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TORT LAW—NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IN ACCIDENT CASES—The Expanding Definition of Liability—Dziokonski v. Babineau, 1978 Mass. Adv. Sh. 1759, 380 N.E.2d 1295

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TORT LAW—NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IN ACCIDENT CASES—The Expanding Definition of Liability—*Dziokonski v. Babineau*, 1978 Mass. Adv. Sh. 1759, 380 N.E.2d 1295.

On October 24, 1973, a motor vehicle struck Norma Dziokonski as she left her school bus.[1] Within a few minutes Norma's mother, Lorraine Dziokonski, arrived at the accident scene and saw her injured daughter lying on the ground. After witnessing the injuries to her daughter, Mrs. Dziokonski suffered physical and emotional shock. She died in the ambulance that drove her daughter to the hospital. Norma's father, Anthony Dziokonski, later learned of his daughter's injuries and his wife's death. He suffered "an aggravated gastric ulcer, a coronary occlusion, physical and emotional shock, distress and anguish."[2] He died twenty-three months after the accident because of these afflictions.[3]

The administratrix of the Dziokonskis' estates sued the school bus driver, the school bus owner, and the driver of the car that struck Norma, for the wrongful death and conscious suffering of both Mr. and Mrs. Dziokonski. After a Massachusetts Superior Court dismissed both complaints for failure to state a claim,[4] the supreme judicial court ordered direct appellate review.[5] The court held that neither complaint should be dismissed for failure to state a claim even though "the weight of authority in this country would deny recovery."[6] By this unprecedented decision, Massachusetts extended a defendant's potential liability for the negligent infliction of emotional distress further than any other jurisdiction.

The development and gradual extension of the tort of negli-

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1. Dziokonski v. Babineau, 78 Mass. Adv. Sh. 1759, 1760, 380 N.E.2d 1295, 1296 (1978).

2. *Id.* at 1761, 380 N.E.2d at 1296.

3. Brief for Defendant-Appellee at 8, Dziokonski v. Babineau, 78 Mass. Adv. Sh. 1759, 380 N.E.2d 1295 (1978).

4. The controlling law in Massachusetts at the time of trial was the impact rule laid down in Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897). This holding was overruled in Dziokonski v. Babineau, 78 Mass. Adv. Sh. 1759, 380 N.E.2d 1295 (1978). *See* notes 10-11 *infra*.

5. Dziokonski v. Babineau, 78 Mass. Adv. Sh. 1759, 1760, 380 N.E.2d 1295, 1296 (1978).

6. *Id.* at 1766-67, 380 N.E.2d at 1299.

gent infliction of emotional distress has occurred in cases with remarkably similar fact patterns. Typically, a parent witnesses an accident[7] caused by a negligent defendant which results in death or injury to the parent's child. As a result of witnessing the accident, the parent suffers emotional shock or harm with ensuing physical injuries.[8] Three well-defined legal approaches have been applied to these cases. The impact rule was the earliest and most restrictive approach used to resolve these disputes. It was followed by the less restrictive zone of danger test and then further liberalized by the *Dillon v. Legg*[9] approach which purportedly adopted a test of reasonable foreseeability.

The earliest American decisions[10] following the "impact rule" required a direct physical impact as a prerequisite to recovery for negligently inflicted emotional harm. The impact requirement was deemed necessary to protect the defendant from fraudulent claims.[11] Other justifications for the rule included the difficulty in establishing proximate causation,[12] the fear of increased litiga-

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7. The vast majority of these accidents involve automobiles. This is because the shock of seeing a loved one struck by an automobile is usually far more gruesome and overwhelming than the shock suffered from witnessing most other accidents.

8. Massachusetts left open the question whether recovery can be had for emotional shock or harm absent any physical injuries caused by negligent, grossly negligent, wanton, or reckless conduct in McDonough v. Whalen, 365 Mass. 506, 517, 313 N.E.2d 435, 442 (1974). Recovery has been allowed for emotional distress absent any physical injury where the defendant's conduct was "extreme and outrageous conduct and without privilege." Agis v. Howard Johnson Co., 76 Mass. Adv. Sh. 2346, 2351, 355 N.E.2d 315, 318 (1976).

9. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). This approach is named after the case in which it was first announced.

10. The leading cases among these early decisions are Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897), and Mitchell v. Rochester R.R., 151 N.Y. 107, 45 N.E. 354 (1896). *Mitchell* was overruled in Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

11. In Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897), the plaintiff was so frightened by the negligent conduct of an employee of the defendant railroad company in removing an unruly passenger that she sustained emotional shock and resulting physical injuries. The court realized that a physical injury might well result from negligently caused fright. It decided, however, that a rule allowing recovery absent an impact would be unjustifiable. The court stated, "The logical vindication of [the impact] rule is that it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright, and that this would open a wide door for unjust claims. . . ." *Id.* at 286, 47 N.E. at 89.

12. In Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963), the court denied recovery absent an impact since "a difficult medical question is presented when it must be determined if emotional distress resulted in physical injury." *Id.* at 311, 379 P.2d at 523, 29 Cal. Rptr. at 43. *Amaya* was

tion,[13] and the possibility of unlimited liability.[14] A strict application of the rule prohibits recovery absent an impact regardless of the severity of the resulting injury.

