Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective versus Subjective Indices of Distress

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NEGLIGENT INFILCTION OF MENTAL DISTRESS: A JURISDICTIONAL SURVEY OF EXISTING LIMITATION DEVICES AND PROPOSAL BASED ON AN ANALYSIS OF OBJECTIVE VERSUS SUBJECTIVE INDICES OF DISTRESS

The case law in the field here treated is in an almost unparalleled state of confusion and any attempt at a consistent exegesis of the authorities is likely to break down in embarrassed perplexity. Early attempts by the courts to deal with the questions were complicated by the lack of any adequate body of legal authorities as well as by the inadequacy of the factual or scientific information available.¹

I. INTRODUCTION

This Comment begins by reviewing the evolution of limiting principles, and the policy issues which gave rise to them, in the area of negligent infliction of mental distress.² A survey of jurisdictions following each of the tests and requirements is provided,³ and some of the problems that these jurisdictions face in administering the various rules are discussed. Difficulties with the arbitrary nature of these restrictions are considered in terms of barring recovery to reasonably foreseeable plaintiffs who sustain serious injury and in terms of allowing recovery in noncompelling situations.

Subsequently, this Comment advocates an approach adopted by a few courts and commentators which shifts the focus of the analysis from

1. Annotation, Right to Recover for Emotional Disturbance or its Physical Consequences, in the Absence of Impact or Other Actionable Wrong, 64 A.L.R.2d 100, 103 (1959) (footnotes omitted).


3. For a discussion of the jurisdictions following the varying tests and requirements, see infra notes 59-75 (physical impact), 91 (zone of danger and physical manifestation), 92 (zone of danger), 139, 145-46 (Dillon), 186-96 (general foreseeability) and accompanying text.

(781)
the duty element of the cause of action to that of proximate cause. A proposal is offered which defines foreseeable injury as that proportion of subjective distress which is factually connected to the objective severity of the stressor. That proportion of injury which is accounted for by intrapsychic, predisposing influences is submitted to be both unforeseeable from the perspective of the defendant and factually unconnected to the tortious event.

It is submitted that foreseeable injury should be qualified or described through recourse to traumatic stress theory in psychology. Individuals who are exposed to traumatic events go through predictable and phasic paths of recovery. The length and scope of such a recovery period in a "normally constituted individual" may be defined as foreseeable, while unique intrapsychic events which interrupt the recovery process may be seen as nonculpable.

Finally, this proposed analysis is assessed both in terms of the traditional policy concerns for limiting the potential liability of defendants and avoiding the successful litigation of fraudulent claims, and in terms of a proposed additional focus on how best to compensate plaintiffs. It is submitted that where the subjective level of stress experienced by the plaintiff exceeds the objective level of severity of the stressor, then the very process of litigation will be most likely to exacerbate the plaintiff’s damages.

II. Survey and Analysis of Existing Requirements

A. Parasitic Recovery—An Analysis of Social Policy

Traditionally, mental distress has been compensable only as a parasitic damage arising from the violation of another independently recog-

4. For a discussion of this proposition, which focusses on a foreseeable injury rather than a foreseeable plaintiff, see infra notes 228-34 and accompanying text.

5. For a discussion of the policy concerns traditionally offered in this area of law, see infra notes 16-18, 42-50 and accompanying text.

6. This proposition is the topic of a doctoral dissertation currently being conducted by the author.

7. See, e.g., Annotation, supra note 1, at 106-07 (traditionally, mental distress compensable only as parasitic upon another tort such as trespass, injury to reputation, invasion of privacy, physical injury or false imprisonment). As a result of this legal status, plaintiffs who suffered invasion of their mental tranquility were afforded only indirect protection. See, e.g., Comment, Negligently Inflicted Mental Distress: The Case for an Independent Tort, 59 Geo. L.J. 1237, 1238 n.8 (1971) [hereinafter Comment, Independent Tort].

Legal scholars have noted that that which is parasitic today, may be recognized as an independent basis of liability tomorrow. Such damages may merely be part of a “transitory stage of legal evolution.” See Comment, Duty, Foreseeability, and the Negligent Infliction of Mental Distress, 39 Me. L. Rev. 303, 306 n.15 (1981) [hereinafter Comment, Foreseeability]; Annotation, supra note 1, at 106 n.4; see also Monteleone v. Co-operative Transit Co., 128 W. Va. 340, 347, 36 S.E.2d
nized protected interest. The most common example of such parasitic recovery has been in actions for negligent infliction of physical injury. Mental distress has long been a recognized element of damages for "pain and suffering." 9

Illustrative of this notion is the New York Court of Appeals' then landmark decision in Mitchell v. Rochester Railway. 10 In Mitchell, the plaintiff, a pregnant woman, was nearly struck by a horse-drawn carriage which was negligently operated by an agent of the defendant. 11 As the result of her fright and excitement, the plaintiff became unconscious and suffered a miscarriage and consequent illness. 12 The court held that fright alone could not form the basis of a legally cognizable action, and thus, subsequent physical harm resulting from that initial fright was noncompensable. 13 Specifically, the court held that no recovery was available for injuries sustained by fright absent a contemporaneous physical injury. 14 This principle became known as the "physical impact" requirement. 15

475, 478 (1945) (various theories of recovery for infliction of mental distress illustrate current phase of evolution of common law).


This notion has continued vitality in a few jurisdictions to the present day. See, e.g., M.B.M. Co. v. Counce, 268 Ark. 269, 273-74, 596 S.W.2d 681, 684, 685 (1980) (no damages for mental distress available absent independent cause of action, physical injury or extreme and outrageous conduct by defendant); Wishard Memorial Hosp. v. Logwood, 512 N.E.2d 1126, 1127 (Ind. Ct. App. 1987) (damages for mental distress available only for physical injury, false imprisonment or assault; invasion of such legal rights, by its nature, likely to provoke emotional disturbance); Bowman v. Doherty, 235 Kan. 870, 875, 686 P.2d 112, 118 (1984) (physical injury resulting from mental distress not required for intentional misconduct by defendant such as assault, false arrest or slander).

For a discussion of those jurisdictions which continue to require an antecedent physical impact in order to recover damages for mental distress, see infra notes 59-75 and accompanying text.

9. See, e.g., McCarthy, Illinois Law in Distress: The "Zone of Danger" and "Physical Injury" Rules in Emotional Distress Litigation, 19 J. MAR. L. REV. 17, 29 (1985) (where defendant causes physical injury to plaintiff, damages for emotional distress have been, and continue to be, recoverable as pain and suffering).


11. 151 N.Y. at 108, 45 N.E. at 354. The plaintiff stood between the heads of the horses when they were finally brought to a stop. Id. at 108, 45 N.E. at 354.

12. Id. at 108-09, 45 N.E. at 354. Medical testimony suggested that the mental shock the plaintiff received from the incident was sufficient to produce these results. Id. at 109, 45 N.E. at 354.

13. Id.

14. Id. at 110, 45 N.E. at 354-55.

15. For discussions and critical analyses of the physical impact rule, see Mc-
In denying recovery, the Mitchell court relied on a series of policy concerns which have continued in vitality, though not without controversy and criticism. The court stated that to allow recovery for mere fright, unaccompanied by antecedent or contemporaneous physical injury, would 1) result in a flood of litigation, 2) risk the successful prosecution of fraudulent claims and 3) expose defendants to potentially unlimited liability. The court feared that

[i]f the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where damages must rest upon mere conjecture or speculation . . . . To establish such a doctrine would be contrary to principles of public policy.

Alternatively, the court held that the plaintiff's damages were not proximately caused by the defendant's conduct. The court reasoned that proximate damages were those which naturally, ordinarily and foreseeably result from a culpable act. Here, the court held that the injury resulted from an unusual combination of circumstances which the defendant could not anticipate, and over which he had no control.

The Mitchell court's proximate cause rationale does not hold up under close analysis. If, as the court asserted, the limiting principle for proximate causality is the degree of foreseeability of the harm suffered, then it may be argued that emotional distress is a foreseeable result of such a near collision. Further, as Dean Prosser has noted, the deter-

Carthy, supra note 9, at 23-24; Comment, Independent Tort, supra note 7, at 1239-40; Comment, Negligent Infliction of Emotional Distress: A Proposal for a Recognized Tort Action, 67 Marq. L. Rev. 557, 558-60 (1984); Comment, Foreseeability, supra note 7, at 306-08.

16. For a discussion of the social policy factors advanced in favor of restrictions on recovery in the area of negligent infliction of mental distress, see generally McCarthy, supra note 9, at 20-21; Comment, Independent Tort, supra note 7, at 1244-45; Note, supra note 2, at 850-53.


18. Id.

19. Id. at 110, 45 N.E. at 355.

20. Id.

21. Id.

22. See, e.g., Spade v. Lynn & B. R.R., 168 Mass. 285, 288, 47 N.E. 88, 89 (1897) (psychic alarm resulting in physical illness is natural result of exposure to danger) (For further discussion of the Spade court's criticism of the Mitchell proximate cause analysis, see infra notes 24-31 and accompanying text.), overruled on other grounds, Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978); see also Sloane v. Southern Cal. Ry., 111 Cal. 668, 680, 44 P. 320, 322-23 (1896) (abandoning physical impact requirement because fright resulting in physical injury is natural and foreseeable result of exposure to danger). The court in Sloane stated:

The interdependence of the mind and body is in many respects so close that it is impossible to distinguish their respective influence upon each
ministration that a particular result is not foreseeable actually reflects a rough sense of "justice," rather than a precise legal standard:

Direct causation, the scope of the risk, the unforeseeable plaintiff, the last human wrongdoer, the distinction between cause and condition, limitations of time and space, substantial factors, natural and probable consequences, mechanical systems of multiple rules, and all the rest of the rigmarole of "proximate cause," all have been tried and found wanting in situations that inevitably arise to which they do not and cannot provide a satisfactory solution. There is no substitute for dealing with the particular facts, and considering all the factors that bear on them, interlocked as they must be.

......

What we are left with is at most an approach to the problem, an attitude, a beginning—a vague, rough and general statement of what we are looking for.[23]

Mitchell's foreseeability analysis with regard to proximate causation was met with criticism almost from the outset. In Spade v. Lynn & Boston R.R.,24 the Massachusetts Supreme Judicial Court adopted the physical impact requirement, but refused to base its analysis on grounds of proximate cause.25 In Spade, the plaintiff suffered severe nervous shock after witnessing an agent of the defendant railroad forcibly remove an intoxicated passenger from the car.26 The court held that the natural result of such danger is psychic alarm, and that strong emotion, mediated by the action of the nervous and circulatory systems, produces physical results.27 Presumably, the court felt that such a generalized human response could not, as a matter of law, be deemed unforeseeable.28

other. . . . It is a matter of general knowledge that an attack of sudden fright, or an exposure to imminent peril, has produced in individuals a complete change in their nervous system, and rendered one who was physically strong and vigorous weak and timid. . . . If these nerves, or the entire nervous system, are thus affected, there is a physical injury thereby produced; and, if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect, through some action upon the mind.  

Id. at 680, 44 P. at 322-23.

25. 168 Mass. at 288, 47 N.E. at 89.
26. Id. at 285, 47 N.E. at 89.
27. Id. at 288, 47 N.E. at 88.
28. This recognition that psychic injury is a natural and foreseeable response to nonphysical environmental trauma has been echoed by many courts in their efforts to expand the scope of protection for the infliction of mental distress. Perhaps the most cogent description of the expectable human reaction to psychic distress may be found in Leong v. Takasaki, 55 Haw. 398, 411-12, 520 P.2d 758, 766-67 (1974):
In addition to asserting the reasonable degree of foreseeability of psychic harm, the *Spade* court stated:

The exemption from liability [for psychic distress unaccompanied by antecedent physical impact] does not rest on the assumption that these do not constitute an actual injury. They do in fact deprive one of enjoyment and of comfort, cause real suffering, and to a greater or lesser extent disqualify one for the time being from doing the duties of life.\[29\]

Thus, the court implicitly avoided a policy determination that allowing such claims would lead to the prosecution of fraudulent actions.\[30\] Rather, the court relied solely on the policy concern for exposing defendants to unlimited liability, and the fear that the judicial system could not practically administer any other rule to justly allocate the burdens between the parties.\[31\]

Traumatic stimulus may cause two types of mental reaction, primary and secondary. The primary response, an immediate, automatic and instinctive response designed to protect an individual from harm, unpleasantness and stress . . . is exemplified by emotional responses such as fear, anger, grief, and shock. This initial response, which is short in duration and subjective in nature, will vary in seriousness according to the individual and the particular traumatic stimulus.

Secondary responses, which may be termed traumatic neuroses, are longer-lasting reactions caused by an individual's continued inability to cope adequately with a traumatic event. Medical science has identified three frequently occurring forms of neuroses resulting from trauma. [These are:] the anxiety reaction . . . the conversion reaction . . . [and] the hypochondriasis reaction . . .

*Id.* For a description of the current diagnostic criteria for the "secondary reactions" alluded to by the *Leong* court, see AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 235-45, 247-53, 257-67 (3d ed. rev. 1987) [hereinafter DSM-III-R].


30. *Id.* The court stated that "recovery therefor cannot be denied on the ground that the injury is fanciful and not real." *Id.*

31. *Id.* at 288-89, 47 N.E. at 89. The court stated: "[R]ules of law respecting the recovery of damages are framed with reference to the rights of both parties; not merely what it might be right for an injured person to receive . . . but also what it is just to compel the other party to pay." *Id.*

It is unfortunate that the *Spade* court, after acknowledging the foreseeability and substantiality of mental damages, chose the impact rule as a method of allocating burdens according to its intuitive sense of fairness. The court appeared most troubled by the facts of the case, in which the plaintiff suffered severe emotional upset from viewing an altercation from a distance. See *id.* at 289, 47 N.E. at 89. Had the court differentiated between the degree of foreseeability of distress resulting from an objectively traumatic experience, and that resulting from the facts of the instant case, it could have preserved its proximate cause analysis without recourse to the impact requirement. For a discussion of this author's proposal for measuring foreseeable injury by a comparison of objective versus subjective indices of distress, see infra notes 238-82 and accompanying text. See also Annotation, *supra* note 1, at 103 (noting tendency of early court decisions to lay out rules and principles broader than required by facts of cases).
In addition to reliance on the element of proximate cause, several courts which adopted the impact requirement have concluded that in the absence of such an impact, the defendant owes no duty of due care to the plaintiff. For example, in *Haile's Curator v. Texas & Pacific Railway*, the plaintiff and his brother had boarded the defendant's train for a pleasure trip on the advice of a physician because the brother had been depressed and nervous following an attack of grippe. The train caught fire, and the plaintiff and his brother barely escaped. Subsequently, the relief train which was sent to convey the stranded passengers was itself involved in an accident. The plaintiff alleged that as a result of these incidents, his brother required commitment to an insane asylum, with little or no hope of recovery. The United States Court of Appeals for the Fifth Circuit held that the defendant had reason to anticipate that its train accidents would cause physical injury, and would produce fright and excitement. However, the court held that the defendant had no reason to anticipate that the latter would result in a permanent mental disability. Rather than concluding its analysis with this apparent proximate cause holding that the injury was unforeseeable from the perspective of the defendant, the court stated that since the plaintiff suffered no bodily impact, the defendant owed him no duty to protect him from fright or excitement.

The *Haile* court's analysis of legal duty also appears to be conceptually erroneous. The existence of a legal duty is typically framed in terms of whether the defendant reasonably should have foreseen that his or her conduct risked harm to the particular plaintiff. It is difficult to understand how a court could conclude that the administrator of a railroad could not have foreseen injury to its passengers in the event of a collision or fire. As Dean Prosser has noted, the existence of a legal duty often merely states the conclusion that a court will recognize and pro-

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32. 60 F. 557 (5th Cir. 1894).
33. Id. at 557.
34. Id.
35. Id. at 558.
36. Id.
37. Id. at 560. In effect, by saying that fright and physical injury was foreseeable from the perspective of the defendant, while insanity was not, the court was indicating that defendants should not be held liable for peculiar predispositions of plaintiffs. For a discussion of the "thin skull" rule, which renders damages to predisposed individuals a priori foreseeable, and thus compensable, see infra notes 210-27 and accompanying text. For a discussion of this author's proposal that predisposition be characterized as unforeseeable injury, see infra notes 258-82 and accompanying text.
38. Id.
39. See *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928). The *Palsgraf* court stated: "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." Id.
vide redress for a particular injury to a particular plaintiff. This analysis by Dean Prosser has been repeatedly echoed by courts in their efforts to expand recovery in the area of negligent infliction of mental distress.

The social policies advanced in favor of the physical impact rule have been the subject of much criticism. The concern over a resulting flood of litigation has simply not materialized in those jurisdictions which have liberalized recovery in this area. Further, courts and commentators have strongly asserted that concerns for judicial expediency are insufficient to stand in the way of redress to injured plaintiffs.

40. Prosser, supra note 23, at 15-16. Dean Prosser stated:

These are shifting sands, and no fit foundation. There is a duty if the court says there is a duty; the law, like the Constitution, is what we make it. Duty is only a word with which we state our conclusion that there is or is not to be liability; it necessarily begs the essential question. When we find a duty, breach and damage, everything has been said. The word serves a useful purpose in directing attention to the obligation to be imposed upon the defendant, rather than the causal sequence of events; beyond that it serves none. In the decision whether or not there is a duty, many factors interplay: the hand of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall. In the end the court will decide whether there is a duty on the basis of the mores of the community . . . . It needs no argument to show that duty does not always coincide with the foreseeable risk.

Id. (footnote omitted). For a discussion of Dean Prosser's assertion that "proximate cause" represents a conclusion based upon social policy, see supra note 23 and accompanying text.


