Frame v. Kothari: May Plaintiffs Recover in New Jersey for the Emotional Distress Suffered Due to the Negligent Misdiagnosis of Third Persons

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FRAME V. KOTHARI: MAY PLAINTIFFS RECOVER IN NEW JERSEY FOR THE EMOTIONAL DISTRESS SUFFERED DUE TO THE NEGLIGENT MISDIAGNOSIS OF THIRD PERSONS?

I. INTRODUCTION

The recent New Jersey Supreme Court decision in Frame v. Kothari has potentially broad implications for the tort of negligent infliction of emotional distress. In Frame the parents of a ten-month-old child brought an action to recover for the emotional distress they suffered as a result of the negligent misdiagnosis and subsequent death of their son. The court applied the traditional tort rule governing bystander recovery and denied recovery on the grounds that the physician's negligent misdiagnosis, the manifestation of injury in the boy, and the observation by the parents were not sufficiently contemporaneous to meet the requirements of the rule. Thus, although recovery was denied in the case, the Frame court, agreeing with a recent California Supreme Court decision, stated that such a cause of action is available and suggested that recovery would be permitted under more "shocking" circumstances. The decision is significant because it represents a potential expansion of the law regarding emotional distress recovery. This article will discuss the proposed cause of action and the criteria a practitioner must demonstrate in order to prove or disprove such a claim.

2. Id. at 640-41, 560 A.2d at 676-77. For a discussion of the facts of Frame, see infra notes 7-27 and accompanying text.
3. Frame, 115 N.J. at 650, 560 A.2d at 681. For a discussion of the bystander recovery rule, see infra notes 28-39 and accompanying text.
5. See Frame, 115 N.J. at 651, 560 A.2d at 682 (Wilentz, C.J., and Garibaldi, J., concurring) (discussing majority's expansion of emotional distress recovery).

The courts have generally been unwilling to expand the bystander recovery rule, particularly in medical malpractice cases. See, e.g., Lindenmuth v. Alperin, 197 N.J. Super. 385, 484 A.2d 1316 (Law Div. 1984). For a discussion of Lindenmuth, see infra notes 46-49 and accompanying text.

Emotional distress recovery continues to be a controversial issue in the courts of New Jersey. In addition to the Frame case, the Supreme Court of New Jersey has very recently decided a number of cases in which emotional distress recovery was an issue. See, e.g., Mauro v. Raymark Indus., 116 N.J. 126, 561 A.2d 257 (1989) (plaintiff who suffered enhanced risk of cancer due to asbestos exposure able to recover for emotional distress and for medical surveillance, but not for enhanced risk of contracting disease without showing that contraction is probable); Giardina v. Bennett, 111 N.J. 412, 545 A.2d 139 (1988) (parents allowed to recover for emotional distress that resulted from doctor's negligence in causing pre-birth death of infant).

6. The focus throughout this article is on New Jersey case law. However,
II. FRAME v. KOTHARI: THE FACTS

On January 22, 1982, between 6:30 and 7:30 a.m., the Frame's ten-month-old son Arik fell down the stairway in their home. The plaintiff parents took the boy to the defendant Health Care Plan of New Jersey (Health Care) where he was treated by one of Health Care's employees, defendant Dr. Kothari, a board-certified pediatrician. Dr. Kothari examined the boy and determined that he had a fever of 102 degrees and a soft spot on the back of his head. Dr. Kothari diagnosed the boy as suffering from a virus and told the Frames to wake the boy every four hours and check for symptoms of head injury.

The Frames returned home and put their son to bed. When they woke him at 2:00 p.m. they became nervous and called Dr. Kothari. According to Dr. Kothari, Mr. Frame stated that the boy had vomited. According to the Frames, Mr. Frame told the doctor that the boy's eyes were "pivoting." Dr. Kothari advised the parents to let the boy sleep for another four hours. When the parents tried to awaken the boy at 6:00 p.m., he was in a near-death state.

The Frames immediately took their son to Cooper Medical Center, where x-rays revealed the presence of a blood clot at the rear of his skull. Emergency surgery was performed around midnight, and the Frames returned home at around 3:00 a.m. The hospital called about two hours later to inform them that Arik had died.

The Frames brought an action to recover both for the wrongful death of their son and for negligent infliction of emotional distress. The Frames alleged that Dr. Kothari was negligent in failing to give them proper instructions during the 2:00 p.m. telephone conversation. Moreover, Mrs. Frame claimed that the discovery of her son four

because the California courts have been so influential in this area, this article also includes a number of references to California case law.

7. Frame, 115 N.J. at 640, 560 A.2d at 676.
8. Id.
9. Id.
10. Id. There was conflicting testimony on this issue. The plaintiffs "disputed Dr. Kothari's testimony that she told them 'to check for the pupils, I asked them to watch for vomiting.'" Id.
11. Id.
12. Id.
13. Id.
14. Id. at 641, 560 A.2d at 676.
15. Id., 560 A.2d at 677.
16. Id.
17. Id.
18. Id.
19. Id. A subsequent autopsy indicated that the boy died from an "intracerebellar hemorrhage due to a blunt trauma to the skull." Id.
20. Id.
21. Id.
hours later in a moribund state caused her to become severely depressed, while Mr. Frame claimed that his personality changed following his son’s death, that he became isolated from his family and friends, and that he continued to suffer a deep sense of loss.

The Superior Court, Law Division, Camden County, awarded the plaintiffs $10,000 for the wrongful death of their son and $500 each for emotional distress. The Superior Court, Appellate Division, affirmed as to the wrongful death award but reversed as to the emotional distress award. The Supreme Court of New Jersey affirmed the decision of the Appellate Division. Significantly, however, the court also recognized in dicta that a cause of action for emotional distress may exist for plaintiffs who witness the negligent misdiagnosis of a family member.

22. Id. A psychiatrist diagnosed Mrs. Frame as suffering from “a chronic post-traumatic stress disorder,” and he attributed this disorder to the series of events which started with the boy’s fall and ended with his death. Id.

23. Id. Seven months after the death of their son the Frames separated, and they were divorced by the time of trial. Id. In addition, Mrs. Frame had a child with another man in the belief that she would “feel better” if she had another baby. Id.

24. Id. at 640, 560 A.2d at 676.

25. Frame v. Kothari, 218 N.J. Super. 537, 547, 528 A.2d 86, 92 (App. Div. 1987). In reversing the emotional distress award, the Superior Court, Appellate Division, reasoned that “mere advice and failure to properly diagnose and treat does not satisfy the [bystander recovery rule] requirement of an ‘incident.’” Id. at 545-46, 528 A.2d at 91. Although the superior court stated that the “viewing of the infant in his death-like state” may have been an incident, it was not the type of incident contemplated in the adoption of the bystander recovery rule. Id. at 546, 528 A.2d at 91.

The superior court also based its holding on policy determinations. The court stated that “to impose liability where the malpractice merely consists of an improper diagnosis will result in too great a cost to society and have a profoundly deleterious impact on the medical profession to the detriment of our society as a whole.” Id.


27. Id. at 649, 560 A.2d at 681. The majority opinion, written by Justice Pollock and joined by four other members of the court, stated that, “[i]n an appropriate case, if a family member witnesses the physician’s malpractice, observes the effect of the malpractice on the patient, and immediately connects the malpractice with the injury, that may be sufficient to allow recovery for the family member’s emotional distress. Such an event could be shocking.” Id.

Two members of the Frame court, however, believed that the majority’s opinion was premature. See id. at 651, 560 A.2d at 682 (Wilentz, C.J., and Garibaldi, J., concurring). Specifically, the concurring opinion stated:

We would, however, await “an appropriate case” before deciding whether the common-law remedy for death or serious injury caused by medical malpractice should be extended to the consequent emotional distress of family members, including situations in which family members are contemporaneously aware that the misdiagnosis [sic] is causing injury to their loved one.

Id. (Wilentz, C.J., and Garibaldi, J., concurring).
III. Background

A. Bystander Emotional Distress Recovery

Traditionally, courts have been reluctant to allow plaintiffs to recover for emotional distress.28 This reluctance has been especially apparent in "bystander" cases, in which plaintiffs seek to recover for the mental disturbance caused not by fear for their own safety, but rather by "witnessing some peril or harm to another person."29 The courts have


The initial common law rule allowed recovery for mental distress only as a "parasitic" damage accompanying physical "impact." Prosser & Keeton on Torts, supra, § 54, at 363 (discussing theory that requisite "impact" was supposed to afford desired guarantee that mental distress is genuine); Diamond, supra, at 480; see Ward v. West Jersey & Seashore R.R., 65 N.J.L. 383, 47 A. 561 (N.J. 1900) (applying impact rule).

