which creates a reasonably foreseeable risk of psychological injury is the proximate cause of any damages arising from the consequences of the defendant’s negligent act. The *Leong* court also stated

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emotional injury. This was a direct victim negligence case where the plaintiff became entrapped in an elevator. The court emphasized that liability is to be based upon foreseeability of the injury. Certainly, the Missouri court will soon be asked to rule on the bystander issue and given the language of the *Bass* decision, the court should, at least, adopt the *Dillon* approach.


110. *See* Rodriguez v. State, 52 Hawaii 156, 472 P.2d 509 (1970). The *Rodrigues* court held that negligent infliction of emotional distress, caused by property damage to the plaintiff’s home, was actionable. The boundaries of defendant’s duty were to be confined to the foreseeable mental distress created by defendant’s unreasonable conduct. Mental distress could be found where a reasonable person could not adequately cope under the circumstances. *Id.* at _, 472 P.2d at 520. Washington is another jurisdiction which has adopted the broad language of *Rodrigues*. See Hunslcy v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976), where plaintiff was allowed a cause of action against a neighbor who crashed into the back of plaintiff’s house. Plaintiff suffered emotional distress because of fear for her husband, who was in an adjoining room.

111. *See* Leong, 55 Hawaii at 410, 520 P.2d at 765.

112. *Id.* at 407, 520 P.2d at 764-65. *Leong* also reiterated that Hawaii does not require a physical manifestation of the emotional injury. *Id.* The court did note that there are two recognized classes of psychological injury. The first is the “primary response” which is manifested by fear, grief, anger and shock. Usually this injury is
that a blood relationship between the plaintiff and the victim is not required.\textsuperscript{113}

Because of the fear that \textit{Leong} did not realistically limit liability, the Hawaii Supreme Court, in \textit{Kelley v. Kokua Sales & Supply, Ltd.},\textsuperscript{114} imposed an arbitrary distance restriction. In \textit{Kelley} the plaintiff, who lived in California, was informed over the telephone of the death of his daughter and grandchildren as a result of a car accident in Hawaii. He then suffered a heart attack. The court concluded that the \textit{Leong} decision, as applied to the facts in \textit{Kelley}, did not adequately limit liability and, therefore, the plaintiff, as a matter of law, was not owed a duty of care by the defendant.\textsuperscript{115} In the 1981 decision \textit{Campbell v. Animal Quarantine Station},\textsuperscript{116} the Hawaii court retreated from the position adopted in \textit{Kelley}. In \textit{Campbell} the court allowed recovery where the family heard over the telephone that their family dog had died due to the negligent care of the defendant. Distinguishing \textit{Campbell} from \textit{Kelley}, the court stated that \textit{Kelley} stood for the proposition that a bystander can only recover if he or she is located within a reasonable distance from the accident.\textsuperscript{117} In \textit{Campbell} the family lived in Honolulu which was considered within a reasonable distance from the tortious event, while in \textit{Kelley}, the plaintiff lived in California. Even though the plaintiffs in both cases learned of the tortious event over the telephone, the Hawaii court appears to have drawn an extremely arbitrary line, deciding that only those who are located in Hawaii at the time of the accident have a cause of action.

\textsuperscript{113} Leong, 55 Hawaii at 410, 520 P.2d at 766-77. See also Comment, supra note 1, at 1248-63.

\textsuperscript{114} 56 Hawaii 204, 532 P.2d 673 (1975). The dissent, however, contended that Hawaii has adopted Justice Andrews' minority position in \textit{Palsgraf} and therefore the defendant was liable for the harm proximately caused. The only limitation is that plaintiff must prove serious mental distress. \textit{Id.} at 211, 532 P.2d at 678 (Richardson, J., dissenting).

\textsuperscript{115} \textit{See id.} at 209, 532 P.2d at 676.

\textsuperscript{116} 63 Hawaii 557, 632 P.2d 1066 (1981).

\textsuperscript{117} \textit{Id.} at 211, 632 P.2d at 1069.
In Dziokonski v. Babineau Massachusetts extended the Dillon requirements in order to hold that a bystander has a cause of action. The court recognized that the majority of jurisdictions follow the zone of danger rule, but, as other courts addressing this issue have done, Dziokonski rejected the underlying policy arguments supporting the denial of liability. Stating that the zone of danger rule was an inadequate measure of foreseeability and that the rule lacked strong logical support, the court adopted a modified version of Dillon. The court stated that reasonable foreseeability is the touchstone of liability and held that when the victim is injured it is reasonably foreseeable that those persons with emotional attachments to the victim will be affected. Acknowledging the size of this class of persons, the court nevertheless believed that the artificial zone of danger rule was unjust. It emphasized that the focus must be on the underlying principles of damage and causation. Therefore, in order to recover, the plaintiff must demonstrate a subsequent substantial physical injury and prove that the defendant's negligence caused the injury. Observing that the Dillon factors may aid in the analysis, the court noted that "it does not matter in practice whether these factors are regarded as policy considerations imposing limits on the scope of reasonable foreseeability . . . or as factors bearing on the determination of reasonable foreseeability itself."

Loosely applying the Dillon factors, the Massachusetts court concluded that a cause of action existed for a parent who sustained substantial physical injuries based upon emotional distress as a result of either witnessing harm to his or

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118. 375 Mass. 555, 380 N.E.2d 1295 (1978). In Dziokonski, a child was struck by a negligent driver. The mother rushed to the scene minutes after the accident's occurrence and saw her daughter lying on the pavement. While accompanying her daughter to the hospital in the ambulance, the mother suffered a fatal heart attack. The father, after learning of these events, also suffered a fatal heart attack. The court allowed the cause of action brought by both their estates for negligent infliction of emotional distress.

119. See id. at __, 380 N.E.2d at 1299.

120. See id. at __, 380 N.E.2d at 1300.

121. Id. at __, 380 N.E.2d at 1302.

122. See id.

123. Id.

124. Id.
her minor child or arriving on the accident scene shortly thereafter. Under Dziokonski, the most important factor is the relationship between the plaintiff and the victim, whereas a "contemporaneous observance" is not as important in determining whether a claim exists.

C. Recommendation for Change

In our increasingly complex society, the orderly and normal function of a man's mind is as critical to his well-being as physical health. Indeed a sound mind within a disabled body can accomplish much, while a disabled mind in the soundest of bodies is rarely capable of making any substantial contribution to society. A normal functioning mind is critical in today's competitive and complex society. Yet, many jurisdictions, including Wisconsin, will not recognize a cause of action for emotional distress when the plaintiff is a bystander. Justification for this stance is often based upon valid policy reasons. However, in at least one situation, the zone of danger rule fails to fulfill the policy objectives. This failure occurs when a severe emotional injury to a spouse or parent is inflicted as a result of the individual's witnessing the negligent killing or maiming of his or her spouse or child. Such injuries are clearly foreseeable within the psychological zone of danger.

125. See id. Because Dziokonski allowed the cause of action where the plaintiffs, especially the father, were not present at the time of the accident, the court in allowing their claims appeared to concentrate on the relationship between the plaintiffs and the victim, rather than their lack of "observance" of the accident. Therefore, the decision in Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (1980), was inevitable. In Ferriter, the Massachusetts Supreme Court held that a man's wife and children had a cause of action when they saw him in the hospital for the first time after the tortious event. The court stated, "[a] plaintiff who rushes onto the accident scene and finds a loved one injured has no greater entitlement to compensation for that shock than a plaintiff who rushes instead to the hospital. So long as the shock follows closely on the heels of the accident, the two types of injury are equally foreseeable." Id. at __, 413 N.E.2d at 697. Because of these broad holdings, Massachusetts, like Hawaii, recently imposed a distance requirement. See Cohen v. McDonnell Douglas Corp., 389 Mass. 327, 450 N.E.2d 581, 587 (1983), where a mother's cause of action was not allowed when she heard of her son's death over the phone. In Massachusetts, although the plaintiff must observe the victim, it does not have to be "contemporaneous" to the tortious event.