42. See generally Comment, Foreseeability, supra note 7, at 307-8 (discussing and criticizing traditional policy justifications in this area).

43. See, e.g., Corso v. Merrill, 119 N.H. 647, 656, 406 A.2d 300, 306 (1979) (fear of flood of litigation has not materialized in jurisdictions expanding recovery); Ramirez v. Armstrong, 100 N.M. 538, 542, 673 P.2d 822, 826 (1983) (same); Schultz v. Barberson Glass Co., 4 Ohio St. 3d 131, 133, 447 N.E.2d 109, 111 (1983) (expressing doubts that problem of increased litigation is real, and if real, would be unacceptable reason for "denying justice").

As an empirical matter, the volume of litigation may actually be heaviest in states which apply the impact rule, presumably due to increased appellate view of efforts to expand recovery or mark out exceptions to the rule. See Niederman v. Brodsky, 436 Pa. 401, 411, 261 A.2d 84, 89 (1970) (citing Lambert, Tort Liability for Psychic Injuries, 41 B.U.L. REV. 584, 592 (1961)).

44. See, e.g., Champion v. Gray, 478 So. 2d 17, 18-19 (Fla. 1985) (price of discernible physical injury, caused by psychic trauma, too great to require physical contact); Schultz v. Barberson Glass Co., 4 Ohio St. 3d 131, 133, 447 N.E.2d 109, 111 (1983) (increased litigation is unacceptable reason for "denying juc-
fact, some courts consider themselves to be under a state constitutional obligation to provide a forum for redress of personal injury.\textsuperscript{45}

Additionally, many courts have denied that a fear of fraudulent litigation should affect the availability of recovery as a threshold matter. Rather, such concerns can best be addressed as a matter of proof at trial.\textsuperscript{46} The existence and extent of mental distress is no longer generally viewed as so substantially different from, and easier to feign than, physical injury as to require qualitatively different rules of recovery.\textsuperscript{47} This change in perception reflects, in part, an increasing judicial notice and acceptance of the advances in the medical and behavioral sciences.\textsuperscript{48}

\textsuperscript{45} See, e.g., Robb v. Pennsylvania R.R., 58 Del. 454, 463, 210 A.2d 709, 714 (1965) (abandoning physical impact rule because "[p]art of our basic law is the mandate that 'every man for an injury done him in his ... person ... shall have remedy by the due course of law ...'") (quoting Del. Const. art. I, \textsection 9); Mazzagatti v. Everingham, 512 Pa. 266, 289, 516 A.2d 672, 684 (1986) (Papadakos, J., dissenting) (arguing for recovery to relatives of person injured through defendant's negligence without requirement that plaintiff contemporaneously view incident) (citing Pa. Const. art. I, \textsection 11); Gates v. Richardson, 719 P.2d 193, 197-98 (Wyo. 1986) (abandoning physical impact rule, noting that "[a]ll courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or delay"’) (quoting Wyo. Const. art. I, \textsection 8).

\textsuperscript{46} See, e.g., Dillon v. Legg, 68 Cal. 2d 728, 735, 441 P.2d 912, 917, 69 Cal. Rptr. 72, 77 (1968) (concern that juries cannot reconcile expert testimony or distinguish deceitful from bona fide claims is doubtful factual assumption); Schultz v. Barberton Glass Co., 4 Ohio St. 3d 131, 134, 447 N.E.2d 109, 112 (1983) (problem is one of adequate proof, and judicial system and evidentiary safeguards sufficient to address this); Sinn v. Burd, 486 Pa. 146, 161, 404 A.2d 672, 680 (1979) ("Factual, legal, and medical charlatans are unlikely to emerge from a trial unmasked") (quoting Niederman v. Brodsky, 436 Pa. 401, 410-11, 261 A.2d 84, 88-89 (1970)).


\textsuperscript{48} See, e.g., Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970). In an oft-cited decision, the Supreme Court of Hawaii stated that "[i]n judging the genuineness of a claim of mental distress, courts and juries may look to 'the quality and genuineness of proof and rely to an extent on the contemporary sophistication of the medical profession and the ability of the court and jury to weed out dishonest claims.'" Id. at 172, 472 P.2d at 519-20 (quoting Ferrara v. Galluchio, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958)) (emphasis added); accord Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 930, 616 P.2d 813, 821, 167 Cal. Rptr. 831, 839 (1980) ("With the rise of modern psychology the basis of this caution [regarding difficulties of proof] in securing an important element of the interest of personality was removed.").

In many jurisdictions, the courts will look to the context and circumstances of the case to assess the genuineness of the claim where the distress is not susceptible to scientific certainty. See, e.g., Johnson v. Supersave Markets, Inc., 686 P.2d 209, 213 (Mont. 1984) (tortious conduct must result in substantial invasion of protected interest and cause significant emotional impact on plaintiff); Sinn v. Burd, 486 Pa. 146, 168, 404 A.2d 672, 683 (1979) (requiring showing that nor-
The concern for exposing defendants to potentially unlimited liability, and thus, placing too onerous a burden on defendants’ beneficial activity, has been the most lasting policy limitation on actions for mental distress. As Dean Prosser notes:

There is still the problem of an end to liability, of a place to stop. It is still unthinkable that any one shall be liable to the end of time for all of the results that follow in endless sequence from his single act. Causation cannot be the answer; in a very real sense the consequences of an act go forward to eternity, and back to the beginning of the world. Any attempt to impose responsibility on such a basis would result in infinite liability for all wrongful acts, which would “set society on edge and fill the courts with endless litigation.”

Aside from the issue of whether these policy limitations are valid concerns in limiting causes of action for mental distress, much criticism has been levelled at the physical impact requirement as not even properly addressing these concerns. It has been recognized, for example, that the rule is both underinclusive and overinclusive; recovery is denied in cases involving severe and objectively verifiable psychic trauma, and is

49. See Comment, Foreseeability, supra note 7, at 308 (noting that liability should not extend ad infinitum, but arguing that impact rule is arbitrary response to this problem); see also Strickland v. Hodges, 134 Ga. App. 909, 911, 216 S.E.2d 706, 708 (1975) (requiring physical impact on “pragmatic” ground of limiting scope of liability); Wishard Memorial Hosp. v. Logwood, 512 N.E.2d 1126, 1127 (Ind. Ct. App. 1987) (same).

This concern has been expressed most strenuously with regard to whether to allow recovery to plaintiffs who witness injury to a third party. See, e.g., Pearson, Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules, 34 U. Fla. L. Rev. 477 (1982) (asserting that arbitrary limitations on liability are necessary for competing policy reasons). Compare Dillon v. Legg, 68 Cal. 2d 738, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (requiring concrete guidelines for determining foreseeability of harm to bystander plaintiff so as to limit otherwise potentially infinite liability) with Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969) (denying recovery to bystanders because once allowed, could extend liability to too many individuals; burdensome liability is “dollars-and-cents argument”). For a discussion of Dillon and its progeny, see infra notes 121-33, 139, 145-46 and accompanying text. For a discussion of Tobin, see infra notes 134-38 and accompanying text.

50. Prosser, supra note 23, at 24 (citations omitted).

51. For criticisms of the physical impact rule, see generally Liebson, Recovery of Damages for Emotional Distress Caused by Physical Injury to Another, 15 J. Fam. L. 163, 168-72 (1976-77); Comment, Independent Tort, supra note 7, at 1239-40; Comment, supra note 15, at 558-60; Comment, Foreseeability, supra note 7, at 307-09.
available for minor distress following a negligible impact.\textsuperscript{52} Further, in an effort to reach equitable results, courts have stretched the facts appreciably so as to find a physical impact where the plaintiff suffered severe but otherwise noncompensable emotional injury.\textsuperscript{53} Since the sole purpose of the rule was to limit the number of potential actions and to assure the legitimacy of the claims, the courts did not always require a causal connection between the impact and the emotional distress.\textsuperscript{54}

A frequently cited example of this proposition is the case of Zelinsky\textit{ v. Chimics},\textsuperscript{55} in which the Pennsylvania Superior Court awarded damages to the plaintiffs solely for their emotional distress following an automobile accident. The court noted that the plaintiffs sustained no physical injuries, but held that the jarring and jostling caused by the collision was sufficient physical impact.\textsuperscript{56} The court stated:

[T]he purpose of the rule requiring physical impact is to prevent "illusive or imaginative or faked" claims. However, where it is definitely established that injury and suffering were proximately caused by an act of negligence, and any degree of physi-

\textsuperscript{52} For an example of this proposition, compare Woodman\textit{ v. Dever}, 367 So. 2d 1061 (Fla. Dist. Ct. App. 1979) (child who witnessed robbery and sexual assault of mother denied recovery because no physical impact on child) with Wilson\textit{ v. Redken Laboratories}, 562 S.W.2d 633 (Ky. 1978) (awarding $30,000 for humiliation and distress resulting from loss of hair due to defective conditioner). For this author's proposal that recovery be based upon an analysis of objective versus subjective indices of distress, see infra notes 238-82 and accompanying text.


\textsuperscript{54} See, e.g., Rickey\textit{ v. Chicago Transit Auth.}, 98 Ill. 2d 546, 553, 457 N.E.2d 1, 4 (1983) ("The requirement of impact often became purely formal, and it was satisfied by a slight jolt or jar or any degree of physical 'impact,' however slight.") (citation omitted); Dziokonski\textit{ v. Babineau}, 375 Mass. 555, 559, 380 N.E.2d 1295, 1297-98 (1978) (once physical injury established, damages resulting solely from nervous shock recoverable despite lack of causal connection); Comment, \textit{Foreseeability}, supra note 7, at 307-08 (impact rule no longer distinguishes legimate from illegitimate claims because it has evolved to allow recovery for slightest impact).


\textsuperscript{56} Zelinsky, 196 Pa. Super. at 318, 175 A.2d at 354.
eral impact, however slight, can be shown, the general rule is no longer applicable . . . [57]

1. Current Status of the Physical Impact Requirement

Despite the more recent trend to discard the physical impact requirement,[58] it remains the primary recovery limitation device for mental distress actions in a few jurisdictions.[59] Some of the difficulties

57. Id. (citing Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958)).

58. See Gates v. Richardson, 719 F.2d 198, 195 n.1 (Wyo. 1986) (list of jurisdictions abrogating the impact rule); Comment, Independent Tort, supra note 7, at 1240.

For a discussion of those jurisdictions granting recovery to plaintiffs who are in imminent apprehension of physical harm, see infra notes 91-92 and accompanying text. For those jurisdictions granting recovery to bystanders of injury to another person, see infra notes 139, 145-46 and accompanying text. For those jurisdictions utilizing a general foreseeable plaintiff analysis, see infra notes 186-96 and accompanying text.

59. Arkansas: See Lou v. Smith, 284 Ark. 249, 685 S.W.2d 809 (1985) (mother of child injured by taking adult dosage of medication must show willful misconduct by pharmacist to recover for mental distress absent physical impact to mother); M.B.M. Co. v. Counce, 268 Ark. 269, 596 S.W.2d 681 (1980) (no action for mental distress absent physical injury, independent cause of action or willful misconduct by defendant).


Indiana: See Boston v. Chesapeake & O. Ry., 223 Ind. 425, 61 N.E.2d 326 (1945) (man whose car was struck and dragged by train stated cause of action for purely emotional damages despite fact that he was not physically injured; physical impact is merely minimum requirement); Wishard v. Memorial Hosp., 512 N.E.2d 1126 (Ind. Ct. App. 1987) (parents who received wrong child from hospital staff barred from recovery for mental distress absent physical impact); Orkin Exterminating Co. v. Walters, 466 N.E.2d 55 (Ind. Ct. App. 1984) (denying recovery for mental distress resulting from breach of insect extermination contract).

Kentucky: See Davis v. Graviss, 672 S.W.2d 928 (Ky. 1984) (recognizing right to substantial recovery for mental distress not directly related to initial physical impact, even where physical injury is merely cosmetic, its existence is debatable or it has completely healed); Deutsch v. Shein, 597 S.W.2d 141 (Ky.
previously discussed with regard to the impact requirement continue to exist in these jurisdictions. In Kentucky, for example, the supreme court found it necessary to characterize the "bombardment of X-rays" as a physical impact in order to sustain recovery to a woman who underwent an elective abortion after her physician failed to ascertain that she was pregnant before exposing her to such X-rays. That same court later noted that substantial recovery for mental distress is available even where such distress is not directly related to the initial physical impact. Further, the physical injury may be merely cosmetic or completely healed, and its very existence may be debatable.

Similarly, the Supreme Court of Indiana held that contemporaneous physical impact is merely a minimum requirement for maintaining actions for mental distress. Subsequent court of appeals cases in Indiana have held that "there is no requirement that the injury be severe to support the parasitic mental anguish claim. A causal connection is all that is mandated." In the District of Columbia, there is no requirement that the physical impact be substantial. Rather, the severity of impact is to be considered only as an element of proof at trial.

The underinclusive nature of the impact rule is clearly exemplified in Saecho v. Matsakoun. In Saecho, three minor children witnessed their brother being killed when he was struck by the defendant's negligently driven automobile. One sibling was in close proximity to the accident and sustained physical injuries, while the other two siblings stood approximately fifteen feet away. The Oregon Court of Appeals held that the child who sustained physical injuries could recover for his emotional injury

1980) (bombardment of X-rays constituted sufficient physical impact to pregnant woman to sustain recovery for distress resulting from elective abortion).

Oregon: See Saecho v. Matsakoun, 78 Or. App. 341, 717 P.2d 165 (1986) (sibling who sustained physical injuries from car accident could recover damages for mental distress stemming from witnessing killing of brother; two other siblings in close proximity, who sustained no physical impact, barred from recovery); see also Norwest v. Presbyterian Intercommunity Hosp., 293 Or. 543, 652 P.2d 318 (1982) (in action for loss of parental consortium, court analogized inter alia, to actions for negligent infliction of mental distress, in denying such recovery).

60. Deutsch v. Shein, 597 S.W.2d 141, 146 (Ky. 1980).
61. Davis v. Graviss, 672 S.W.2d 928, 931 (Ky. 1984).
62. Id.
66. Id.; see also Waldon v. Covington, 415 A.2d 1070, 1076 n.20 (D.C. 1980).
68. Id. at 342-43, 717 P.2d at 166.
69. Id.
distress stemming from witnessing the death of his brother, 70 while the remaining two children were barred from recovery. 71

The court adopted the impact requirement because it reasoned that such a rule "reflect[s] the best policy option [since] [t]he line it provides is clear, and it creates a clear relationship between compensability and the plaintiff’s being a victim of a breach of duty." 72 The court refused to adopt a rule which would allow recovery to those individuals who do not sustain physical injury, but who are in imminent apprehension of physical harm (the so-called "zone of danger" rule), 73 reasoning that the mental distress engendered by witnessing injury to a loved one would likely be the same whether the plaintiff was in the zone of danger or not. 74 Thus, because the court felt that a more expansive rule would itself be underinclusive in providing redress to injured plaintiffs, it chose a more conservative rule. 75

B. The "Zone of Danger" and "Physical Manifestation" Requirements

A large majority of jurisdictions have abandoned the physical impact requirement as a limitation on actions for mental distress. 76 In place of physical impact, many of these jurisdictions have extended liability to those plaintiffs who are foreseeably placed at risk of physical harm by the conduct in question. This limiting mechanism has become known as the "zone of danger" test. 77 Notably, this test does not extend liability to those individuals who are foreseeably psychologically affected, 78 but rather is limited to those who are placed in imminent apprehension of physical harm at the time of the breach. 79

One of the original and perhaps best known decisions which adopted the zone of danger test was Dulieu v. White & Sons. 80 In Dulieu, the defendant had negligently driven a horse-drawn van into the plaintiff’s tavern. 81 The plaintiff, a pregnant woman, sustained severe ner-

70. Id. at 345, 717 P.2d at 168.
71. Id. at 348, 717 P.2d at 169-70.
72. Id. at 348, 717 P.2d at 169.
73. For a discussion of the zone of danger rule, see infra notes 76-90 and accompanying text.
74. Saecho, 78 Or. App. at 348, 717 P.2d at 169.
75. For a discussion of the underinclusiveness of the zone of danger rule, see infra notes 120-33 and accompanying text.
77. For further discussion and critical analysis of the zone of danger test, see generally Comment, supra note 15, at 560-66; Comment, Foreseeability, supra note 7, at 313-15.
78. For a discussion of those jurisdictions which allow recovery to plaintiffs who are foreseeably psychologically harmed, see infra notes 186-96 and accompanying text.
79. See generally Comment, supra note 15, at 560.
80. 2 K.B. 669 (1901).
81. Id. at 670.
vous shock as a result of the incident, and she ultimately gave premature birth to an intellectually deficient child.\textsuperscript{82} The court noted that the operator of a vehicle on a highway owes a duty of due care not to injure persons or property on or adjacent to the highway.\textsuperscript{83} The court held that the duty extended to the plaintiff due to her "reasonable apprehension of immediate bodily hurt."\textsuperscript{84}

The fact that the plaintiff in Dulieu was within the zone of physical danger was not sufficient, by itself, to sustain recovery. This merely established that a duty existed which had been breached. In order to establish actual damages, the plaintiff was also required to prove that she sustained a physical injury as the direct and natural result of the initial emotional distress.\textsuperscript{85} The court reasoned that "[i]f [the defendant's] negligence has caused [the plaintiff] neither injury to property nor physical mischief, but only an unpleasant emotion of more or less transient duration, an essential constituent of a right of action for negligence is lacking."\textsuperscript{86}

This so-called "physical manifestation" requirement served two major purposes. First, it served to limit the potential liability of defendants since a cause of action was only available in those cases where physical injury could be established.\textsuperscript{87} Second, it operated as an element of proof that the plaintiff suffered actual mental distress, and thus that the suit was not trivial or fraudulent.\textsuperscript{88}

\textsuperscript{82} Id.