The impact rule, however, did not succeed in limiting frivolous emotional distress claims because "plaintiffs devised tortured interpretations of the requirement, allowing the slightest physical impact to be a springboard to get a bystander recovery case into court." Note, Limiting Liability for the Negligent Infliction of Emotional Distress: The "Bystander Recovery" Cases, 54 S. Cal. L. Rev. 847, 849 (1981) [hereinafter Note, Limiting Liability]; see, e.g., Zelinsky v. Chimens, 196 Pa. Super. 312, 318-19, 175 A.2d 351, 354 (1961) (plaintiffs able to proceed with emotional distress claim upon showing that they were "jostled and jarred" in automobile collision).

Eventually, the courts were confronted with cases in which there was no actual impact, but in which impact was dangerously close. These "near miss" cases led the majority of courts to reject the physical impact rule in favor of the "zone of danger" approach. Diamond, supra, at 480; see also Note, The Next Best Thing to Being There?: Foreseeability of Media-Assisted Bystanders, 17 Sw. U.L. Rev. 65, 67-68 (1987) (discussing weakness of impact rule and stating that "the impact rule has been abandoned in the vast majority of American jurisdictions in favor of either the zone of danger test or a [foreseeable bystander] approach"); see, e.g., Falzone v. Busch, 45 N.J. 559, 569, 214 A.2d 12, 17 (1965) (court rejected impact rule where defendant drove automobile dangerously close to plaintiff).

Under the zone of danger rule, a plaintiff may recover for emotional distress, regardless of whether there was actual physical impact, if she could show: (1) that she was in the zone of physical danger, and (2) that the mental distress suffered was physically manifested. Diamond, supra, at 480-81; see also Note, Limiting Liability, supra, at 849-53; Case Comment, supra, at 934-36.

The zone of danger rule, like the predecessor impact rule, has been criticized as being ineffective in dealing with the fear of unlimited liability in emotional distress cases. Note, Limiting Liability, supra, at 850-53.


The typical fact situation in a bystander case involves a parent who witnesses her child being injured or killed in an automobile accident. Note, Limiting
adopted rules that allow bystanders to recover for emotional distress; however, due to the fears of unlimited liability for negligent acts and of overburdening the courts with emotional distress litigation, the courts have drawn such rules rather conservatively.30

In Portee v. Jaffee31 the New Jersey Supreme Court set forth the current approach taken by the New Jersey courts in bystander cases. The Portee court adopted a bystander recovery rule similar to that followed in other jurisdictions.32 The court held that the plaintiff mother could maintain a cause of action for the emotional distress she suffered as a result of her witnessing the aftermath of an elevator accident that ult-

Liability, supra note 28, at 847-48, 855-56. Thus, the typical case involves some "sudden occurrence." See Ochoa v. Superior Court, 39 Cal. 3d 159, 167, 703 P.2d 1, 6, 216 Cal. Rptr. 661, 666 (1985) ("Many of the subsequent cases requiring an application of the Dillon factors have also involved situations similar to the Dillon case where there was a brief, sudden occurrence."). For a discussion of Ochoa, see infra notes 78-83 and accompanying text. For a discussion of Dillon, see infra note 32.

30. See Prosser & Keeton on Torts, supra note 28, § 54, at 360-61. A number of reasons have been articulated for the courts' reluctance to allow bystanders to recover for emotional distress: (1) mental distress cannot be measured in terms of money; (2) the physical consequences of a mental disturbance are too remote, and therefore not proximately caused; (3) there is a lack of precedent; and (4) there would be a vast increase in litigation. Id. at 360; see also Diamond, supra note 28, at 480 n.20. These objections have been referred to collectively as the "general fear of unlimited liability." Note, Limiting Liability, supra note 28, at 847 n.7.

32. Id. at 97-101, 417 A.2d at 526-28. The Portee court adopted a rule similar to that announced by the Supreme Court of California in Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

The Dillon court departed from the majority rule that plaintiffs must have been in the zone of danger before they may recover for mental distress. The court allowed the plaintiff mother to recover for the mental distress caused by her witnessing an accident that killed her daughter, even though the plaintiff herself was in a position of complete safety. Dillon, 68 Cal. 2d at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.

The Dillon court determined that under certain circumstances a bystander may be a foreseeable plaintiff, and hence is owed a duty of reasonable care. See id. at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80; see also Diamond, supra note 28, at 481-83 (discussing Dillon rule); Case Comment, supra note 28, at 943-48 (detailed discussion of Dillon observation and location guidelines).

The Dillon court set forth several guidelines relevant in determining whether the plaintiff owes such a duty:

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

Dillon, 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

Dillon has caused considerable controversy and has been applied inconsistently by the courts. For a discussion of the criticisms and proposals made by various commentators, see infra note 94.
mately killed her son. The court held that a plaintiff could recover for emotional distress if he or she could prove that: (1) the death or serious physical injury of another was caused by the defendant's negligence; (2) a marital or intimate family relationship existed between the plaintiff and the injured person; (3) the plaintiff observed the death or injury at the scene of the accident; and (4) severe emotional distress resulted.

The Portee rule is arguably well suited to handle the typical bystander case in which a parent witnesses a child being injured in a sudden accident. The rule, however, is not so easily applied to other situations, and courts generally have been unwilling to expand the Portee doctrine, allowing recovery only where the requirements of the rule are

33. Portee, 84 N.J. at 90, 417 A.2d at 522. The facts of the Portee case were extremely tragic. A seven-year-old boy was trapped in an elevator shaft between the door and the wall of the elevator shaft. Id. at 91, 417 A.2d at 522. When the elevator was activated the boy was dragged up by the elevator. Id. Police officers and the boy's mother soon arrived at the scene. Id. For four and one-half hours the officers tried to free the child. Id. The boy's mother watched as her son "moaned, cried out and flailed his arms." Id. "[The boy] died while still trapped, his mother a helpless observer." Id., 417 A.2d at 523.

After her son's death, the mother suffered severe depression and became self-destructive, attempting to take her own life. Id. at 91-92, 417 A.2d at 523. Subsequently, she brought an action against the owners of the building and two elevator companies asserting survival and wrongful death claims and seeking damages in her own right for the mental distress she suffered by witnessing her son's anguish and death. Id. at 92, 417 A.2d at 523.

34. Id. at 101, 417 A.2d at 528. The recovery allowed under Portee is limited by the degree of severity of the injury that led to the mental distress. Id. The Portee court pointed out that, when confronted with accidental death, the expected reaction of normal persons is shock and fright. Id. at 100, 417 A.2d at 528 (quoting Caputzal v. Lindsay Co., 48 N.J. 69, 76, 222 A.2d 513, 517 (1966)). The court held, therefore, that death or serious injury is necessary to permit recovery. Id.

35. Id. at 101, 417 A.2d at 528. In discussing the familial relationship requirement, the Portee court stated: "[i]t is the presence of deep, intimate, familial ties between the plaintiff and the physically injured person that makes the harm to emotional tranquility so serious and compelling." Id. at 98, 417 A.2d at 526-27.

36. Id. at 101, 417 A.2d at 528. In discussing the contemporaneous observation requirement, the Portee court stated:

Discovering the death or serious injury of an intimate family member will always be expected to threaten one's emotional welfare. Ordinarily, however, only a witness at the scene of the accident causing death or serious injury will suffer a traumatic sense of loss that may destroy his sense of security and cause severe emotional distress.

Id. at 99, 417 A.2d at 527.

37. Id. at 101, 417 A.2d at 528. Specifically, the Portee court stated that "[t]he harm we have determined to be worthy of judicial redress is the trauma accompanying the observation of the death or serious physical injury of a loved one." Id. at 100, 417 A.2d at 527-28 (emphasis added).