126. Comment, supra note 1, at 1237.
127. See supra text accompanying notes 18-58.
128. See Comment, supra note 4, at 1096.
However, the reasons used to justify the impact rule are still used to justify the existence of the zone of danger rule. Although these reasons have been debunked many times, it appears necessary to do so again because Wisconsin, following its decision in *Waube*, continues to cling to them to support the zone of danger rule.

Denying a cause of action because of fears of a flood of litigation and fraudulent claims indicates a basic distrust of the psychological injury. Yet, even courts which deny liability by applying the zone of danger rule admit that this fear alone is insufficient to deny liability and that medical science has progressed to a point where legitimate diagnosis is possible. Courts have fashioned guidelines, such as those used in *Dillon*, to prevent fraudulent claims. Indeed, what could be more natural than for a mother to suffer severe emotional distress after witnessing a debilitating injury to her child? Under the *Dillon* system there may be fraudulent claims, but rejecting an entire class of claims based upon isolated instances is admitting that the inconvenience of administering such a rule is a legitimate basis for denial of recovery. This notion, as previously pointed out, has been rejected many times. Furthermore, the zone of danger rule, at least in Wisconsin, produces a harsh inequity.

129. See supra text accompanying note 7.
130. See W. Prosser, supra note 15, at 327.
131. See, e.g., Tobin v. Grossman, 24 N.Y.2d 609, 615-16, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558-59 (1969). See also Comment, supra note 1, at 1245, 1250, 1251-53. One commentator noted that the distrust of the mental injury "was certainly a product of its time. It was a time when medical science, especially that branch concerned with the study of emotions, was in its infancy." Leibson, Recovery of Damages for Emotional Distress Caused by Physical Injury to Another, 15 J. Fam. L. 163, 163 (1977). Medical science has now grown to the point where diagnosis of mental injury can be established to a reasonable degree of medical certainty; unfortunately courts have felt restricted by the earlier precedent in recognizing this evolution. Note, Mental Distress, 63 Geo. L.J. 1179, 1184-85 (1975).
132. Wisconsin under *Waube v. Warrington*, 203 Wis. 603, 258 N.W. 497 (1935), will not allow a cause of action where a mother a few feet away sees her child run over by a car, but under the holding of *Hawes v. Germantown Mut. Ins. Co.*, 103 Wis. 2d 524, 309 N.W.2d 356 (Ct. App. 1981), will apparently allow a cause of action where the mother is in the direct line of the car but jumps out of its path and is hit in the foot by a flying stone.
flood of litigation, other states which have allowed bystander recovery have not experienced such an occurrence.\textsuperscript{133}

The only policy reasons which may legitimately support a denial of a duty are unlimited and unduly burdensome liability. Essentially, the issue revolves around whether courts are willing or able to fashion relief for the parent or spouse bystander.

Regarding unduly burdensome liability, Tobin described this policy consideration as a "kind of dollars-and-cents" argument.\textsuperscript{134} The court asserted that expanding the duty owed to bystanders would impose increased insurance costs on society. However, Judge Keating, in his Tobin dissent, observed that the majority did not offer any evidence to support its assertion.\textsuperscript{135} Similarly, the courts in both Sinn v. Burd\textsuperscript{136} and D'Ambra v. United States\textsuperscript{137} found the "dollars-and-cents" argument unpersuasive. Indeed, if the court can fashion relief for situations involving parents, spouses or loved ones, the number of such claims in relation to the cost spreading ability of insurance should have a minimal effect on society's pocketbook. Even if the cost of insurance escalates, this should still not deter the bringing of a just claim. Prevailing values demand accountability. In D'Ambra the Rhode Island Supreme Court phrased the issue in a moral tone: assuming the risk is foreseeable and potential liability should not outrun culpability, would society be outraged at

\textsuperscript{133} For example, it appears that the California appellate division has heard less than 70 appeals in this area over the last 15 years. This number certainly does not represent a flood of litigation, given the size of that state's court system. Furthermore, many bystander recovery cases will involve a death or serious injury where the plaintiff would be bringing a wrongful death action, or if the victim survived, a joint action for loss of consortium. Therefore, any additional burden on the judicial system would probably be minimal. A recent case adopting the Dillon standards noted that in those states following the California lead, a flood of litigation has not materialized. See Ramirez v. Armstrong, __ N.M. __, 673 P.2d 822 (1983). See also A Tort in Transition: Negligent Infliction of Mental Distress, 70 A.B.A. J. 62, 64 (1984).


\textsuperscript{135} See id. at 620, 249 N.E.2d at 425, 301 N.Y.S.2d at 563 (Keating, J., dissenting). Judge Keating also noted that ever since the courts began recognizing claims in product liability actions, there has been an increasing recognition that the argument concerning unlimited liability has no merit.

\textsuperscript{136} 486 Pa. 146, __, 404 A.2d 672, 684 (1979).

\textsuperscript{137} 114 R.I. 643, __, 338 A.2d 524, 530 (1975).
the imposition of liability where a mother saw her child run down in the road?\textsuperscript{138}

The \textit{Tobin} court suggested that the problem of unlimited liability is exemplified by extending recovery for harm to unforeseeable consequences.\textsuperscript{139} Courts have admitted that this could be a problem, but have, as in the case of \textit{Dillon}, placed limitations on the extent of the duty owed.\textsuperscript{140} Legitimate actions in the bystander cases do exist and although the law may be unable to fashion relief with scientific precision, this does not justify denial of all relief. The \textit{Dillon} guidelines appear workable and provide the additional benefit of helping to prove that plaintiff has, in fact, suffered damages.\textsuperscript{141}

However, some commentators, including Professor Prosser, who favor extension of liability admit that the \textit{Dillon} guidelines are arbitrary.\textsuperscript{142} But experience has demonstrated that, for the most part, these guidelines have a rational basis. The relationship guideline not only curtails unlimited liability, but also helps to guarantee that the emotional distress is genuine.\textsuperscript{143} The contemporaneous observance guideline fur-

