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Damages - Mental Suffering - Recovery Denied for One Witnessing Injury to the Person of Another When Not within the Zone of Danger

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from the continued use of outmoded common law distinctions, together with the resulting usurpation of the jury function[65] via directed verdicts and summary judgments for the landowner, point out the need for the abandonment of these distinctions and their numerous exceptions; (3) the trend in the direction of *Rowland v. Christian*[66] is a viable trend which has not only been recognized in Hawaii and Colorado but also in several other states, including Minnesota and Iowa, even though none of these states could rely on the additional statutory support available in North Dakota. Furthermore, there is no need to await legislative action before rejecting the rigid common law distinctions and exceptions in North Dakota. These distinctions have been judicially created and have outgrown their usefulness in a modern society. There is no sound reason why North Dakota should not acknowledge the *Rowland* trend and adopt it.

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DAMAGES—MENTAL SUFFERING—RECOVERY DENIED FOR ONE WITNESSING INJURY TO THE PERSON OF ANOTHER WHEN NOT WITHIN THE ZONE OF DANGER—The parents of a new-born baby commenced an action for damages against the defendant hospital alleging emotional and mental shock suffered by the mother as a result of witnessing her child dropped to the tiled floor of her hospital room by an employee of the hospital. The prayer for relief included additional medical expenses required for the child's care and hospitalization of the mother during this period.

On a motion for summary judgment, the trial court dismissed the part of the complaint seeking damages for the mother's emotional and mental shock. In hearing the plaintiff's appeal,[1] the

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65. 44 N.Y.U.L. REV. 426 (1969). In discussing the restriction placed on the province of the jury by the common law classifications, the writer states:

> Where such cases do reach the jury, it is often for consideration of the plaintiff's status rather than for the more fundamental question of whether defendant has acted carelessly. Thus the jury is deprived of the flexibility necessary to allow it to assess the burden of liability on the facts of each case in accord with community standards. Furthermore, injustice may result from the possibility that meritorious claims may never be brought because the prudent advocate recognizes that recovery will be denied before he is allowed the opportunity to demonstrate the unreasonableness of the defendant's conduct.

Id. at 430-31 (footnotes omitted).

66. Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968).

1. The defendant moved for dismissal on the ground that there was a delay in perfection of the appeal. The court denied the motion, citing Hogan v. Knoop, 191 N.W.2d 263, 264 (N.D. 1971) which held that if delay has not resulted in prejudice to the respondent the motion will be denied. Whetham v. Bismarck Hospital, 197 N.W.2d 678, 679 (N.D. 1972).

Supreme Court of North Dakota *held* that recovery would be permitted only if the defendant's negligent act had threatened the plaintiff herself with harm or placed her within the zone of danger. The complaint contained no facts to support this contention, therefore the judgement dismissing the action was affirmed. *Whetham* v. *Bismarck Hospital*, 197 N.W.2d 678 (N.D. 1972).

There are three views on the permissibility of tort actions for the recovery of damages by one suffering mental anguish as a result of witnessing injury to another or the fear that a third person will be injured. These views demonstrate the judicial restrictions that various courts have placed on bystander recovery for mental distress.[2]

The traditional rule denying recovery is expressed in terms of impact or contemporaneous physical injury. This is based on the proposition that emotional distress accompanied by physical injury as a result of the defendant's negligent acts is not compensable unless there has been a physical impact upon the plaintiff.[3] The rationale for the impact requirement is that it provides assurance that the mental distress is real.[4] So, in jurisdictions where impact is required to recover for mental distress, compensation is denied in the situation where the mental suffering is the consequence of injury to another.[5] The Court in *Whetham* expressly rejected the impact rule requiring contemporaneous physical injury to permit

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2. *See* Amdursky, *The Interest in Mental Tranquility*, 13 BUFFALO L. REV. 339 (1964); Goodhart, *The Shock Cases and Area of Risk*, 16 MOD. L. REV. 14 (1953); Magruder, *Mental and Emotional Disturbances in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944).

3. The impact rule is followed by a minority of jurisdictions today and "is destined for rapid extinction, and might perhaps even never be applied again." W. PROSSER, THE LAW OF TORTS § 54, at 332 (4th ed. 1971) [hereinafter cited as PROSSER].