The potential harshness of this impact requirement and increasing dissatisfaction with its justifications[15] led to a relaxation of the rule that there be physical contact as a prerequisite to recovery. Thus, courts have circumvented the rule by discovering some trivial impact[16] in cases where recovery seems justified. Dissatisfaction with the rule grew because its justifications were found inadequate. Courts have stated that the threat of fraudulent claims cannot justify retaining the rule. The purpose of our legal system is to decide case-by-case whether the claims have merit. Denying all recovery merely in anticipation of unjust claims would erode the

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overruled in Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). Due to the extreme difficulties in establishing the required proximate causation with any degree of certainty, the court refused to do away with the existing impact rule.

13. In Knaub v. Gotwalt, 422 Pa. 267, 220 A.2d 646 (1966), the court stated: "If we permitted recovery in a case such as this, our Courts would be swamped by a virtual avalanche of cases for damages for many situations and cases hitherto unrecoverable. . . ." *Id.* at 271, 220 A.2d at 647.

14. Unlimited liability is a misnomer since liability could never actually be unlimited. Rather, the term is used to describe the situation where a merely negligent defendant might be held liable for the emotional harm to many claimants. *See* notes 71-73 *infra* and accompanying text.

15. Neither volume of cases, nor danger of fraudulent claims, nor difficulty of proof, will relieve the courts of their obligation in this regard. None of these problems are insuperable. Statistics fail to show that there has been a "flood" of such cases in those jurisdictions in which recovery is allowed; but if there be increased litigation, the courts must willingly cope with the task. As to the danger of illusory and fictional claims, this is not a new problem; our courts deal constantly with claims for pain and suffering based upon subjective symptoms only; and the courts and the medical profession have been found equal to the danger. Fraudulent claims may be feigned in a slight-impact case as well as a no-impact case. Likewise, the problems of adequacy of proof, for the avoidance of speculative and conjectural damages, are common to personal injury cases generally and are surmountable, being satisfactorily solved by our courts in case after case.

Robb v. Pennsylvania R.R., 58 Del. 454, 463-64, 210 A.2d 709, 714 (1965) (footnote omitted).

16. In Porter v. Delaware, L. & W.R., 73 N.J. 405, 63 A. 860 (1906), the court acknowledged the fact that no recovery could be allowed for injuries due to fright or shock alone. The court stated, however, that if there was any physical impact, then there could be recovery for all resulting injuries whether they are emotionally or physically based. The court found that the impact requirement was satisfied because dust had gotten into the plaintiff's eyes. *See also* Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928) (evacuation of horse's bowels in lap of plaintiff held sufficient impact); Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930) (smoke inhaled by plaintiff held sufficient impact).

courts' adjudicatory function.[17] Furthermore, the difficulties in establishing proximate causation continually decrease as medical knowledge increases.[18] Finally, jurisdictions which have allowed recovery absent an impact have not experienced vast increases in litigation.[19]

This frequent bending of the impact rule and the widespread discontent with its purported justifications, prompted most juristictions[20] to replace it with the zone of danger test.[21] This test expanded liability by allowing recovery to a plaintiff who is within an area of potential physical harm at the time of the defendant's negligent act. A plaintiff can recover for injuries sustained as a direct result of a physical impact or as a result of the emotional harm caused by the plaintiff's fear for his safety. This test, for example, allows one who narrowly escapes being struck by a negligent defendant's automobile to recover if he was within the zone of danger. Recovery is justified on the grounds that a defendant can reasonably foresee the possible harm to a person within the zone of danger.[22] Once foreseeability is established, a duty of care arises,[23] and it is immaterial whether an impact actually occurs.[24] Most courts have found the zone of danger test an equitable and consis-

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17. Robb v. Pennsylvania R.R., 58 Del. 454, 463, 210 A.2d 709, 714 (1965); Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

18. *See* note 78 *infra*. Since medical science has become more adept at tracing physical or emotional injuries back to their original sources, mere speculative claims can be more frequently denied recovery. *See, e.g.*, Okrina v. Midwestern Corp., 282 Minn. 400, 405, 165 N.W. 2d 259, 263 (1969); Niederman v. Brodsky, 436 Pa. 401, 410-11, 261 A.2d 84, 88-89 (1970).

19. *See, e.g.*, Robb v. Pennsylvania R.R., 58 Del. 454, 210 A.2d 709 (1965); *see* note 15 *supra*.

20. *See*, RESTATEMENT (SECOND) OF TORTS § 436 app. (1966 & Supp. 1977) (listing states which still follow impact rule).

21. The case commonly regarded as the first to adopt the zone of danger test is Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935). In *Waube*, the court held that one put in peril of physical harm could recover for injuries sustained absent physical impact. While the court adopted the zone of danger test, it denied recovery to the plaintiff because she was not located within the zone of danger.

22. This same requirement of reasonable foreseeability has also led most jurisdictions to deny recovery to plaintiffs outside of the zone of danger. They have refused to find any duty of care owed to one who was not in any threat of personal danger since there is no reasonable foreseeability of harm. *See, e.g.*, Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935). *But see* Dillon v. Legg, 68 Cal. 2d at 728, 441 P.2d at 912, 69 Cal. Rptr. at 72.