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  \item \textsuperscript{138} See id. at __, 338 A.2d at 529. Even the \textit{Tobin} court admitted that the injury to the mother was foreseeable. \textit{Tobin} v. Grossman, 24 N.Y.2d 609, 615, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558 (1969).
  \item \textsuperscript{139} See \textit{Tobin}, 24 N.Y.2d at 616, 249 N.E.2d at 423, 301 N.Y.S.2d at 559.
  \item \textsuperscript{140} California has certainly proven that it can control bystander recovery. See \textit{supra} notes 70-72 and accompanying text. This unlimited liability argument was also used to fight the imposition of strict liability in product liability actions absent privity. However, because of a thoughtful expansion of liability, industry has not intolerably suffered from the abandonment of the previous privity requirements.
  \item \textsuperscript{141} As stated in \textit{Portee} v. Jaffee, 84 N.J. 88, __, 417 A.2d 521, 527 (1981), it is not difficult to understand that severe emotional distress has been suffered when the bystander, who has a personal relationship with the victim, witnesses the severe injuries inflicted upon that person.
  \item \textsuperscript{142} See W. \textit{Prosser}, \textit{supra} note 15, at 335. \textit{Tobin} expressly pointed out this alleged defect of the \textit{Dillon} guidelines. \textit{Tobin}, 24 N.Y.2d at 618, 249 N.E.2d at 424, 301 N.Y.S.2d at 561. \textit{See also} Nolan \& Ursin, \textit{supra} note 63, at 586; Comment, \textit{supra} note 81.
  \item Medical authorities agree that the average bystander, that is, one who has no special relationship to the victim, ordinarily will not experience any systematic emotional reaction from witnessing the accident. \textit{Leibson}, \textit{supra} note 131, at 197 (1977). This requirement, therefore, is not arbitrary and also disposes of the fear of unlimited liability as long as courts require a close, intimate relationship. \textit{Id.} at 198. Certainly there will be cases where, at least initially, a close relationship does not appear to exist, for example, aunts, uncles, and other relatives. In such cases, the plaintiff should assume the burden of establishing the closeness of the relationship. \textit{Id.} at 198. \textit{But see} \textit{Drew} v. \textit{Drake}, 110 Cal. App. 3d 555, 168 Cal. Rptr. 65 (1980). The \textit{Drew}
ther ensures that the emotional injury is serious. The contemporaneous observance requirement, however, should not be limited, as in California, to actual perception, but should allow recovery for a person who happened upon the grisly scene shortly after the accident’s occurrence since that person could be expected to experience as much trauma as if he had actually perceived the accident.

If Wisconsin were to lift the current policy restrictions denying bystander recovery, the court would have to fashion policy guidelines similar to those in Dillon to allow the cause of action. Under the Wisconsin approach, once a duty of care is established toward the victim, the defendant is liable for all the consequences stemming from a breach of duty.

court denied plaintiff’s claim where she lived with the male victim for three years. The court based its decision on the fact that there was no family relationship and there was no allegation that defendant knew or should have known of the relationship. This latter requirement demonstrates California’s strict construction of the Dillon guidelines. Drew, however, was incorrectly decided given that California has allowed recovery for siblings and spouses where the defendant, at the time of the accident, did not know of the relationship between the plaintiff and the victim. See, e.g., Shepard v. Superior Court, 76 Cal. App. 3d 16, 142 Cal. Rptr. 612 (1977); Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977).


144. All humans will experience the emotional trauma of having someone close to them die or be seriously injured. Not all types of emotional distress should be actionable. Certainly in today’s society one must develop a thick skin. See Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 Mich. L. Rev. 874, 887 (1939). But the sudden shock of witnessing a loved one being injured, one which most people are unprepared for, deserves recovery. To this end, the contemporaneous requirement helps to ensure that unlimited liability is not realized. Furthermore, it ensures that the distress inflicted is more serious than it would otherwise be since the person not only experiences the void which the passing of the victim brings but must also endure witnessing the infliction of the pain and suffering upon the victim. See, e.g., Portee v. Jaffee, 84 N.J. 88, 417 A.2d 521 (1980).

Jurisdictions which have gone beyond the Dillon requirement of contemporaneous observance have found it necessary to impose some limit just beyond this observance requirement. See, e.g., Kelley v. Kokua Sales & Supply, Ltd., 56 Hawaii 204, 532 P.2d 673 (1975); Cohen v. McDonnell Douglas Corp., 389 Mass. 327, 450 N.E.2d 581, 587 (1983). See also supra notes 116-25 and accompanying text.

145. Comment, supra note 81, at 871-72.

These consequences would include harm to the bystander no matter where his location or the relationship to the victim. Since foreseeability is not an issue in establishing causation, the fear of unlimited liability could be truly realized. The Wisconsin court could fashion requirements similar to the *Dillon* guidelines in order to enable plaintiffs to establish a cause of action. These guidelines certainly place rational limits on the class of plaintiffs and type of recoverable harm while ensuring the continuance of a just cause of action. As mentioned previously, these guidelines should not be strictly applied at the pleading stage of the action. Rather, if a situation developed where recovery would "shock the conscience of society," the trial court in Wisconsin has the power, after trial, to deny recovery based upon public policy. If the Wisconsin Supreme Court is still skeptical of the claim, additional requirements could be imposed to further ensure its validity. Finally, this cause of action would not only apply to negligence claims, but also to products liability actions.

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147. *See supra* text accompanying notes 51-52 & 55-56.

148. *See* Dziokonski v. Babineau, 375 Mass. 555, ___ 380 N.E.2d 1295, 1302 (1978), where the court stated: "I[t does not matter in practice whether these factors are regarded as policy considerations imposing limits on the scope of reasonable foreseeability . . . or as factors bearing on the determination of reasonable foreseeability itself."

149. One commentator has asserted that the *Dillon* factors have nothing to do with foreseeability. *See* Comment, *supra* note 81, at 858. Even if this assertion were true it would not affect Wisconsin's adoption of the rule given Wisconsin's unique approach to the duty determination. *See supra* text accompanying notes 146-47.

150. Certain courts such as Portee v. Jaffee, 84 N.J. 88, ___, 417 A.2d 521, 526-27 (1980), require that the injury to the victim be serious, or that, as in Barnhill v. Davis, 300 N.W.2d 104, 108 (Iowa 1981), the plaintiff believe, as would a reasonable person, that the injury to the victim is serious. One commentator noted that where the victim's injury is serious, medical authorities are in agreement that the plaintiff can be expected to suffer severe emotional distress. *See* Leibson, *supra* note 131, at 199-200. Many courts allowing recovery also state that the plaintiff's distress must be serious. *See, e.g.,* Portee, 84 N.J. at ___, 417 A.2d at 526-27. *See also* Barnhill, 300 N.W.2d at 108. For further discussion as to what constitutes a serious emotional injury, *see infra* text accompanying note 216.

Hawaii's approach, which rejected all the *Dillon* factors, is not practical as demonstrated by its own decisions in Kelley v. Kokua Sales & Supply, Ltd., 56 Hawaii 204, 532 P.2d 673 (1975), and Campbell v. Animal Quarantine Station, 63 Hawaii 557, 632 P.2d 1066 (1981). *See supra* notes 109-17 and accompanying text.

151. There should be no difference between an action where the mother witnessed the maiming of her child due to the negligence of the driver and an action where the driver is unable to stop in time due to faulty brakes. *See* Shepard v. Supe-
One area yet to be addressed by courts which have allowed bystander recovery is the recovery by family members for emotional distress suffered as a result of the defendant's intentional infliction of physical harm on another family member. For example, while the victim of an aggravated assault\(^1\) suffers from the physical and emotional scars, the family members often must also endure great emotional suffering caused by the defendant's conduct. In such a situation, the victim could bring a civil action against the defendant. However, the family has also suffered and deserves recovery. If Wisconsin were to allow a bystander's action for negligent infliction of emotional distress where the defendant negligently caused harm to the victim, then it should also allow a claim for the emotional distress suffered by the victim's family as a result of the defendant's intentional conduct.