\textsuperscript{83} Id. at 671. This duty presumably arises because individuals on or adjacent to a highway are foreseeably placed at risk of harm by the operation of an automobile. See Palsgraf v. Long Island R.R., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928) (duty is owed to those individuals who are foreseeably harmed by conduct in question).

\textsuperscript{84} Dulieu, 2 K.B. at 672. The court went on to note, in dicta, that such a duty would not extend to an individual who sustained psychic discomfort as a result of fear for the safety of another: "A has, I conceive, no legal duty not to shock B.'s nerves by the exhibition of negligence towards C., or towards the property of B. or C." Id. at 675. This so-called "bystander limitation" has continued in vitality in most jurisdictions to this day. For a discussion of jurisdictions which allow bystander recovery to plaintiffs who are also within the zone of danger, see infra notes 95-103 and accompanying text. For a discussion of jurisdictions allowing general bystander recovery, see infra notes 139, 145-46 and accompanying text.

\textsuperscript{85} Dulieu, 2 K.B. at 673. In the present case, this requirement was met because the plaintiff suffered a premature and problematic delivery. Id. at 670.

\textsuperscript{86} Id. at 673.

\textsuperscript{87} See Champion v. Gray, 478 So. 2d 17, 20 (Fla. 1985). The Champion court stated: "We recognize that [the physical manifestation requirement] is somewhat arbitrary, but in our view it is necessary to curb the potential of fraudulent claims, and to place some boundaries on the indefinable and unmeasurable psychic claims." Id.

\textsuperscript{88} As the Dulieu court stated: "Fear . . . taken alone falls short of being actual damage not because it is a remote or unlikely consequence, but because it can be proved and measured only by physical effects." Dulieu, 2 K.B. at 673 (quoting F. Pollack, THE LAW OF TORTS 51 (6th ed. 1901)).
Similarly, the zone of danger rule served to limit the liability of defendants by preventing recovery to the potentially large number of individuals who would become emotionally upset as a result of either witnessing the injuries to another, or as the result of concern for the injured parties.

Further, by limiting recovery to individuals who were directly exposed to physical harm, the courts could be better assured of the legitimacy of the claim.

1. The Current Status of the Zone of Danger and Physical Manifestation Tests

Currently, a large number of jurisdictions follow a combination of both the zone of danger and physical manifestation tests as limiting devices on actions for negligent infliction of mental distress. A few jurisdictions have extended the zone of danger test.


90. See, e.g., Comment, Foreseeability, supra note 7, at 313; Comment, Negligent Infliction of Emotional Distress: Liability to the Bystander—Recent Developments, 30 Mercer L. Rev. 735, 737-38 (1979).


Delaware: See Mergenthaler v. Asbestos Corp. of Am., 480 A.2d 647 (Del. 1984) (workers suffering mental distress after being exposed to asbestos failed to allege present physical injury); Robb v. Pennsylvania R.R., 58 Del. 454, 210 A.2d 709 (1965) (woman who narrowly escaped impact from train and suffered subsequent cessation of lactation stated cause of action).

Idaho: See Hatfield v. Max Rouse & Sons Northwest, 100 Idaho 840, 606 P.2d 944 (1980) (man whose farm equipment was auctioned at too low price failed to allege physical manifestation of mental distress); Summers v. Western Idaho Potato Processing Co., 94 Idaho 1, 479 P.2d 292 (1971) (employee whose clothes were ripped off by machinery leaving her nude in front of fellow employees failed to allege physical manifestation of humiliation).

Illinois: See Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 457 N.E.2d 1 (1983) (minor who witnessed serious injury to brother on escalator required to plead and prove he was in zone of danger and suffered resulting physical injury); Hunt v. Chettri, 158 Ill. App. 3d 76, 510 N.E.2d 1324 (1987) (barring recovery to mother of stillborn infant because mother not reasonably fearful for own safety and did not suffer subsequent physical injury). For further discussion of


Minnesota: See Leao v. Washington County, 397 N.W.2d 867 (Minn. 1986) (man who was forced to have sexual contact with nude dancer failed to meet physical manifestation test; wife was not in zone of danger); Stadler v. Cross, 295 N.W.2d 552 (Minn. 1980) (parents who witnessed serious injury to child not within zone of danger; defendant’s liability for consequences of act cannot be unlimited).

Mississippi: See Entex., Inc. v. McGuire, 414 So. 2d 437 (Miss. 1982) (granting recovery for nervous condition following gas explosion in plaintiff’s presence which destroyed home and injured wife; dicta that recovery available to plaintiff not within zone of danger who witnesses injuries to another); First Nat’l Bank v. Langley, 314 So. 2d 324 (Miss. 1975) (agent of bank wrongly suspected of theft stated action for subsequent physical and mental pain).

North Carolina: See Campbell v. Pitt County Memorial Hosp., Inc., 84 N.C. App. 314, 352 S.E.2d 902 (mother of child injured during breech delivery failed to allege physical manifestation of distress), aff’d, 321 N.C. 260, 362 S.E.2d 273 (1987); Woodell v. Pinehurst Surgical Clinic, 78 N.C. App. 230, 336 S.E.2d 716 (1985) (per curiam) (woman who was negligently misinformed she was pregnant with twins failed to allege physical manifestation of distress), aff’d, 316 N.C. 550, 342 S.E.2d 523 (1986); Wyatt v. Gilmore, 57 N.C. App. 57, 290 S.E.2d 790 (1982) (man who suffered heart attack after car struck tree on property stated cause of action). But see Williamson v. Bennett, 251 N.C. 498, 112 S.E.2d 48 (1960) (woman who suffered neurotic disorder after car collision failed to state cause of action because collision not proximate cause of disorder; defendant was under no duty to guard against peculiar predisposition of plaintiff, especially where plaintiff’s distress resulted from imagined fear for another).

Oklahoma: See Ellington v. Coca Cola Bottling Co., 717 P.2d 109 (Okla. 1986) (consumer who became physically ill after finding what she thought was worm in soft drink stated cause of action for mental distress; no recovery available for harm directed at third party).

South Carolina: See Rhodes v. Security Fin. Corp., 268 S.C. 300, 233 S.E.2d 105 (1977) (emotional distress resulting from debt collection attempt not extreme or severe enough); Padgett v. Colonial Wholesale Distrib. Co., 232 S.C. 593, 103 S.E.2d 265 (1958) (recovery available for emotional distress resulting in skin rash, weight loss and fever following car accident). In a slightly different context than a traditional tort action, the Supreme Court of South Carolina held that a man who died of a cerebral hemorrhage after witnessing injury to his son was entitled to accident insurance despite the fact that his injury resulted initially from mental distress from witnessing injury to another. Twitty v. Key Life Ins. Co., 260 S.C. 573, 197 S.E.2d 656 (1973).


Tennessee: See Shelton v. Russell Pipe & Foundry Co., 570 S.W.2d 861 (Tenn. 1978) (father who learned of serious injury to daughter not within zone of danger; dicta that would extend liability to relative who directly perceived incident); Trent v. Barrows, 55 Tenn. App. 182, 397 S.W.2d 409 (1965) (emotional distress resulting in heart attack when car struck plaintiff’s home held compensable).

Vermont: See Vaillancourt v. Medical Center Hosp., 139 Vt. 138, 425 A.2d
dictions require that the plaintiff be within the zone of physical danger, but have expressly abandoned the requirement of physical manifestation of psychic distress. Those jurisdictions which have extended liability beyond the zone of physical danger, but which continue to re-

92 (1980) (father of dead fetus not within zone of danger; mother reasonably feared for own safety so as to sustain recovery); Guilmette v. Alexander, 128 Vt. 116, 259 A.2d 12 (1969) (mother who witnessed serious injury to daughter not within zone of danger); Savard v. Cody Chevrolet, Inc., 126 Vt. 405, 234 A.2d 656 (1967) (infant whose house was struck by defendant’s truck stated action for subsequent nervous shock, sleeplessness, loss of appetite resulting in weight loss, faintness and trembling).

Virginia: See Modaber v. Kelley, 232 Va. 60, 348 S.E.2d 233 (1986) (injuries to stillborn fetus considered as physical injury to mother so that mother could recover damages for mental distress); Hughes v. Moore, 214 Va. 27, 197 S.E.2d 214 (1973) (woman who suffered pains in chest and arms, cessation of lactation and premature resumption of menses after defendant drove car into her porch stated cause of action; physical manifestation of mental distress must be demonstrated, by clear and convincing evidence, to have naturally resulted from fright caused by defendant’s conduct).

West Virginia: See Monteleone v. Cooperative Transit Co., 128 W. Va. 340, 36 S.E.2d 475 (1945) (woman whose face was slightly cut by splintered glass when trolley wire struck car failed to state cause of action for headaches resulting from post-traumatic psychoneurosis; physical injury must naturally flow from serious mental distress).

Wisconsin: See Garrett v. City of New Berlin, 122 Wis. 2d 223, 362 N.W.2d 137 (1985) (teen who witnessed police car seriously injure brother stated cause of action because she was member of group police were chasing, and thus was in zone of danger; hysteria was sufficient physical manifestation of psychic distress); La Fleur v. Mosher, 109 Wis. 2d 112, 325 N.W.2d 314 (1982) (physical manifestation of distress unnecessary where independent “guarantee of genuineness of the claim” exists; such guarantee present in action for wrongful confinement); Colla v. Mandella, 1 Wis. 2d 594, 85 N.W.2d 345 (1957) (heart attack resulting from fright after collision of truck with plaintiff’s horse indispensable since plaintiff feared for personal safety). For further discussion of Garrett, see infra notes 104-11 and accompanying text.

92. Alabama: See Farmers & Merchants Bank v. Hancock, 506 So. 2d 305 (Ala. 1987) (awarding damages for mental distress and physical deterioration following wrongful repossession of trucks); Taylor v. Baptist Medical Center, 400 So. 2d 369 (Ala. 1981) (parent of stillborn fetus stated action without antecedent physical impact or resulting physical manifestation of psychic distress; mental suffering is recognizable standing alone).


North Dakota: See Hanson v. Williams County, 389 N.W.2d 319, 323 n.9, 336 n.8 (N.D. 1986) (utilizing zone of danger limitation as illustration that not all injuries are entitled to legal recognition); Wetham v. Bismarck Hosp., 197 N.W.2d 678 (N.D. 1972) (mother who witnessed nurse drop newborn on floor not within zone of danger).

93. For a discussion of other jurisdictions which have expressly abandoned the physical manifestation requirement, see infra note 119 and accompanying text.
quire resulting physical injury, are discussed later in this Comment.\(^{94}\)

Several of those jurisdictions which require that the plaintiff be within the zone of danger have explicitly held that once it has been established that the plaintiff suffered imminent apprehension of physical harm, damages are recoverable despite the fact that the mental distress resulted primarily or exclusively from concern for the safety of another individual.\(^{95}\) For example, in *Keck v. Jackson*,\(^{96}\) the plaintiff and her mother were parked in the emergency lane of a highway in order to repair a flat tire when their vehicle was negligently struck by the defendant.\(^{97}\) The plaintiff received serious physical injuries, while her mother received injuries resulting in death after three months of hospitalization.\(^{98}\) The Supreme Court of Arizona held that recovery was available for the plaintiff’s mental distress despite the fact that the distress resulted predominantly from witnessing the injuries to her mother.\(^{99}\) The court held that such distress to a bystander is foreseeable from the perspective of the defendant only if the bystander has a close personal relationship, either by consanguinity or otherwise, with the victim.\(^{100}\) In an effort at limiting the potential liability of defendants, the court required that the plaintiff also be in reasonable apprehension of physical harm from the defendant’s conduct.\(^{101}\) Further, the mental distress had to be manifested as a physical injury because purely emotional damages were

\(^{94}\) For a discussion of these jurisdictions, see *infra* notes 139, 145-46 and accompanying text.

\(^{95}\) *See* Keck v. Jackson, 122 Ariz. 114, 593 P.2d 668 (1979) (en banc) (woman in car struck by defendant could recover damages for distress resulting from witnessing injuries to mother); Towns v. Anderson, 195 Colo. 517, 579 P.2d 1163 (1978) (en banc) (boy in direct proximity to destruction of home and injury to sister stated cause of action); Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 457 N.E.2d 1 (1983) (minor who witnessed serious injury to brother on escalator must plead and prove he also reasonably feared for own safety); Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952) (if plaintiff was in imminent apprehension of physical harm, no apportionment of damages based on fear for self versus others is necessary); Tebbutt v. Virostek, 65 N.Y.2d 981, 483 N.E.2d 1142, 493 N.Y.S.2d 1010, (1985) (mother of fetus that died as result of negligent performance of amniocentesis barred from recovery because mother did not learn of injury until stillbirth one month later; distress to plaintiff within zone of danger which results from concern for safety of another is recoverable, but must result from contemporaneous observance of injury); Bovsun v. Sanperi, 61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 (1984) (wife and daughter who were in vehicle struck by defendant’s automobile stated action for mental distress resulting from witnessing injuries to husband/father; such rule adequately addresses concern for unlimited liability). For further discussion of *Keck*, see *infra* notes 96-102 and accompanying text. For further discussion of *Garrett*, see *infra* notes 104-11 and accompanying text.

\(^{96}\) 122 Ariz. 114, 593 P.2d 668 (1979) (en banc).

\(^{97}\) *Id.* at 114, 593 P.2d at 668.

\(^{98}\) *Id.*

\(^{99}\) *Id.* at 116, 593 P.2d at 670 (citing *RESTATEMENT (SECOND) OF TORTS* § 313 (1965)).

\(^{100}\) *Id.*

\(^{101}\) *Id.*
deemed to be too speculative.\textsuperscript{102}

It should be apparent that, logically, such a holding implicitly allows for the recovery of damages which were \textit{not caused} by the defendant's breach of a legal duty. If the defendant's sole legal obligation is to avoid exposing the plaintiff to physical harm, then such exposure did constitute a breach. However, it was not that breach which caused the plaintiff's emotional injury, but rather the defendant's independent and separate breach of a duty to the mother. The court's analysis exposes the actual policy rationale behind the zone of danger test. The requirement that a plaintiff be within the zone of danger is actually a threshold device which limits the potential liability of a defendant.\textsuperscript{103} Once this requirement is met, a plaintiff may recover for \textit{all} damages which flowed from the incident, whether they were related to the breach or not.

Other jurisdictions have also stretched the zone of danger analysis in order to provide recovery where there was little concern for overextending the defendant's liability or opening the way for trivial or fraudulent claims. In \textit{Garrett v. City of New Berlin},\textsuperscript{104} a brother and sister and a group of their friends were watching an outdoor movie, apparently without having paid for admission. A police car entered the premises with its headlights extinguished in pursuit of the children, and ran over the plaintiff's brother, causing him severe and permanent injuries.\textsuperscript{105} The sister was at all times no closer to the police vehicle than fifteen or twenty feet, and she never feared for her own safety.\textsuperscript{106} As a result of her mental distress from witnessing the injuries to her brother, she suffered insomnia, disruption of her family relationships, lowering of her school grades and deterioration in her self-image.\textsuperscript{107}

The trial court granted summary judgment against the sister's claim, holding that she was not within the zone of danger and did not suffer any resulting physical manifestation of her initial distress.\textsuperscript{108} The Supreme Court of Wisconsin reversed, holding that the sister was within the zone of danger since she was a member of the group that the officers were pursuing.\textsuperscript{109} The court felt that it did not matter that her distress resulted from concern for her brother's safety rather than her own, noting that she was a witness to the injuries, and thus, there was little fear of opening the way for fraudulent claims or unlimited liability.\textsuperscript{110}

Further, the court held that the sister's "hysteria" at the scene of

\textsuperscript{102} \textit{Id.} at 115-16, 593 P.2d at 669-70 (citing \textsc{Restatement (Second) of Torts} § 436A (1965)).

\textsuperscript{103} See supra notes 89-90 and accompanying text.

\textsuperscript{104} 122 Wis. 2d 223, 362 N.W.2d 137 (1985).

\textsuperscript{105} \textit{Id.} at 226, 362 N.W.2d at 139.

\textsuperscript{106} \textit{Id.} at 226-27, 362 N.W.2d at 139.

\textsuperscript{107} \textit{Id.} at 227, 362 N.W.2d at 140.

\textsuperscript{108} \textit{Id.} at 227-28, 362 N.W.2d at 140.

\textsuperscript{109} \textit{Id.} at 232-33, 362 N.W.2d at 142.

\textsuperscript{110} \textit{Id.} at 234, 362 N.W.2d at 143.
the accident, coupled with her subsequent insomnia and deteriorating academic and interpersonal performance, constituted sufficient physical injury.\(^{111}\)

As in Garrett, many courts have found subsequent physical manifestation of psychic distress on the facts of a case where concerns with unlimited liability or fraudulent claims were minimal.\(^{112}\) As a result, damages are awarded despite the lack of a causal connection between the defendant’s conduct and the required physical injury.\(^{113}\) However, a few jurisdictions which follow the physical manifestation rule have added explicit requirements that the physical injury be substantial and causally connected to the defendant’s breach.\(^{114}\)

2. Critique and Abandonment of the Physical Manifestation Requirement

The physical manifestation requirement has been criticized as being overinclusive, in that it permits recovery for demonstrably trivial mental distress accompanied by physical symptoms, and underinclusive, since serious distress is noncompensable absent the happenstance of subse-

111. Id. at 236, 362 N.W.2d at 144. The court cited certain medical authorities in stating that hysteria is a neurotic condition often characterized by conversion of anxiety to physical symptoms such as convulsions and muscular contractions. Id. at 236-37, 362 N.W.2d at 144-45 (citing Stedman’s Medical Dictionary 782 (2d Lawyer’s ed. 1966); 2 J. Schmidt, Attorney’s Dictionary of Medicine and Word Finder H-142 (1984)). For a discussion of the diagnostic criteria for the disorders described by the court, see DSM-III-R, supra note 28, at 255-67. Notably, the court did not address the fact that such “convulsions” and “contractions” were not alleged in the present case.