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clearly met.39

B. Applying the Bystander Recovery Rule in Medical Malpractice Cases: The Difficulty in Misdiagnosis Situations

In medical malpractice cases, a plaintiff may seek to recover for the emotional distress suffered as a result of witnessing a physician's negligent medical treatment of a third person. Such a plaintiff seeks to recover as a bystander and thus the Portee rule applies.40 In Poli Koch v. Calabro41 the plaintiff mother was allowed to recover for the emotional distress resulting from her observation of the defendant physician's negligent administration of fluids into her daughter's jugular vein, causing her daughter to die two hours later of cardiac failure.42 Thus, the courts of New Jersey allow bystander emotional distress recovery in medical malpractice cases where there has been an observable negligently performed medical procedure.43

On the other hand, claims for emotional distress in the medical mis-


It should be noted, however, that although Portee allows plaintiffs who were not in the zone of physical danger to recover under certain circumstances, plaintiffs who were in the zone of danger may still recover without regard to the Portee requirements. See, e.g., id. at 255-59, 473 A.2d at 545-47 (neighbor-guardian did not meet Portee requirements, but, in rescuing child from circus animal, became rescuer whose intervention was foreseeable and who could recover under traditional rule).

40. For a discussion of the typical "bystander," see supra note 29 and accompanying text. For a discussion of the Portee rule, see supra notes 31-39 and accompanying text.


42. Id. at 112, 506 A.2d at 1286-87. The physician had inserted a catheter into the child's right internal jugular vein for the introduction of hyperalimentation fluid. Id. The catheter, however, was not positioned properly and the child died two hours later of a cardiac tamponade. Id. The plaintiff was present during the two hours between the start of the hyperalimentation and the child's death. Id.

43. Cases like Poli Koch support the general proposition that recovery is permitted where the plaintiff has witnessed some injury-producing event. For a discussion of the injury-producing event requirement, see infra notes 55-59 and accompanying text.

It should be noted that the courts of New Jersey have also allowed family members to recover for emotional distress in the medical malpractice context along a separate line of cases. Where the physician's negligence involves the diagnosis or treatment of an unborn child, the courts of New Jersey have allowed the parents to recover for emotional distress as direct victims of the physician's negligence. See, e.g., Giardina v. Bennett, 111 N.J. 412, 415, 545 A.2d 139, 140 (1988) (in allowing parents to recover for emotional distress court stated that "[m]edical malpractice causing a stillbirth results in infliction of a direct injury to the mother as well as to her unborn child.").

This direct-victim type of analysis is similar to that applied by the courts of California. See Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (husband allowed to recover from wife's physician for
diagnosis context have been less successful. As a general proposition, it seems clear that in any type of case the discovery of "the death or serious injury of an intimate family member will always be expected to threaten one's emotional welfare."\(^\text{44}\) In medical misdiagnosis cases, however, the difficulty in allowing third parties to recover for emotional distress is that "[t]he nature of a misdiagnosis is such that its results may neither manifest themselves immediately nor be shocking. Hours, days or months may separate a misdiagnosis, the manifestations of the injury to the patient, and the family member's observation of the injury."\(^\text{45}\)

In \textit{Lindenmuth v. Alperin}\(^\text{46}\) a mother sought to recover for the emotional distress resulting from the defendant physician's failure to diagnose an intestinal obstruction in the plaintiff's newborn child which caused the child to die three days after birth.\(^\text{47}\) The court denied recovery, holding that a misdiagnosis does not qualify as an event that can be observed by the plaintiff, as required by \textit{Portee}.\(^\text{48}\) In addition, the \textit{Lindenmuth} case has been interpreted as denying recovery because the injury occurred gradually rather than as a result of a brief and sudden event.\(^\text{49}\)

Thus, courts have distinguished cases where the basis of the cause of action is a negligent misdiagnosis from cases where there has been an observable medical procedure,\(^\text{50}\) denying recovery in the former be-

\begin{enumerate}
\item \textit{Portee}, 84 N.J. at 99, 417 A.2d at 527. \(\text{n. 44}\)
\item Frame v. Kothari, 115 N.J. 638, 644-45, 560 A.2d 675, 678 (1989). \(\text{n. 45}\)
\item 197 N.J. Super. 385, 484 A.2d 1316 (Law Div. 1984). \(\text{n. 46}\)
\item Id. at 386, 484 A.2d at 1316. \(\text{n. 47}\)
\item Id. In denying recovery, the \textit{Lindenmuth} court stated that the "failure to diagnose and treat an intestinal blockage was not '[a]n event causing injury which can be the subject of sensory perception.'" Id. at 389, 484 A.2d at 1318 (quoting Jansen v. Children's Hosp. Medical Center, 31 Cal. App. 3d 22, 24, 106 Cal. Rptr. 883, 885 (1973)). The \textit{Lindenmuth} court went on to state that the "'[p]laintiff's emotional distress arose from observing the result rather than an act.'" Id. \(\text{n. 48}\)
\item The \textit{Frame} court discussed a number of similar cases from other jurisdictions. For a discussion of these cases, see \textit{infra} note 59 and accompanying text. \(\text{n. 49}\)
\item \textit{See Frame}, 115 N.J. at 645, 560 A.2d at 679 (\textit{Lindenmuth} can be interpreted as "denying recovery when the mother watched the deterioration of her child over a period of three days without appreciation of the impact of the doctor's act of malpractice"). The \textit{Frame} court discussed cases from other jurisdictions that support the proposition that a slow deterioration in health will not support recovery for emotional distress. For a discussion of these cases, see \textit{infra} note 77 and accompanying text. \(\text{n. 50}\)
\item In allowing recovery in a medical treatment case, the \textit{Polikoff} court addressed the distinction between the misdiagnosis type of case and the observable medical procedure type of case. \textit{See Polikoff v. Calabro}, 209 N.J. Super. 110, 114-15, 506 A.2d 1285, 1288 (App. Div. 1986). The \textit{Polikoff} court distinguished the cause of action before it from the cause of action in \textit{Lindenmuth}, stating that "'[a]ccording to plaintiffs' theory of the malpractice action, their child did not die as a result of the disease or condition for which she was being treated but rather
cause plaintiffs have been unable to show a contemporaneous observation as required by *Portee*.51

IV. *Frame v. Kothari: New Jersey Addresses the Medical Misdiagnosis Issue*

In *Frame v. Kothari*52 the Supreme Court of New Jersey specifically addressed the issues raised when the bystander recovery rule is applied in the medical misdiagnosis context.53 That is, the court confronted the difficult problem plaintiffs face in these cases in attempting to show a contemporaneous observation as required by *Portee*.

A. Frame Liberalizes the Contemporaneous Observation Requirement in Medical Malpractice Cases

The contemporaneous observation requirement has been described as consisting of three distinct elements: "(1) What was observed? (2) How was it observed? [and] (3) When was it observed?"54 The *Frame* decision is analyzed in terms of these three questions.

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51. *See Portee*, 84 N.J. at 101, 417 A.2d at 528 (requiring "observation of the death or injury at the scene of the accident"). In the medical misdiagnosis situation, the injury suffered by the patient might not manifest itself contemporaneously with the physician’s negligence. *See Frame*, 115 N.J. at 645, 560 A.2d at 679 ("The observing family member will not be exposed to the harm of seeing a healthy victim one moment and a severely injured one the next.") (citing Case Comment, *supra* note 28, at 946). The injury may in fact manifest itself via a gradual deterioration, possibly leading to death. Thus, it may be impossible for the family member to observe the injury at the scene of the negligent act.


53. *See id.* at 644, 560 A.2d at 678 ("Our focus here is on the right of one family member to recover for the emotional distress caused by the medical misdiagnosis of another member of the family.").


The *Portee* formulation was drawn directly from the *Dillon* guidelines. *See Portee*, 84 N.J. at 97-101, 417 A.2d at 526-28. *Portee* requires that in order to recover for negligent infliction of emotional distress a plaintiff must show that there was an observation of death or serious injury at the scene of the accident. *Id.* at 101, 417 A.2d at 528. This requirement was derived from guideline number two of the *Dillon* approach which directs the court to determine "[w]hether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident." *Dillon v. Legg*, 68 Cal. 2d 728, 740-41, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968). Therefore, the same three-step analysis which was applied to *Dillon* may be applied to *Portee* as well.

For a discussion of the *Portee* rule, see *supra* notes 31-39 and accompanying text. For a discussion of *Dillon*, see *supra* note 32.
1. What was observed?

a. The plaintiff must observe the physician’s malpractice

Generally, the bystander rule requires that the plaintiff observe some injury-producing event in order to recover for emotional distress. In the Frame court held that in the medical misdiagnosis context the plaintiff must observe the defendant’s negligent act in order to recover as a bystander. Although it can be argued that the Lindenmuth court set forth an equally strict requirement, a more accurate interpretation of the case is that it supports the general proposition that the observation of some injury-producing event will support recovery. A few courts have been much more liberal in applying the bystander rule, allowing recovery where the plaintiff observed only the results of the defendant’s act. Such cases, however, are the exception. Most courts have allowed recovery only where the plaintiff observed some injury-producing event.