In determining whether a claim has been established, the court should apply the four traditional negligence elements of duty, breach, cause and damage. As proof of recoverable damages, the court could require that the plaintiff demonstrate severe emotional distress.\(^2\) The Dillon factors should not be used to sever liability since the defendant's conduct was intentional in inflicting harm on the victim. The Dillon factors originally were developed as a balance between ensuring that the plaintiff's just claim is heard and the concern over possible unlimited liability of defendants for their negligent conduct. Courts should be less concerned with limiting liability where the defendant's conduct is intentional or aggravated. The rationale behind the extension of recovery

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\(^1\) See, for example, Woodman v. Dever, 367 So. 2d 1061 (Fla. Dist. Ct. App. 1979), where the plaintiff-child witnessed the sexual assault of his mother. The court denied his action because Florida follows the impact rule requiring that the plaintiff suffer a contemporaneous physical injury.

\(^2\) See infra notes 214-19 and accompanying text for a discussion of recoverable damages absent physical injuries.
absent physical injury to victims of the defendant's intentional infliction of emotional distress was that courts were less concerned with limiting liability and more concerned with ensuring that victims were justly compensated.\textsuperscript{154} This same reasoning should apply in extending recovery to family members who suffer severe emotional distress as a result of the defendant's targeted, antisocial conduct toward his or her victim.

III. THE PHYSICAL INJURY REQUIREMENT

A. Generally

In order to recover for emotional distress, a majority of American courts require that the plaintiff's distress be manifested by some physical injury.\textsuperscript{155} The reasons most often cited for denial of recovery absent physical injury are that an emotional disturbance which does not physically manifest itself is likely to be so temporary that the task of allowing recovery would unduly burden the courts; or, in the absence of a "guarantee of genuineness" provided by such harm, the emotional disturbance would be difficult to prove; or, the defendant has merely been negligent and his culpability is not so great that he should be required to compensate the plaintiff for a purely mental disturbance.\textsuperscript{156} However, in cases involving mishandling of corpses and negligent transmission of death messages, a significant minority of courts have allowed recovery for negligent infliction of emotional distress

\begin{itemize}
\item \textsuperscript{154} See infra note 223 and accompanying text.
\item \textsuperscript{155} "If 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." \textsc{Restatement (Second) of Torts} § 436A (1965).
\item \textsuperscript{156} See, e.g., \textit{Payton} v. Abbott Labs, Inc., 386 Mass. 540, __, 437 N.E.2d 171, 178-79 (1982) (adopting \textsc{Restatement (Second) of Torts} § 436A comment b (1965)). In \textit{Payton}, the plaintiffs, who were daughters of mothers who had taken the drug D.E.S. during pregnancy, sued the manufacturers for emotional distress caused by apprehension of the significant possibility of future cancer. The plaintiffs did not allege any physical injuries. The Massachusetts Supreme Court denied the cause of action. One has to wonder whether \textit{Payton} was decided in this manner so as to place a restraint on liability after the court's liberal decision in \textit{Ferriter} v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (1980). \textit{See also supra} note 125.
\end{itemize}
without a showing of physical injury.\textsuperscript{157} Professor Prosser noted that these cases allowing recovery all appeared to have an "especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serve as a guarantee . . . ." \textsuperscript{158}

The physical injury rule, which requires manifestation of the emotional distress by physical injury, recently has come under attack. The leading decision advocating abolition of the rule is \textit{Molien v. Kaiser Foundation Hospitals}.\textsuperscript{159} The plaintiff, Mr. Molien, and his wife were members of the defendant hospital's health plan. Following a routine physical performed by a staff physician, Mrs. Molien was informed that she had contracted syphilis. She was treated, then advised to bring her husband to the hospital for testing. Mr. Molien's blood test revealed that he did not have syphilis and it was later discovered that the original diagnosis of Mrs. Molien was also incorrect. Mr. Molien sued the hospital and the doctor for negligent infliction of extreme emotional distress and for the subsequent expenses incurred for marriage counseling in an effort to save his marriage.

Because Mr. Molien was not in the hospital when his wife was erroneously diagnosed, the defendants argued that his claim for emotional distress was barred by \textit{Dillon}.\textsuperscript{160} In \textit{Molien} the California Supreme Court distinguished \textit{Dillon} by finding Mr. Molien a direct victim of, rather than a bystander to, the hospital's negligence.\textsuperscript{161} The \textit{Molien} court

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\textsuperscript{157} W. PROSSER, \textit{supra} note 15, at 329-30.
\textsuperscript{158} \textit{Id.} See also Johnson v. State, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975), where a daughter was erroneously informed of her mother's death by the defendant hospital. The court decided to allow a cause of action absent any allegation of physical injury because the plaintiff was owed a duty of care by the hospital and therefore was a \textit{direct} victim of the negligence. The court noted that from the facts of the case, the "guarantee of genuineness" of the emotional distress was present. \textit{See supra} note 43 and accompanying text. However, any hope that this case stood for the proposition that New York would not require physical injury when plaintiff is a direct victim of defendant's negligence has been clouded by the decision in Vaccaro v. Squibb Corp., 52 N.Y.2d 809, 418 N.E.2d 386, 436 N.Y.S.2d 871 (1980). But see Johnson v. Jamaica Hosp., 95 A.D.2d 598, 467 N.Y.S.2d 634 (1983), where the court, after holding that plaintiff was a direct victim rather than a bystander, allowed a cause of action for emotional distress absent an allegation of physical injury.
\textsuperscript{159} 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).
\textsuperscript{160} \textit{Id.} at 921, 616 P.2d at 815, 167 Cal. Rptr. at 833.
\textsuperscript{161} \textit{Id.} at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834.
\end{flushleft}
noted, as did the *Dillon* court, that the foreseeability of the risk is the essential ingredient in establishing a duty of care and concluded that the hospital owed a duty given that the doctor's misdiagnosis, coupled with the recommendation that Mrs. Molien inform her husband that she had contracted syphilis, could be foreseen to produce marital discord and emotional distress.\(^{162}\)

Once a duty to the husband was established, the *Molien* court examined the personal injury requirement. Noting that proof of physical injury is the majority rule and is designed to minimize trivial and false claims,\(^ {163}\) the court believed that the rule did not serve its purpose because it is both overinclusive and underinclusive. The rule is overinclusive because it permits recovery when emotional distress is accompanied by physical injury, no matter how trivial the injury. The rule is underinclusive because it mechanically denies access to possible valid claims.\(^ {164}\) Since the rule did not adequately serve its purpose, it was no longer justifiable. *Molien* relied upon the Hawaii Supreme Court decision in *Rodrigues v. State*\(^ {165}\) to establish a new standard that would protect courts against a potential flood of spurious claims and shield defendants from unlimited liability. It adopted Professor Prosser's standard of proof which required some "guarantee of genuineness" of serious mental injury from the circumstances of the case.\(^ {166}\) Essentially, the standard requires jurors to assess the damage in light of what a reasonable person could endure. In addition, the court noted that circumstances would exist where the alleged emotional injury could be proven by expert medical testimony.\(^ {167}\) Since

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162. *Id.* at 922-23, 616 P.2d at 816-17, 167 Cal. Rptr. at 834-35.

163. *Id.* at 925, 616 P.2d at 818, 167 Cal. Rptr. at 836.

164. *Id.* at 928-29, 616 P.2d at 820, 167 Cal. Rptr. at 838. The court also found that the physical injury rule encourages "extravagant pleading and distorted testimony" as to any physical injury suffered. In addition, the court noted that the border between psychological and physical injury is often blurred. *Id.* at 929-31, 616 P.2d at 820-21, 167 Cal. Rptr. at 838-39.

165. 52 Hawaii 156, 472 P.2d 509 (1970). Hawaii was the first jurisdiction to eliminate the physical injury rule. *See supra* note 110.