113. See, e.g., Taylor v. Baptist Medical Center, 400 So. 2d 369, 373 (Ala. 1981) (“perfectly obvious that any injury from the traditional tort [requirement of physical manifestation] is slight and the damages sought for the mental disturbance constitute the primary [if not the sole] reason for having initiated the action”); Montinieri v. Southern New England Tel. Co., 175 Conn. 337, 344, 398 A.2d 1180, 1184 (1978) (noting tendency of plaintiffs to exaggerate bodily symptoms to predicate parasitic recovery for more grievous emotional injury).

114. See Haord v. Shawnee Mission Medical Center, 233 Kan. 267, 662 P.2d 1214 (1983) (subsequent physical injury must be direct and proximate result of distress caused by negligence of defendant, and must appear within short span of time after initial emotional disturbance); Hughes v. Moore, 214 Va. 27, 197 S.E.2d 214 (1973) (plaintiff must establish by clear and convincing evidence that physical injuries naturally resulted from fright proximately caused by defendant’s conduct); Monteleone v. Co-operative Transit Co., 128 W. Va. 340, 36 S.E.2d 475 (1945) (plaintiff may recover only for physical injury which naturally results from serious mental distress).
quent physical symptoms. Further, such a rule may actually encourage extravagant pleading and distorted testimony by the plaintiff in order to state a cause of action, since once a physical manifestation is established, damages are awarded almost entirely for mental anguish.

It is often asserted that advances in the medical and mental health sciences have enabled adequate proof of the existence and degree of psychic distress without the existence of "objective" physical symptomology. Thus, it is argued that physical symptoms should be viewed as highly persuasive evidence of the extent of the distress, rather than as a threshold requirement for bringing the action.

As a result of all, or some combination of, these criticisms, several jurisdictions have explicitly abandoned the physical manifestation requirement.


116. As one court commented: "To . . . require that, before one who is mentally injured may recover, he must at least regurgitate once seems ... to be imposing upon the law a requirement that makes little or no sense." James v. Lieb, 221 Neb. 47, 58, 375 N.W.2d 109, 116 (1985) (quoting Fournell v. Usher Pest Control Co., 288 Neb. 684, 697, 305 N.W.2d 605, 611 (1981) (Krivosha, C.J., dissenting), overruled, James, 221 Neb. 47, 375 N.W.2d 109).

117. See, e.g., Taylor v. Baptist Medical Center, 400 So. 2d, 369, 374 (Ala. 1981) (requiring physical manifestation would be "adherence to procrastinate principles which have little or no resemblance to medical realities"); Sinn v. Burd, 486 Pa. 146, 404 A.2d 672, 678 (1979) ("[i]t has been long assumed that medical science is unable to establish that the alleged psychic injuries in fact resulted from [an] accident . . . . Advancements in medical and psychiatric science through this century have discredited these hoary beliefs."); Note, supra note 2, at 854.

118. See Paugh v. Hanks, 6 Ohio St. 3d 72, 77, 451 N.E.2d 759, 764-65 (1983) (physical manifestation can be factor in helping jury decide whether claim is compensable); Gates v. Richardson, 719 P.2d 193, 200 (Wyo. 1986) (it is sufficient that plaintiff has burden of proving damages).

C. Foreseeable Plaintiff Analysis—The Dillon Criteria

The zone of danger limitation, which conditions recovery upon a plaintiff’s having been in imminent apprehension of personal physical harm, has also been heavily criticized as being over and underinclusive.\(^\text{120}\) The underinclusive nature of this limitation was cogently discussed in the landmark decision by the California Supreme Court in *Dillon v. Legg*.\(^\text{121}\) In *Dillon*, the defendant had been negligently operating his automobile when he struck an infant child, causing her fatal injuries.\(^\text{122}\) The deceased’s mother was in close proximity, and personally witnessed the collision.\(^\text{123}\) The trial court sustained the defendant’s motion for summary judgment against the mother because she had not been within the zone of physical danger.\(^\text{124}\)

The California Supreme Court reversed the trial court’s ruling against the mother and discarded the zone of danger requirement.\(^\text{125}\)


\(^{120}\) *See*, e.g., Culbert v. Sampson’s Supermarkets, Inc., 444 A.2d 433, 435, 436 (Me. 1982) (noting the “arbitrary and unjust consequences of applying a spatial limitation on liability,” and that “zone of danger rule bars claims by reasonably foreseeable plaintiffs regardless of the authenticity and severity of the injury”); Dziokonski v. Babineau, 375 Mass. 555, 564, 380 N.E.2d 1295, 1300 (1978) (zone of danger rule “lacks strong logical support”); Paugh v. Hanks, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983) (zone of danger rule is unduly restrictive and prevents redress where emotional injury is severe and foreseeable); Saecho v. Matsakoun, 78 Or. App. 340, 717 P.2d 165 (1986) (zone of danger rule does not provide rational differentiations between those who may recover and those who may not).

\(^{121}\) 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (en banc). For further discussion of *Dillon*, see generally McCarthy, * supra* note 9, at 26-27; Comment, * supra* note 15, at 567-72; Comment, *Foreseeability, supra* note 7, at 314-17.

\(^{122}\) 68 Cal. 2d at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74.

\(^{123}\) *Id.* The deceased’s sister was also in close proximity and personally witnessed the event. *Id.*

\(^{124}\) *Id.* at 732, 441 P.2d at 915, 69 Cal. Rptr. at 75. The motion for summary judgment against the sister was denied because it was unclear from the pleadings whether she had feared for her own safety at the time of the collision. *Id.* The trial court had been applying the California Supreme Court’s prior holding in *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 35 (1963), that in order to recover, a plaintiff must be within the zone of physical danger. *Dillon* expressly overruled *Amaya*. 68 Cal. 2d at 748, 441 P.2d at 925, 69 Cal. Rptr. at 85.

\(^{125}\) *Dillon*, 68 Cal. 2d at 740-41, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81.

The court began:

In the first place, we can hardly justify relief to the sister for trauma which she suffered upon apprehension of the child’s death and yet deny it to the mother merely because of a happenstance that the sister was some few yards closer to the accident. The instant case exposes the hopeless artificiality of the zone-of-danger rule. *Id.* at 739, 441 P.2d at 915, 69 Cal. Rptr. at 75.
The court stated that the zone of danger rule merely represents a conclusion about the scope of a defendant's duty to foreseeable plaintiffs; it reflects no more than a sum total of public policy considerations. In discarding the old rule, the court, in turn, addressed some of the policy considerations typically associated with actions for negligent infliction of mental distress. With regard to the fear of potentially fraudulent litigation, the court stated that, despite this possibility, there could certainly be no doubt that a parent who witnesses the death of his or her child would foreseeably suffer mental and physical injury. Further, the possibility of successful recovery for fraudulent assertions in some cases would not justify denying recovery for an entire class of actions.

Although the court acknowledged a real and substantial concern for exposing defendants to potentially infinite liability, the court held that the extent of such liability could be contained by traditional negligence principles. Defendants would only owe a duty of due care to those individuals who were foreseeably endangered by the conduct in question. Since the defendant's duty would depend on the degree of foreseeability of injury to the plaintiff, the Dillon court expressly contemplated that the determination of the existence of a duty would be made on a "case-by-case basis." The court fashioned a now well-known set of factors or guidelines which future courts would take into account in determining whether a defendant should reasonably have foreseen injury to a particular plaintiff:

(1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it.
(2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident.

126. Id. at 734, 441 P.2d at 916, 69 Cal. Rptr. at 76 (quoting W. Prosser, The Law of Torts 332-33 (3d ed. 1964)).
127. Id. at 735-40, 441 P.2d at 917-20, 69 Cal. Rptr. at 77-81. For a discussion and critical analysis of these policy considerations, see supra notes 16-18, 42-50 and accompanying text.
128. Id. at 735-36, 441 P.2d at 917, 69 Cal. Rptr. at 77; accord Portee v. Jaffee, 84 N.J. 88, 417 A.2d 521 (1980). The Portee court stated: "[T]he interest assertedly injured is more than a general interest in emotional tranquility. It is the profound and abiding sentiment of parental love. . . . The law should find more than pity for one who is stricken by seeing that a loved one has been critically injured or killed." Id. at 97, 417 A.2d at 526.
129. Dillon, 68 Cal. 2d at 736, 417 A.2d at 917, 69 Cal. Rptr. at 77-78.
130. Id. at 739, 441 P.2d at 919, 69 Cal. Rptr. at 78-79.
131. Id. at 739, 441 P.2d at 919-20, 69 Cal. Rptr. at 79-80. For a discussion of the landmark Palisgraf decision, which defined a legal duty as extending only to those individuals who were foreseeably affected by the conduct in question, see supra notes 39, 83.
132. Id. at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80. For a discussion of the inconsistent manner in which jurisdictions have applied the supposed flexible Dillon factors, see infra notes 173-85 and accompanying text.
dent 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.133

The three Dillon factors—"proximity", "contemporaneous observ-
ance" and "relationship"—have not been adopted by all jurisdictions
which have considered them. For example, in the renowned decision in
Tobin v. Grossman,134 the New York Court of Appeals denied recovery to
a mother who was near the scene of the accident where her two year old
child was hit and seriously injured by the defendant's automobile.135
The mother did not see the accident, but she heard the screech of the
brakes and immediately ran to the scene.136

The court stated that the recognition of an action for mental dis-
tress to a bystander who was not within the zone of physical danger de-
pendent entirely upon a consideration of the social policy factors
involved.137 The court addressed each of the Dillon foreseeability fac-
tors in turn, and rejected them as insufficient to contain liability within
manageable limits.138

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133. Id. at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.
135. Id. at 611, 249 N.E.2d at 419-20, 301 N.Y.S.2d at 554-55.
136. Id. Even if the Tobin court had adopted the Dillon holding, recovery
could have been denied since the mother arguably did not contemporaneously
observe the event. For a discussion of the split in jurisdictions regarding the
definition, scope and importance of contemporaneous perception, see infra
notes 161-72 and accompanying text.
137. Id. at 615, 249 N.E.2d at 422, 301 N.Y.S.2d at 558. The court stated
that this creation of a new cause of action did not depend upon advances in
medical science, technology or economics, but rather "[t]he question [was]
profonder than that." Id. at 613, 249 N.E.2d at 421, 301 N.Y.S.2d at 556. The
court reasoned it was irrelevant that there had been advances in the accuracy of
diagnosis and causal analysis of mental trauma. Id. Further, there was no sud-
den realization of the trauma that a parent experiences following injury to a
child. Id. at 615, 249 N.E.2d at 422, 301 N.Y.S.2d at 558. Rather, the court's
refusal to recognize a new cause of action depended solely upon a consideration
of risking unlimited liability to defendants. Id. at 615-17, 249 N.E.2d at 422-23,
301 N.Y.S.2d at 558-60.

138. Id. at 616-17, 249 N.E.2d at 423, 301 N.Y.S.2d at 559-60. The rela-
tionship factor was seen as inadequate because it would logically "extend to
older children, fathers, grandparents, relatives, or others in loco parentis, and
even to sensitive caretakers . . . . Moreover, in any one accident, there might
well be more than one person indirectly but seriously affected by the shock of
injury or death to the child." Id. at 616, 249 N.E.2d at 423, 301 N.Y.S.2d at 559.
The proximity and contemporaneous observance factors were rejected as being
too difficult to define and circumscribe. The court stated that "[a]ny rule based
solely on eyewitnessing the accident could stand only until the first case comes
along in which the parent is in the immediate vicinity but did not see the acci-
dent." Id. at 617, 249 N.E.2d at 423, 301 N.Y.S.2d at 560.
1. Current Status of the Dillon Analysis

Despite the Tobin court's admonitions, several jurisdictions have adopted the Dillon criteria nearly verbatim.139 A few jurisdictions have

139. Florida: See Champion v. Gray, 478 So. 2d 17, 20 (Fla. 1985) (mother who died of shock and grief after hearing, and coming immediately upon scene of, fatal injury to daughter stated cause of action; plaintiff must be "directly involved in the event" and must have "especially close emotional attachment" to the injured party); Brown v. Cadillac Motors Car Div., 468 So. 2d 903 (Fla. 1985) (man who struck and killed mother due to defective automobile must still allege demonstrable physical injury flowing from accident). For further discussion of Champion with regard to defining the scope of the contemporaneous observance requirement, see infra note 167 and accompanying text.


Massachusetts: See Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978) (mother who arrived on scene shortly after daughter was struck by automobile stated cause of action; requiring 1) parent who 2) witnesses event or comes on scene while injured child still there and who 3) suffers physical manifestation of distress).


Nevada: See State v. Eaton, 101 Nev. 705, 710 P.2d 1370 (1985) (mother of child killed when family car skidded on ice entitled to recover even though not in zone of danger; placing greatest emphasis on contemporaneous observance factor because recovery not available for "mere grief").

New Hampshire: See Nutter v. Frisbie Memorial Hosp., 124 N.H. 791, 474 A.2d 584 (1984) (parents who arrived at hospital shortly after death of infant, and who were immediately advised of death, failed to meet contemporaneous observance factor); Corso v. Merrill, 119 N.H. 647, 406 A.2d 300 (1979) (mother who heard thud when car struck daughter and saw daughter moments later, and father who heard wife scream, stated cause of action; requiring 1) parent who 2) contemporaneously sensorially perceives 3) serious injury to child and 4) suffers physical manifestation of distress).

Ohio: See Paugh v. Hanks, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983) (woman who suffered distress due to concern for own and children’s safety after cars collided with fence on her property stated cause of action).

Pennsylvania: See Brooks v. Decker, 512 Pa. 365, 516 A.2d 1380 (1986) (father who passed ambulance which was rushing to scene of son’s accident failed to meet contemporaneous observance factor); Mazzagatti v. Everingham, 512 Pa. 266, 516 A.2d 672 (1986) (mother who was one mile away from scene of child’s accident, and who received phone call regarding the accident immediately thereafter, failed to meet contemporaneous observance factor); Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979) (mother who witnessed daughter being struck and killed by negligently driven automobile stated cause of action).

expressed a willingness to do so if an appropriate test case came along.140 Further, several jurisdictions have adopted the Dillon factors while adding the requirement that the plaintiff suffer distress from witnessing objectively serious injury141 to the third party.142

Texas: See City of Pasadena v. Freeman, 731 S.W.2d 590 (Tex. Ct. App. 1987) (stepfather who rushed to scene after accident, and did not see stepson until later at hospital, did not meet contemporaneous observance factor), aff'd, 744 S.W.2d 923 (Tex. 1988); Hastie v. Rodrigues, 716 S.W.2d 675 (Tex. Ct. App. 1986) (woman who lived with man for five years, but did not establish elements of common law marriage, did not meet relationship factor); Landreth v. Reed, 570 S.W.2d 486 (Tex. Ct. App. 1978) (minor who witnessed sister drown in pool stated cause of action).

140. Mississippi: See Entex, Inc. v. McGuire, 414 So. 2d 437 (Miss. 1982) (recovery available for nervous condition following gas explosion in plaintiff's presence which destroyed home and injured wife; dicta that recovery available to bystander not within zone of danger).

Tennessee: See Shelton v. Russell Pipe & Foundry Co., 570 S.W.2d 861 (Tenn. 1978) (father who learned of serious injuries to daughter after accident failed to state cause of action; dicta that recovery available to close relative who directly perceives event).

141. As one court commented: "We base this limitation on the common sense notion that people recover from serious shock quickly if it turns out to be a false alarm." Gates v. Richardson, 719 P.2d 193, 199 (Wyo. 1986); accord Portee v. Jaffee, 84 N.J. 88, 417 A.2d 521 (1980) (perception of less serious harm would not ordinarily result in severe emotional distress). For a discussion of this author's proposal that recovery be conditioned on the objective degree of stress expected to be engendered by a particular event, see infra notes 258-82 and accompanying text.

142. Iowa: See Roberts v. Bruns, 387 N.W.2d 140 (Iowa 1986) (mother who was not present when daughter critically injured by hit and run driver failed to meet proximity and contemporaneous observance factors); Oberreuter v. Orion Indus., Inc., 342 N.W.2d 492 (Iowa 1984) (denying recovery to woman not present when husband and son burned by electric line); Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981) (granting recovery to bystander who 1) is in proximity to event, 2) contemporaneously observes injuries to 3) husband, wife or relative within 12th degree of consanguinity and 4) reasonably and actually believed victim would be killed or seriously injured).

Montana: See Versland v. Caron Transp., 206 Mont. 313, 671 P.2d 583 (1983) (wife who witnessed fatal injuries to husband from collision with truck stated cause of action; requiring contemporaneous observance of accident, close relationship to victim and death or serious injury to victim).

Nebraska: See James v. Lieb, 221 Neb. 47, 375 N.W.2d 109 (1985) (minor who witnessed truck kill sister stated cause of action; modifying Dillon factors by placing greatest weight on relationship factor, requiring marital or intimate familial relation with victim and requiring death or serious injury to victim).