The impact rule has recently been rejected in a number of jurisdictions. *See* Robb v. Pennsylvania R.R., 58 Del. 454, 210 A.2d 709 (1965), Daley v. La Croix, 384 Mich. 4, 179 N.W.2d 390 (1970); Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965); Battalla v. State, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961); Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970); Savard v. Cody Chevrolet, Inc., 126 Vt. 405, 234 A.2d 656 (1967).

4. A number of courts have found that the slightest impact is sufficient to permit recovery and "a Georgia circus case (Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928)) has reduced the whole matter to a complete absurdity by finding 'impact' where the defendant's horse 'evacuated his bowels' into the plaintiff's lap." PROSSER, *supra* note 3, at 331.

5. The reasons given for the impact rule were of a three-fold nature. First, there was the difficulty of proving causation between the claimed damages and the alleged mental distress; second, there was a fear of fraudulent or fictitious claims; and third, the courts reasoned that any other rule would cause a flood of litigation. The courts that have abandoned the impact rule have rejected these reasons because 1) the advancement of medical science since the rule's adoption and the inconsistency of allowing recovery where the slightest impact is present refutes the claim of difficulty in proving causation; 2) inherent in the judicial system is the ability to detect false and fraudulent claims and such claims arise no more often than in cases where slight impact is present; and 3) the jurisdictions abandoning the impact rule have not shown an increase in litigation, and an increase in work-load is not a valid objection anyway. The plaintiff should be given an opportunity to present his claim. Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84, 85-89 (1970).

recovery for the consequences of mental suffering negligently inflicted.[6]

In the jurisdictions that have abandoned the impact rule, the zone of danger test is usually applied to determine recovery for mental distress. This represents the weight of authority in American jurisdictions.[7] The rule is applied to determine whether a legal duty is owed to the plaintiff.[8] A duty is found if the plaintiff fears for his own safety, and being within the zone of danger, is threatened with immediate physical harm.[9]

The zone of danger test focuses on the personal safety of the plaintiff. Given the requirement that the plaintiff must be within the danger zone to recover, mental suffering with resulting physical injury to or fear for the safety of another is eliminated due to the lack of one of the essential elements for recovery.[10] Until recently, the only cases permitting recovery of damages for mental distress as a result of fear for another were old lower court decisions "probably to be explained on the basis of threatened physical injury to the plaintiff herself."[11] This development in the law occurred despite an attempt by the framers of the *Restatement of Torts* to provide recovery for one suffering emotional and mental

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6. Whetham v. Bismarck Hospital, 197 N.W.2d 678, 684 (N.D. 1972).

7. Strazza v. McKittrick, 146 Conn. 714, 156 A.2d 149 (1959); Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Williamson v. Bennett, 251 N.C. 498, 112 S.E.2d 48 (1960); Frazee v. Western Dairy Prods., 182 Wash. 578, 47 P.2d 1037 (1935); Klassa v. Milwaukee Gas Light Co., 273 Wis. 176, 77 N.W.2d 397 (195). *See* note 3 *supra*. *See also* Annot., 29 A.L.R.3d 1337 (1970).

8. The leading case invoking the zone of danger doctrine is Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935). This was an action seeking recovery for the intestate's death as a result of witnessing her child's death after being struck by defendant's automobile.

The court denied recovery analyzing the right of the plaintiff in terms of duty rather than proximate cause. In applying this concept the court stated that: "The answer must be reached by balancing the social interests involved in order to ascertain how far defendant's duty and plaintiff's right may justly and expediently be extended." *Id.* at 501. The doctrine that "[n]egligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. . . . The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another." This language was adopted from Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99, 100 (1928). As applied to the case, the plaintiff was not permitted to recover because the defendant's duty was to use ordinary care to avoid injuring those who may be put in physical peril as a result of a breach of this standard. However, this duty could not be extended to allow recovery by "one out of the range of ordinary physical peril as a result of the shock of witnessing another's danger." Waube v. Warrington, 216 Wis. 603, 258 N.W. 497, 501 (1935).

9. Strazza v. McKitterick, 146 Conn. 714, 156 A.2d 149 (1959); Klassa v. Milwaukee Gas Light Co., 273 Wis. 176, 77 N.W.2d 397 (1956). The injury must be the result of fear for oneself not fear for another when the injury could have been the result of both.