166. *See Molien*, 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

167. *Id.*
the *Molien* decision, many jurisdictions have followed its holding and have eliminated the personal injury rule.\(^{168}\)

The *Molien* decision, however, has not escaped the criticism of California commentators. One commentator asserts that since *Molien* creates a duty of care to avoid exposing the plaintiff to circumstances involving serious emotional distress, the only limiting factor in the creation of this duty is that the foreseeable risk involves serious, debilitating emotional distress; and, by equating duty solely with foreseeability, California courts have relinquished their ability to weigh policy concerns, such as the risk of harm incurred against the burdens imposed upon certain types of conduct and the cost of compensation.\(^{169}\) If the judge concludes that a reasonable juror might consider the harm foreseeable, the issue must go to the jury. Therefore, duty hinges on a jury determination


thereby increasing uncertainty and insurance and litigation costs.\footnote{170}

In response to this criticism, it must be noted that the \textit{Molien} approach does not appear to be entirely inconsistent with previous California case law addressing the determination of duty.\footnote{171} However, even if such criticism were correct, it would be of no concern in jurisdictions such as Wisconsin because, unlike California courts which balance policy factors at the initial stage of the suit, Wisconsin courts balance the policy issues at the end of the trial.\footnote{172}

Another criticism of the \textit{Molien} approach is that juries are called upon to rely on their own experiences in establishing causation with the result that liability is now founded upon foreseeability, with the danger that such foreseeability will appear stronger in hindsight.\footnote{173} However, this criticism rings hollow since juries are always called upon to use their own experiences as a yardstick. Furthermore, other devices can be implemented to ensure that the jury properly considers the evidence in establishing causation.\footnote{174}

But legitimate questions arise over what is a "guarantee of genuineness."\footnote{175} The crucial problem is determining whether actual damages exist. By its very nature, a physical injury is much easier to verify than a mental injury. It has

\footnotetext{170}{\textit{Id.}}.
\footnotetext{172}{See, e.g., \textit{Morgan v. Pennsylvania Gen. Ins. Co.}, 87 Wis. 2d 723, 738, 275 N.W.2d 660, 667 (1979).}
\footnotetext{173}{Note, \textit{supra} note 169, at 1165.}
\footnotetext{174}{See infra notes 216-21 and accompanying text.}
\footnotetext{175}{Note, \textit{The Death of the Ensuing Physical Injury Rule: Validating Claims for Negligent Infliction of Emotional Harm}, 10 HOFRSA L. REV. 213, 228 (1981). The author proposes several guidelines to limit liability under the "guarantee of genuineness" standard. He also suggests that \textit{Molien} implied that the guarantee of genuineness was to be found in the nature of the defendant's conduct. Noting that the defendant's conduct is examined by the court in an intentional infliction of emotional distress case (that is, the "extreme and outrageous" requirement) to ensure the validity of the claim, the author believed that approach should not be used since the defendant's conduct was only negligent and it would be difficult to find a guarantee of genuineness from negligent conduct alone. Rather, the author postulates that the court could have found a guarantee of genuineness from the eventual disintegration of the Molien marriage. \textit{See id.} at 227.}
been noted that a plaintiff, such as Mr. Molien, could testify that he suffered serious mental distress caused by the misdiagnosis of syphilis and would be in a position to recover under the Molien rationale. The defense could do little to rebut the allegation of emotional injury except to suggest that under the circumstances a reasonable person would not suffer any serious emotional distress.\textsuperscript{176}

However, a case can be made for using the “guarantee of genuineness” standard.\textsuperscript{177} Although nebulous, this standard encompasses all the circumstances surrounding the conduct of the defendant and the reaction of the plaintiff in order to establish a standard for recovery, and it relegates the jury to its proper role as ultimate arbitrator of the case. The standard has been refined by other jurisdictions concerned about an open-ended instruction which, in the opinion of some, gives little guidance to the jury except to instruct that the jury may rely on its own experiences in determining whether a compensable injury has occurred.\textsuperscript{178}

The final problem with Molien is its treatment of the Dillon and Justus bystander recovery decisions. The problem revolves around determining whether the plaintiff is to be considered a direct or an indirect victim.\textsuperscript{179} If the standard, as provided in Molien, is the foreseeability of the risk of serious harm, then it can be argued that Mrs. Dillon falls within this class of persons. However, the court, still concerned about unlimited liability, affirmed the Dillon and Justus standards in “indirect” emotional harm cases.\textsuperscript{180} As long as the Dillon requirements are so strictly construed, there will be disputes and judicial straining over the particular class to which the plaintiff belongs.\textsuperscript{181} Because of this conflict and

\textsuperscript{176} Note, supra note 169, at 1167.

\textsuperscript{177} The “guarantee of genuineness” term was coined by Professor Prosser. It simply means, and the jury is instructed as such, that given the circumstances, a normally constituted person could be expected to suffer severe emotional distress. See Molien, 27 Cal. 3d at 928-30, 616 P.2d at 820-21, 167 Cal. Rptr. at 838-39. See also Calif. Jury Inst.-Civil 12.73 (West Supp. 1983).

\textsuperscript{178} See, e.g., Bass v. Nooney, 646 S.W.2d 765, 772-73 (Mo. 1983); Paugh v. Hanks, 6 Ohio St. 3d 72, , 451 N.E.2d 759, 767 (1983). See also infra notes 216-21 and accompanying text for an illustration of such refinements.

\textsuperscript{179} Nolan & Ursin, supra note 63, at 603; Note, supra note 169, at 1173.

\textsuperscript{180} See Molien, 27 Cal. 3d at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834.

\textsuperscript{181} Note, supra note 169, at 1176.
the increasing susceptibility of emotional distress to medical proof, one commentator has suggested abandoning the Dillon standard in favor of the Molien foreseeability test in both bystander and direct victim cases. The California courts have so far refused to do so. However, a recent California decision appears to suggest a rational approach to distinguishing between the bystander and direct victim. In Ochoa v. Superior Court the court suggested that in order to be considered a direct victim, the defendant, as in Molien, must take some affirmative action towards the plaintiff which causes his or her injury. By making this distinction, California courts can apply the Dillon standards to plaintiffs who are indirect victims of negligence and apply the Molien formulation to the direct victims of the defendant’s negligence.

One step not yet taken by California is the elimination of the physical injury requirement in bystander cases. Use of this rule makes no sense in a jurisdiction that applies the Dillon formulation since the Dillon factors address the policy concerns and ensure the validity of the claim. If medi-

182. See Nolan & Ursin, supra note 63, at 609-19. This approach, however, probably is not practical given the Hawaiian experience with its very liberal bystander recovery system. See supra text accompanying notes 109-17.

183. See, e.g., Cortez v. Macias, 110 Cal. App. 3d 640, 167 Cal. Rptr. 905 (1980). The court discussed Molien but concluded that the facts of the instant case were controlled by Justus v. Atchinson, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977). “The language in Molien is sufficiently broad, it would appear, to permit similar reasoning to be applied to the facts of the case before us. However, in its discussion in Molien, the Supreme Court refers, by citation, to its 1977 Justus decision, without overruling, modifying or distinguishing that decision beyond the degree that the court distinguished Dillon.” Cortez, 110 Cal. App. 3d at 649, 167 Cal. Rptr. at 909. See supra note 80 and accompanying text.