New Jersey: See Portee v. Jaffee, 84 N.J. 88, 417 A.2d 521 (1980) (adopting Dillon but placing greatest emphasis on relationship factor, requiring marital or intimate familial relationship with victim and requiring death or serious injury to victim); Polikoff v. Calabro, 209 N.J. Super. 110, 506 A.2d 1284 (1986) (mother who witnessed negligent medical treatment to daughter, but did not witness daughter's death, stated cause of action since mother contemporaneously observed tortious conduct and injury).

New Mexico: See Ramirez v. Armstrong, 100 N.M. 538, 673 P.2d 822 (1983) (plaintiff must witness death or serious injury to the victim).

Notably, the Dillon court did not have to decide whether a physical manifestation\(^{143}\) of psychic distress was still necessary.\(^{144}\) Subsequent to Dillon, California has dispensed with that requirement.\(^{145}\) Those jurisdictions following the Dillon analysis are split regarding the need for such a showing.\(^{146}\)

The three Dillon factors have been given different weights and have been operationally defined in different manners in the jurisdictions which have adopted the general Dillon rationale. A small number of states have placed greatest emphasis on the relationship factor,\(^{147}\) asserting that since the purpose of the factors is to assess the degree of foreseeability of injury to the plaintiff, it should be apparent that it is

must witness serious injury or death to the victim and must realize, at the time, that the injuries were serious).

\(^{143}\) For a discussion of the physical manifestation requirement, see supra notes 76-90, 115-18 and accompanying text. For a discussion of jurisdictions expressly abandoning this requirement, see supra note 119 and accompanying text.

\(^{144}\) Dillon, 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80. The Dillon court expressly noted that “we deal here with a case in which plaintiff suffered a shock which resulted in physical injury and we confine our ruling to that case.” Id.


\(^{146}\) The following discussion continues to require physical manifestation of distress: Florida: See Champion v. Gray, 478 So. 2d 17 (Fla. 1985) (physical manifestation necessary to curb fraudulent claims and place boundaries on “indefinable and unmeasurable psychic claims”); Brown v. Cadillac Motors Car Div., 468 So. 2d 903 (Fla. 1985) (plaintiff must allege demonstrable physical injury, such as death, paralysis or muscular impairment, flowing from accident). But see Eagle-Picher Indus., Inc. v. Cox, 481 So. 2d 517 (Fla. Dist. Ct. App. 1985) (where antecedent physical impact present, plaintiff need not allege subsequent physical manifestation).


most foreseeable that close relatives will be upset by serious injury to a loved one. Further, there has been a good deal of variability among jurisdictions in defining the threshold requirement for a sufficient "relationship." Illustrative of some courts' treatment of the relationship factor is the decision of the Supreme Court of Nebraska in James v. Lieb. The James court adopted the Dillon rationale for bystander recovery, but emphasized that the Dillon factors "were not intended to be fixed guidelines with [sic] which an aggrieved plaintiff-bystander was required to satisfy in order to recover; rather, the factors were to be taken into account by courts in assessing the degree of foreseeability of emotional injury to the plaintiff." The court modified the Dillon requirements by placing the greatest emphasis on the relationship factor because "[p]ersonal relationship may link people together more tightly, if less tangibly, than any mere physical and chronological proximity." In order to satisfy the relationship factor, the court held that there must be a marital or intimate familial relationship between the plaintiff and victim. The court believed that such a requirement would serve to limit recovery to those

148. For further discussion of this proposition, see generally Liebson, supra note 51, at 196 (other Dillon factors of no importance medically); Teff, Liability for Negligently Inflicted Nervous Shock, 99 LAW Q. REV. 100 (1983) (asserting that relationship to victim should be primary factor in determining foreseeability of emotional injury to plaintiff).

149. For example, Florida requires an "especially close emotional attachment" to the injured party, Champion v. Gray, 478 So. 2d 17 (Fla. 1985), while Montana requires a "close relationship." Versland v. Caron Transp., 206 Mont. 313, 671 P.2d 583 (1983). Wyoming has defined the necessary relationship through recourse to that state's wrongful death statute. Gates v. Richardson, 719 P.2d 193 (Wyo. 1986). According to the Wyoming Supreme Court, such a definition, limited to spouses, children, parents and siblings, serves the social policy purposes of avoiding nuisance suits and fraudulent claims, and limiting the potential liability of defendants. Id. Similarly, Iowa requires that the plaintiff and victim be husband and wife or related within the second degree of consanguinity. Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981). New Mexico requires a marital or intimate familial relationship, limited to husband and wife, parent and child, grandparent and grandchild, brother and sister or persons in loco parentis. Ramirez v. Armstrong, 100 N.M. 538, 673 P.2d 822 (1983).

150. 221 Neb. 47, 375 N.W.2d 109 (1985). In James, a brother and sister had been riding their bicycles when a garbage truck which was negligently operated by an employee of the defendant backed over the sister and killed her. Id. at 48, 375 N.W.2d at 111. The brother helplessly watched the collision and, as a result, suffered physical and mental distress. Id.

151. Id. at 55, 375 N.W.2d at 114 (citing Paugh v. Hanks, 6 Ohio St. 3d 72, 76, 451 N.E.2d 759, 764 (1983)). This is precisely what the Dillon court had in mind originally when it cautioned that the analysis it was adopting "contemplates that courts, on a case-by-case basis, analyzing all the circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen. The courts thus mark out the areas of liability, excluding the remote and unexpected." Dillon, 68 Cal. 2d at 741. 441 P.2d at 921. 69 Cal. Rptr. at 81.

152. James, 271 Neb. at 55, 375 N.W.2d at 115 (citing D'Ambra v. United States, 114 R.I. 643, 656-57, 338 A.2d 524, 531 (1975)).

153. Id.
who were most genuinely to be injured.  

The *James* court further noted that while the mental distress to a close relative of the victim would likely be the same regardless of whether the relative directly witnessed the event or heard about it later, the contemporaneous observance and proximity factors were still necessary because they served as policy limitations on the extent of the defendant's liability.  

The important consideration in determining whether these factors have been met is "where, when, and how the injury to the third person entered into the consciousness of the claimant, and what degree there was of familial or other relationship . . . ". Finally, the court held that emotional distress would be actionable only if the victim experienced death or serious injury from the defendant's conduct.

In contrast to this fairly detailed treatment of the relationship factor, several jurisdictions have limited their holdings to the facts of the case, apparently leaving further definition and refinement of the required relation between plaintiff and victim for future cases. Other courts have explicitly declined to draw a boundary around the class of persons whose peril would foreseeably invoke mental distress. Instead, this is left as a jury question bearing on the reasonableness of the plaintiff's reaction to the event.

The contemporaneous observance factor has received an even greater disparity of treatment in jurisdictions following the *Dillon* analysis. The importance of a direct perception of the event has been

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154. *Id.*

155. *Id.* at 57, 375 N.W.2d at 116.

156. *Id.* (citing Dziokonski v. Babineau, 375 Mass. 555, 568, 380 N.E.2d 1295, 1302 (1978)).

157. *Id.*

158. See, e.g., Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978) (granting recovery at least where parent witnesses injuries to child); Toms v. McConnell, 45 Mich. App. 647, 207 N.W.2d 140 (1973) (same); Corso v. Merrill, 119 N.H. 647, 406 A.2d 300 (1979) (same). In Texas, it is clear that a brother may recover for witnessing injuries to a sister. See Landreth v. Reed, 570 S.W.2d 486 (Tex. Ct. App. 1978). However, a woman may not recover for witnessing injuries to a man with whom she has lived for five years, because they did not establish the elements of a common law marriage. See Hastie v. Rodriguez, 716 S.W.2d 675 (Tex. Ct. App. 1986).

159. See Paugh v. Hanks, 6 Ohio St. 3d 72, 80, 451 N.E.2d 759, 767 (1983).

160. See *id.* (citing Hunsley v. Giard, 87 Wash. 2d 424, 436, 553 P.2d 1096, 1103 (1976)). This notion that the relationship factor, or any of the other *Dillon* factors, should really be employed to assess the reasonable severity of the injury to the plaintiff (i.e., as an indicator of the foreseeability of injury as a matter of proximate cause) has been employed by a few courts which have extended liability beyond the concrete *Dillon* guidelines to a general foreseeability analysis. See, e.g., Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974). For further discussion of the general foreseeability analysis, see infra notes 180-96, 228-34 and accompanying text.
stressed by several courts.\textsuperscript{161} In the absence of contemporaneous observance, the plaintiff’s injuries are viewed in some jurisdictions as mere grief,\textsuperscript{162} which is only compensable in an action for loss of consortium or solatium.\textsuperscript{163} In contrast, several jurisdictions view contemporaneous observance as irrelevant to the degree of distress foreseeably experienced by the plaintiff. Rather, direct perception is viewed exclusively as a policy limitation on defendants’ liability.\textsuperscript{164}

Those jurisdictions placing significant emphasis on the contemporaneous observance factor are split regarding what constitutes “contemporaneous.” In California, the appellate courts are either split regarding whether a direct and immediate perception is necessary, or have devised a myriad of corollary rules to allow recovery in certain situations.\textsuperscript{165} Several states have explicitly defined “contemporaneous” as

\textsuperscript{161} See Gates v. Richardson, 719 P.2d 193 (Wyo. 1986). In Gates, the court stated: “The essence of the tort is the shock caused by the perception of an especially horrendous event . . . . It is more than bad news . . . . It may be the crushed body, the bleeding, the cries of pain, and, in some cases, the dying words . . . .” Id. at 199 (citation omitted); accord Oberreuter v. Orion Indus., 342 N.W.2d 492, 494 (Iowa 1984) (proximity and contemporaneous observance necessary to assure “horror” and “visceral participation” in the event).

Generally, the proximity factor has received less attention than the other factors because, if the contemporaneous observance factor has been met, the proximity factor has necessarily also been met. See, e.g., Portee v. Jaffee, 84 N.J. 88, 100, 417 A.2d 521, 527 (1980). Further, some courts view proximity as merely evidence of the degree of emotional bond between the plaintiff and victim. See id. But see Paugh v. Hanks, 6 Ohio St. 3d 72, 79, 451 N.E.2d 759, 766 (1983) (proximity factor very important in determining foreseeability of injury to plaintiff from perspective of defendant).


\textsuperscript{163} See, e.g., Mazzagatti v. Everingham, 512 Pa. 266, 516 A.2d 672 (1986).

\textsuperscript{164} See, e.g., James v. Lieb, 221 Neb. 47, 375 N.W.2d 109 (1985) (mental distress to close relative same regardless of direct perception of accident; contemporaneous observance factor necessary only to limit defendants’ liability). This sentiment has been most strenuously asserted in those jurisdictions rejecting the Dillon factors as threshold elements for recovery. See, e.g., Tommy’s Elbow Room, Inc. v. Kavorian, 727 P.2d 1038, 1043 (Alaska 1986) (Dillon factors merely guidelines to be liberally construed), modified, Croft v. Wicker, 737 P.2d 789 (Alaska 1987) (abandoning contemporaneous observance factor in favor of general foreseeability analysis). For further discussion of the general foreseeability analysis, see infra notes 186-96 and accompanying text.

\textsuperscript{165} Compare Nazaroff v. Superior Court, 80 Cal. App. 3d 553, 145 Cal. Rptr. 657 (1978) (mother who heard neighbor scream son’s name, and who arrived at scene of son’s near drowning immediately afterwards, stated cause of action) and Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969) (mother who arrived on scene moments after gunpowder explosion, and immediately viewed injuries to son, stated cause of action) with Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977) (father who was present in delivery room when fetus died not contemporaneously aware of death until he was told moments later), overruled, Ochoa v. Superior Court, 39 Cal. 3d 159, 705 P.2d 1, 216 Cal. Rptr. 661 (1985) and Parsons v. Superior Court, 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978) (parents who arrived on scene of accident in which daughters were killed “before the dust had settled” failed to meet contemporaneous observance factor) and Deboe v. Horn, 16 Cal. App. 3d
including arriving on the scene after the initial impact of the accident, but before the victim is removed from the scene.\textsuperscript{166} Other jurisdictions are more vague (or liberal), granting recovery, for example, where the plaintiff is “directly involved in the event”\textsuperscript{167} or when the news of the event “comes into the consciousness” of the plaintiff in a reasonably quick manner.\textsuperscript{168}

Similar to the varied treatment of the term “contemporaneous,” states have given disparate treatment to the terms “observation” and “event.” Although few, if any, courts have explicitly stated which senses must be utilized in “observing” the event, it appears that at least seeing or hearing the impact is sufficient.\textsuperscript{169} However, a few courts have extended the plaintiff’s “perceptible presence.”\textsuperscript{170} Further, there has been

\begin{footnotesize}
221, 94 Cal. Rptr. 77 (1971) (wife who did not see injured husband until she arrived at hospital did not meet contemporaneous observance factor).

More recently, the California Supreme Court has approved, in dicta, of those lower court decisions granting recovery to plaintiffs who arrive on the scene of the accident immediately after the impact of the tortious act. See Ochoa v. Superior Court, 34 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985) (approving, inter alia, of Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969) and Nazaroff v. Superior Court, 80 Cal. App. 3d 553, 145 Cal. Rptr. 657 (1978)).

166. See, e.g., Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978) (recovery available to plaintiff who either witnesses event or comes on scene while child still there; dispositive issue is how, when and where event came into consciousness of plaintiff); Gates v. Richardson, 719 P.2d 195 (Wyo. 1986) (plaintiff must contemporaneously observe event or immediately come upon scene).

167. See, e.g., Champion v. Gray, 478 So. 2d 17 (Fla. 1985). In defining “directly involved in the event,” the Supreme Court of Florida stated that if the plaintiff sees or hears the accident, or arrives on the scene while the victim is still there, he or she is likely “involved.” Id. at 20. The court stated that it did not reach the question whether seeing the injured person in the hospital shortly after the event would be sufficient, but noted that “we would think that this scenario reaches the outer limits of the required involvement with the event.” Id.


169. See, e.g., Nazaroff v. Superior Court, 80 Cal. App. 3d 553, 566-67, 145 Cal. Rptr. 657, 664 (1978) (mother who heard neighbor scream son’s name, and who arrived on scene of son’s near drowning immediately afterwards, stated cause of action); Corso v. Merrill, 119 N.H. 647, 406 A.2d 300 (1979) (mother who heard thud when car struck daughter stated cause of action; father who heard wife scream and rushed to scene also stated cause of action); Paugh v. Hanks, 6 Ohio St. 3d 72, 79-80, 451 N.E.2d 759, 766 (1983) (plaintiff does not have to actually see accident; observance through sense of hearing is sufficient).

170. See, e.g., Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977). In Krouse, the plaintiff had been sitting in his car while his wife and a neighbor were removing groceries from the back seat. Id. at 65, 562 P.2d at 1024, 137 Cal. Rptr. at 865. The defendant negligently lost control of his car and struck both women, killing the plaintiff’s wife. Id. The California Supreme Court stated:

[T]he Dillon requirement of “sensory and contemporaneous obser-
some question as to when the tortious event occurred, and whether the “event” must be a brief and sudden occurrence rather than a sequence or course of events over time.

D. General Foreseeable Plaintiff Analysis

The utilization of the Dillon foreseeability factors by many courts as substantive prerequisites or limitations on recovery has been criticized by many commentators. As in the case of each of the other recovery

171. See Polikoff v. Calabro, 209 N.J. Super. 110, 506 A.2d 1284 (1986). In Polikoff, plaintiff's daughter sustained heart failure in plaintiff's presence as the result of fluid accumulation in the heart from a catheter which was negligently misinserted at an earlier time. Id. at 112, 506 A.2d at 1287. The court held that the plaintiff contemporaneously perceived both the tortious act and the injury to a loved one, by framing the tortious event as having occurred not when the catheter was misinserted (when the mother was not present), but rather when the fluid was introduced into the catheter (when the mother was present). Id. at 114, 506 A.2d at 1288.

172. Compare Ochoa v. Superior Court, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985) (mother who witnessed son's medical needs being ignored over lengthy period of time at youth detention center stated cause of action; plaintiff must be contemporaneously aware of the 1) tortious nature of the defendant's conduct; 2) injury to a loved one; and 3) causal connection between these) with Wisniewski v. Johns-Manville Corp., 812 F.2d 81 (3d Cir. 1987) (widow and children of man who died from asbestos exposure failed to meet contemporaneous observance factor; denying recovery for "gradual, non-traumatic injury"); Frame v. Kothari, 218 N.J. Super. 537, 528 A.2d 86 (contemporaneous observance factor not met where physician misdiagnosed plaintiff's son's cerebral hemmorhage in their presence; such misdiagnosis was not an "incident"); cert. granted, 109 N.J. 45, 532 A.2d 1111 (1987).

requirements, the Dillon criteria are frequently both over- and under-inclusive, allowing recovery where the objective nature of the stress is slight, or, more typically, denying recovery for severe and foreseeable psychic distress. In short, the Dillon court’s “promise” that its factors would serve as guidelines to be evaluated “on a case-by-case basis, analyzing all the circumstances” has not been realized.

In California, the original Dillon jurisdiction, the California Supreme Court has limited the application of the Dillon factors to cases involving a paradigmatic bystander situation. In Molien v. Kaiser Foundation Hospitals, the plaintiff’s wife was negligently misdiagnosed by the defendants as having syphilis. As a result of the misdiagnosis, she suspected her husband of having engaged in extramarital affairs, and the subsequent tension and hostility led to a break-up of the marriage. The court held that where the concern for unlimited liability, which is present in typical bystander actions, is not presented by the facts, the application of the Dillon factors is precluded.

174. For criticisms of the physical impact rule, see supra notes 51-57 and accompanying text. For criticisms of the physical manifestation requirement, see supra notes 115-18 and accompanying text. For criticisms of the zone of danger requirement, see supra notes 120-33 and accompanying text.