Recovery has been permitted without making the distinctions between fear for oneself and fear for one's children. Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933).

10. *See* Brody, *Negligently Inflicted Psychic Injuries: A Return to Reason*, 7 VILL. L. REV. 232 (1962).

11. PROSSER, *supra* note 3, at 334, *citing* Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (1912); Cohen v. Ansonia Realty Co., 162 App. Div. 791, 148 N.Y.S. 39 (1914); Gulf, C. & S. F. Ry. v. Coopwood, 96 S.W. 102 (Tex. Civ. App. 1906).

distress as a result of witnessing injury to another in a situation similar to that presented in the *Whetham* case.[12]

The third view of mental distress has evolved from the 1968 California Supreme Court decision in *Dillon v. Legg*.[13] Recovery was permitted for mental suffering, with consequent bodily injury, caused by fear of danger or injury to a third person. Although *Dillon* has not been adopted in other jurisdictions, it represents the liberal view in permitting recovery for mental distress.

There are two leading cases in California that involve recovery for mental distress and consequent bodily injury resulting from fear for another's safety. In *Amaya v. Home Ice, Fuel and Supply Co.*,[14] the plaintiff's mother sought to recover for fright and nervous shock with consequent bodily injury suffered as she helplessly watched her seventeen month old son being run over by defendant's truck. The Court affirmed the trial court's dismissal because the "complaint did not state facts sufficient to constitute a cause of action. . . ."[15] The decision was reached by balancing the "plaintiff's undoubted interest in freedom from invasion of her bodily security"[16] with administrative, socio-economic and moral factors. The administrative factors concerned the effective administration of the judicial process in the promotion of justice including questions of proof[17] and the limits of liability for the infliction of mental suffering as a result

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12. The RESTATEMENT OF TORTS § 313 (1934) contained a caveat in which the American Law Institute expressed no opinion as to whether negligent conduct causing bodily harm to a spouse or child and witnessed by the parent or spouse with resulting mental distress would make the actor liable in an action to recover for the illness or bodily harm resulting from fear for another.

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

14. Amaya v. Home Ice, Fuel and Supply Co., 59 Cal. 2d 295, 29 Cal. Rptr. 33, 379 P.2d 513 (1963) (three justices dissenting). The plaintiff declined to amend the complaint to state that recovery was predicated on "fear of her own safety." *Id.* at 298, 29 Cal. Rptr. at 34, 379 P.2d at 514.

15. *Id.* at 298, 307-09, 29 Cal. Rptr. at 34, 40-41, 379 P.2d at 514, 520-21. In determining whether the complaint stated a cause of action, the court approached the issue from the standpoint of whether there was a duty owed by the defendant to the injured party and adopted the view expressed in Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935). The determination of the existence of a duty and the scope of his duty was a matter of law to be determined by the court. The existence of a duty was more than just a question of foreseeability. If the jury is allowed to determine the existence of a duty as well as the violation of this duty through application of a "foreseeability formula," the same test is used in determining two distinct issues. Secondly, the duty is determined as a matter of law since "[t]here is a legal duty on any given set of facts *only if the court or legislature says there is a duty.*" *Id.* at 309, 29 Cal. Rptr. at 41, 379 P.2d at 521.

16. Amaya v. Home Ice, Fuel and Supply Co., 59 Cal. 2d 295, 310, 29 Cal. Rptr. 33, 42, 379 P.2d 513, 522 (1963).

17. In considering the problems of proof involved in mental suffering cases the court was concerned with the question of: "[W]hether in this area of inquiry where emotions play so large a role the law has now become sufficiently responsive to scientific reality to redress the 'net balance of justice.'" *Id.* at 312, 29 Cal. Rptr. at 43, 379 P.2d at 523. In response to this question the court stated that: "The question is a disturbing one, and cannot be answered merely by invoking the rule that a conflict of expert testimony is for the jury." *Id.* at 312, 29 Cal. Rptr. at 43, 379 P.2d at 523.

of witnessing injury to another.[18] The socio-economic and moral factors involved included the question of the point at which the negligent defendant's liability ceased, since one cannot be liable to the end of time for the consequences of a single act.[19] These factors were to determine the point at which the defendant's duty and the plaintiff's right ceased to exist. After balancing these factors the *Amaya* court denied recovery because the defendant's liability could not be extended to include the *Amaya* fact situation.[20]