23. W. PROSSER, LAW OF TORTS § 43, at 251 (4th ed. 1971).

24. *Id.* § 54, at 331-33. Prosser states that there should be some requirement of satisfactory proof and that there should be no recovery for hypersensitive mental disturbance where a normal person would not be affected under the circumstances.

tent approach in determining liability. Attempts to extend liability beyond the zone of danger were initially unsuccessful because the courts feared that without this fixed boundary they would have no logical way to limit potential claims.

The 1968 *Dillon* decision in California marked a major change in negligent infliction of emotional distress cases by replacing the zone of danger test with a test of reasonable foreseeability. In *Dillon*, a child was struck and killed by a negligent automobile driver as the child's mother and sister watched. Although the sister was arguably located within the zone of danger, the mother was not. The court decided it would be unreasonable to allow only the sister to recover merely because she was a few yards closer to the accident. Finding the zone of danger test too arbitrary,[25] the court discarded it, holding that both the mother and sister could recover for the emotional distress caused by the defendant's negligence. The court adopted reasonable foreseeability as a more appropriate test for determining liability and announced three guidelines for determining whether the emotional harm was reasonably foreseeable:

> (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 the 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.[26]

These three guidelines can be categorized respectively as physical proximity, sensory proximity, and emotional proximity.

The *Dillon* approach has generally been rejected. In only two states, Hawaii and Rhode Island, have the highest courts[27] adopted

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25. 68 Cal. 2d at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.

26. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80. These guidelines were to be applied case-by-case in order to alleviate the injustices under the zone of danger approach.

27. Lower courts in Connecticut and Michigan have also followed the *Dillon* approach. The Connecticut case, however, could have been decided under the zone of danger test since the plaintiffs were within the zone of danger. D'Amicol v. Alvarez Shipping Co., 31 Conn. Supp. 164, 326 A.2d 129 (Super. Ct. 1973) (recovery allowed when parents witnessed the death of their child when car in which all three were riding was struck by negligent defendant); Toms v. McConnell, 45 Mich. App. 647, 207 N.W.2d 140 (1973) (recovery allowed when mother, outside zone of danger,

the *Dillon* rationale. The Hawaii court followed the California lead in *Leong v. Takasaki*,[28] but decided that the guidelines set down in *Dillon* were merely an expansion of the zone of danger test and still included arbitrary barriers to recovery.[29] Mr. Chief Justice William S. Richardson, writing for the majority, in the *Leong* decision, said that the better approach in determining liability should require only that "it be reasonably foreseeable that a reasonable plaintiff-witness to an accident would not be able to cope with the mental stress engendered. . . ."[30] Thus, the determination of liability in Hawaii is not based upon whether the defendant should reasonably have foreseen the plaintiff's presence at the accident. Rather, the court considers whether the plaintiff's failure to cope with the stress is reasonable. The court further explained that the *Dillon* criteria of physical, sensory, and emotional proximity should only be used in determining the degree of mental stress suffered and not in determining liability.[31]

Rhode Island also followed a limited *Dillon* approach in *D'Ambra v. United States*[32] by permitting recovery to a mother-witness located outside the zone of danger. The court carefully limited its decision only to cases involving the relationship of mother and child and acknowledged that it was actually bending the zone of danger test rather than eliminating it. This relaxation of the zone

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witnessed the death of her daughter when struck by a panel truck driven by negligent defendant).

28. 55 Hawaii 398, 520 P.2d 758 (1974). In *Leong*, an action was brought on behalf of a ten-year-old boy who suffered mental distress from seeing his grandmother killed by defendant's automobile. Although the case could arguably have been decided under the zone of danger test, the court decided to eliminate this artificial barrier to recovery. *Id.* at 402-07, 520 P.2d at 762-64. Furthermore, the court held that the absence of a blood relationship should not foreclose recovery. This was based upon the Hawaiian concept of adoption whereby the child is reared as a child of the adoptive family and is entitled to inherit through them. *Id.* at 410-11, 520 P.2d at 766.

29. *Id.* at 409, 520 P.2d at 765. This finding was based upon the initial *Dillon* requirement of proximity of the plaintiff to the accident.

30. *Id.* at 410, 520 P.2d at 765.

31. *Id.* at 410, 520 P.2d at 765-66. These factors are only indicative of the degree of stress suffered and go only to damages. The *Leong* decision concludes that the defendant is liable as long as the plaintiff witnessed the accident and his resulting emotional harm was not unreasonable. The *Dillon* factors are to be used in determining the extent of damages but not in determining the threshold question of liability. Thus, for example, a defendant can be liable absent a close physical proximity to the accident, but the trier of fact will consider that factor in determining damages.

32. 114 R.I. 643, 338 A.2d 524 (1975) (driver of a mail truck negligently struck and killed four-year-old boy as mother witnessed from position of safety).

of danger test was, according to the court, an exception for mother-child relationship cases rather than an unqualified acceptance of the *Dillon* approach.[33]

While only two jurisdictions have followed the *Dillon* expansion of liability, many have rejected it.[34] New York was the first to do so in *Tobin v. Grossman*.[35] In *Tobin*, a mother inside a neighbor's house heard the screech of tires and noted the absence of her two-year-old son. She immediately went outside and saw him lying injured on the ground. She sought recovery for injuries sustained as a result of viewing her son's injuries. In denying recovery, the court examined the foreseeability test of *Dillon* and concluded: "If foreseeability be the sole test, then once liability is extended the logic of the principle would not and could not remain confined. It would extend to older children, fathers, grandparents, relatives, or others *in loco parentis*, and even to sensitive caretakers, or even any other affected bystanders."[36] This fear of nearly unlimited liability has led New York, as well as other jurisdictions,[37] to reject *Dillon* and follow the zone of danger test.