186. For examples of other jurisdictions which allow bystander recovery and do not require physical manifestation of emotional distress, see Culbert v. Sampson’s Supermarkets, Inc., 444 A.2d 433 (Me. 1982); Entex, Inc. v. McGuire, 414 So. 2d 437 (Miss. 1982); Portee v. Jaffee, 84 N.J. 88, 417 A.2d 521 (1980); Paugh v. Hanks, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983).
EMOTIONAL DISTRESS

C. The Wisconsin Approach

Wisconsin generally adheres to the majority rule that there can be no recovery for emotional distress absent a subsequent physical injury. The first decision to explicitly deny a cause of action for negligent infliction of emotional distress without a physical injury was *Ver Hagen v. Gibbons* in 1970. In that case the plaintiff charged that the defendant had negligently constructed his fireplace. When the plaintiff built a fire, the entire house became engulfed in flames forcing the plaintiff to flee for his life. The plaintiff alleged he suffered great mental anguish and fear for his well-being. The court framed the issue as "whether one can recover for mental anguish and emotional distress which is the result of another's negligence and which is not manifested by, or causative of, any physical injury." The court quickly reviewed the history of emotional distress in Wisconsin and noted that there has been some uncertainty in Wisconsin over the physical injury requirement. This uncertainty was created by cases such as *Colla v. Mandella*, in which the plaintiff died of a heart attack after the defendant's negligently parked truck rolled into the plaintiff's house. The court in *Colla* noted that the impact rule was clearly abandoned by *Pankropf v. Hinley* and, therefore, allowed recovery. *Colla*, however did not affirmatively address the physical injury requirement. Also, in *Ritter v. Coca-Cola* and *Vincky v. Midland Mutual Casualty Insurance Co.*, which were up on appeal for issues other than physical injury, the court affirmed awards for emotional distress where

187. 47 Wis. 2d 220, 177 N.W.2d 83 (1970).
188. Id. at 221, 177 N.W.2d at 83.
189. Id. at 221-22, 177 N.W.2d at 84.
190. Id. at 225, 177 N.W.2d at 85.
191. 1 Wis. 2d 594, 85 N.W.2d 345 (1957).
192. 141 Wis. 146, 123 N.W. 625 (1909).
193. 24 Wis. 2d 157, 128 N.W.2d 439 (1964).
194. 35 Wis. 2d 246, 151 N.W.2d 77 (1967).
there had been no significant subsequent physical manifestation of injury.

The Ver Hagen court ruled that the statement in Alsteen v. Gehl that the court "now possess[ed] the tools whereby [it] can intelligently evaluate claims of emotional injury . . ." applied only to the tort of intentional infliction of emotional distress. The tool to adequately evaluate emotional distress in negligence cases was to be the physical injury requirement. The dissent, however, noted that proof is equally difficult in both intentional and negligent actions, and, therefore, allowance of recovery should be extended to negligent infliction of emotional distress since the damage is just as real.

Although the physical injury requirement has been affirmed in later cases, the test has been altered to provide that mental distress is compensable only when "there is an accompanying or resulting physical injury." This alteration made it possible for the Wisconsin Court of Appeals in

195. 21 Wis. 2d 349, 124 N.W.2d 312 (1963). The four factors the court will use to evaluate whether a claim exists for intentional infliction of emotional distress are: (1) the defendant intended to cause the emotional distress; (2) the defendant's conduct was extreme and outrageous such that an average member of the community would regard it as being a complete denial of the plaintiff's dignity as a person; (3) the plaintiff must prove that defendant's conduct was a cause in fact of his injuries; and (4) the plaintiff must demonstrate that he suffered an extreme disabling emotional response. See id. at 359-60, 124 N.W.2d at 318.

196. Ver Hagen, 47 Wis. 2d at 225-26, 177 N.W.2d at 86 (quoting Alsteen v. Gehl, 21 Wis. 2d at 359, 21 N.W.2d at 318).

197. Id. at 228, 177 N.W.2d at 87 (Wilkie, J. dissenting).

198. See, e.g., Scarpaci v. Milwaukee County, 96 Wis. 2d 663, 675, 292 N.W.2d 816, 822 (1980); Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 694, 271 N.W.2d 368, 378 (1978). Both cases cited Ver Hagen for this rule; yet Ver Hagen only addressed the issue of whether emotional distress must be manifested by a physical injury. See Ver Hagen, 47 Wis. 2d at 220, 177 N.W.2d at 84. Furthermore, Ver Hagen's express holding states that no recovery for emotional distress will be allowed absent a physical manifestation. See id. at 227, 177 N.W.2d at 86. The confusion of the later decisions arose because Ver Hagen cited Riehl v. DeQuaine, 24 Wis. 2d 23, 127 N.W.2d 788 (1964), to demonstrate that Wisconsin previously allowed recovery for neurotic trauma when associated with physical injuries. But the Riehl decision was used only to illustrate that Wisconsin would allow recovery for emotional distress. In Riehl, the emotional distress claim was parasitic to the physical injury claim. The question, however, in Ver Hagen was whether physical injury must be parasitic to the emotional distress in order to establish a separate and distinct claim for negligent infliction of emotional distress. This distinction, though, may be only a formalistic one since in either case, as long as there is a physical injury, a claim for emotional distress can be established. Under this formulation, however, the plaintiff in Hawes
Hawes v. Germantown Mutual Insurance Co.\textsuperscript{199} to allow recovery where the plaintiff suffered a scrape on her heel caused by the collapse of a wall around her. The plaintiff later suffered weight loss, insomnia and loss of appetite. The court found that the scrape and the later symptoms alone were insufficient for recovery, but together they established a direct causal relationship between the collapsing wall and the emotional distress.\textsuperscript{200}

The supreme court also recently reexamined the rule in La Fleur v. Mosher.\textsuperscript{201} While generally affirming Ver Hagen, the court created an exception in the case of negligent confinement. In La Fleur the plaintiff was a fourteen year old who became ill while attending a concert. She was taken to the La Crosse Police Department where the defendant, Officer Mosher, unsuccessfully attempted to contact her parents. The plaintiff was put into an open, unoccupied cell because of her continuing illness and the officer's need to attend to other duties. The officer locked the door leading to the cell area in order to assure the plaintiff's privacy. The officer apparently forgot about the plaintiff and she was not found until fourteen hours later. The plaintiff alleged that during this time period she became cold and frightened; knocked on the outside door to no avail, and generally became convinced that her parents knew she was in the holding cell, but had chosen to leave her there "to teach her a lesson." The plaintiff suffered no accompanying or resulting physical injuries, but she was diagnosed by a psychiatrist as suffering from a traumatic neurosis. Relying on Ver Hagen, the trial court granted the defendant's summary judgment motion.\textsuperscript{202}

On appeal, the La Fleur court reiterated the policy reasons behind the physical injury rule.\textsuperscript{203} Again, it stated that

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would have had to bring an action for his scraped heel with the claim for emotional distress being parasitic to the scraped heel claim.
\end{quote}

\begin{enumerate}
\item Hawes v. Germantown Mutual Insurance Co. \textsuperscript{199} 103 Wis. 2d 524, 309 N.W.2d 356 (Ct. App. 1981).
\item See id. at 532, 309 N.W.2d at 360.
\item La Fleur v. Mosher. \textsuperscript{201} 109 Wis. 2d 112, 325 N.W.2d 314 (1982).
\item Id. at 113-15, 325 N.W.2d at 315.
\item Id. at 115, 325 N.W.2d at 316.
\end{enumerate}
these concerns had not barred recognition of emotional distress absent physical injury in intentional infliction of emotional distress because the court possessed the "tools" to intelligently evaluate the emotional distress claim. By requiring the conduct to be "extreme and outrageous," the very nature of the conduct in an intentional tort provided the "tool" or the guarantee that the claim was genuine and serious.204 La Fleur generally affirmed the physical injury rule, but it added that a negligent confinement by its very nature, subject to certain requirements, also guarantees the genuineness of the claim of severe emotional distress.205

