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Comments: Negligent Infliction of Emotional Distress: Developments in the Law

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NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS: DEVELOPMENTS IN THE LAW

Courts have traditionally been wary of plaintiffs who bring actions for negligent infliction of emotional distress. For various policy reasons, jurisdictions have imposed standards that plaintiffs must satisfy prior to bringing an action. This comment traces the origin and development of these standards, evaluates their success in protecting deserving plaintiffs, and projects the future course of the tort.

I. INTRODUCTION

As Anglo-American society moved from an agrarian to an industrial age, considerable litigation followed from the multitude of accidents attendant such a shift. Negligent rather than intentional misconduct became the dominant source of litigation and courts were forced to reformulate their rules of liability. To provide consistent and workable guidelines, courts sometimes sacrificed fairness for foundation. Since courts met new causes of action with stubborn resistance, plaintiffs were forced to plead their cases in conjunction with an established tort. When courts grudgingly accepted new causes of action, they designed arbitrary rules to define narrowly the scope of liability. It was in this environment that the tort of negligent infliction of emotional distress had its genesis. Its development has been marked by a series of arbitrary standards, such as the impact, zone of danger, and foreseeability rules, each of which is more progressive than its predecessor and designed to provide a workable solution for adjudicating emotional injury cases.

This comment traces the development of the various rules concerning negligent infliction of emotional distress, with special emphasis on third party bystander cases. It critically analyzes the rules and offers a projection of the future status of the law and discusses the current and projected state of the law in Maryland.

II. BACKGROUND

Despite the early acceptance of damages for assault,[1] the law has been reluctant to redress injuries for non-physical invasions.[2] This re-

1. One of the earliest recorded cases is I. de S. et ux v. W. de S., Y.B. 22 Edw. 3, f. 99 pl. 60 (1348), *noted in* C. GREGORY & H. KALVEN, CASES AND MATERIALS ON TORTS 918-19 (2d ed. 1969), where damages were recovered by a women who narrowly escaped injury by a hatchet thrown by the defendant. The court stated: "There is harm, and a trespass for which they shall recover damages, since he made an assault upon the woman, as it is found although he did no other harm."
2. A particularly hostile attitude can be found in Huston v. Freemansburg, 212 Pa. 548, 61 A. 1022 (1905):

> All of these cases are of recent and unhealthy growth, and none of them stands squarely on the ancient ways. In the last half century the ingenuity of counsel, stimulated by the cupidity of clients and encouraged by

luctance has been more pronounced when the misconduct is negligent rather than intentional.[3]

In an 1861 English case[4] that exemplified the nineteenth century judicial attitude, Lord Wensleydale flatly stated: "[m]ental pain or anxiety the law cannot value, and does not pretend to redress when the unlawful act complained of causes that alone."[5] With few exceptions[6] the common law was in agreement.[7] Emotional harm was regarded as too metaphysical and evanescent for courts to contemplate.[8] The reasons most frequently stated by courts for denying recovery include: (1) damages are too speculative;[9] (2) fraud may be easily committed;[10] (3) injury is outside the bounds of proximate cause;[11] and (4) great in-

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> the prejudices of juries, has expanded the action for negligence until it overtops all others in frequency and importance; but it is only in the very end of that period that it has been stretched to the effort to cover so intangible, so untrustworthy, so illusory, and so speculative a cause of action as mere mental disturbance. It requires but a brief judicial experience to be convinced of the large proportion of exaggeration, and even of actual fraud, in the ordinary action for physical injuries from negligence; and if we opened the door to this new invention the result would be great danger, if not disaster, to the cause of practical justice.

Id. at 550-51, 61 A. at 1023. This passage was later condemned as "an unjust attack on our whole judicial system." Bosley v. Andrews, 393 Pa. 161, 177, 142 A.2d 263, 271 (1958) (Musmanno, J., dissenting).

3. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54 (4th ed. 1971).
4. Lynch v. Knight, 9 H.L. Cas. 577 (1861), *noted in* Goodrich, *Emotional Disturbance As Legal Damage*, 20 MICH. L. REV. 497, 497 (1922).
5. Lynch v. Knight, 9 H.L. Cas. 577, 598 (1861), *noted in* Goodrich, *supra* note 4, at 497.
6. Dean Prosser noted the exceptions of negligent transmissions of messages by telegram companies and negligent mishandling of corpses. W. PROSSER, *supra* note 3, § 54, at 329-30. In addition, parents were able to recover damages for mental anguish caused by the seduction of their daughter. *See, e.g.*, Dwire v. Stearns, 44 N.D. 199, 172 N.W. 69 (1919); Andrews v. Askey, 173 Eng. Rep. 376 (1837).
7. One author has suggested that no damages could be recovered for mental distress partly because of the "practical impossibility of administering any other rule," since at common law parties were incompetent to testify. Bohlen, *Right to Recover for Injury Resulting From Negligence Without Impact*, 50 U. PA. L. REV. 141, 143 (1902).
8. *See* T. COOLEY, A TREATISE ON THE LAW OF TORTS 94 (3d ed. 1906) ("mere mental pain and anguish are too vague for legal redress where no injury is done to person, property, health or reputation"); W. PROSSER, *supra* note 3, § 54, at 329.
9. St. Louis I.M. & So. Ry. v. Taylor, 84 Ark. 42, 104 S.W. 551 (1907); Cleveland C.C. & St.L. Ry. v. Stewart, 24 Ind. App. 374, 56 N.E. 917 (1900); Nelson v. Crawford, 122 Mich. 466, 81 N.W. 335 (1899); Ward v. West Jersey & S. R.R., 65 N.J.L. 383, 47 A. 561 (1900).
10. Morse v. Chesapeake & O. Ry., 117 Ky. 11, 77 S.W. 361 (1903); Nelson v. Crawford, 122 Mich. 466, 81 N.W. 335 (1899); Ward v. West Jersey & S. R.R., 65 N.J.L. 383, 47 A. 561 (1900).
11. Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898); Ward v. West Jersey & S. R.R., 65 N.J.L. 383, 47 A. 561 (1900); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896); Miller v. Baltimore & O.S.W. R.R., 78 Ohio St. 309, 85 N.E. 499 (1898); Chittick v. Philadelphia Rapid Trans. Co., 224 Pa. 13, 73 A. 4 (1909); Ewing v. Pittsburg, C.C. & St.L. Ry., 147 Pa. 40, 23 A. 340 (1892).

crease in litigation would ensue.[12] Since no independent recovery could be had in an action for negligent infliction of emotional distress,[13] a plaintiff was required to show some physical injury in connection with his emotional injury. With some exceptions, courts were slow to realize that emotional shock could produce bodily reactions resulting in physical injury. Therefore, damages for emotional distress, labeled "parasitic"[14] because of their attachment to a recognized tort, were first recovered under the impact rule, the first in a series of limitations on the ability of a plaintiff to recover damages.

A. The Impact Rule

By requiring that a physical impact accompany an emotional injury, courts hoped to provide a definitive test that would preclude, or at least limit, contrived claims. A plaintiff could easily prove the existence or non-existence of an impact, and courts felt that severe emotional harm was more likely to occur when the plaintiff suffered a physical blow. The impact rule was first established in England in 1888 in *Victorian Railways Commissioners v. Coultas,*[15] and despite its short life there, it has stubbornly survived in this country. In *Coultas,* the gatekeeper of a railway company negligently invited the plaintiffs to drive their buggy over a level crossing when it was unsafe to do so. A train approached and the buggy barely made it across without being struck. In reversing an award for damages, the Judicial Committee of the Privy Council held that the damage sustained by the plaintiffs because of the fright was too remote.[16]

The case was immediately criticized by other courts. While *Coultas* held that as a matter of law injury is not the ordinary consequence