In *Dziokonski v. Babineau*,[38] the Massachusetts Supreme Judicial Court abrogated the then existing impact rule, by-passing both the zone of danger and *Dillon* approaches, and adopted its own version of a reasonable foreseeability test. The impact rule had been followed in Massachusetts since the 1897 decision of *Spade v. Lynn & Boston R.R.*[39] Realizing, however, that the primary justifi-

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33. The court's explanation for bending the zone of danger test to allow recovery in mother-child cases was that this close emotional relationship required greater protection. According to the court, "[W]here a mother witnesses the death of her child, it is only reasonable that the parameters of liability established by the zone of physical danger be bent to accommodate the overwhelming impact of the mother's and child's mental and emotional relationship. Anything less would be to deny psychological reality." *Id.* at 657, 338 A.2d at 531.

34. *E.g.*, Arcia v. Altagracia Corp., 264 So. 2d 865 (Fla. Dist. Ct. App. 1972); Strickland v. Hodges, 134 Ga. App. 909, 216 S.E.2d 706 (1975); Aragon v. Speelman, 83 N.M. 285, 491 P.2d 173 (1971); Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969); Whetham v. Bismarck Hosp., 197 N.W.2d 678 (N.D. 1972); Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970); Guilmette v. Alexander, 128 Vt. 116, 259 A.2d 12 (1969); Grimsby v. Samson, 85 Wash. 2d 52, 530 P.2d 291 (1975).

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

36. *Id.* at 616, 249 N.E.2d at 423, 301 N.Y.S.2d at 559.

37. *See* note 34 *supra*.

38. 78 Mass. Adv. Sh. 1759, 380 N.E.2d 1295 (1978). *See* notes 1-6 *supra* and accompanying text for the facts and holding of *Dziokonski*.

39. 168 Mass. 285, 47 N.E. 88 (1897). *See* note 10 *supra* for facts of *Spade* and justifications given for adopting the impact rule.

cation given for the impact rule in *Spade* was the threat of unjust claims,[40] the court decided that this treat alone could no longer justify denial of recovery in all cases and overruled *Spade*.[41] The court decided that the determination of whether a claim was justified was best left for the trier of fact.[42] The court relied heavily on the *Dillon* rationale in adopting its own test of reasonable foreseeability.[43] The adopted test is based on a determination of where, when, and how the plaintiff learned of the injury to the third person and by the relationship existing between the plaintiff and the injured party. These factors were deemed "relevant in measuring the limits of liability for emotionally based injuries resulting from a defendant's negligence."[44]

In adopting a test of pure reasonable foreseeability the *Dziokonski* court sought to eliminate any artificial barriers to recovery. In the court's view, if real injuries are sustained, and a causal connection can be established between those injuries and the defendant's negligence, then a defendant ought to be held liable for the consequences of his negligence. The only limitation the court placed on this determination was that the injury sustained must be reasonably foreseeable.[45] Thus, the *Dziokonski* court has apparently forsaken the arbitrary barriers to recovery found in the impact rule, the zone of danger test, and the *Dillon* approach, in favor of a test of pure reasonable foreseeability.

The *Dziokonski* court attempted to arrange a more equitable method of determining liability than the *Dillon* court did. The devised test may not be more equitable, however, because it is too amorphous to be applied uniformly. The factors deemed relevant by the *Dziokonski* court in determining liability are similar to those used in *Dillon*.[46] While not as narrow or restrictive[47] as the *Dillon*

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40. 78 Mass. Adv. Sh. at 1762, 380 N.E.2d at 1297.

41. *Id.* at 1766, 380 N.E.2d at 1299. For a discussion of the various other justifications for the impact rule, see notes 11-14 *supra* and accompanying text.

42. *Id.* at 1766-67, 380 N.E.2d at 1299.

43. *Id.* at 1775, 380 N.E.2d at 1302.

44. *Id.* at 1775-76, 380 N.E.2d at 1302.

45. *Id.* at 1774, 380 N.E.2d at 1302.

46. *See* note 26 *supra* and accompanying text.

47. This flexibility was an attempt to further eliminate any arbitrary barriers to recovery. Indeed the court acknowledged this fact that "[e]very effort must be made to avoid arbitrary lines which 'unnecessarily produce incongruous and indefensible results.'" 78 Mass. Adv. Sh. at 1775, 380 N.E.2d at 1302 (quoting Mone v. Greyhound Lines, Inc., 368 Mass. 354, 365, 331 N.E.2d 916, 922 (1975) (Braucher, J., dissenting)).