The Wisconsin Supreme Court believed that under the facts of the La Fleur case, the likelihood of severe emotional distress was great. However, by making this exception to the physical injury rule, the court will most likely be confronted by plaintiffs in equally compelling situations demanding relief. However, this confrontation may not be the only problem that will face Wisconsin courts. The trend indicates a realization among state courts that recent advances made by medical science can establish psychological injuries.206

Given this trend both inside and outside of Wisconsin in allowing recovery absent a physical injury, the Wisconsin courts may be hard-pressed to deny recovery. Currently, Wisconsin applies the two standard policy justifications, to deny an emotional distress claim absent a physical injury: fear of fraudulent claims and exposure of defendants to un-

204. Id. at 116-17, 325 N.W.2d at 316.

205. Id. at 120-21, 325 N.W.2d at 318. The requirements are as follows:
   (1) The defendant must have been negligent in confining the plaintiff.
   (2) The confinement must be for a substantial period of time.
   (3) The circumstances surrounding the confinement must be such that a reasonably constituted person would be emotionally harmed.
   (4) The confinement must be a substantial factor in causing the emotional distress.
   (5) The resulting emotional distress must be severe.

Id.

limited liability. The physical injury requirement is supposedly designed to distinguish fraudulent from honest claims and provide a means to evaluate the mental injury. However, the rule fails to fairly achieve its purpose and should be replaced by criteria which will.

Under Hawes and previous case law interpreting Ver Hagen, an accompanying physical injury is sufficient to overcome the pleading barrier. The injury can be slight. The accompanying injury requirement thus does nothing to ensure that emotional distress was actually suffered since it bears no relationship to the emotional distress. Seen in this light, the physical injury rule is an arbitrary liability-limiting device. Such a situation also encourages rather than discourages fraudulent pleading since plaintiffs may exacerbate their injuries to meet the de minimis physical injury requirement. Since Wisconsin requires an “accompanying or manifesting” physical injury, the same de minimis physical injury which applies to the “accompanying” requirement must also apply to the “manifestation” requirement. Again, for the same reasons, this encourages fraudulent pleading. To rectify this situation, Wisconsin could do one of two things. First, it could require a serious physical injury; however, this approach does not comport with enlightened legal thinking in this area. Second, it could eliminate the injury requirement altogether.

As to unlimited liability, this fear is less justifiable in a situation where the plaintiff is a direct victim of the defendant’s negligence than when he or she is a bystander.

207. See La Fleur, 109 Wis. 2d at 115, 325 N.W.2d at 316.
209. If the accompanying physical injury was serious, and the plaintiff later suffered emotional distress as a result of these injuries, then it could be persuasively argued that the physical injury is evidence of the emotional distress suffered since it is understandable that one could suffer extreme distress after viewing extensive damage to his or her body. In this case, however, the plaintiff would bring an action for the physical injuries with the emotional distress being considered parasitic to this action, that is, pain and suffering, rather than a separate claim for emotional distress.
210. This danger has been noted in those jurisdictions which have disposed of the physical injury requirement. See Note, supra note 175, at 223-24.
211. See, e.g., Comment, supra note 1.
bystander situation, unlimited liability may be realized where there are no limits to recovery. However, if the defendant’s negligent act is directed toward the plaintiff, he or she should be liable for those damages that are inflicted. If damages can be proven, then liability is not unlimited, rather it is limited to harm directly inflicted upon the victim by the defendant’s negligence. The *La Fleur* court described this fear as exposing the defendant to liability for “every type of mental disturbance.” Wisconsin could require, as it does for an intentional infliction claim, and similar to other jurisdictions recognizing the negligent infliction claim, that a severe, debilitating emotional distress be proven. This could be accomplished by requiring that independent, objective evidence be introduced to verify the mental injury, expert medical testimony be used where needed and a jury instruction be read allowing recovery

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212. This is assuming that the *Dillon* factors are not used to limit the scope of liability.

213. *La Fleur*, 109 Wis. 2d at 115, 325 N.W.2d at 316.


216. Wisconsin has recognized that several forms of neurosis are actionable. *See, e.g.*, *La Fleur v. Mosher*, 109 Wis. 2d 112, 122, 325 N.W.2d 314, 318 (1982) (traumatic neurosis); Redepenning v. Dore, 56 Wis. 2d 129, 144, 201 N.W.2d 580, 588 (1972) (mixed neurotic and psychosomatic type). *See also* Riehl v. DeQuaine, 24 Wis. 2d 23, 30-31, 127 N.W.2d 788, 792-93 (1964). In these cases there was no physical manifestation of the emotional distress.

One commentator noted:

What “harm” then is necessary to support a threshold tort? One example is “shock” — the sudden agitation of the mental senses which temporarily incapacitates the victim and requires at least minimum medical attention. Other examples are continuing nervousness, sleeplessness, or nausea for which a physician would prescribe medication. Beyond this threshold are the neuroses, resulting psychosomatic disabilities, and other more serious illnesses. “Harm,” then, is mental distress serious enough to require medical attention.


217. Prosser, *supra* note 144, at 888. In a slightly different context Professor Prosser urged that this standard be used to evaluate injuries caused by intentional infliction of emotional distress. However, this standard is equally applicable to negligence actions. As an example, relatives and acquaintances could testify to the plaintiff’s condition before the negligent act and after.

only when a reasonable person, normally constituted, would be unable to adequately cope under the circumstances.\footnote{219} This formulation should satisfy those critics who are skeptical of both the psychological injury and those persons in the health care industry who treat and may testify to the existence of such an injury. Furthermore, if a physical manifestation of the mental injury exists, this evidence could be introduced to demonstrate the degree of the mental injury suffered.\footnote{220} Finally, the built-in guarantee to at least assure a credible claim is the plaintiff's attorney. Given the time and expense involved in bringing an action, if a credible claim cannot be made most experienced attorneys probably would not follow through with a trial.

As a practical consideration, the elimination of the physical injury requirement would also eliminate the increasingly difficult task of distinguishing between a physical manifestation and a purely emotional reaction.\footnote{221} As a final note, recognition of this action would apply only to tort and not contract actions.\footnote{222}

Wisconsin justifies the different treatments of intentional and negligent infliction of emotional distress by asserting that under intentional infliction, courts have the "tools" to ensure the validity of the claim, that is, "extreme and outrageous" conduct of the defendant. Although this requirement

\footnote{219} As in Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970), courts have always expressed confidence in the jury's ability to detect a fraudulent claim. \textit{See}, \textit{e.g.}, Towns v. Anderson, 196 Colo. 517, 579 P.2d 1163, 1164 (1978). For an excellent example, see Klassa v. Milwaukee Gas Light Co., 273 Wis. 176, 77 N.W.2d 397 (1956), where the jury awarded the plaintiff $0.06 for her emotional distress.

\footnote{220} \textit{See}, \textit{e.g.}, Paugh v. Hanks, 6 Ohio St. 3d 72, 451 N.E.2d 759, 764-65 (1983).

\footnote{221} See Bass v. Nooney Co., 646 S.W.2d 765, 771-72 (Mo. 1983), in which the court noted that the \textit{Restatement (Second) of Torts} § 436A comment c (1965) forecast this problem. See also Annot., 64 A.L.R.2d 100, 115 n.6 (1959), which noted that mental injuries many times may be characterized by complex physical reactions, and because of an accident of pleading, they are characterized as mental rather than physical.