55. See Portee v. Jaffee, 84 N.J. 88, 417 A.2d 521 (1980). In Portee, the plaintiff alleged that the defendants were negligent in that they “fail[ed] to provide a safe elevator.” Id. at 92, 417 A.2d at 523. This was not an act which could have been “observed.” In addition, the plaintiff did not witness the initial accident because she arrived at the scene after her son had become trapped in the elevator. Id. at 91, 417 A.2d at 522. The plaintiff did, however, observe an injury-producing event. That is, she observed her son while he was still trapped in the elevator shaft and in great pain. Id., 417 A.2d at 522-23. Thus, the plaintiff observed an injury-producing event which caused her mental trauma, and therefore she was allowed to maintain a cause of action for emotional distress.

56. Frame, 115 N.J. at 649, 560 A.2d at 681 (“[I]f a family member witnesses the physician’s malpractice, observes the effect of the malpractice on the patient, and immediately connects the malpractice with the injury, that may be sufficient to allow recovery for the family member’s emotional distress.”) (emphasis added).

57. See Lindenmuth v. Alperin, 197 N.J. Super. 385, 389, 484 A.2d 1316, 1318 (Law Div. 1984) (failure to diagnose and treat was not event which could be subject of sensory perception). For a discussion of Lindenmuth, see supra notes 46-49 and accompanying text.

58. Archibald v. Braverman, 275 Cal. App. 2d 253, 256, 79 Cal. Rptr. 723, 725 (1969) (Plaintiff mother allowed to recover when she saw her severely injured child after accident took place. Court stated that “[m]anifestly, the shock of seeing a child severely injured immediately after the tortious event may be just as profound as that experienced in witnessing the accident itself.”); Mercado v. Transport of N.J., 176 N.J. Super. 234, 422 A.2d 800 (Law Div. 1980) (mother allowed to recover after finding her son lying fatally injured in street after he had been struck by bus); see Mobaldi v. Regents of Univ. of Cal., 55 Cal. App. 3d 573, 583, 127 Cal. Rptr. 720, 727 (1976) (“Foreseeability depends upon what the emotionally traumatized plaintiff observes. It is observation of the consequences of the negligent act and not observation of the act itself that is likely to cause trauma so severe as to result in physical injury.”).

59. See, e.g., Jansen v. Children’s Hosp. Medical Center, 31 Cal. App. 3d 22, 24, 106 Cal. Rptr. 883, 884 (1973) (event causing injury must be subject of sensory perception); see also Thing v. La Chusa, 48 Cal. 3d 644, 666, 771 P.2d 814, 828, 257 Cal. Rptr. 865, 879 (1989) (“Greater certainty and a more reasonable limit on the exposure to liability for negligent conduct is possible by limiting the right to recover . . . to plaintiffs who personally and contemporaneously perceive
Whether the witness must observe the tortious act, the injury, or both has been a key issue in bystander recovery cases.\(^{60}\) Commentators have argued that observing the family member’s injury should be sufficient to support emotional distress recovery.\(^{61}\) In addition, it has been suggested that the only justification for a rule which requires that the plaintiff witness the act as well as the result is to limit the number of potential plaintiffs, and that “[t]his rule excludes a wide spectrum of claims in which the act is not observed in any manner, or worse, is non-observable.”\(^{62}\) Medical malpractice cases, for example, often present the injury-producing event and its traumatic consequences.”). For a discussion of \textit{La Chusa}, see infra note 95.

In \textit{Jansen}, a doctor failed to diagnose an ulcer in the plaintiff’s five-year-old child. 31 Cal. App. 3d at 23, 106 Cal. Rptr. at 884. The plaintiff mother sought recovery for the emotional trauma she suffered by witnessing the pain-ridden deterioration and death of her child. \textit{Id.} The court denied recovery, stating that the \textit{Dillon} rule “contemplates a sudden and brief event causing the child’s injury. . . . [T]he event causing injury to the child must itself be one which can be the subject of sensory perception.” \textit{Id.} at 24, 106 Cal. Rptr. at 884-85. This “suddenness” requirement, however, was later rejected by the Supreme Court of California. \textit{See} \textit{Ochoa} v. Superior Court, 39 Cal. 3d 159, 168, 703 P.2d 1, 7, 216 Cal. Rptr. 661, 667 (1985) (“[T]he ‘sudden occurrence’ requirement is an unwarranted restriction on the \textit{Dillon} guidelines.”).

In \textit{Budavari} v. \textit{Barry}, 176 Cal. App. 3d 849, 222 Cal. Rptr. 446 (1986), the plaintiff’s husband was treated by the defendant physicians for chest and knee injuries. \textit{Id.} at 851, 222 Cal. Rptr. at 447. The physicians took chest X-rays which showed a possible lesion on the husband’s lung. \textit{Id.} The physicians, however, failed to either inform the plaintiff’s husband of the lesion or to further investigate the problem. \textit{Id.} As a result of the defendant’s negligence the cancer was not diagnosed until two years later, when it had become terminal. \textit{Id.} The plaintiff sought recovery for the emotional trauma she suffered while her husband was dying. \textit{Id.} The \textit{Budavari} court denied recovery under \textit{Dillon}, stating that the “failure to detect cancer or to follow up on the X-ray findings was not an event which could be witnessed.” \textit{Id.} at 853, 222 Cal. Rptr. at 448.

In \textit{Pate} v. \textit{Children’s Hosp.}, 158 Mich. App. 120, 404 N.W.2d 632 (1986), the plaintiff alleged that the defendant hospital failed to diagnose that her sister was suffering from pneumococcal pneumonitis (pneumonia). \textit{Id.} at 121, 404 N.W.2d at 632. Two days later the plaintiff brought her sister to the defendant’s emergency room but she died while awaiting treatment. \textit{Id.} at 122, 404 N.W.2d at 632-33. The plaintiff sought to recover for the emotional distress suffered as a result of the defendant’s negligence. \textit{Id.} at 121, 404 N.W.2d at 632. The Michigan Court of Appeals denied recovery, stating that “[w]hat is missing from these allegations is the contemporaneous infliction of a tortious injury that could be described as an inherently shocking event. All that the plaintiff has alleged are negligent omissions in the form of nonobservable events that occurred two days prior to the decedent’s death.” \textit{Id.} at 124, 404 N.W.2d at 633.

\(^{60}\) Case Comment, supra note 28, at 944.

\(^{61}\) \textit{Id.} at 945 (“The event that affects the plaintiff’s emotional distress is not the act, but the results of that act.”); \textit{see} \textit{Diamond}, supra note 28, at 489 (“[T]here is no persuasive evidence that contemporaneous sensory perception of the actual accident is a prerequisite of severe mental harm, or that such perception merits compensaton while witnessing the destructive results does not”).

\(^{62}\) Case Comment, supra note 28, at 945 (suggesting better way to limit number of potential plaintiffs would be to create more rigorous definition of what “results”—that is, what kind of injury—would support recovery).
situations in which the tortious conduct consists of nonobservable events. In the medical malpractice context, however, the Frame court set forth a strict requirement. Under Frame the plaintiff must "observe" the physician's malpractice.

b. The plaintiff must observe severe results

The Frame court made it very clear that the results would have to be severe to support recovery, stating that "[t]o justify recovery, the plaintiff should observe the kind of result that is associated with the aftermath of an accident, such as bleeding, traumatic injury, and cries of pain." The court went on to state that "[r]ecover[y] for the negligent infliction of emotional distress is meant to cover the observation of shocking events that do not occur in the daily lives of most people."

Although this shocking event limitation is present in the bystander analysis generally, it is most evident in the third-party medical malpractice cases. Given the facts before it, the Frame court seemed to rely on

63. Id. at 945 n.123.
64. Frame, 115 N.J. at 649, 560 A.2d at 681.

Although the plaintiff must observe the physician's act (i.e., the misdiagnosis), it is not clear whether the plaintiff must understand the tortious nature of the defendant's act. The rule set forth by the Frame court requires the plaintiff to show that she was able to connect the defendant's act to the family member's injury. Id. This seems to suggest that the answer to the above question is yes—the plaintiff must understand the tortious nature of the defendant's conduct. In a recent California case, however, the California Supreme Court suggested that the answer to this question should be no, stating that "such a requirement would lead to the anomalous result that a mother who viewed her child being struck by a car could not recover because she did not realize that the driver was intoxicated." Ochoa v. Superior Court, 39 Cal. 3d 159, 170, 703 P.2d 1, 8, 216 Cal. Rptr. 661, 668 (1985). For a discussion of the Ochoa case, see infra notes 78-83 and accompanying text.