175. See, e.g., Ochoa v. Superior Court, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985) (Bird, C.J., concurring and dissenting) (criticizing courts’ usage of Dillon factors as substantive prerequisites for recovery and illustrating this objection by reviewing many cases denying recovery for severe mental distress).

176. Dillon, 68 Cal. 2d at 740, 441 P.2d at 921, 69 Cal. Rptr. at 80. The Dillon court was quite clear that it did not consider the factors to be minimum requirements for recovery. “We are not now called upon to decide whether, in the absence or reduced weight of some of the factors, we would conclude that the accident and injury were not foreseeable.” Id. at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.

177. “What has followed in Dillon’s wake is confusion rather than clarity. The Dillon guidelines have been strictly and mechanically applied. This has led to arbitrary, inconsistent and inequitable results antithetical to principles enunciated in Dillon.” Ochoa v. Superior Court, 39 Cal. 3d 159, 182, 703 P.2d 1, 17, 216 Cal. Rptr. 661, 676-77 (1985) (Bird, C.J., concurring and dissenting).

178. As Chief Justice Bird has noted: “[I]f a plaintiff is a ‘direct victim’ of the defendant’s conduct, then a ‘pure’ foreseeability test applies to determine liability for negligent infliction of emotional distress. However, if the plaintiff is a ‘bystander,’ the three Dillon criteria are invoked.” Id. at 189, 703 P.2d at 22, 216 Cal. Rptr. at 682 (Bird, C.J., concurring and dissenting).

179. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). For further discussion of the Molien decision, see McCarthy, supra note 9, at 40-43; Comment, supra note 2.

180. 27 Cal. 3d at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.

181. Id. at 920, 616 P.2d at 814-15, 167 Cal. Rptr. at 832-33.

182. This case did not present a typical bystander situation because, although the defendants’ actions were primarily directed at the plaintiff’s wife, the plaintiff’s distress did not result solely from concern for his wife’s safety, but also for his own well-being in his marriage. Further, the defendants had instructed the plaintiff’s wife to advise her husband that she tested positive for venereal disease, and thereafter performed tests on the husband in order to detect the presence of the disease. Id. at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832. As a result, the defendants’ actions could be said to have been “directed
then Dillon is not controlling. Rather, recovery is available to 1) a reasonably foreseeable plaintiff 2) who sustains serious psychic injury. Where the conduct of the defendant is directed at the plaintiff, the risk of harm to him or her is reasonably foreseeable.

Molien’s requirement of a foreseeable plaintiff who suffers serious and objectively verifiable distress has been adopted by several jurisdictions for all negligent infliction of mental distress actions. For example,

the husband as well as at the wife. Id. at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.

Id. at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835. Several courts and commentators have noted that the “direct victim” test is merely reasonable foreseeability “in disguise.” See Nolan & Ursin, supra note 173, at 603; Note, Negligent Infliction of Emotional Distress: New Horizons After Molien v. Kaiser Foundation Hospitals, 13 Pacific L.J. 179, 189 (1981).


Connecticut: See Morris v. Hartford Courant Co., 200 Conn. 676, 513 A.2d 66 (1986) (employee discharged after wrongful accusation of stealing funds failed to state cause of action because conduct of defendant did not foreseeably risk emotional distress which might result in bodily illness to plaintiff); Montiniere v. Southern New England Tel. Co., 175 Conn. 337, 398 A.2d 1180 (1978) (husband and wife held hostage by gunman who received address from directory assistance stated cause of action against phone company; requiring that defendant should have realized that conduct involved unreasonable risk of emotional distress, and that such distress might result in illness or bodily injury).

Hawaii: See Campbell v. Animal Quarantine Station, 63 Haw. 557, 632 P.2d 1066 (1981); Kelly v. Kokua Sales & Supply, Ltd., 56 Haw. 204, 532 P.2d 673 (1975); Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974); Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970). For further discussion of Leong, with regard to placing the emphasis of the analysis on the foreseeability of emotional injury, as opposed to the foreseeability of harm to the particular plaintiff, see infra notes 228-34 and accompanying text.

Kansas: See Bowman v. Doherty, 235 Kan. 870, 686 P.2d 112 (1984) (attorney’s failure to obtain continuance, resulting in defendant’s arrest, did not constitute actionable conduct for negligent infliction of mental distress absent physical manifestation of distress); Hoard v. Shawnee Mission Medical Center, 233 Kan. 267, 662 P.2d 1214 (1983) (parents who were mistakenly informed that daughter had died must also allege that emotional distress resulted in immediate physical injuries).

Louisiana: See Chappetta v. Bowman Transp., Inc., 415 So. 2d 1019 (La. Ct. App. 1982) (woman whose car was run over by tractor trailer stated cause of action; liability depends on existence of breach of duty and proximate causal connection between breach and emotional injury).

Missouri: See Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983) (woman who suffered extreme anxiety after being trapped in elevator stated cause of action; requiring that 1) defendant reasonably foresee that conduct risks such distress and 2) emotional distress be “medically diagnosable” and “medically significant”); Davis v. Shelton, 710 S.W.2d 8 (Mo. Ct. App. 1986) (woman who wit-
ple, in *Hunsley v. Giard*, the Supreme Court of Washington declined to follow any of the arbitrary limiting principles generally employed in the area of negligent infliction of mental distress. The court reasoned that the boundaries of liability would be adequately curtailed by the traditional method of limiting a defendant's duty to foreseeable plaintiffs. Further, in order to be compensable, emotional suffering would need to be manifested by objective symptomatology and must have been the reaction of a normally constituted individual.

The *Hunsley* court declined to fashion a per se rule regarding the availability of bystander recovery, or to fashion specific guidelines for circumscribing a defendant's liability in such cases. This would normally be a jury question regarding the reasonableness of the plaintiff's reaction. Similarly, the Supreme Court of Alaska, which had earlier adopted the *Dillon* factors, abandoned the contemporaneous observer

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188. *Id.* at 434, 555 P.2d at 1102. The court stated that:

the application of the various rules, their exceptions and aberrations, has led the courts to reach absurd results and created numerous artificial boundaries. . . . Rather than add to the already existing confusion with the formulation of a new rule, we conclude that the wisest approach is to return to the traditional principles, theories and standards of tort law. Thus we test the plaintiff's negligence claim against the established concepts of duty, breach, proximate cause and damage or injury.

189. *Id.* at 435-36, 553 P.2d at 1103.

190. *Id.* at 436, 553 P.2d at 1103. The court did not have to decide whether such objective symptomatology must include a physical injury, since such an injury was present in this case. *Id.* at 433-34, 553 P.2d at 1102.

191. *Id.* at 436, 555 P.2d at 1103 (citing Rodrigues v. State, 52 Haw. 156, 174, 472 P.2d 509, 512 (1970)).

192. *Id.*

193. *Id.* (citing Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974)). For further discussion of this proposition, see infra notes 228-34 and accompanying text.

194. See Tommy's Elbow Room, Inc. v. Kavorkian, 727 P.2d 1038 (Alaska 1986) (adapting *Dillon* factors, but cautioning that these factors were merely guidelines to be liberally construed in establishing degree of foreseeability of injury to plaintiff). For a discussion of Croft v. Wicker, 737 P.2d 789 (Alaska 1987), which modified *Kavorkian* by abandoning the *Dillon* factors as threshold requirements, see infra notes 195-96 and accompanying text.
vance factor when it stood in the way of redress for a foreseeable injury. Instead, the court applied a traditional foreseeability analysis.

III. PROPOSAL

A. Social Policy Revisited

The series of tests and requirements imposed in the area of negligent infliction of mental distress have been devised in an effort to meet several social policy concerns. As the courts have faced new and more compelling fact patterns, the tests have progressed in a linear fashion towards allowing greater degrees of recovery. It is submitted that the continued confusion and dissatisfaction in this area of law does not stem from imperfections in the requirements themselves, but rather from a basic failure to properly identify and clarify the underlying policy issues which these requirements were intended to address. It is submitted that before a proper legal analysis can be developed, it is necessary to reframe the underlying concerns.

1. "Fraudulent" Claims

It is submitted that it is neither necessary nor helpful to view the term "fraudulent claim" as involving a specific intent to deceive the courts. Rather, it would be sufficient if this term referred to those instances where inappropriate, excessive or unnecessary recovery was provided.

Many individuals who bring actions for mental distress are genuinely, though wrongly, convinced that the defendant's conduct caused them emotional discomfort. Although the psychological mechanisms

195. See Croft v. Wicker, 737 P.2d 789 (Alaska 1987). In Croft, parents who were in close proximity to the sexual molestation of their daughter, but who did not contemporaneously observe the incident, were held to have stated a cause of action for mental distress. Id. at 791-93. The court held that the parents' distress was foreseeable because a youth would naturally seek the consolation of her parents under such circumstances. Id. at 792. The court cited cases which allowed recovery for the observance of the immediate consequences of the defendant's conduct, but apparently declined to limit its analysis to an interpretive extension of Dillon. Id. at 791.

196. Id.

197. For a discussion of these social policy concerns, see supra notes 16-18, 42-50 and accompanying text.

198. "Reframing" is a psychotherapeutic technique, in which a seemingly unsolvable problem is restated in different terms. In the new context, the solution is available and even self-evident. See Tavantzis, Tavantzis, Brown & Rohrbaugh, Home-Based Structural Family Therapy for Delinquents at Risk of Placement, in M. Mirkin & S. Koman, HANDBOOK OF ADOLESCENTS AND FAMILY THERAPY 81 (1985).

199. See Payton v. Abbott Labs., 386 Mass. 540, 437 N.E.2d 171 (1982). The Payton court stated: It is in recognition of the tricks that the human mind can play upon
underlying this phenomenon are quite varied and complex, at least two
general causative factors are frequently involved. The first is primarily
intrapsychic, while the second results from an interaction between the
individual and the process of litigation.

Certain individuals are extremely passive and dependent, meaning
that they do not see themselves as in control of their lives, but rather
feel controlled by people and circumstances around them. When they
encounter any degree of stress, they are overly ready to retreat to a sick
role, which requires the help of others, because they feel unable to cope
through self-reliance.\footnote{200 Other individuals are unable to manage
the anger they experience when they are injured or annoyed by others.\footnote{201
Such excessive feelings and tension may become bottled up, appearing
as anxiety or depression,\footnote{202 or may be manifested as excessive rage and
hostility.\footnote{203 At either extreme, the individual may need to externalize
the blame for these feelings, so that he or she perceives the feelings as
being caused by some outside source, rather than recognize them as
coming predominantly from within.\footnote{204 While these feelings are con-
scious, or within the person’s awareness, the mechanisms creating them
are frequently not conscious,\footnote{205 and it would be erroneous to say that
the individual was committing a fraud.

There is frequently an interaction between the process of litigation
and the individuals involved.\footnote{206 If, as previously suggested, certain indi-
viduals are overly prepared to blame their emotional discomfort on
others, then this will be exacerbated by the process of litigation, which

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\textit{itself, as much as of the deception that people are capable of perpetrat-
ing upon one another, that we continue to rely upon traditional indica-
of harm to provide objective evidence that a plaintiff actually has suf-
fered emotional distress.}

\textit{Id. at 547, 437 N.E.2d at 175.}

\footnote{200 \textit{See Singer, Psychological and Forensic Considerations in the Treatment of Post-
Trumatic Stress Disorders, 1 Am. J. Forensic Psychology 3, 5 (1983); see also
DSM-III-R, supra note 28, at 353-54 (diagnostic criteria for “Dependent Person-
ality Disorder”).}

\footnote{201 \textit{See Singer, supra note 200, at 5.}

\footnote{202 \textit{See id. at 6.}

\footnote{203 \textit{See id. at 5.}

\footnote{204 \textit{See Titchener, Post-Traumatic Decline: A Consequence of Unresolved Destruc-
tive Drives, in C. Figley, 2 Trauma and Its Wake 5 (1986). Titchener notes that
the sense of disorganization and helplessness which follows an unexpected tra-
umatic event may overload the individual. Id. at 16. Unable to deal with these
strong aggressive feelings, the individual may unconsciously “project” this sense
of helplessness onto others, “deny” experiencing these feelings, or “exter-
nalize” responsibility for these feelings onto the environment or others. Id.}

\footnote{205 \textit{See C. Brenner, An Elementary Textbook of Psychoanalysis 79-96
(revised ed. 1974) (discussion of the various “defense mechanisms” and their
unconscious or semi-conscious nature).}

\footnote{206 \textit{See Melton, Petryla, Pothress & Slobochin, Psychological Evalu-
ations for the Courts 283 (1987) (participation in legal process may exacer-
bate certain personal traits of the claimant).}
focusses exclusively on the effects of the defendant's conduct.207 Again, it would be too simplistic to conclude that the plaintiff, plaintiff's attorney or plaintiff's expert have conspired to extract undeserved compensation. The adversarial, team approach of litigation often subtly influences individuals to emphasize certain facts or experiences, while deemphasizing others.208

2. Unlimited Liability and the "Floodgates of Litigation"

The other policy issues underlying the legal requirements in actions for negligent infliction of mental distress are a concern for placing an unfair and disproportionate burden of liability on defendants, and overburdening judicial resources in administering these claims. It is submitted, however, that these concerns are not, in fact, different from the concern for the successful prosecution of "fraudulent" actions. If recovery is limited to instances where it would be generally viewed as appropriate and not excessive, then, by definition, the defendant's liability is commensurate with the damage that the defendant's conduct caused. Further, the judicial system would not be overburdened by administering fair and proper claims.

The risk of unlimited liability is equally present in the context of extensive recovery to one individual who meets the threshold duty requirements, as to graded degrees of recovery to many individuals in, for example, bystander actions. Although this Comment has dealt predominantly with legal standards which have limited recovery unnecessarily, the flipside of this is also apparent. Courts facing claims which have met the threshold duty requirements have sustained these actions on noncompelling facts, or have been inconsistent in devising a myriad of subsidiary rules and standards so as to limit actual recovery and reach a

207. See Singer, supra note 200, at 9.
208. See Platt & Husband, Post-Traumatic Stress Disorder in Forensic Practice, 4 AM. J. FORENSIC PSYCHOLOGY 29, 35 (1986). These authors describe this phenomenon, which they term "role enactment," as a process in which the litigant picks up subtle clues from the attorneys or treating professionals as to the symptoms they might be expected to have. Id. The questions and messages communicated by the professionals may have the effect of covertly influencing the litigant to report additional symptoms, or may reinforce the degree and severity of existing symptoms. Id. This process may be conscious or unconscious. Id.; see also Simon & Zusman, The Effect of Contextual Factors on Psychiatrists' Perception of Illness: A Case Study, 24 J. HEALTH & SOC. BEHAV. 186 (June 1983). These authors discovered empirically that mental health experts' diagnostic and prognostic decisions correlated highly with the practitioner's forensic position (whether the expert worked for the plaintiff or defendant). Id. at 191. The authors postulate that this phenomenon is not the result of a conscious decision on the part of the experts, but rather is the result of a process termed "situational adjustment," in which the expert becomes unconsciously "forensically engaged" or allied with his or her "side." Id. at 194; see also MELTON, PETRILA, POYTHRESS & SLOBOGIN, supra note 206, at 282 (suggesting that clinicians carefully examine their own biases regarding the propriety of compensating mental injury).
just result.\textsuperscript{209} Once the "foreseeable plaintiff" element is established, many courts have blindly applied "foreseeable injury" and cause-in-fact principles from other areas of law with little cogent analysis.

One obvious example of this is the application of the so-called "thin skull" rule, which renders any peculiar vulnerability or predisposition on the part of the plaintiff a priori foreseeable by the defendant.\textsuperscript{210} In \textit{Stoleson v. United States},\textsuperscript{211} the United States Court of Appeals for the Seventh Circuit recently had occasion to confront the thin skull rule head on. In Stoleson, the plaintiff had experienced alternate expansion and contraction of her coronary arteries as the result of exposure to nitroglycerin in an ammunitions plant.\textsuperscript{212} Although the plaintiff experienced no lasting medical damage as a result of this exposure, she continued to experience characteristic chest pains and related symptoms.\textsuperscript{213} All of the experts who testified were in agreement that the plaintiff suffered from a "hypochondriacal neurosis," although there was disagreement about when this condition began.\textsuperscript{214} The court cited the thin skull rule in holding that it would be irrelevant whether the exposure to the nitroglycerin caused the onset of a hypochondriacal illness, or whether it merely precipitated the onset of hypochondriacal symptoms in a predisposed individual.\textsuperscript{215}

\textsuperscript{209} The Dillon court anticipated such an improper application of its guidelines: "In future cases the courts will draw lines of demarcation upon \textit{facts more subtle than the compelling ones . . . before us}" 68 Cal. 2d at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81 (emphasis added).

\textsuperscript{210} This rule is named for the following hypothetical: If A. hits B. lightly on the head as the result of a legally culpable act, and B. is unexpectedly injured because his skull is unnaturally thin, A. remains liable for those unforeseeable damages. Hence, A. is held to "take his victim as he finds him." \textit{See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS} 261 (4th Ed. 1971).

The applicability of this rule to actions for psychic damages was contemplated by the early court decisions which extended liability in this area. See \textit{Sloan v. Southern Cal. Ry.}, 111 Cal. 668, 683, 44 P. 320, 324 (1896) ("[w]hoever might sustain injury by such [a culpable] act would be entitled to recover to the full extent of his injury, irrespective of his previous physical condition or susceptibility to harm."); \textit{Dulieu v. White & Sons}, 2 K.B. 669, 679 (1901) ("[I]t is no answer to the sufferer's claim for damages that he would have suffered less injury . . . if he had not had an unusually thin skull . . . ").