Approximately five years later, the California Supreme Court reversed the *Amaya* decision in *Dillon v. Legg*.[21] In *Dillon*, the plaintiff sought compensation for emotional shock and physical injury suffered as a result of witnessing the defendant's automobile negligently collide with and subsequently cause the death of the plaintiff's minor daughter.[22] The court reversed the trial court's dismissal of the mother's cause of action. The California Supreme Court thus became the first upper court in an American jurisdiction[23] to hold that a parent outside the zone of danger and not in fear for her own safety could recover for emotional distress and consequent physical injuries suffered as a result of witnessing an

18. In determining the limits of liability in mental suffering where the physical injury is to a third person, the court examined limitations suggested by Dean Prosser, including the requirements that: 1) the injury that was threatened or inflicted is serious enough to cause shock and resulting physical harm; 2) the action can be "confined to the members of the immediate family;" and 3) the plaintiff may be required to be present at the accident or the resulting "shock must be fairly contemporaneous" with the accident. These limits were rejected as arbitrary, but it was held that the socio-economic factor required that at some point liability for negligence ceases. *Id.* at 312-13, 29 Cal. Rptr. at 43-44, 379 P.2d at 523-24. *See* PROSSER, *supra* note 3, at 334-35.

19. Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 313, 29 Cal. Rptr. 33, 44, 379 P.2d 513, 524 (1963); Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 24 (1953).

20. Recovery is denied because: 1) "[T]he social utility of such activities [such as use of the streets and highways in commerce] far outweighs the somewhat speculative interest of individuals to be free from the risk of the type of injury here alleged."; and, 2) "As long as our system of compensation is based on the concept of fault, we must also weigh 'the moral blame attached to the defendant's conduct.'" Conduct which is negligent rather than intentional has less moral guilt attached and the social utility of such conduct is considered greater when these factors are balanced. *Id.* at 314-15, 29 Cal. Rptr. at 45, 379 P.2d at 525.

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

22. Three causes of action were instituted in the superior court: 1) an action for the wrongful death of the child, 2) an action for the emotional distress and physical injury received by the mother as a result of witnessing the accident, and 3) an action for the emotional distress and physical injury of the decedent's sister resulting from witnessing the accident. The trial court dismissed the mother's cause of action but denied a motion for summary judgment on the sister's claim because of the possibility that she had been within the "zone of danger or feared for her own safety." *Id.* at 731-32, 69 Cal. Rptr. 74-95, 441 P.2d at 914-15.

23. The landmark English decision in Hambrook v. Stokes Bros. [1925] 1 K.B. 141 (C.A. 1924) was an action seeking damages by a husband for the loss of his wife's services. The wife suffered from emotional distress and physical injuries which ultimately caused her death as a result of the defendant's negligence in leaving a truck parked at the top of a steep narrow street when it subsequently rolled down the incline. The mother had been walking up the street with her children, and they had just parted when she saw the vehicle approaching. The mother's fear for the safety of her children resulted in nervous shock. The trial court's instructions required that the mother must have feared for her own safety before recovery would be allowed. However, on appeal the court allowed the cause of action notwithstanding the fact that the fear was for the safety of her children. The decision was based on the breach of a duty which was "[a] duty to

injury causing the subsequent death of her child.[24]

Initially the *Dillon* court noted that the case differed from *Amaya*, since the complaint presented a claim by a mother who was not within the zone of danger as contrasted with the claim of a sister who may have been within the zone of danger.[25] The court rejected the zone of danger rule in *Dillon*, reasoning that it was an illustration of the "hopeless artificiality" of a rule which permitted recovery in one case and not in another merely because of the location of the claimants to the accident. Further, the impact rule has been rejected in California. Therefore, the zone of danger concept could not stand since, "the only reason for the requirement of presence in that zone lies in the fact that one within it will fear the danger of *impact*."[26]

The courts in the past have denied recovery for mental suffering resulting from fear for another because of the absence of a duty owed to the plaintiff. In analyzing the concept of duty, the *Dillon* court noted that the two reasons for denial of a duty have been 1) the fear of fraudulent claims[27] and 2) the foreseeability of the risk.[28] *Dillon* rejected these reasons and promulgated guidelines to assist in determining the existence of a duty. These guidelines asked:

> (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.[29]

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use reasonable care to avoid injuring those using the highway. It is thus a duty owed to all wayfarers, whether they are injured or not; though damage by reason of the breach of duty is essential before any wayfarer can sue." *Id.* at 156 (Atkin, L.J.). The application of this case has been limited in subsequent English decisions. Dillon v. Legg, 68 Cal. 2d 728, 744-46, 69 Cal. Rptr. 72, 82-84, 441 P.2d 912, 922-24 (1968).