guidelines, they still attempt to focus the determination of liability on the same issues, namely, where, when, and how the plaintiff became aware of the injury to the third person. In *Dillon* the prerequisites to finding liability were close proximity to the accident, sensory and contemporaneous observance of the accident, and close family relationship.[48] The *Dziokonski* decision does not indicate what events are required to establish liability. Thus, a determination under *Dziokonski* of where the plaintiff learned of the injury requires an inquiry similar to that of *Dillon* into plaintiff's proximity to the accident. Unlike the *Dillon* insistence upon close proximity, however, *Dziokonski* does not prohibit recovery to one who was distant from the accident. Mr. Dziokonski, for example, never appeared at the scene of the accident, yet the court refused to dismiss his claim against the defendants. Clearly, under the *Dillon* test Mr. Dziokonski's complaint would be dismissed for failure to state a claim. The difficulty with the generalized factors as set down in *Dziokonski* is that they offer little guidance for an ultimate decision on liability. The new test merely requires that lower courts, in determining liability, focus attention on where, when, and how the plaintiff learned of the accident. It does not instruct the courts as to what effect to give to the findings on each of these issues. This relatively boundless test will result in inconsistencies in subsequent decisions. Moreover, it greatly increases the chances of a finding of liability based upon the desire of a sympathetic jury to compensate an injured plaintiff.

Arbitrary barriers to recovery are necessary to protect defendants[49] and guide lower courts to a practical and uniform determination of liability. An analysis of post-*Dillon* California cases shows the difficulties in arriving at practical and uniform results despite *Dillon's* comparatively restrictive guidelines. This analysis also demonstrates that California courts are not currently using a pure reasonable foreseeability test, but rather are sharpening the boundaries imposed by *Dillon*.

The first California case to apply the *Dillon* approach was *Archibald v. Braverman*[50] which further defined the *Dillon* boundaries of liability. In *Archibald*, the defendant negligently sold gunpowder to the plaintiff's thirteen-year-old son. The gunpowder exploded and seriously injured the boy. Within moments of the

48. 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.
49. *See* text accompanying note 74 *infra*.
50. 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969).

explosion, the plaintiff-mother appeared in an effort to aid her son. Although she was not an eyewitness to the accident the mother did hear[51] the explosion and saw the severe injuries suffered by her son. As a result, she suffered fright, shock, and mental illness and required institutionalization.[52]

In applying the *Dillon* criteria, the appellate court had no difficulty in satisfying the requirements of physical proximity[53] and a close family relationship.[54] The difficulty arose in satisfying the second *Dillon* requirement of a sensory and contemporaneous observance of the accident as the plaintiff had not viewed the accident. The court, without discussing the issue, held this requirement was satisfied because "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. Consequently, the shock sustained by the mother herein was 'contemporaneous' with the explosion so as to satisfy the 'observance' factor."[55] Thus, *Archibald* further defined the "sensory and contemporaneous observance" criteria of *Dillon* to include hearing the accident as well as seeing the accident.

Rather than employ a test of reasonable foreseeability, lower court decisions since *Archibald* have continually clarified and defined the *Dillon* guidelines. Recovery has been denied in subsequent decisions where a wife witnessed her husband's condition in the hospital emergency room thirty to sixty minutes after an accident,[56] where parents witnessed the lengthy developments of an

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51. While the decision as reported does not expressly state that the mother heard the explosion, that fact has been noted in subsequent California decisions. *See, e.g.*, Jansen v. Children's Hosp. Medical Center, 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1973), where the court, in discussing *Archibald* stated that, "it can be inferred that the mother heard the explosion, thus having a 'sensory observance of it.'" *Id.* at 24, 106 Cal. Rptr. at 885.

52. 275 Cal. App. 2d at 255, 79 Cal. Rptr. at 724.

53. "[T]he mother, having witnessed the injuries within moments after the explosion at a time when she was attempting to render aid, fulfilled the 'nearness' requirement in terms of distance as well as time." *Id.* at 256, 79 Cal. Rptr. at 725.

54. "[T]he 'relationship' factor was indisputably established inasmuch as the plaintiff and the accident victim are mother and son." *Id.* at 256, 79 Cal. Rptr. at 724.

55. *Id.* at 256, 79 Cal. Rptr. at 725. *But see* D'Ambra v. United States, 354 F. Supp. 810, 821 (D.R.I. 1973) (criticizing the conclusion reached in *Archibald*). This satisfaction of the contemporaneous observance requirement in *Archibald* may also have been influenced by the court's awareness of the defendant's criminal violation for selling gunpowder to a minor (CAL. HEALTH & SAFETY CODE § 12082 (Deering 1975)). 275 Cal. App. 2d at 256, 79 Cal. Rptr. at 725. This may have raised the defendant's culpability above that of mere negligence.

56. Deboe v. Horn, 16 Cal. App. 3d 221, 94 Cal. Rptr. 77 (1971). In *Deboe*, the

infection in their child rather than a sudden accident,[57] and where plaintiffs did not actually witness the accident.[58]

In *Arauz v. Gerhardt*[59] the court denied recovery to a mother who arrived upon the scene within five minutes of the accident and saw her son's severe injuries. In denying recovery, the court distinguished *Arauz* from *Archibald* since the mother in *Archibald* had heard the accident which caused her son's injuries while the mother in *Arauz* had not.[60] Clearly, the *Arauz* court did not employ a pure reasonable foreseeability test. A defendant can reasonably foresee emotional harm to a mother who views her son's severe injuries moments after an accident. A requirement that the mother also hear the accident is not necessary for this determination. Rather than employ a reasonable foreseeability test, the *Arauz* decision further defined the *Dillon* limitations on liability. The contemporaneous observance criterion therefore requires either a visual or aural observance of the accident.