The social policy underlying the thin skull rule is that, without it, victims would be systematically undercompensated, since victims with above-average injuries would get reduced damages, and victims with below-average injuries would not get an off-setting increase. \textit{See, e.g., Lancaster v. Norfolk & W. Ry.}, 773 F.2d 807, 822 (7th Cir. 1985), \textit{cert. denied}, 107 S. Ct. 1602 (1987).

\textsuperscript{211} 708 F.2d 1217 (7th Cir. 1983). For a discussion of the Stoleson decision, see \textit{Time}, July 12, 1971 at 41.

\textsuperscript{212} 708 F.2d at 1219-20.

\textsuperscript{213} \textit{Id.} at 1220.

\textsuperscript{214} \textit{Id.}

\textsuperscript{215} \textit{Id.} at 1220-22. Further, the court held that the defendant would still be liable even if the symptoms were triggered by the plaintiff's physician's incorrect exaggeration of the state of her organic impairment. \textit{Id.} at 1221 (citing \textit{Heims v. Hanke}, 5 Wis. 2d 465, 471, 93 N.W.2d 455, 459 (1958), \textit{overruled}, But-
The court sustained this action on duty grounds because the plaintiff was physically impacted, and she suffered a physical manifestation of her mental distress. Once a foreseeable plaintiff was established, the court mechanically applied a per se foreseeable injury rule. However, the court subsequently fashioned several alternative methods to defeat or limit recovery on the grounds of factual cause or damages. While not going so far as to require proof of hypochondriasis by clear and convincing evidence, the court advised district judges to "approach such claims with the healthy skepticism necessary to prevent excessive and unfounded damage awards, bearing in mind that there is not much difficulty in finding a medical expert witness to testify to virtually any theory of medical causation short of the fantastic." 216

The Stoleson court also noted that any damages would need to be adjusted downward for the possibility that the plaintiff's pre-existing condition would have resulted in harm to her even in the absence of culpable conduct by the defendant. 217 Finally, the court held that the plaintiff's claim could have been barred on the ground of "remoteness of damage," although by its own admission, the court was not clear exactly what the state supreme court had in mind when it developed this concept. 218

Subsequent to its Stoleson decision, the Seventh Circuit again uti-

zow v. Wausau Memorial Hosp., 51 Wis. 2d 281, 187 N.W.2d 349 (1971); Butzow, 51 Wis. 2d 281, 187 N.W.2d 349).

Whether hypochondriasis exists as an intrapsychic syndrome, as opposed to solely a manifest symptom, and whether it can be caused by traumatic exposure to an external event late in life, is the subject of much debate in psychology. Compare C. Wenar, M. Handlon & A. Garner, Origins of Psychosomatic & Emotional Disturbances (1962) (faulty caretaking by mother in early infancy is common denominator in all psychosomatic disorders) and McCranie, Hypochondriacal Neurosis, 20 Psychosomatics 11 (1979) (the somatic symptom serves as a symbolic representation of low self-esteem stemming from early life need-frustrations which are subsequently ingrained in the personality) with M. Seligman, Helplessness (1975) (inability to control environmental contingencies decreases motivation and causes emotional and psychophysiological disturbances).

216. 708 F.2d at 1222. This "healthy skepticism" contrasts with other court opinions expressing confidence in the advancements in the behavioral sciences. For further discussion of this proposition, see supra notes 47-48, 117 and accompanying text.

217. Id. at 1223-24. In short, her skull was so thin that it would likely have "cracked" sooner or later due to some unrelated daily occurrence.

218. Id. at 1224. This "remoteness of damage" rationale was originally espoused by the Wisconsin Supreme Court in Howard v. Mt. Sinai Hosp., Inc., 63 Wis. 2d 515, 217 N.W.2d 383 (1974). In Howard, the plaintiff developed an irrational fear of contracting cancer as the result of the negligent insertion of a catheter into her shoulder. Id. at 516-17, 217 N.W.2d at 384. The court held that this fear was so out of proportion to the culpability of the tortfeasor, that, as a matter of public policy, the defendant was not to be held liable for the damages. Id. at 519, 217 N.W.2d at 385. Notably, the court viewed this approach as an individuated response to a particular fact pattern, and made no effort to explain conceptually whether the limitation stemmed from a consideration of duty, cause or damages. See id. at 523a, 217 N.W.2d at 388 (Hansen, J., concurring)
lized the principle of damage mitigation when there was a significant likelihood that the plaintiff’s mental distress would have been precipitated by an event unrelated to the defendant’s conduct. In *Lancaster v. Norfolk & Western Railway*, a worker brought an action for negligent infliction of mental distress against the railway with which he was employed. The plaintiff had been threatened with a broomstick by one supervisor, “goosed” and sexually assaulted by another, and almost hit with a sledgehammer by a third. When he was threatened with a pickaxe handle by yet a fourth supervisor, the plaintiff became schizophrenic.

The jury returned a finding that the tortious actions of the supervisors precipitated a latent schizophrenic personality in the plaintiff. Yet, citing *Stoleson*, the court noted that the plaintiff’s damages must be reduced to reflect the likelihood that he would have become schizophrenic anyway from a nonliable cause. However, presumably due to the vulgarity and severity of the stressor, the court managed to prevent an actual mitigation of damages by asserting that while the district court did not instruct the jury on this issue, the jury was “at least apprised of the issue” through the arguments of counsel and the testimony of the defense expert.

The damage mitigation analysis has also been employed by the United States Court of Appeals for the Second Circuit. That court expressly left the task of appraising the relative contributions of the defendant’s conduct and the plaintiff’s predisposition to the discretion of the fact-finder, unencumbered by legal restrictions.

Finally, in an effort to limit uncomfortable results stemming from the application of the “thin skull rule,” some courts have distinguished between a physical susceptibility to negative emotions (which would be compensable) and a susceptibility to the negative emotion itself (which would not be compensable).

Clearly, there have been discernible efforts to limit liability for

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220. Id. at 811-12. One might wonder what took him so long!
221. Id. at 812.
222. Id. at 822.
223. Id. at 823.

224. *See* Steinhauser v. Hertz Corp., 421 F.2d 1169 (2d Cir. 1970) (schizophrenia precipitated by minor car accident held compensable, although defendants were entitled to establish probability that plaintiff would have developed psychosis in any event).

225. The Second Circuit stated: “It is no answer that exact prediction of [the plaintiff’s] future apart from the accident is difficult or even impossible. However taxing such a problem may be for men who have devoted their lives to psychiatry, it is one for which a jury is ideally suited.” Id. at 1174.

226. *See*, e.g., Wyatt v. Gilmore, 57 N.C. App. 57, 290 S.E.2d 790, 793 (1982) (distinguishing heart attack resulting from physical susceptibility to fright (compensable) with unreasonable fear (noncompensable)).
mental distress on common-sense grounds even when legal duty requirements have been met. However, this effort has by no means been consistent or predictable.227

B. The Foreseeable Injury: A Shift in Focus

Those states following the expanded Dillon and general foreseeability analyses have primarily focused on an analysis of legal duty (i.e., whether the particular plaintiff was foreseeably affected). However, to suggest, for example, that familial nonbystanders are not foreseeably affected by injury to a loved one is at best artificial, and at worst absurd.228 What may not be foreseeable, however, is the nature and scope of the plaintiff’s emotional injury. In short, the concept of foreseeability in emotional distress actions has often been confused by the courts’ fusion of the duty and proximate cause analyses.229

227. See, e.g., Jacobs v. New Orleans Pub. Serv., Inc., 432 So. 2d 843, 846 (La. 1983) (plaintiff suffering from anxiety neurosis stemming from car accident did not fail to mitigate damages by not seeking treatment because no evidence that further treatment would have been effective or financially possible); Penouilh v. Crain, 396 So. 2d 947 (La. Ct. App.) (involutional melancholia held precipitated by car accident despite evidence of premorbid history of interpersonal difficulties), cert. denied, 399 So. 2d (1980); Richman v. City of Berkley Dept. of Pub. Works, 84 Mich. App. 258, 269 N.W.2d 555 (1978) (accident prevented plaintiff from utilizing “active lifestyle as a defense mechanism to combat her depression”).

An interesting case in a similar vein is Thomas v. United States, 327 F.2d 379 (7th Cir. 1964). In Thomas, the plaintiff suffered physical injury when a government mail truck was negligently driven into her automobile. Id. at 380. The plaintiff had been hospitalized for six months for a “psychoneurotic reaction, depressive reaction” three years prior to the accident, but her treatment had been successful in that she had subsequently performed well at her job and in her capacity as a mother. Id. The district court had allowed only nominal damages for the element of pain and suffering on the ground that, because of the plaintiff’s mental illness which was aroused by the injury, she had received a “certain gratification.” Id. In other words, the court concluded that the accident aroused a hypochondriacal illness which provided for the plaintiff an excuse for her basic problems of anxiety and insecurity. See id. at 380 n.3. The Seventh Circuit reversed and increased the damage award, citing the thin skull rule in holding that an offset for gratification was inappropriate. Id. at 381. The appellate court had apparently misunderstood the term “gratification” (a psychological term of art), by equating it with “enjoyment.” Id. at 380 n.4. Rather, the term refers to intrapsychic instinctual need gratification, and suggests that the plaintiff was prepared to choose any readily available reality stimulus in order to retreat to the sick role. See Singer, supra note 200, and accompanying text.

228. See, e.g., Diamond, supra note 173, at 489 (“It has not been shown, and it is not self-evident, that proximity to the accident necessarily determines the severity of psychological trauma.”); Teff, supra note 148 (asserting that victim’s relationship to plaintiff should be primary factor in determining foreseeability of injury to bystander).

229. See, e.g., Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974) (Dillon factors should not be utilized to bar recovery, but should at most indicate degree of mental distress suffered); Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976) (required degree of relationship between plaintiff and victim is jury question regarding reasonableness of plaintiff’s reaction to event).
In *Leong v. Takasaki*, the Supreme Court of Hawaii rejected the *Dillon* factors as a test of legal duty. Rather, the court held that these factors should be indicative of "the degree of mental distress suffered" by the plaintiff. The court stated: "[W]hen it is reasonably foreseeable that a reasonable plaintiff-witness to an accident would not be able to cope with the mental stress engendered by such circumstances, the trial court should conclude that defendant's conduct is the proximate cause of plaintiff's injury and impose liability. . . ." In short, such factors as familial relatedness or contemporaneous observance of the accident contribute to the objective foreseeability that the plaintiff will be seriously distressed as opposed to merely affected as a threshold matter.

The *Leong* analysis is premised on the notion that the policy concerns of unlimited liability and fraudulent claims can be appropriately limited by an objective assessment of the traumatic event and its reasonably expectable effects on a normally constituted individual. This rationale has been expressly adopted by many courts, although the resulting foreseeability standards have not followed from the premise.

C. Describing and Quantifying Foreseeable Injury: An Analysis of Objective Versus Subjective Indices of Distress

If defendants are held liable for injuries sustained by foreseeable plaintiffs, then such liability is not unlimited, but rather is contained by traditional negligence principles. Further, if injury must be objectively reasonable, then "fraudulent" claims and unlimited liability will be reasonably averted. This two-pronged analysis has been approximated by some courts and commentators in advocating for a standard which requires 1) a foreseeable plaintiff and 2) resulting serious mental distress.

What is missing from this analysis, however, is an objective

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231. Id. at 410, 520 P.2d at 765-66.
232. Id. at 410, 520 P.2d at 766.
233. Id. at 410, 520 P.2d at 765 (emphasis added). For further discussion and criticism of the "foreseeable harm" analysis, see generally Note, supra note 2, at 864-66.
234. See, e.g., *Dillon*, 68 Cal. 2d 728, 746, 441 P.2d 912, 924, 69 Cal. Rptr. 72, 84 (1968) ("The driver of a car . . . is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur . . . and is not to be considered negligent towards one who does not possess the customary phlegm.") (citation omitted); *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979) (*Leong* objective requirement of serious mental distress to normally constituted individual is reasonable response to fears of unlimited liability); *D’Ambra v. United States*, 114 R.I. 643, 653, 338 A.2d 524, 529 (1975) ("Certainly the law should not compensate for every minor psychic shock incurred in the course of daily living; it should not reinforce the neurotic patterns of our society.").
causal link between the defendant's impact on the plaintiff and the resulting severe injury.

For example, if the plaintiff is involved in a minor automobile accident due to the defendant's negligence, and the plaintiff experiences minor anxiety for a few days as a result, the claim would presumably be barred as involving nonserious injury. In contrast, if the plaintiff developed a debilitating anxiety neurosis, then the injury would be serious and recovery available. However, this would violate common-sense notions of factual causation.

In essence, there are two broad causal agents involved: the environmental precipitant and the individual's lifelong character development or personality. If the latter is a predominant cause of the subjective psychic distress an individual experiences, then the individual has a "thin skull." And if the environmental event triggers an intrapsychic process in this individual which yields subjective discomfort, then the event is a necessary, but not sufficient, condition (or "but-for") for the distress. When the character structure is such that nearly any event could trigger subjective discomfort, then, in essence, the triggering event was not even necessary. And where the character structure

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237. Clearly, models of causation have plagued the legal system as a practical and philosophical matter for centuries. See, e.g., Landes & Posner, Causation in Tort Law: An Economic Approach, 12 J. LEGAL STUD. 109, 109-11 (1983) (concluding that causation in tort law is undefinable and should therefore be based solely upon considerations of economic efficiency). However, this problem typically stems from competing policy issues. In the case of the individual developing a debilitating psychic injury from a minor car accident, it is arguable, from a psychological perspective, whether the accident in fact "caused" the injury. See Mazzagatti v. Everingham, 512 Pa. 266, 516 A.2d 672 (1986) (Nix, C.J., concurring) (where Dillon factors not met, factual cause of plaintiff's injuries is more the plaintiff's own emotional makeup than the defendant's conduct); PETRILA, POYTHRES & SLOBOGIN, supra note 206, at 282 (concept of cause may not make sense in deterministic psychological paradigm); Sidley, Proximate Cause and Traumatic Neurosis, 11 BULL. AM. ACAD. PSYCHIATRY & LAW 197 (1983) (same).

238. The relative contributions of environmental and intrapsychic forces in the development of psychopathology has been fiercely debated in psychology. However, it is generally agreed that character structure plays at least a significant role. See Hendin, Haas, Singer, Gold & Trigos, The Influence of Precombat Personality on Posttraumatic Stress Disorder, 24 COMPREHENSIVE PSYCHIATRY 530 (1983) (current work on post-traumatic stress disorder has inappropriately deemphasized role of preexisting character in determining response to trauma); see also Modlin, The Trauma in "Traumatic Neurosis," 24 BULL. OF MENNINGER CLINIC 49 (1960). Modlin states: "'[T]raumatic neurosis' specifies and overemphasizes one factor of stress with resultant understatement of other stresses and of the individual organism's propensity for breakdown." Id. at 50.

239. Here, some courts will mitigate the defendant's damage liability by the likelihood of the plaintiff's encountering other triggering events. See supra notes 216-26 and accompanying text.
is such that only a severe environmental insult would cause lasting discomfort, then such an external event would be both necessary and sufficient.\textsuperscript{240}

The condition of the pre-event character structure can be determined arithmetically if certain variables are known. For example, if an individual is extremely upset by an objectively minor event, then it is said that such individual is “predisposed” to such distress. Conversely, a minor psychic reaction to an objectively stressful event would lead the observer to conclude that the individual had a “thick skull.” Thus, level of predisposition \( P \) can be operationally defined as the difference between objective stress \( O \) and subjective impact of event \( S \): \( P = O - S \). Where \( P \) is negative, for example, the individual “over-reacted” to the stimulus, thus implicating at least a partial influence of intrapsychic forces.