24. The Dillon decision has been rejected in New Hampshire, Jelley v. LaFlame, 108 N.H. 471, 238 A.2d 728 (1968); New York, in Tobin v. Grossman, 24 N.Y.2d 609, 301 N.Y.S.2d 554, 249 N.E.2d 419 (1969), and Vermont, Guilmette v. Alexander, 128 Vt. 116, 259 A.2d 12 (1969).

25. *See* note 22 *supra*.

26. Dillon v. Legg, 68 Cal. 2d 728, 733, 69 Cal. Rptr. 72, 75, 441 P.2d 912, 915 (1968).

27. *Id.* at 735-37, 69 Cal. Rptr. at 77-78, 441 P.2d at 917-18. The court rejected this reason as unsound because by a *per se* elimination of all claims the courts are escaping from their responsibility of providing remedies for sound claims. The judicial process itself must determine whether the claims asserted are fraudulent and this problem may be no more prevalent than in other areas of tort law.

28. *Id.* at 739-40, 69 Cal. Rptr. at 79-80, 441 P.2d at 919-20. The court would not draw a distinction between the "zone of danger of physical impact" and the "zone of danger of emotional impact" and, as foreseeability is a major element of every case, it is necessary to determine the presence of a duty on a case-by-case basis.

29. *Id.* at 740-41, 69 Cal. Rptr. at 80, 441 P.2d at 920. These guidelines are similar to those suggested by PROSSER. *See* note 18 *supra*.

These factors are to be used to indicate the degree of foreseeability so that a determination may be made as to "whether the accident and harm was *reasonably* foreseeable." The determination will be made on a case by case basis to permit the areas of liability to be mapped out by applying these standards to the fact situation presented.[30]

Application of the *Dillon* holding to subsequent cases in which recovery for mental distress and resulting physical injuries is sought requires adoption of the general tort concepts of negligence, foreseeability and proximate cause. The limits of liability, though not defined, are restricted by the guidelines established by the court and provide a test of reasonable foreseeability in determining the existence of a duty.[31] The court explicitly confined its holding to situations where the plaintiff's shock results in physical injury.[32] An independent cause of action was not created by this holding. Rather, the recovery for emotional shock is "parasitic to" a breach of duty to the child. If a contributory negligence defense is successful, recovery will be denied.[33] It is too early to ascertain what the ramifications of the *Dillon* decision[34] will be.

Despite the landmark California Supreme Court decision in *Dillon*, the Court of Appeals of New York in *Tobin v. Grossman*[35] denied recovery for mental and physical injuries resulting from fear for another. The plaintiff mother brought an action to recover for mental and physical injuries which she suffered as a result of viewing serious injuries sustained by her child's involvement in an auto-

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30. *Id.* at 740, 69 Cal. Rptr. at 81, 441 P.2d at 921.

31. Several commentators have praised the *Dillon* decision. Dean Prosser stated:

> It seems sufficiently obvious that the shock of a mother at danger or harm to her child may be both a real and a serious injury. All ordinary human feelings are in favor of her action against the negligent defendant. If a duty to her requires that she herself be in some recognizable danger, then it has properly been said that when a child is endangered, it is not beyond contemplation that its mother will be somewhere in the vicinity, and will suffer serious shock. . . . Yet it is equally obvious that if recovery is to be permitted, there must be some limitation.

PROSSER, *supra* note 3, at 334. *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 18.4 at 1039 (1956); RESTATEMENT OF TORTS, Caveat, § 313 (1934).