65. Frame, 115 N.J. at 643, 560 A.2d at 678 (citing Gates v. Richardson, 719 P.2d 193, 199 (Wyo. 1986)). Frame's requirement is in line with the general approach taken by bystander cases. See Portee v. Jaffee, 84 N.J. 88, 101, 417 A.2d 521, 528 (1980) (plaintiff must show that "the death or serious physical injury of another [was] caused by defendant's negligence"); Case Comment, supra note 28, at 946 (stating that, in general, only serious bodily harm or death will support recovery).


67. See, e.g., Pate v. Children's Hosp., 158 Mich. App. 120, 124, 404 N.W.2d 632, 633 (1986) (The court, in denying recovery for emotional distress based on misdiagnosis of sister, stated that "[w]hat is missing from these allegations is the contemporaneous infliction of a tortious injury that could be described as an inherently shocking event."). For a further discussion of Pate, see supra note 59.

In discussing the cases in which plaintiffs have sought to recover for the emotional distress suffered as a result of the defendant's malpractice upon a third person, the Frame court stated that the "common thread running through these cases is that a misdiagnosis normally does not create the kind of horrifying scene that is a prerequisite for recovery." Frame, 115 N.J. at 647-48, 560 A.2d at 680.
this limitation in denying recovery to the plaintiff parents. 68  

2. How did the observation take place?  

In the medical misdiagnosis situation, Frame requires that the plaintiff observe both the defendant’s malpractice and the resulting injury. 69 Thus, the “how” element is relevant for two distinct requirements. The Frame court requires plaintiffs to show some sensory perception both of

68. See Frame, 115 N.J. at 650, 560 A.2d at 681. In denying recovery to the plaintiff parents, the Frame court stated that “[t]he chain of circumstances, although deeply tragic, were [sic] not ‘shocking.’” Id.  

A problem in analyzing and understanding bystander recovery cases is that recovery may be allowed in one situation but denied in another similar instance when both cases seem to meet the same requirements of the bystander recovery rule. It appears that the “shocking event” limitation often forms the basis of differentiation in resolving the “close” cases. For example, in Mercado v. Transport of N.J., 176 N.J. Super. 234, 422 A.2d 800 (Law Div. 1980), a mother was allowed to recover for emotional distress after she found her son lying fatally injured in the street after he had been struck by a bus. On the other hand, in Arauz v. Gerhardt, 68 Cal. App. 3d 937, 137 Cal. Rptr. 619 (1977), recovery was denied to a plaintiff mother who found her child injured and bleeding after he had been hit by a car. Applying the “shocking event” limitation, the differentiation is that it is more shocking to see a fatally injured child than to see a child with a bleeding cut.  

One commentator has discussed the difficulty in distinguishing bystander cases, comparing Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 725 (1969) with Arauz. See Note, Limiting Liability, supra note 28, at 859-61. In Archibald, the plaintiff’s 15-year-old son was severely injured when he purchased negligently packaged gunpowder at defendant’s store. 275 Cal. App. 2d at 254, 79 Cal. Rptr. at 724. The plaintiff was not present but arrived within moments and suffered severe shock from seeing her injured son. Id. at 255, 79 Cal. Rptr. at 724. The Archibald court allowed the plaintiff mother to recover for her emotional distress stating that “the shock sustained by the mother herein was ‘contemporaneous’ with the explosion so as to satisfy the ‘observance’ factor.” Id. at 256, 79 Cal. Rptr. at 725.  

In Arauz, the plaintiff’s son was struck by defendant’s automobile. 68 Cal. App. 3d at 939, 137 Cal. Rptr. at 620. The plaintiff arrived at the scene within approximately five minutes to see her son with blood on his face. Id. at 940-41, 137 Cal. Rptr. at 621. The Arauz court denied recovery stating that “the shock claimed by plaintiff Arauz resulted from seeing her son after the accident and, therefore, ‘under circumstances not materially different from those undergone by every parent whose child has been injured in an unobserved and antecedent accident.’” Id. at 949, 137 Cal. Rptr. at 627 (quoting Powers v. Sissoev, 39 Cal. App. 3d 865, 874, 114 Cal. Rptr. 868, 874 (1974)).  

The analysis under Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), is very similar for these two cases. The two holdings, therefore, seem to be irreconcilable. However, the commentator suggests that “the true basis for the distinction between Archibald and Arauz was that Mrs. Archibald witnessed a more gruesome scene; thus her emotional injury was more believable.” Note, Limiting Liability, supra note 28, at 861.  

It should be noted that the Supreme Court of California recently disapproved Archibald in Thing v. La Chusa, 48 Cal. 3d 664, 668, 771 P.2d 814, 830, 257 Cal. Rptr. 865, 881 (1989). For a discussion of La Chusa, see infra note 95.

69. Frame, 115 N.J. at 649, 560 A.2d at 681. For a discussion of whether the plaintiff must observe the “act or results,” see supra notes 55-64 and accompanying text.
the defendant’s malpractice and the resulting injury.\textsuperscript{70}

3. \textit{When did the observation take place?}

   The bystander recovery rule requires that the observation be contemporaneous with the tortious event.\textsuperscript{71} In medical malpractice cases, especially misdiagnosis situations, the negligent act, the injury and the observation will generally not be simultaneous.\textsuperscript{72} Thus, a timeliness issue may arise in two contexts: (1) when did the injury manifest itself,\textsuperscript{73} and (2) when was the injury observed?\textsuperscript{74}

   a. The injury may occur somewhat gradually

   As a general proposition, the gradual deterioration of health of a close family member will not support an action for emotional distress.\textsuperscript{75} This proposition is supported by the two underlying principles in medical malpractice emotional distress cases—that (1) "a slow deterioration in health is characteristic of the type of harm with which individuals are expected to cope" and (2) that "an element of emotional preparation exists when the injury develops slowly."\textsuperscript{76} The Frame court discussed a number of cases that support this proposition.\textsuperscript{77} In recognizing that re-

\textsuperscript{70} Frame, 115 N.J. at 649, 560 A.2d at 681.

As to the defendant’s malpractice, the Frame court made specific reference to the 2:00 p.m. telephone call during which the defendant’s misdiagnosis took place. \textit{Id.} at 650, 560 A.2d at 681. It appears that the Frames' presence on the telephone call with the defendant physician was a sufficient sensory perception of the physician’s negligent act (i.e., the misdiagnosis) and would have supported recovery had the court concluded that the resulting injury was sufficiently contemporaneous with this perception.

As to the resulting injury, the court stated that "[t]he injury must be one that is susceptible to immediate sensory perception, and the plaintiff must witness the victim when the injury is inflicted or immediately thereafter." \textit{Id.} at 644, 560 A.2d at 678. Here, the court concluded that the observed injury—seeing Arik in a moribund state four hours after the telephone call—was not immediate enough. \textit{Id.} at 650, 560 A.2d at 681.

\textsuperscript{71} See Portee v. Jaffee, 84 N.J. 88, 101, 417 A.2d 521, 528 (1980) (observation of injury must be made "at the scene of the accident"); \textit{see also} Case Comment, \textit{supra} note 28, at 947 (timeliness limitation is required so that bystander recovery does not extend to any close relative who happens to see injured person at some time while injury is still evident).

\textsuperscript{72} See Frame, 115 N.J. at 645, 560 A.2d at 678 ("Hours, days, or months may separate a misdiagnosis, the manifestation of the injury to the patient, and the family member’s observation of the injury.").

The more typical bystander cases have involved some sudden accident. For a discussion of the typical bystander case, \textit{see supra} note 29 and accompanying text.

\textsuperscript{73} \textit{See} Case Comment, \textit{supra} note 28, at 945-46.

\textsuperscript{74} \textit{See id.} at 947-48.

\textsuperscript{75} \textit{See id.} at 945-46.

\textsuperscript{76} \textit{Id.} at 946.

\textsuperscript{77} \textit{See Frame}, 115 N.J. at 645-48, 560 A.2d at 679-81. The court first stated that the Lindenmuth decision can be interpreted as "denying recovery when the mother watched the deterioration of her child over a period of three days with-
covery may be justified in certain medical malpractice situations, how-
out appreciation of the impact of the doctor's act of malpractice."  *Id.* at 645, 560 A.2d at 679. For a discussion of the *Lindenmuth* case, see supra notes 46-49 and accompanying text.