12. Kalen v. Terre Haute & I. R.R., 18 Ind. App. 202, 47 N.E. 694 (1897); Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897); Nelson v. Crawford, 122 Mich. 466, 81 N.W. 335 (1899); Ward v. West Jersey & S. R.R., 65 N.J.L. 383, 47 A. 561 (1900). Other courts denied recovery because of the lack of precedent. *See, e.g.*, Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896); Lehman v. Brooklyn City R.R., 54 N.Y. Sup. Ct. 355 (1888); Victorian Rys. Comm'rs v. Coultas, 13 App. Cas. 222 (P.C. 1888). For criticism of the traditional reasons against recovery, see Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260 (1921).

13. The term is a logical outgrowth of intentional infliction of emotional distress. As in the case with negligent infliction of emotional distress, damages for intentional infliction were first recovered as "parasitic damages." *See* Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40, 40-41 (1956).

14. 1 T. STREET, FOUNDATIONS OF LEGAL LIABILITY 470 (1980 ed.):

> The treatment of any element of damages as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is to-day recognized as parasitic will, forsooth, tomorrow be recognized as an independent basis of liability. It is merely a question of social, economic and industrial needs as those needs are reflected in the organic law.

Id.

15. 13 App. Cas. 222 (P.C. 1888).

16. *Id.* at 225.

of fright, an Irish court[17] held that this issue should be left to the jury. Two English cases[18] distinguished *Coultas,* and it was overruled in 1901 by *Dulieu v. White & Sons.*[19] Between its adoption in *Coultas,* and its demise in *Dulieu,* however, the impact rule was adopted by New York in *Mitchell v. Rochester Railway,*[20] and Massachusetts in *Spade v. Lynn & Boston Railroad.*[21]

Mitchell perhaps best represents the impact rule, echoing all of the traditional arguments against recovery.[22] In *Mitchell,* the plaintiff was standing upon a crosswalk when a team of horses belonging to the defendant raced towards her. Although she was not struck, the horses came so close that the plaintiff stood between their heads when they were finally stopped. Medical testimony was offered at trial to prove that the miscarriage the plaintiff suffered was the proximate result of her shock and fright. The Court of Appeals of New York held that without impact the plaintiff lacked a cause of action.

The basic premise of *Mitchell* was that since a plaintiff could not recover for mere fright, she could not recover for any injuries resulting from fright.[23] In addition, the court denied recovery because the damages were too remote to lie in the bounds of proximate cause.[24] The *Mitchell* court also combined the traditional fear of fraud and increased litigation arguments into a loosely defined public policy argument.[25]

In contrast to *Mitchell,* the Supreme Judicial Court of Massachusetts in *Spade v. Lynn & Boston Railroad*[26] argued the impact rule al-

17. Bell v. Great N. Ry., 26 L.R. Ir. 428 (1890).
18. Wilkinson v. Downton, [1897] 2 Q.B. 57; Pugh v. London B. & S.C. Ry., [1896] 2 Q.B. 248. *Wilkinson* is one of the leading cases on intentional infliction of emotional distress. In *Wilkinson*, the defendant, a practical joker, told the plaintiff that her husband had been injured in an accident and that she was to take two pillows and go in a taxi to get him. Recovery was allowed; the court refused to follow *Coultas* because of *Pugh* and *Bell*, and also because *Coultas* did not involve a willful act.
19. [1901] 2 K.B. 669.
20. 151 N.Y. 107, 45 N.E. 354 (1896).
21. 168 Mass. 285, 47 N.E. 88 (1897).
22. *See supra* text accompanying notes 9-12.
23. Mitchell v. Rochester Ry., 151 N.Y. 107, 109, 45 N.E. 354, 354 (1896).
24. The *Mitchell* court stated:

> Moreover, it cannot be properly said that the plaintiff's miscarriage was the proximate result of the defendant's negligence. Proximate damages are such as are the ordinary and natural results of the negligence charged, and those that are usual, and may, therefore, be expected. It is quite obvious that the plaintiff's injuries do not fall within the rule as to proximate damages. The injuries to the plaintiff were plainly the result of an accidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control, and hence her damages were too remote to justify a recovery in this action.