32. Dillon v. Legg, 68 Cal. 2d 728, 740, 69 Cal. Rptr. 72, 80, 441 P.2d 912, 920 (1968).

33. The court stated in dictum that, "In the absence of the primary liability of the tortfeasor for the death of the child, we see no ground for an independent and secondary liability for claims for injuries by third parties. The basis for such claims must be adjudicated liability and fault of defendant; that liability and fault must be the foundation for the tortfeasor's duty of due care to third parties who, as a consequence of such negligence, sustain emotional trauma." *Id.* at 733, 69 Cal. Rptr. at 76, 441 P.2d at 916 (1968).

34. In Archibald v. Brauerman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969) recovery was sought by a mother for emotional distress and mental illness suffered as a result of viewing her son's injuries. The plaintiff mother did not witness the explosion which caused the injury to her son. However, she appeared at the scene within moments thereafter. The court of appeals reversed the summary judgment, and by applying the *Dillon* guidelines determined that recovery would be permitted upon the proof of negligence.

35. Tobin v. Grossman, 24 N.Y.2d 609, 301 N.Y.S.2d 554, 249 N.E.2d 419 (1969).

mobile accident.[36] The court, affirming the motion to dismiss, stated the well-established rule that a cause of action seeking recovery for unintended harm as a result of injuries to another does not exist regardless of the witnessing of the accident or the relationship of the parties.[37]

The *Tobin* court's decision was based on the zone of danger rule and adoption of the policy reasons developed in *Amaya v. Home Ice, Fuel and Supply Co.*[38] Rejection of the impact rule was acknowledged. However, the court reasoned that the plaintiff could recover only if the scope of the duty was extended to create a new duty and cause of action.[39] It felt that broadening of the tort concepts because of "new technological, economic, or social developments" would be required to achieve "a corresponding legal recognition."[40] But it thought that once liability is extended by application of a foreseeability test, it would be impossible to confine it within the limits of public policy.[41]

Thus, *Tobin* rejected the guidelines suggested by the California Supreme Court in *Dillon*, calling them arbitrary distinctions because of the number of variables presented by allowing unlimited liability. The New York court was concerned with the difficulty of "holding strict rein on liability" and it was content to impose liability only when persons were directly threatened with physical danger.[42]

The *Restatement (Second) of Torts* § 313 (1) (1965), states:

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

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36. The complaint alleged that the mother witnessed the accident. However, a pretrial examination disclosed that the accident did not occur in her "presence" but that she was close by, and, upon hearing screeching brakes, she went to the scene. The court took the pleadings as true in determining the motion to dismiss. *Id.* at 611-12, 301 N.Y.S.2d at 555, 249 N.E.2d at 419-20.

37. Tobin v. Grossman, 24 N.Y.2d 609, 301 N.Y.S.2d 554, 249 N.E.2d 419 (1969).

38. Amaya v. Home Ice, Fuel and Supply Co., 59 Cal. 2d 295, 29 Cal. Rptr. 33, 379 P.2d 513 (1963).

39. Tobin v. Grossman, 24 N.Y.2d 609, 613, 301 N.Y.S.2d 554, 556, 249 N.E.2d 419, 421 (1969). *See* Dillon v. Legg, 68 Cal. 2d 728, 733, 69 Cal. Rptr. 72, 76, 441 P.2d 912, 916 (1968).

40. Tobin v. Grossman, 24 N.Y.2d 609, 615, 301 N.Y.S.2d 554, 558, 249 N.E.2d 419, 422 (1969).

41. *Id.* at 616-17, 301 N.Y.S.2d at 559-60, 249 N.E.2d at 423.

42. *Id.* at 618-19, 301 N.Y.S.2d at 561-62, 249 N.E.2d at 424. In applying the zone of danger test recovery has been permitted where the parent fears for his child's as well as his own safety. Bowman v. Williams, 164 Md. 937, 165 A. 182 (1933). The court in *Dillon* attacked this as promoting fraudulent pleadings to allege fear for one's safety. However, the *Tobin* court did not address this issue.

Section 313(2) applies the rule stated in subsection (1) only to those who are within the zone of danger and only if the negligent conduct of the actor has caused an unreasonable risk of bodily harm.[43] Thus, the *Restatement (Second) of Torts* reflects the weight of authority in American jurisdictions today.