The *Frame* court discussed cases from other jurisdictions. In *Amodio v. Cunningham*, 182 Conn. 80, 438 A.2d 6 (1980), the plaintiff had brought her daughter to the defendant physician because the child was having trouble breathing.  *Id.* at 83-84, 438 A.2d at 8. The defendant failed to diagnose the serious nature of the child's respiratory problems and allowed her to return home.  *Id.* The next day the child began gasping for breath and her heart stopped momentarily while her mother administered mouth-to-mouth resuscitation.  *Id.* The child was rushed to the hospital but died two days later, after artificial life-support was discontinued.  *Id.* The plaintiff sought to recover for the emotional distress she suffered as a result of witnessing her daughter's decline and death.  *Id.* The *Amodio* court denied recovery, stating that "the injuries suffered by the plaintiff's child became manifest a considerable period of time after the alleged negligence of the defendants occurred."  *Id.* at 93, 438 A.2d at 12.

In *Williams v. Baker*, 540 A.2d 449, *vacated and reh'g granted*, 540 A.2d 449, 457 (D.C. 1988), the plaintiff had brought her son to the emergency room of a hospital because he was suffering from a very high temperature.  *Id.* at 450. The defendant physician diagnosed the boy as suffering from a minor virus.  *Id.* He prescribed some tablets and sent him home.  *Id.* Late that night the boy was seized with a coughing spell, began choking and lost consciousness.  *Id.* The plaintiff rushed her son to the hospital where a tube was inserted into the child's throat in order to allow him to breathe.  *Id.* The boy was transferred to another hospital in critical condition.  *Id.* The boy spent 13 days in the hospital before he was released.  *Id.*

The plaintiff sought recovery for the emotional distress she suffered as a result of the defendant's negligence.  *Id.* The plaintiff alleged, among other things, that after being told that her son "had survived a life threatening episode, she continued to feel hysterical and worried 'about the possibility of brain damage.' "  *Id.* The District of Columbia Court of Appeals denied recovery, refusing to adopt a *Dillon* approach and stated that even if it were to adopt such an approach, there is no "element of a sudden shock" in the facts before it which would justify recovery.  *Id.* at 457. The ultimate decision in the case is yet to be determined, since the case was vacated and the petition for rehearing en banc was granted.  *Id.*

In *Wilson v. Galt*, 100 N.M. 227, 668 P.2d 1104 (Ct. App.), *cert. quashed*, 100 N.M. 192, 668 P.2d 308 (N.M. 1983), the defendant physician failed to diagnose that the plaintiffs' newborn son was suffering from bilirubin encephalopathy (the accumulation in the brain of the yellow pigment in bile).  *Id.* at 230, 668 P.2d at 1107. As a result of this misdiagnosis, the child suffered brain damage.  *Id.* The plaintiff parents sought to recover for the emotional distress they suffered due to the defendant's negligence.  *Id.* The New Mexico Court of Appeals denied recovery, stating that the "complaint indicates no observation by either parent of a sudden trauma involving [the child]. The allegations suggest a gradual occurrence of harm, and awareness by the parents of the deterioration but not of the cause."  *Id.* at 233, 668 P.2d at 1110.

It should be noted, however, that in discussing the *Wilson* case the *Frame* court did not discuss the *Wilson* court's reasoning.  *See Frame*, 115 N.J. at 647, 560 A.2d at 680. The *Wilson* court refused to adopt and apply a *Dillon* type analysis to the case. 100 N.M. at 233, 668 P.2d at 1110. The *Wilson* court stated that "California has refused to extend *Dill* v. *Legg* to the medical malpractice field."  *Id.* (citing *Jansen v. Children's Hosp. Medical Center*, 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1973)). Although this may have been true in 1985 when the *Wilson* case was decided, California has since applied *Dill* in medical malprac-
ever, the *Frame* court relied heavily on the California Supreme Court's decision in *Ochoa v. Superior Court.*

The *Ochoa* court focused on the issue as to "whether, in order to state a cause of action under *Dillon [v. Legg]*, the child’s injury must have been the result of a *brief and sudden* occurrence viewed contemporaneously by the plaintiff." After discussing a number of California cases, the court rejected the "sudden occurrence" requirement as an "unwarranted restriction on the *Dillon* guidelines."

In place of the strict suddenness requirement, the *Ochoa* court provided that "when there is observation of the defendant’s conduct and the child’s injury and contemporaneous awareness [that] the defendant’s conduct or lack thereof is causing harm to the child, recovery is permitted." The *Frame* court agreed with this approach. Thus, both *Ochoa* practice cases. See, e.g., *Ochoa v. Superior Court*, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985). For a discussion of the *Ochoa* case, see infra notes 78-83 and accompanying text.

78. See *Frame*, 115 N.J. at 648-49, 560 A.2d at 680-81 (discussing *Ochoa v. Superior Court*, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985)).

In *Ochoa*, the plaintiff mother visited her thirteen-year-old son who was in custody in a county juvenile hall. *Ochoa*, 39 Cal. 3d at 163, 703 P.2d at 3, 216 Cal. Rptr. at 663. The boy had become ill and had been placed in the juvenile hall's infirmary. *Id.* While her son went into convulsions, hallucinated, vomited, coughed up blood, and complained of great pain, the mother remained by his side and tried as best she could to comfort him. *Id.* at 163-64, 703 P.2d at 3-4, 216 Cal. Rptr. at 663-64. She continually importuned the defendant doctor to allow her to take her son to their family physician. *Id.* Finally, the mother was ordered to leave and did so in an emotional turmoil. *Id.* at 164, 703 P.2d at 4, 216 Cal. Rptr. at 664. (After defendants insisted that plaintiff leave her son, "[s]he bent down to kiss him and [he] clasped her tightly and pleaded that she [stay] because he was so sick." . . . [The mother] never again saw her son alive."). The next morning her son died. *Id.*

The *Ochoa* court held that the plaintiff could state a cause of action to recover for the emotional harm suffered as a result of the defendants’ negligence. *Id.* at 165, 170, 703 P.2d at 4, 8, 216 Cal. Rptr. at 664, 668.


80. *Id.* at 168, 703 P.2d at 7, 216 Cal. Rptr. at 667 (The court stated that the "sudden occurrence" requirement "arbitrarily limits liability when there is a high degree of foreseeability of shock to the plaintiff and the shock flows from an abnormal event, and, as such, unduly frustrates the goal of compensation—the very purpose which the cause of action was meant to further.").

81. *Id.* at 170, 703 P.2d at 8, 216 Cal. Rptr. at 668. As to the facts before it, the *Ochoa* court stated:

[The mother] was aware of and observed conduct by the defendants which produced injury in her child. She was aware of the fact that her child was in need of immediate medical attention. To her knowledge the defendants had failed to provide the necessary care. . . . [S]he was able to perceive, and suffered shock, from the connection between defendants’ conduct and her child's injury.

*Id.* at 169-70, 703 P.2d at 8, 216 Cal. Rptr. at 668.

82. *Frame*, 115 N.J. at 649, 560 A.2d at 681 ("In an appropriate case, if a family member witnesses the physician's malpractice, observes the effect of the
and Frame allow recovery even if the harm occurs somewhat gradually.83

One difficulty with this approach became apparent when the Frame court applied the new rule. The court required that the negligent misdiagnosis "manifest itself in an immediate injury."84 This application seems inconsistent with Ochoa and the very rule set forth by Frame. Thus, defendants should argue for strict adherence to this immediate injury language, while plaintiffs should argue that the immediate injury language should be interpreted liberally (in line with Ochoa).85 That is, plaintiffs should argue that the manifestation of the injury was sufficiently contemporaneous with the misdiagnosis such that the plaintiff was able to understand the causal relationship between the physician's misdiagnosis and the resulting injury.86

b. The injury must be observed at its inception

In general "[t]he plaintiff's observation of the injuries should be

malpractice on the patient, and immediately connects the malpractice with the injury, that may be sufficient to allow recovery for the family member's emotional distress.").