Id. at 110, 45 N.E. at 355.
25. *Id.*
26. 168 Mass. 285, 47 N.E. 88 (1897).

most exclusively from an expediency viewpoint.[27] In *Spade,* while the defendant's conductor was removing a drunken passenger from a train, the conductor jostled another drunken passenger who fell onto the plaintiff. Although the fall itself did not harm the plaintiff, she alleged physical injury because of her fright. The *Spade* court conceded that a psychic injury could be the direct and immediate consequence of negligence and that fear could produce physical injuries that could flow proximately from negligence,[28] but claimed that it was impossible to administer satisfactorily any rule other than the impact rule.[29] Moreover, while the physical consequences of emotional injuries are direct, the court held that they are not foreseeable to the defendant.[30] The court stated that "the general conduct of business and of the ordinary affairs of life, must be done on the assumption that persons who are liable to be affected thereby are not peculiarly sensitive."[31] The opinion conceded the injustice of the rule, but stated "[t]he logical vindication . . . 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, which could not successfully be met."[32] Although it listed cases contrary to the impact rule, the *Spade* court did not criticize or attempt to distinguish them.[33]

Although most states adopted the impact rule, it did not escape judicial scrutiny. For example, the English case of *Dulieu v. White & Sons*[34] criticized both *Mitchell* and *Spade.* Although *Mitchell* asserted that damages arising from emotional trauma were too remote to be proximately caused, *Dulieu* disagreed. The *Dulieu* court suspected that physical injuries are often the direct consequence of emotional injury.[35] Later courts[36] and commentators[37] were less equivocal and pointed to

27. In 1899, Justice Holmes, writing for the Supreme Judicial Court of Massachusetts, stated: "The point decided in *Spade* . . . is not put as a logical deduction from the general principles of liability in tort, but as a limitation of those principles upon purely practical grounds." Smith v. Postal Tel. Cable Co., 174 Mass. 576, 577-78, 55 N.E. 380, 380 (1899).
28. *Spade*, 168 Mass. at 288, 47 N.E. at 88-89.
29. *Id.* at 288, 47 N.E. at 89.
30. *Id.* at 289, 47 N.E. at 89.
31. *Id.*
32. *Id.* at 290, 47 N.E. at 89 (emphasis supplied).
33. The *Spade* court cited three cases: Purcell v. St. Paul City Ry., 48 Minn. 134, 50 N.W. 1034 (1892); Fitzpatrick v. Great W. Ry., 12 U.C.Q.B. 645 (Hilary Term, 18 Vic.); Bell v. Great N. Ry., 26 L.R. Ir. 428 (1890). *Spade*, 168 Mass. at 290, 47 N.E. at 89.
34. [1901] 2 K.B. 669.
35. *Id.* at 677.
36. *See* Bourhill v. Young, 1943 A.C. 92, 103, in which the court stated: "the distinction between mental shock and bodily injury was never a scientific one, for mental shock is presumably in all cases the result of, or at least accompanied by, some physical disturbance in the sufferer's system." *See also* Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 A. 540 (1930).
37. *See* Goodrich, *supra* note 4, at 498-503; Smith, *Relation of Emotions to Injury And Disease: Legal Liability For Psychic Stimuli*, 30 VA. L. REV. 193, 212-16 (1944).

medical evidence that confirmed *Dulieu's* suspicion. Because *Spade* shared this belief, the court in *Dulieu* criticized *Spade* for adhering to the impact rule despite its questionable foundation.[38]