This same attempt at limiting liability by using the *Dillon* barriers to recovery is evident in *Justus v. Atchison*.[61] In *Justus*, a husband was present in the hospital delivery room with his wife when medical complications arose.[62] He was still present in the delivery

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wife contended that a general allegation of negligence resulting in injury was sufficient to state a cause of action. The court dismissed the complaint stating "that facts giving rise to a cause of action for injuries resulting from emotional distress must be specifically pleaded. Since plaintiff-wife failed to do so here, the demurrer was properly sustained." *Id.* at 224, 94 Cal. Rptr. at 79-80. The court went on to say that even if she had done so liability would not exist since she never appeared at the scene of the accident as required under *Dillon*.

57. Jansen v. Children's Hosp. Medical Center, 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1973). In *Jansen*, rather than rely on the reasonable foreseeability test, the court held that the language of *Dillon* contemplates recovery only when there is "a sudden and brief event causing the child's injury . . . [and] that the event causing injury to the child must itself be one which can be the subject of sensory perception." *Id.* at 24, 106 Cal. Rptr. at 884-85.

> 58. Although it is true . . . that the rule allowing recovery for emotional shock and its after effect is not necessarily limited to the narrow facts involved in [*Dillon*] . . . we do not think that this court (especially in light of the strong dissents in *Dillon*) should extend the rule to a case such as this where the shock, as claimed, resulted from seeing the daughter 30 to 60 minutes after the accident and thereafter under circumstances not materially different from those undergone by every parent whose child has been injured in a non-observed and antecedent accident.

Powers v. Sissoev, 39 Cal. App. 3d 865, 873-74, 114 Cal. Rptr. 868, 874 (1974). *See also*, Parsons v. County of Monterey, 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978).

59. 68 Cal. App. 3d 937, 137 Cal. Rptr. 619 (1977).

60. *Id.* at 949, 137 Cal. Rptr. at 626. *See* note 51 *supra*.

61. 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977).

62. These included the concern of the medical staff, use of emergency proce-

room when the physician announced the death of the fetus. Recovery was denied for the emotional harm he suffered because at the moment of death the fetus was hidden from the husband's contemporaneous perception.[63] *Justus* has continued to define the barriers imposed by *Dillon* by requiring not only presence at the accident but also an actual observance. In *Justus*, no such observance was found. Again, liability would certainly be established under a pure reasonable foreseeability test. The explanation for denying recovery is that *Justus* follows the *Dillon* barriers to recovery.[64]

The most recent California Supreme Court decision to address the *Dillon* issue was *Krouse v. Graham*.[65] In *Krouse*, a husband remained in the driver's seat of his car while his wife and neighbor removed groceries from the back seat. As his wife went to close the back door of the car, the defendant's vehicle struck both women and then collided with the plaintiff's car.[66] The husband saw the defendant's vehicle approaching and realized it must have hit his wife prior to striking his car. Although he did not actually see his wife being struck by the defendant's vehicle, the California Supreme Court decided that he fully perceived that she had been struck and therefore must be deemed a percipient witness.[67]

While *Krouse* could have been decided on the mere fact that

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dures, and the prolapsing of the umbilical cord of the fetus. *Id.* at 564, 565 P.2d at 122, 139 Cal. Rptr. at 97.

63. In the words of the court, "he had been admitted to the theater but the drama was being played on a different stage." *Id.* at 584, 565 P.2d at 135, 139 Cal. Rptr. at 110.

64. Another possible explanation for the decision reached in *Justus* is that the California court is retreating from the *Dillon-Archibald* approach. The facts of *Justus* appear to establish a greater showing of "contemporaneous observance" than *Archibald*. However, the court explicitly distinguished *Justus* from *Archibald* in that the plaintiff in *Archibald* was able to sense the accident, whereas the plaintiff in *Justus* was not. *Id.* at 584, 565 P.2d at 135, 139 Cal. Rptr. at 110. The California Supreme Court itself endorsed the *Archibald* decision stating:

> Decisional law has also imposed on the remedy temporal limitations which flow from *Dillon*'s requirement that the injury result "from the sensory and contemporaneous observance of the accident, . . ." . . .
>
> We confirm the propriety of the expression in *Archibald*, *supra*, that the *Dillon* requirement of "sensory and contemporaneous observance of the accident" does not require a *visual* perception of the impact causing the death or injury.

Krouse v. Graham, 19 Cal. 3d 59, 76, 562 P.2d 1022, 1031, 137 Cal. Rptr. 863, 872 (1977) (quoting Dillon v. Legg, 68 Cal. 2d 728, 740, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968)).

65. *Id.* at 59, 562 P.2d at 1022, 137 Cal. Rptr. at 863.

66. *Id.* at 65, 562 P.2d at 1024, 137 Cal. Rptr. at 865.

67. *Id.* at 72, 562 P.2d at 1031, 137 Cal. Rptr. at 872.

the plaintiff must have heard the accident, the court failed to raise this point. Instead, the court granted recovery because the plaintiff had "perceived" the accident. Thus, the "contemporaneous perception" requirement, after *Krouse*, may also be satisfied by a sensory perception of the accident absent both visual or aural perception. This supreme court decision has defined even further the *Dillon* barriers to recovery.