It is precisely that proportion of subjective distress which is accounted for by predisposition or character structure\textsuperscript{241} which is unforeseeable, in the common understanding of that word, from the perspective of the defendant. This is, in essence, what the \textit{Leong} court\textsuperscript{242} adopted when it held that serious distress to a \textit{normally constituted individual} would be foreseeable as a matter of proximate cause.\textsuperscript{243} As already noted, this concept has been expressly adopted by many courts, although their resulting foreseeability standards do not follow correctly

\begin{itemize}
\item \textbf{240.} The relative causal contributions of environmental and intrapsychic forces may be inferred by a consideration of the objective level of impact of the exogenous stressor. Where the event is extremely traumatic, the influence of intrapsychic forces would be expected to play a small role. Conversely, where the objective nature of the exogenous stressor is slight, the influence of intrapsychic forces likely predominates. This may be visually depicted as follows:

\begin{center}
\begin{tikzpicture}
\fill [pattern=north east lines, pattern color=black!50] (0,0) -- (5,0) -- (5,5) -- (0,5) -- cycle;
\end{tikzpicture}
\end{center}

Low Objective Stress \hspace{1cm} High Objective Stress

\begin{itemize}
\item \textbullet{} influence of external event on functioning
\item \textbullet{} influence of intrapsychic forces on functioning
\end{itemize}

\begin{itemize}
\item \textbf{241.} Here, the equation is merely altered arithmetically to be: \( S = O - P \) (culpable subjective distress is determined by objective trauma minus character predisposition).
\item \textbf{242.} For a discussion of \textit{Leong}, see \textit{supra} notes 229-34 and accompanying text.
\item \textbf{243.} For a “normally constituted individual,” \( S \) and \( O \) would always be equal since no peculiar predisposition would exist (i.e. \( P = 0 \)). Since \textit{all} humans are predisposed to some unique form of psychic discomfort, it is more exact to say that when \( P = 0 \), there is no unforeseeable injury from the perspective of the defendant.
\end{itemize}
from the premise.244

What clearly remains to be considered after quantifying nonforeseeable injury is to qualify or describe it so that it may be practically administered by the courts and understood by juries. The Leong court correctly distinguished between “primary reactions” to a trauma, which involve the instinctive, autonomic responses of fear, anger, grief and shock, and “secondary reactions,” which result from the individual’s continuing inability to cope adequately with the traumatic event.245 The former reaction tends to be generalized in the human species, and relatively internalized in expression,246 while the latter varies considerably among individuals and is more externally verifiable. The secondary reactions include, but are not limited to, continuing and debilitating anxiety states, the conversion of uncomfortable feelings and emotions to physical discomfort, and a hypochondriacal retreat to the sick role.247 It is the secondary reactions which result in debilitation, significant medical expenses, lost earnings, etc. The quality, nature and scope of the secondary reactions depend more upon the unique character of the individual, especially when the level of objective stress is relatively slight.248

Liability can be limited by holding the defendant responsible for those secondary reactions which are foreseeable. Foreseeability would depend upon a finding of fact that the particular secondary reaction

244. See supra note 234 and accompanying text.
245. Leong, 55 Haw. at 411-12, 520 P.2d at 766-67.
246. See, e.g., Kolb & Mutalipassi, 12 Psychiatric Annals 979 (1982). These researchers found that exposure to trauma-related stimuli induced a generalized startle reflex pattern followed by fright, aggression or generalized tremor in victims of combat-related stress syndromes. Id. at 980. The authors postulated the “existence of an on-going perceptual motor abnormality with regressive impairment ... and fixation through emotional conditioning to a primitive startle-arousal pattern...” Id. at 985. In short, sights and sounds simulating those of the original trauma serve as conditioned stimuli to induce the self-preservation responses of flight, flight or paralysis. The prototype of this internalized response is believed by these theorists to be the innate startle response of infancy. Id.
247. See, e.g., Leong, 55 Haw. at 412, 520 P.2d at 767.
248. The notion that a complex secondary process unique to the particular developmental history of the individual plays a significant role in the behavioral outcome of an event is generally accepted by behavioral scientists, although aetiological and phenomenological theories diverge. For example, classical psychoanalytic theory proposes that reality stimuli may strengthen instinctual impulses through an associative mechanism. The threatened emergence of these forbidden impulses creates a “danger situation” leading to signal anxiety which motivates and strengthens the mediating force of the personality to create a “compromise” between adversarial forces. See, e.g., C. Brenner, supra note 205, at 71-78. In contrast, the inability to control or predict environmental contingencies has been implicated in the development of neurotic symptomology. The past learning history of the organism would significantly affect the appraisal of novel and traumatic events. See generally M. Seligman, supra note 215; Mineka & Kihstrom, Unpredictable and Uncontrollable Events: A New Perspective on Experimental Neurosis, 87 J. Abnormal Psychology 256, 257-59 (1978).
would occur in a citizen of ordinary sensibilities. The question would be, in essence: Could the average person have handled this event without recourse to nonadaptive intrapsychic mechanisms? Or was maladaptation a reasonable result of the incident? The emphasis is on the debilitating secondary reactions because initial autonomic responses are typically of less significance in determining damages, and are rarely lasting in persons of ordinary sensibilities.249 Further, it is the secondary reverberations within the individual which may not be foreseeable.

An interesting way to operationalize foreseeable secondary reactions would be to limit recovery to those cases where the defendant impacted the plaintiff in a manner that "most people do not face with sufficient frequency or sufficient certainty to anticipate, to prepare for, and thus to absorb without suffering severe or permanent emotional damage."250 The only problem with this limiting mechanism is that uniqueness of injury can occur where the objective nature of the stressor is still slight. For example, one may be startled by the approach of a pet kangaroo (presumably a unique experience, at least in this country), but long-term psychic distress would not be foreseeable. Further, a distinction would be necessary between events unique in the experience of society in general, and those unique to the experience of the plaintiff. Many people have never been in a car accident, though these are quite common.251 Thus, some combination of uniqueness and objective severity of the stressor would be required.

The question of what constitutes a common, and thus foreseeable, secondary response still remains. In-depth longitudinal studies of trauma victims suggest a predictable and phasic path of recovery,252 wherein the initial autonomic "outcry"253 is followed by stages of alternating denial254 and intrusiveness.255 In very brief summary form,

249. See, e.g., Telf, supra note 148, at 106-07; Comment, Independent Tort, supra note 7, at 1251-52.
250. Note, supra note 2, at 868 (emphasis added).
251. See Horowitz, Post-Traumatic Stress Disorders, 1 BEHAV. SCIENCES & LAW 9 (1983). Horowitz notes that "[s]ome life events are common when their incidence among a population is considered, but are shocking and uncommon experiences for the individual who has for the first time experienced such an episode." Id. at 18-19.
252. See Horowitz, supra note 251; Lindy, An Outline for the Psychoanalytic Psychotherapy of Post-Traumatic Stress Disorder, in C. Figley, 2 TRAUMA AND ITS WAKE 195 (1986); Titchener, supra note 204.
253. Horowitz, supra note 251, at 11. This "outcry" may be an expression of rage, fear or supplication. The outcry is directed at loss, which is the major component of most serious life events. Id. The loss is of the previous view of the self in relation to a predictable environment. When that self/environment relation changes, the opportunity for either qualitative growth or emotional stagnation exists. See R. Kegan, THE EVOLVING SELF (1982) (all stages of human growth involve letting go of previous view of self in relation to psychosocial environment).
254. Horowitz, supra note 251, at 11-12. "Denial" is characterized by psychological numbing, with diminished cognitive information processing and
post-traumatic event reactions typically follow an alternating path of denial of the impact of the event and intrusive flooding of the memories and feelings associated with that event. This process is relatively universal in the human species. 257 The common understanding of this process is that, following a traumatic event, individuals go through alternating periods of confusion, grief, fear and rage, on the one hand, and seemingly inappropriate denial or unexpected courage, on the other hand.

This reverberating process may be analogized to the physical action of a pendulum.258 At one end of the arc is the intrusive reaction, while at the other end is the denial reaction. The more force that is initially applied to the pendulum, the further out in both directions it will go, and the longer it will take to return to rest. Thus, the more objectively severe the traumatic event, the more severe will be the denial and intrusive reactions, and the longer the individual will take to return to status quo.259

emoting. Id. at 11. Denial is not necessarily a negative or unhealthy process, but rather may be an appropriate and adaptive response aimed at providing the individual time to integrate the overwhelming novel experience. See Smith, Sealing Over and Integration: Modes of Resolution in the Post-Traumatic Recovery Process, in C. Figley, 2 TRAUMA AND ITS WAKE 20, 22 (1986).

255. Horowitz, supra note 251, at 12-14. During the “intrusive” stages, ideas and feelings related to the event flood the individual’s conscious awareness. Presumably, these are the thoughts and feelings which were unavailable in the denial stages. Id. at 12. Poor concentration, hypervigilence, startle reactions, anxiety attacks and reactivation of the fight/flight autonomic response are common. Id. at 13.

Notably, the current diagnostic criteria for “Post Traumatic Stress Disorder” include symptoms of both the denial and intrusive stages. See DSM-III-R, supra note 28, at 247-51. Characteristic symptoms include recurrent and distressing dreams and recollections of the event, as well as psychogenic amnesia and efforts to avoid feelings and thoughts associated with the event. Id. at 250.

256. A thorough analysis of the predominant contemporary model of traumatic stress theory is well beyond the scope of this paper. It will suffice to summarize it briefly. The memories of a traumatic event, the hypothesized neural substrate of which are called “engrams,” are maintained in active memory storage. Horowitz, supra note 251, at 15. These memory engrams are repeatedly presented to conscious awareness in an effort to successfully code and store them in less active form. Id. Since highly novel events do not have a contextual or semantic core of related memories available in the already existing memory mass, it is very difficult to use associative mechanisms in order to “file” the new image. Id. In other words, the individual’s view of the world cannot be reconciled with the new information. Id. As a result, the existing cognitive “map” or “schema” must itself accommodate to the new experience. Id.; see also R. Kegan, supra note 253, at 43-45 (process of adaptation involves assimilation of new experiences into old view of world, and accommodation of old view of world to new experiences) (citing, inter alia, J. Piaget, THE CONSTRUCTION OF REALITY IN THE CHILD (2d ed. 1954)).

257. See Horowitz, supra note 251, at 10 (summarizing “relatively universal tendencies” in stress recovery response cycle).

258. See, e.g., Lindy, supra note 252, at 199.

259. In fact, the individual does not return to his or her previous position. All experiences change the individual irreversibly. The issue is whether that
The pendulum analogy is somewhat incomplete, however, since the human psyche, unlike inanimate objects, does not merely react to external pressures, relying solely on friction for resistance. Rather, humans react to stress through complex, goal-directed behaviors. This process has been termed "working through" or "meaning-making." The denial and intrusion reactions are important tools in the working through process. By keeping memories of the event out of conscious awareness, the individual is permitted time and energy to deal with the meaning and impact of that event. However, if the memories are kept out of consciousness completely, the individual never learns from, or comes to terms with, the experience. Thus, the intrusion of event-related memories maintains inner-directed behaviors towards integration.

The typical working through process following traumatic events is understandable and foreseeable from the perspective of the defendant and the fact-finder since virtually all humans have had to work through difficult life experiences. There is a shared understanding of what people go through in times of loss or distress. Further, the reasonable nature and duration of this process can be related to the objective severity of the stressor itself. The more threatening and novel the experience, the more difficult it will be to come to terms with. Some events are so threatening to the integrity of the person that even a normally constituted individual would be expected to require years of grief and confusion in order to integrate the experience.

However, the working through process can also be slowed down or prevented under circumstances involving relatively minor objective distress. The traumatic experience may awaken dormant self-images of incompetence or may remind the individual of earlier traumatic experiences; the choice is either a descent into meaninglessness or the slow reconstruction of a whole new sense of meaning. In fact, this crisis of meaning can serve as a catalyst to disrupt old patterns, attempt new responses, and chart a new course.

260. For a discussion of the "working through" process, see Horowitz, supra note 251, at 14; Lindy, supra note 252, at 197-98.

261. See Lindy, supra note 252, at 198. Lindy states: Within limits, we assume that the psychic organism is capable of breaking down the impact of traumatic stressors and their associated affect states into manageable amounts that permit gradual intrapsychic processing. We identify this process as the working through of trauma. The task requires (1) the recovery of affect-laden memory traces; (2) the attribution of meaning to these memory traces; and (3) the reestablishment of psychic continuity with the past.

262. Accommodating to change or loss is inherent in all human growth experiences; from birth, see C. Brenner, supra note 205, at 71-74 (discussion of birth and early infancy traumas), to death, see E. Kubler-Ross, Death: The Final Stage of Growth (1975) (end of life is but one of many "deaths" that individuals go through).

263. See Horowitz, supra note 251, at 14-16.
events. \(^{264}\) Further, the individual's intrapsychic capacity for controlling the length and dosage of the denial and intrusive periods may be inadequate. \(^{265}\) Under such circumstances, the individual might experience an overwhelming influx of traumatic memories, or may keep the entire episode out of conscious awareness, thus leading to maladaptive avoidance behaviors. \(^{266}\) Such processes describe what is meant by a character "predisposition." It is these processes which are unforeseeable from the perspective of the defendant, and which factually account for a proportion of the subjective distress experienced by the plaintiff. The arithmetic difference between the length of time and level of grief and confusion expected during a reasonable working through process, and that actually required and experienced by the plaintiff, is the proportion of damages which would be noncompensable under the model proposed in this Comment.

Support for this model may be found by a consideration of a number of policy issues. Courts and commentators have been concerned about exposing defendants to potentially unlimited liability, and allowing the successful litigation of fraudulent claims. However, as noted earlier, \(^{267}\) liability may be limited in terms of the degree of recovery available to one plaintiff, as well as in terms of the number of potential plaintiffs. Further, if by "fraudulent claim" it is meant that recovery is not deemed objectively appropriate, then the analysis proposed here is a well-suited limiting device.

Another policy issue which has received very little attention in the literature is how best to compensate plaintiffs. If the goal of tort law is to place the plaintiff in the same position that he or she would have been in but for the tortious act, \(^{268}\) or to allocate the benefits and burdens among the parties, then any method or theory of recovery which violates this purpose would be inappropriate.

The very process of litigation itself, or the judicial sanctioning of the plaintiff's theory, may exacerbate or stultify the plaintiff's damages. \(^{269}\) In Stoleson, \(^{270}\) the Seventh Circuit, in a rare move, addressed this issue squarely. The court noted that certain persons have a tendency to transform mental distress into debilitating physical symptoms, \(^{271}\) and that awarding damages to such plaintiffs might "aggravate

\(^{264}\) Id. at 14-15.
\(^{265}\) Id. at 15.
\(^{267}\) See supra notes 209-27 and accompanying text.
\(^{268}\) See RESTATEMENT (SECOND) OF TORTS § 901 (1965) and accompanying comments.
\(^{269}\) See MELTON, PETRILA, POYTHRESS & SLOBOGIN, supra note 206, at 283.
\(^{270}\) 708 F.2d 1217 (7th Cir. 1983). For a discussion of Stoleson, see supra notes 211-18 and accompanying text.
\(^{271}\) Id. at 1222.
those symptoms and thus make litigation itself a source of illness."\textsuperscript{272} The court held that the significant expenditure of energy which was required in order to pursue the lawsuit, and the apparent need to have her position vindicated by a higher authority, aggravated the plaintiff's symptoms.\textsuperscript{273} The court refused to attribute these damages stemming directly from the lawsuit to the defendant.\textsuperscript{274}

The potential negative impact of the litigation itself on the trauma victim's subsequent adaptation is supported by traumatic stress theory. Perhaps one of the most critical prognostic indicators for post-traumatic recompensation is the ability of the individual to break down the memories and associated feelings from the trauma into manageable doses which may be processed and integrated according to a schedule which the individual can tolerate.\textsuperscript{275} Optimally, the alternating periods of denial and intrusion, which follow the impact of the event, will be balanced in intensity and duration in such a way that neither becomes a long-term, predominant state. Litigants must face the events surrounding the trauma on an artificial timetable. As is often the case with victims of crime, the litigant must discuss and recapitulate the event repeatedly at the request of others. Further, this typically takes place in unfamiliar surroundings, in the presence of strangers and in an adversarial context.\textsuperscript{276}

Not only is the individual flooded with the memories of the event, but the opposite may also occur. The litigation might serve a defensive function which permits the plaintiff to avoid interpreting the event in a meaningful manner. It is not unreasonable to suggest that the adversarial mode of litigation, coupled with the necessity for submitting to the strategies and decisions of the "authority figure" of the attorney, would maintain feelings of rage and dependency.\textsuperscript{277}

The issues raised here are by no means limited to civil litigation for mental distress. In fact, it is submitted that they permeate some of the basic assumptions underlying American jurisprudence. To sanction the notion that emotional, behavioral and cognitive components of a human being may be significantly and permanently influenced by the conduct of others, and that this influence should not at least be apportioned in terms of the degree of responsibility of the individual and his or her

\textsuperscript{272} Id.
\textsuperscript{273} Id.
\textsuperscript{274} The court stated: "It would be strange if stress induced by litigation could be attributed in law to the tortfeasor. An alleged tortfeasor should have the right to defend himself in court without thereby multiplying his damages..." Id. at 1223.
\textsuperscript{275} See Horowitz, supra note 251, at 16; Lindy, supra note 252, at 198, 201.
\textsuperscript{277} See Singer, supra note 200, at 9. Singer notes: "In too many circumstances, the case drags on and drags the individual down to becoming a chronically disabled patient." Id.
surroundings, is to subscribe to a philosophy of determinism which is in conflict with our judicial system's general assumption of free will. Further, it is conflict with the perception of free will and control of oneself which may be at the heart of psychological health.278

Certainly, it is not suggested that the legal process exacerbates psychic damages in all circumstances, or that the process does not frequently improve the plaintiff's position both financially and emotionally. For example, the need to regain control and predictability over one's environment may be met through active efforts to acquire redress.279 A judicial sanction of the plaintiff's claim, and a provision for compensation, might restore a sense that the environment is ultimately fair and just.280 What is required, then, is a method of generally identifying those situations where legal redress will likely be beneficial.

It is submitted that where the influence of intrapsychic forces is substantial or predominant in creating subjective distress in the litigant, legal redress will be least likely to attain ultimately beneficial results, no matter how well-intentioned. As noted earlier, clinical observation of patients who developed post-traumatic syndromes in response to objectively minor events suggests that these individuals were extremely passive, dependent or unable to handle anger in an adaptive manner prior to the impact of the event.281 When the level of objective discomfort is significantly below that of subjective distress, this premorbid character is likely playing a determinative role. It is these very aspects of premorbid style which would be most susceptible to the externalizing, adversarial and dependence-inducing elements of litigation.282

In short, when subjective discomfort exceeds the objective level of stress, the individual is most likely to be passive, dependent and angry. The process of litigation will then be most likely to exacerbate these very characteristics.

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278. See, e.g., Fein, How the Insanity Defense Retards Treatment, 8 LAW & HUMAN BEHAV. 283, 284 (1984) (concluding that individuals who perceive themselves as free and responsible tend towards higher levels of awareness, initiative, achievement, independence, complexity and other attributes valued by society) (citing Monahan, Abolish the Insanity Defense?—not yet, 26 RUTGERS L. REV. 719 (1973)).

279. See L. EVERSTINE & D. EVERSTINE, supra note 276, at 38.
280. Id. at 45.
281. See supra notes 200-05 and accompanying text.