83. See PROSSER & KEETON ON TORTS, supra note 28, § 54, at 61 n.76 (Supp. 1989) ("California has ruled that the Dillon principles may apply even if the harm occurs gradually, rather than from a brief and sudden occurrence.") (citing Ochoa, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661); see also Budavari v. Barry, 176 Cal. App. 3d 849, 853 n.4, 222 Cal. Rptr. 446, 448 n.4 (1986) ("The 'event' witnessed in a Dillon case need not, however, be a 'brief and sudden occurrence' producing an immediate injury. A course of negligence lasting over a period of several hours, and witnessed by the plaintiff, is actionable.") (citing Ochoa, 39 Cal. 3d at 168, 703 P.2d at 7, 216 Cal. Rptr. at 667). For a discussion of Budavari, see supra note 59.

84. Frame, 115 N.J. at 650, 560 A.2d at 681 (emphasis added).

85. In Ochoa, the plaintiff's emotional trauma resulted from the defendant physician's medical neglect of her son while the son was in custody in a county juvenile hall. Ochoa, 39 Cal. 3d at 163, 703 P.2d at 3, 216 Cal. Rptr. at 663. When the plaintiff initially visited her son, he was very pale and looked dehydrated. Id. In addition, his skin was clammy and sweaty. Id. Thus, it appears that the physician's neglect had resulted in an immediate injury. This alone, however, was not the basis for the plaintiff's emotional distress claim. The boy's condition continued to deteriorate. Id. The plaintiff's pleas to the physician to allow her to take her son to a private doctor were dismissed. Id. at 165-64, 703 P.2d at 3-4, 216 Cal. Rptr. at 663-64. It was this gradual deterioration and the continued neglect by the defendant which brought on the plaintiff's emotional trauma. Id. at 169-70, 703 P.2d at 8, 216 Cal. Rptr. at 668.

The factual situation before the Frame court was different. The negligent misdiagnosis that occurred during the 2:00 p.m. phone call did not manifest itself until four hours later when the parents found their son in a death-like condition. Frame, 115 N.J. at 650, 560 A.2d at 681. Eleven more hours passed before the Frames learned that their son had died. Id. In denying recovery for their emotional distress, the Frame court stated that "[t]he chain of circumstances, although deeply tragic, were [sic] not 'shocking.'" Id. For a discussion of the shocking event limitation, see supra notes 66-68 and accompanying text.

86. Given the decision reached in Frame, it is possible that four hours would be an outer limit on this time frame. See Frame, 115 N.J. at 650, 560 A.2d at 681.
contemporaneous with their inception." The Frame decision does not require that the negligent act, the manifestation of the injury, and the observation all occur in a brief sudden event. However, it is submitted that the injury must be observed at its inception and that this observation must be reasonably contemporaneous with the defendant's negligent act such that the plaintiff understands that it is the defendant's act that has caused the injury. Without this connection the situation of the bystander parent is like that of "any parent who witnesses the pain and suffering of his or her child due to illness or injury and is unaware that the defendant's conduct is a contributing factor to the continued pain and suffering." The justification for such a comparison in the Frame case, however, is not entirely clear. The Frames were acting according to the specific instructions of the defendant physician. Therefore, it seems unreasonable to conclude without discussion that when the Frames tried to wake their son and found him moribund they were entirely unaware that the defendant's actions had contributed to their son's condition.

87. Case Comment, supra note 28, at 948.
88. See Frame, 115 N.J. at 645-46, 560 A.2d at 679 ("[O]ne family member should not recover for emotional distress resulting from the misdiagnosis of another family member, at least in the absence of a close temporal connection between the misdiagnosis and the injury, as well as the contemporaneous observation of the injury by the family member.").

The Ochoa decision, on which Frame relied, found that the factual situation in Ochoa was distinguishable from other cases which have denied recovery in that the plaintiff "was able to perceive, and suffered shock, from the connection between defendants' conduct and her child's injury." Ochoa, 39 Cal. 3d at 170, 703 P.2d at 8, 216 Cal. Rptr. at 668. The facts of the cases suggest that this connection is likely to be much more apparent in a medical neglect case, like Ochoa, than in a typical misdiagnosis case, like Frame.

89. Ochoa, 39 Cal. 3d at 170, 703 P.2d at 8, 216 Cal. Rptr. at 668; see Frame, 115 N.J. at 650, 560 A.2d at 681.

In denying recovery to the parents for their emotional distress, the Frame court stated that "[i]n a sense, their situation was like that of parents who witnessed the pain and suffering of their child due to illness or injury without awareness that a medical misdiagnosis was contributing to their child's continued pain and suffering:" Frame, 115 N.J. at 650, 560 A.2d at 681 (citing Ochoa, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661).

90. Frame, 115 N.J. at 640, 560 A.2d at 676. The defendant physician told the Frames that their son was suffering from a virus but that they should wake him every four hours to check for signs of head injury. Id. When the Frames woke their son they became nervous because the boy had vomited and his eyes were pivoting. Id. The defendant, however, advised the Frames to let their son sleep for another four hours. Id. at 641, 560 A.2d at 677. When they tried to awaken their son four hours later he was in a death-like state. Id.

91. Id. at 650, 560 A.2d at 681 (citing Ochoa, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661).

As a general matter, it is not clear that the distinction between plaintiffs who connect the defendant's conduct to the family member's injury and plaintiffs who merely witness the traumatic results of the negligent act is a meaningful distinction. It is submitted that there are two justifications for such a distinction. First, the distinction may simply be a method of allowing recovery in certain
B. Frame Briefly Addresses Policy Considerations

The Frame court was confronted with a bystander emotional distress issue against a backdrop of confusion. The courts have set forth various rules and guidelines that allow bystanders to recover for their emotional distress,92 but defining the limits of such liability continues to present difficult problems.93 The commentators have criticized the courts and have proposed recovery formulations of their own.94 Judges have ex-

medical misdiagnosis situations without "opening the floodgates" to any family member who happens to see the results. Cf. id. at 649-50, 560 A.2d at 681 (court acknowledging possible economic effects on medical profession). Using this justification, the distinction between such plaintiffs is realistically portrayed as an arbitrary line drawn primarily for economic concerns.

A second justification is that the plaintiff's shock and mental trauma may actually be brought on or enhanced by the defendant's conduct, and not merely by the results. The Ochoa court seemed to follow this view, noting the plaintiff's allegation that she "experienced extreme mental and emotional distress and concern for her son and for [sic] the apparent outrageous neglect of medical care while she was present." Ochoa, 39 Cal. 3d at 170, 703 P.2d at 8, 216 Cal. Rptr. at 668 (brackets in original) (citing plaintiff's complaint). The Ochoa court went on to find that the plaintiff "was able to perceive, and suffered shock, from the connection between the defendant's conduct and her child's injury." Id. Given this analysis, the distinction between plaintiffs who connect the defendant's conduct to the family member's injury and plaintiffs who merely witness the traumatic results of the negligent act seems reasonable. The Ochoa court's analysis, however, points to an additional problem.

The Ochoa court went on to hold that, although the plaintiff must make a connection between the defendant's conduct and the family member's injury, the plaintiff does not have to be aware of the tortious nature of the defendant's conduct. Id. Although this may relieve plaintiffs of some of their burden in proving emotional distress claims, it seems to make the whole distinction irrelevant. That is, what is the difference between a parent who understands that the defendant's actions are causing harm to her child but does not understand that the defendant's conduct is "wrong" and a parent who suffers mental trauma when she finds her child injured but does not know that it was the defendant's actions that caused the injury?

Thus, the real justification for requiring plaintiffs to show that they were able to "connect" the defendant's conduct with the family member's injury is that the courts want to allow recovery but only in narrowly circumscribed situations so as to quell the "general fear of unlimited liability." See Note, Limiting Liability, supra note 28, at 847 n.7.


93. See Case Comment, supra note 28, at 933 ("Defining the limits of liability continues to present the most significant obstacle to reaching a rational rule."); see also Ochoa, 39 Cal. 3d at 178, 703 P.2d at 14, 216 Cal. Rptr. at 674 (Grodin, J., concurring) ("[T]here remain after today's opinion numerous questions concerning the application of the Dillon guidelines which have proved troublesome to the lower courts and which this court must, sooner or later, confront and resolve.").