These California decisions have not implemented the *Dillon* approach by relying on a reasonable foreseeability test. Rather, they have been based on the arbitrary guidelines promulgated by *Dillon*. The *Dziokonski* reliance on *Dillon* to establish a pure reasonable foreseeability test, therefore, is misplaced. California's continued adherence to and interpretation of the *Dillon* limits to recovery is in sharp contrast with the more liberal approach to liability taken by the Massachusetts court. The *Dziokonski* language offers far less guidance to the lower courts than *Dillon*. Although *Dziokonski* aims to eliminate the use of any arbitrary barriers to recovery,[68] these barriers are the best practical way to limit liability. The difficulties and inconsistencies of the most recent California decisions illustrate the problems in attempting to apply even the limited foreseeability test of *Dillon*.

The *Dziokonski* decision itself illustrates that a test of reasonable foreseeability is inappropriate when applied to cases involving negligent infliction of emotional harm. Concededly there is some point at which a court will refuse to extend liability for injuries it deems too remote. The *Dziokonski* court acknowledged this fact stating, "In some instances, it will be clear that the question is properly one for the trier of fact, while in others the claim will fall outside the range of circumstances within which there may be liability."[69] By refusing to dismiss the claim relating to Mr. Dziokonski, the court has decided that a plaintiff who never appears at the scene of the accident, but who merely learns of the accident from another, has stated a cause of action. This holding has greatly increased the potential liability of a defendant far beyond that existing in California or any other jurisdiction.[70]

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68. *See* note 47 *supra*.

69. 78 Mass. Adv. Sh. at 1776, 380 N.E.2d at 1302.

70. Even Hawaii, the state to adopt the most liberal *Dillon* approach, prior to *Dziokonski*, would not allow recovery for an injury as remote as Mr. Dziokonski's. In Kelley v. Kokua Sales and Supply, Ltd., 56 Hawaii 204, 532 P.2d 673 (1975), the Hawaii court was faced with an injury suffered by one who never appeared at the scene of the accident. The court decided "that the duty of care enunciated [in previ-

An additional problem with a pure reasonable foreseeability test is that the class of people who can reasonably be foreseen to suffer emotional harm from an accident which causes injuries to another is very large.[71] A defendant who negligently strikes a single pedestrian will, under a pure reasonable foreseeability test, conceivably find himself liable to the pedestrian's mother, father, spouse, children, distant relatives, and perhaps even his friends. As other courts[72] have acknowledged there is no logical place to deny recovery under this test.[73] Reasonable foreseeability is an inadequate test since in application it evolves as either too broad a determinant of liability or must be applied with illogical limitations.

A pure reasonable foreseeability test also produces a risk of liability disproportionate to the culpability of the defendant. The law of torts seeks to strike a balance between the wrongfulness of the defendant's act and the resulting harm suffered by the plaintiff. The degree of the defendant's culpability is a factor in determining both liability and damages. Thus, punitive damages may be allowed in cases of intentional acts but never for negligent acts. The negligent defendant has not acted with any sense of hostility or intent but is guilty only of an error of judgment—a mistake. Rather than unduly burden a merely negligent defendant the law often requires a closer nexus of causation than would be required if the defendant's act was intentional.[74] Reasonable foreseeability is an inappropriate approach for negligent infliction of emotional distress situations. Since the class of people affected may be very large,

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ous Hawaii cases] applies to plaintiffs . . . who were located within a reasonable distance from the scene of the accident." *Id.* at 209, 532 P.2d at 676. The reason for requiring a physical proximity to the accident was because "[w]ithout a reasonable and proper limitation of the scope of the duty of care owed by [defendants, defendants] would be confronted with an unmanageable, unbearable and totally unpredictable liability." *Id.*

71. This becomes especially true in light of the fact that it has been noted by medical authorities that a shock suffered from merely being told of an accident "could actually be worse in some cases because a person who was not present and did not observe the circumstances in which the loved one died or was injured, could very well imagine a scene much more gruesome and a vision of death much more horrible than actually happened." Leibson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. FAM. L. 163, 196 n.79 (1976-1977).

72. *See, e.g., Tobin*, discussed at notes 35-37 *supra* and accompanying text.

73. This argument was noted by the court in *Dziokonski* but discarded since any alternative test would involve using arbitrary lines to recovery. 78 Mass. Adv. Sh. at 1774-75, 380 N.E.2d at 1302.

74. *See, e.g.*, Waube v. Warrington, 216 Wis. 603, 606, 258 N.W. 497, 501 (1935).

some barriers are necessary to balance the defendant's liability with his culpability. A merely negligent defendant should not be held responsible for an injury as remote as Mr. Dziokonski's.