The Supreme Court of North Dakota has adopted the majority position. To recover for mental distress the plaintiff must have been threatened with harm or have been in fear of physical impact by being within the zone of danger. The court's holding in *Whetham v. Bismarck Hospital*[44] reflects the reasoning expressed in *Amaya, Tobin* and the *Restatement (Second) of Torts*. In determining whether a cause of action had been stated, the court examined the arguments advanced by the two California decisions and the recent New York case. In adopting the zone of danger test the court necessarily rejected the guidelines established in *Dillon*. The *Whetham* court quoted extensively from the dissent in *Dillon* which opposed the infinite liability, arbitrary standards, and undeterminable distinctions which result from the application of the *Dillon* approach.[45]

Whetham seems to have been a fitting case for the application of the guidelines established by the *Dillon* court.[46] The general tort concepts of negligence, foreseeability, and proximate cause as applied to the hospital employee would have permitted recovery. In determining whether a duty was owed, the plaintiff would have had to prove that it was reasonably foreseeable that a parent witnessing the accident would suffer emotional and mental shock after seeing her child dropped to the floor and hearing the impact. In *Whetham* the plaintiff was in the hospital room when the accident occurred,

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43. A change has been made in the RESTATEMENT (SECOND) OF TORTS by elimination of the caveat contained in § 313 of the first RESTATEMENT OF TORTS. The change was made to represent the weight of authority although "a number of those present at the Institute meeting, [felt] that the situation of a mother who sees her child negligently killed before her eyes is one in which recovery would be justified." RESTATEMENT (SECOND) OF TORTS, Reporter's notes, Appendix § 313 at 11 (1966).

RESTATEMENT (SECOND) OF TORTS § 313(2), comment *d* at 114 (1965) states an example where recovery would not be permitted:

> Thus, where the actor negligently runs down and kills a child in the street, and its mother, in the immediate vicinity, witnesses the event and suffers severe emotional distress resulting in a heart attack or other bodily harm to her, she cannot recover for such bodily harm unless she was herself in the path of the vehicle, or was in some other manner threatened with bodily harm to herself otherwise than through the emotional distress at the peril to her child.

See also RESTATEMENT (SECOND) OF TORTS § 436 (1965).

44. Whetham v. Bismarck Hospital, 197 N.W.2d 678 (N.D. 1972).

45. *Id.* at 682-83.

46. This conclusion is reached on the assumption that at trial the plaintiff could prove she suffered consequent bodily injury resulting from the emotional distress. In the prayer for relief, the complaint states "that as a direct and proximate result of such negligence, Dixie [mother] suffered a *severe emotional and mental shock*, for which she now seeks recovery in money damages." *Id.* at 679 (emphasis added).

the emotional shock was the result of observing the negligent act, and the mother-child relationship existed. Thus, the guidelines under which recovery was permitted in *Dillon* were met.

The fact situation in *Whetham* seems more compelling in requiring an expansion of liability than in the other cases the court considered. In those cases the social utility of limiting liability for the users of the highways was balanced against the desirability of allowing recovery for a bystander's mental distress. Public policy overcame the fear of unduly burdensome liability in this situation. However, in *Whetham*, the concern was with the negligence of a hospital which is in the business of providing the services essential for the health and welfare of the patients it serves. As such the social utility of the defendant's conduct is outweighed by public policy, thus requiring an extension of the concept of duty to permit recovery on these facts. As the *Dillon* court pointed out, the extension of liability should be determined on a case by case basis through the use of general guidelines to determine whether the injury suffered was reasonably foreseeable. An independent liability is not established. Rather, recovery by the third person is dependent on a breach of a duty to the person directly harmed.

In conclusion, the future of the extension of liability for recovery for injury sustained by mental suffering resulting from a fear of injury to another is not clear. The success of the *Dillon* doctrine will depend on the ability of the courts to apply the guidelines[47] in defining liability.[48] However, an intelligent application of these standards provides reasonable limits. Elimination of the arbitrary "zone of danger" rule and application of a reasonable new standard would provide litigants such as the plaintiff in *Whetham* the opportunity to present a prima facie case for judicial determination.[49]

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47. *See* note 18 *supra.*
48. *See* note 34 *supra.*
49. *See* Comment, *Negligence—Infliction of Emotional Harm—A Suggested Analysis*, 54 IOWA L. REV. 914 (1969); 13 S.D.L. REV. 402 (1968).