94. See generally Diamond, supra note 28 (criticizing Dillon and arguing for unified compensation system); Miller, The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit The Crime", 1 U. Haw. L. Rev. 1 (1979) (advocating application of general tort principles with limitation on re-
covery in mental distress cases). Professor Diamond criticizes Dillon because only one of the Dillon guidelines, the close relationship factor, is clearly relevant to foreseeability. Diamond, supra note 28, at 488-89. He also agrees with Professor Miller and argues for a recovery theory that would extend to "all foreseeable plaintiffs who suffer serious mental injury, but that recovery should be limited to economic 'out of pocket' losses." Id. at 502 (emphasis in original). See generally Note, Limiting Liability, supra note 28 (criticizing a number of alternative recovery theories). The Note proposes a rule that allows recovery for those types of emotional distress for which a reasonable person would be emotionally unprepared. See id. at 866-73. The Note suggests that some types of mental distress, such as grief, should not warrant recovery because they are "an unavoidable part of everyone's life." Id. at 870.

95. See Ochma, 39 Cal. 3d at 178-81, 703 P.2d at 14-16, 216 Cal. Rptr. at 674-76 (Grodin, J., concurring). Justice Grodin discussed many of the formulations proposed by the various commentators and recognized that "the choice inevitably involves difficult questions of public policy, including a determination as to whether the nature of emotional injury requires any limitations upon recovery that are not imposed also upon physical injury and, if so, precisely what those limitations ought to be." Id. at 181, 703 P.2d at 16, 216 Cal. Rptr. at 676 (Grodin, J., concurring).

See also id. at 181-96, 703 P.2d at 16-27, 216 Cal. Rptr. at 676-87 (Bird, C.J., concurring in part, dissenting in part). Chief Justice Bird discussed numerous cases that have applied the Dillon guidelines and argued for a clearly simplified approach. The Chief Justice provided the following conclusion:

The Dillon guidelines originally envisioned as aids in determining reasonable foreseeability have been transformed into rigid, threshold requirements for recovery. Arbitrary, inconsistent and inequitable results are the rule. The Molien [v. Kaiser Found. Hosps., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980)] 'direct victim' scheme, at least as construed by the majority, only adds another layer of confusion.

The majority's reasoning simply perpetuates the problem.

The answer lies in a careful reading of the grounds on which Dillon and Molien rest. An individual who suffers emotional distress, regardless of whether he or she is a 'direct victim' or a 'bystander,' should be able to recover damages if (1) the emotional distress was reasonably foreseeable and (2) the distress suffered was serious. The concepts of reasonable foreseeability and serious injury, employed together, adequately protect against unlimited liability and provide a principled basis for determining it. Dillon should remain a guidepost to assist the trier of fact in determining liability.

Id. at 195-96, 703 P.2d at 27, 216 Cal. Rptr. at 687 (Bird, C.J., concurring in part, dissenting in part).

The Supreme Court of California has very recently addressed the commentators' criticisms and the inconsistent applications of the Dillon guidelines in what could be described as a rather unexpected and dramatic reformulation and reaffirmance of the now 20-year-old bystander recovery rule. See Thing v. La Chusa, 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

In La Chusa the plaintiff's minor son was struck by the defendant's automobile. Id. at 647, 771 P.2d at 815, 257 Cal. Rptr. at 866. The plaintiff mother did not see or hear the accident but arrived at the scene to find her son lying in the street, bloody and unconscious. Id. at 647-648, 771 P.2d at 815, 257 Cal. Rptr. at 866. The plaintiff sought to recover for the emotional distress she suffered. Id. at 648, 771 P.2d at 815, 257 Cal. Rptr. at 866.

In deciding the case, the La Chusa court specifically addressed the issue of
In reaching the conclusion that, under certain circumstances, it would allow plaintiffs who observe a physician's negligent misdiagnosis and its results to recover for emotional distress, the Frame court confronted difficult questions of policy. The court recognized the effects that such a cause of action could have on the economics of the medical profession. However, the Frame court determined that "any added whether the Dillon guidelines were adequate. Id. at 647, 771 P.2d at 815, 257 Cal. Rptr. at 866. The Court discussed the criticisms and inconsistent application of Dillon. Id. at 661-67, 771 P.2d at 825-29, 257 Cal. Rptr. at 876-80. The La Chusa court responded to this criticism and to the confusing situation in the lower courts by turning the Dillon "guidelines" into a rigid three-part test, stating:

[A] plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but only if, said plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress—a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances. Id. at 667-68, 771 P.2d at 829-30, 257 Cal. Rptr. at 880-81 (emphasis added) (footnotes omitted).

The La Chusa court thus rejected that portion of the Ochoa opinion which described the Dillon factors as mere guideposts. Id. at 668, 771 P.2d at 830, 257 Cal. Rptr. at 881.

The La Chusa court denied recovery to the plaintiff in the case before it, stating:

[The] plaintiff was not present at the scene of the accident in which her son was injured. She did not observe defendant’s conduct and was not aware that her son was being injured. She could not, therefore, establish a right to recover for the emotional distress she suffered when she subsequently learned of the accident and observed its consequences. Id. at 669, 771 P.2d at 830, 257 Cal. Rptr. at 881.

The question now arises whether the New Jersey Supreme Court will adopt this approach. That is, after Frame, will the New Jersey Supreme Court continue to take a more liberal stance toward the application of the bystander recovery rule? Or will it adopt the much more rigid stance recently adopted by the California Supreme Court in La Chusa?

96. Frame, 115 N.J. at 649, 560 A.2d at 681. Specifically, the court stated that:

We recognize that the evaluation of a family member's claim for emotional distress involves drawing lines. Whenever a court draws lines, it risks the criticism of arbitrariness. Drawing lines, however, is the business of the courts, and lines must be drawn to provide remedies for wrongs without exposing wrongdoers to unlimited liability. Id.

97. Id. at 649-50, 560 A.2d at 681. The Frame court recognized that a physician's negligence in misdiagnosing a patient may lead to tragic consequences that could expose the physician to enormous liability. Id. at 644, 560 A.2d at 678. The court, however, did not set forth a detailed discussion of the policies involved. The court simply stated that it was "sensitive to the concerns . . . of the medical profession." Id. at 649-50, 560 A.2d at 681. But see id. at 651-53, 560 A.2d at 682-83 (Wilentz, C.J., and Garibaldi, J., concurring) (arguing that majority's decision was premature in that societal policies were not sufficiently argued on record).
cost to the medical profession from the recognition of such a claim is outweighed by the suffering of severe emotional distress from the shock of observing a misdiagnosis that results in immediate injury to a loved one." 98

The cause of action that the Frame court recognized was "narrowly circumscribed." 99 The court attempted to draw lines based on temporal proximity. 100 The contemporaneous requirement as to both the manifestation of the injury and the observation by the plaintiff formed the platform on which the lines were drawn. 101 Thus, the limiting principle in the third-party-medical-malpractice-emotional-distress cases is that recovery will be denied to plaintiffs who seek to recover for emotional distress resulting from the misdiagnosis of another family member when there is no "close temporal connection between the misdiagnosis and the injury, as well as the contemporaneous observation of the injury by the family member." 102

V. Conclusion

In Frame v. Kothari the Supreme Court of New Jersey considered the right of a plaintiff to recover for the emotional distress caused by the medical misdiagnosis of another member of the plaintiff's family. 103 Obtaining such recovery under the Portee bystander recovery rule is difficult because very often the misdiagnosis, the resulting injury in the family member, and the observation by the plaintiff will not be simultaneous, as is the situation in the typical bystander recovery case.

The Frame court stated that under certain circumstances the negligent misdiagnosis of a family member could support a claim for emotional distress. In order to bring a cause of action under Frame, the plaintiff must show that: (1) she witnessed the physician's negligent treatment or diagnosis of a close family member; (2) she observed the effects of such treatment or diagnosis, causing severe harm or death; and (3) she immediately connected the physician's act with the injury. 104

Although the Frame court denied recovery on the facts of the case before it, the spectrum of medical malpractice cases is wide. Frame

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98. Id. at 650, 560 A.2d at 681.
99. Id.
100. Id. at 649, 560 A.2d at 681. "Temporal proximity" refers to the contemporaneous observation requirement. See Prosser & Keeton on Torts, supra note 28, § 54, at 366.
101. See Frame, 115 N.J. at 649, 560 A.2d at 681 ("[I]f a family member witnesses the physician's malpractice, observes the effect of the malpractice on the patient, and immediately connects the malpractice with the injury, that may be sufficient to allow recovery.").
102. Id. at 646, 560 A.2d at 679 (discussing decisions from other courts as consistent with this proposition).
103. Id. at 644, 560 A.2d at 678.
104. Id. at 649, 560 A.2d at 681.
presents practitioners in New Jersey with a new legal argument, the medical field with a new source of liability, and grieving parents with a new method of compensating the uncompensatable.

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