Whatever test is adopted must contain some barriers to recovery in order to operate both functionally and equitably. The best test for deciding these cases is one which does not permit recovery beyond that class of persons who are actually present at and witness the accident.[75] While this test obviously involves arbitrary barriers to recovery, such barriers have been shown to be necessary. Judge Quirico's dissent in *Dziokonski* also stated that this test was the most appropriate:

> I would agree also that if, contrary to the facts in the present case, a parent had been present at the time of the alleged negligent conduct which caused the injury, and such parent had suffered emotional distress and resulting physical injury, then he or she should recover regardless of whether they were within the zone of risk of bodily harm created by the negligent act.[76]

Additionally, the witness requirement significantly decreases the number of possible claimants. Thus, a negligent defendant's potential liability will be far less likely than it would be under a reasonable foreseeability test. This test can also be applied with ease and certainty and provide for more consistent results than a reasonable foreseeability test. A further requirement of a close familial relationship should also be necessary.[77]

This proposed test is similar to the test currently being followed in California. The cases after *Dillon*, which have clarified and defined the California approach, have reached the same result as this proposed test. In practice, this test expands the zone of danger test by requiring only presence at and perception of the accident. Extending liability beyond the zone of danger test will allow recovery for those emotional based harms that can be accu-

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75. This test is similar to the approach currently being followed in California. The witnessing should include both visual and aural observance. A benefit of a concise, definite statement of the rule is to eliminate the confusion and inconsistencies the courts are faced with when attempting to interpret a test such as "sensory and contemporaneous observance."

76. 78 Mass. Adv. Sh. at 1779, 380 N.E.2d at 1303 (footnote omitted) (Quirico, J., dissenting).

77. This should certainly include parent-child and spousal relationships. Once a lesser degree of relationship is present (e.g. grandparent-grandchild) the issue should be left to the trier of fact. It will depend on the closeness of the particular relationship in question.

rately shown to have a causal relationship to the accident witnessed. Current medical knowledge can adequately establish the required showing of proximate causation.[78] This approach would recognize that the mere presence at and witnessing of an accident involving a close relative can have devastating emotional effects.[79] At the same time, it would not permit recovery to everyone who may be affected by an injury to a third person.[80]

Any concrete guidelines can be criticized as being inequitable if they are too arbitrary. Presumably, tort law must impose some limits on liability. The alternative, compensating all injuries regardless of their remoteness, would overload the capacity of our judicial system to determine who is to blame for plaintiff's injuries. The choice, therefore, is not whether there should be guidelines, but whether the guidelines should be flexible or concrete.

Flexible guidelines have several advantages. They can preclude the bright line distinctions that lead to inequitable results. Without hard and fast rules limiting liability, courts would not have to harshly deny recovery to an injured plaintiff because no impact occurred, because he was outside the zone of danger, or because he did not perceive the accident.

There are disadvantages, however, to this alternative. The primary weakness of the reasonable foreseeability test outlined by the

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78. In recent years . . . the medical profession has made tremendous advances in diagnosing and evaluating emotional and mental injuries. While psychiatry and psychology may not be exact sciences, they can now provide sufficiently reliable information concerning causation and treatment of psychic injuries, to provide a jury with an intelligent basis for evaluating a particular claim. In this light, we are confident that juries are capable of assessing whether a claim is concocted and fictitious or, in fact, real.

Towns v. Anderson, 579 P.2d 1163, 1164 (Colo. 1978). *Towns*, decided just two weeks prior to *Dziokonski*, rejected the impact rule and replaced it with the zone of danger test as adopted by RESTATEMENT (SECOND) OF TORTS § 436 app. (1966). 579 P.2d at 1165. This faith in the medical profession is also shared by Prosser. "Not only fright and shock, but other kinds of mental injury are marked by definite physical symptoms, which are capable of clear medical proof. It is entirely possible to allow recovery only upon satisfactory evidence and deny it when there is nothing to corroborate the claim. . . ." W. PROSSER, LAW OF TORTS § 54, at 328 (4th ed. 1971) (footnotes omitted).

79. *See generally* Leibson, *supra* note 71.

80. Judge Quirico, dissenting in *Dziokonski*, also decided this test was the appropriate one to implement and that recovery should not be allowed to one who subsequently comes upon the scene of the accident;

It is my opinion that we should not prescribe rules that allow or deny recovery by the parent on the basis of the speed and efficiency of an ambulance team in responding to an accident call, or on the haste with which a parent can be notified and rushed to the accident scene.

78 Mass. Adv. Sh. at 1779, 380 N.E.2d at 1304 (Quirico, J., dissenting).

Dziokonski court is its indefiniteness. The test is too flexible. It is inevitable that many subjective considerations unrelated to the liability issue will creep into the determination of whether a specific plaintiff's case falls within the reasonable foreseeability rubric. The wide range of subjective considerations present in both jury and judge determinations under this test will necessarily lead to inconsistent results. Concrete guidelines, on the other hand, provide the objective standards by which individual cases can be uniformly adjudicated.

Massachusetts' decision in *Dziokonski* to expand liability in negligent infliction of emotional harm cases by adopting a test of reasonable foreseeability is patently unwise. Its reliance upon the *Dillon* case is also misplaced considering California's current approach of clarifying and defining the barriers to recovery announced in *Dillion*. A test of reasonable foreseeability is neither functional nor equitable in application. It offers little guidance to the lower courts in determining the ultimate issue of liability. Rather, the *Dziokonski* approach allows juries to impose liability according to their sympathies. A better balancing of plaintiff's rights with the degree of care owed by defendants is achieved by establishing some arbitrary barriers to recovery. A test which requires both presence at and perception of an accident, either aurally or visually, realistically accounts for these factors.

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