\footnote{222} Because negligent infliction of emotional distress is a tort action it would not apply when emotional distress is inflicted by a breach of contract. However, if the conduct of the defendant reaches the level of a bad faith tort, such damages should be allowed for intentional infliction of emotional distress. \textit{See} Deno v. Transamerica Title Ins. Co., 126 Ariz. 527, 617 P.2d 35 (1980); Quezada v. Hart, 67 Cal. App. 3d 754, 761-63, 136 Cal. Rptr. 815, 818-20 (1977). \textit{But see} Jarvis v. Prudential Life Ins. Co., 448 A.2d 407, 410 (N.H. 1982).
may provide added justification for imposing liability, it may not provide an accurate barometer of the degree of plaintiff's emotional distress. This inaccuracy is because the outrageous requirement, while measuring the defendant's culpability, does not focus on the plaintiff's reaction. Rather, it assumes a certain reaction to the defendant's conduct. Assuredly, in many situations the plaintiff will suffer extreme distress caused by the defendant's outrageous conduct. However, courts following the physical injury rule fail to recognize that emotional distress, whether intentionally or negligently inflicted, is usually the same "and does not become more real simply because it was intentionally inflicted."  

Besides the "outrageousness" tool, the Wisconsin Supreme Court, possibly seeking further justification for the distinction in the imposition of liability, recently stated: "With advancing techniques in psychiatry and clinical psychology, we concluded that triers of fact could make intelligent, evaluative judgments on a plaintiff's claim for damages arising out of the defendant's alleged intentional infliction of emotional distress." But who is the psychiatrist examining — the plaintiff or the defendant? Of course the psychiatrist is examining the plaintiff's emotional reaction and not the defendant's conduct. Modern medicine's ability to diagnose the level of emotional distress is not premised upon whether the distress was intentionally or negligently inflicted, rather, the physician is examining the plaintiff's condition with the stimulus or defendant's conduct being but one factor in his or her diagnosis. Therefore, the recognition of a psychia-

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223. Millard, Intentionally and Negligently Inflicted Emotional Distress: Toward a Coherent Reconciliation, 15 Ind. L. Rev. 617, 630 (1982). For example, assume that the defendant was driving a car down the street or piloting a plane at 10,000 feet. If the defendant increases the speed of his car and intentionally swerves from traffic towards a pedestrian, or the pilot purposely puts the plane into a 5,000 foot dive, society would probably label such conduct "outrageous." Any severe emotional distress suffered by pedestrians in the path of the car or passengers in the plane could be recovered. However, if a faulty steering mechanism caused the car to swerve towards the pedestrians or a poorly maintained engine caused the plane to dive 5,000 feet, the plaintiffs in these two situations would not state a cause of action, absent a physical injury. However, in both cases the level of distress suffered would likely be the same.

trist’s competence to diagnose emotional distress should not be limited to intentional torts.

Today, the underlying justification supporting retention of the physical injury rule is that if this rule is eliminated, the burden of proof in a negligent infliction action is much less than the burden in an intentional infliction action, although with the intentional infliction tort the culpability of the defendant is much greater.225 This greater level of culpability initially justified imposition of liability absent physical injury because the desire to punish for such conduct outweighed the policy considerations limiting liability, even at a time when the state of medical science was less able to accurately diagnose the mental injury.226 However, given that Wisconsin227 and other jurisdictions228 recognize that medical science can diagnose mental injury, the time has come to eliminate artificial barriers to recovery and to adopt a rule based upon the usual tort principles which allow a cause of

225. Since Hawes v. Germantown Mut. Ins. Co., 103 Wis. 2d 524, 309 N.W.2d 356 (Ct. App. 1981), the Wisconsin plaintiff's ability to state and prove a claim for negligent infliction of emotional distress, even with the physical injury rule, may be less than the burden on the plaintiff to state and prove the extreme and outrageous requirement in an intentional infliction claim. Determining what level of conduct is necessary to establish “extreme and outrageous” is necessarily a question for the jury. However, in previous cases the appellate review of trial court decisions on summary judgment motions indicate that the alleged level of conduct needs to be quite egregious. See McKissick v. Schroeder, 70 Wis. 2d 825, 235 N.W.2d 686 (1975) (alleged refusal by police to allow plaintiff to call for medical assistance for dying son while the police conducted extensive questioning was sufficient to state a claim); Laska v. Steipreis, 69 Wis. 2d 307, 231 N.W.2d 196 (1975) (allegation that landlord drove his car across lessee's property in an attempt to collect rents due or drive plaintiff off the property was insufficient to state a cause of action); Slawek v. Stroh, 62 Wis. 2d 295, 215 N.W.2d 9 (1974) (allegation that a defendant harassed a woman constantly over telephone and in person was sufficient to state a cause of action).

In jurisdictions that have eliminated the physical injury rule, but still follow the Restatement (Second) approach for intentional infliction of emotional distress, this disparity in the level of proof required, given the difference in degree of culpability, has not yet been recognized. See, e.g., Ochoa v. Superior Court, 143 Cal. App. 3d 611, 191 Cal. Rptr. 907, 915 (1983); Delia v. Torres, 134 Cal. App. 3d 471, 483-84, 184 Cal. Rptr. 787, 794-95 (1982).

226. See Millard, supra note 223, at 625.


action, absent physical injury, for negligent and intentional infliction of emotional distress. Therefore, if the plaintiff can establish duty, breach, cause and severe emotional injuries, recovery should be allowed. Similarly, if the defendant acted intentionally to cause emotional distress, recovery should be allowed where severe emotional distress was inflicted. The extreme and outrageous conduct of the defendant, if it in fact exists, should justify imposition of punitive damages.229

IV. Conclusion

As courts have struggled with the underlying policy considerations in extending liability, suspicion of the emotional injury has shrouded the development of the negligent infliction of emotional distress claim. Even under this cloud, many courts have challenged the traditional policy concerns restraining liability. Their experience has demonstrated that workable formulas which encompass the policy concerns that previously denied extension of liability exist.

Usually at the forefront of legal development, the Wisconsin court has remained a spectator for the better part of a decade as other jurisdictions struggled with the issue of recovery for emotional damage. This nonparticipation, at least, presents the Wisconsin courts with the opportunity to benefit from the experience of other jurisdictions that developed workable formulas. Additionally, the apparent trepidation which the Wisconsin courts have experienced when addressing the issue of emotional injury appears to be waning in light of the Hawes v. Germantown Mutual Insurance Company230 and La Fleur v. Mosher231 decisions. The time

229. An alternate, but less desirable, method to assure a “guarantee of genuineness” for a negligent infliction claim is to require that the plaintiff prove a high degree of negligence, that is, recklessness, on the part of the defendant and that it be shown by clear and convincing evidence. A similar approach was used by the Wisconsin Supreme Court when in Wangen v. Ford Motor Co., 97 Wis. 2d 260, 273-75, 300, 294 N.W.2d 437, 446, 457-58 (1980), it faced the issue of whether punitive damages were recoverable in a products liability action. Assuming that physical injury rule is eliminated, raising the threshold of proof would eliminate the burden of proof disparity between negligent infliction and intentional infliction of emotional distress.


231. 109 Wis. 2d 112, 325 N.W.2d 314 (1982).
for recognition of a separate claim for negligent infliction of emotional distress has arrived.

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