Dulieu also disagreed with *Mitchell's* premise that since a plaintiff could not bring an action for fright, then he could not recover damages for fright.[39] According to *Dulieu,* injury is the basis for an action and as long as there is physical injury, fright is actionable.[40] There can be injury without impact and impact without injury. This part of *Mitchell's* holding was also criticized as being both illogical and contrary to common law.[41] A traditional reason for not allowing recovery for fright alone was that damages were regarded as too speculative for measurement.[42] When physical injuries are directly traceable to fright, however, these measurement problems do not exist.[43] And, as *Dulieu* noted, the jury would not encounter greater difficulty in determining the effects of nervous shock through fright without impact than when there was impact.[44] *Dulieu,* which was particularly unsympathetic to the public policy arguments of *Mitchell* and *Spade,*[45] stated: "[s]uch a course involves the denial of redress in meritorious cases and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of claim."[46] Some later courts, including the Court of Appeals of Maryland, answered *Mitchell* and *Spade* with a countervailing public policy that a remedy should exist for every substantial wrong.[47]

As dissatisfaction with the impact rule increased, courts that

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38. [1901] 2 K.B. at 681.
39. *Id.* at 673.
40. *Id.* at 673-74.
41. *E.g.*, Bohlen, *supra* note 7, at 152; Lambert, *Tort Liability for Psychic Injuries*, 41 B.U.L. REV. 584, 589 (1961); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1036 (1936); McNiece, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S L. REV. 1, 26 (1949); Smith, *supra* note 37, at 208 n.34; Throckmorton, *supra* note 12, at 266.
42. For a criticism of the traditional rationale, see Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 320, 73 So. 205, 207 (1916).
43. The *Alabama Fuel* court explained this distinction in the following terms:
> Damages, when confined to fright alone, is [sic] dealing with a metaphysical, as contradistinguished from a physical condition, with something subjective instead of objective, and entirely within the realm of speculation. So the damages suffered where the only manifestation is fright are too subtle and speculative to be capable of admeasurement by any standard known to the law; but when the damages are physical and objective as consequent upon the physical pain and incapacity manifested by and ensuing upon a miscarriage, the damages are quite as capable of being measured by a jury as if they had ensued from an impact or blow.

Id. at 320, 73 So. at 207.
44. Dulieu v. White & Sons, [1901] 2 K.B. 669, 681.
45. *Id.* at 680-81.
46. *Id.* at 681.
47. *See, e.g.*, Bowman v. Williams, 164 Md. 397, 403-04, 165 A. 182, 184 (1933); Lam-

honored stare decisis attempted to mitigate its harshness. Some courts, including those of New York and Massachusetts, construed the facts to satisfy the requirements of the impact rule.[48] This led to strained results; occurrences such as dust in the eyes[49] and smoke inhalation[50] constituted sufficient impact for recovery.[51] The eagerness of courts to find impact may well have led plaintiffs' counsel to falsify the existence of an impact.[52] Ironically, courts had designed the impact rule to prevent falsification of claims. In sharp contrast to the cases allowing recovery for the slightest impact is *Bosley v. Andrews,*[53] a 1958 decision by the Supreme Court of Pennsylvania. Although the plaintiff alleged nervous shock and accompanying heart problems as a result of being

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bert v. Brewster, 97 W. Va. 124, 138, 125 S.E. 244, 249 (1924). The *Bowman* court stated:

> It is objected that the effect of fright is subjective, imaginative, conjectural, and speculative, and therefore easily simulated and feigned, so that its actual existence is difficult to ascertain, and, if found to exist, is inherently insusceptible of compensation by a precise pecuniary standard. These considerations undeniably tend to multiply fictitious or speculative claims, and to open to unscrupulous litigants a wide field for exploitation, but these difficulties are common, are surmountable, and so should not prevent the operation of the general and fundamental theory of the common law that there is a remedy for every substantial wrong.

Bowman, 164 Md. at 403-04, 165 A. at 184.

48. *See, e.g.*, Driscoll v. Gaffey, 207 Mass. 102, 92 N.E. 1010 (1910) (plaintiff forcibly seated on floor); Homans v. Boston Elev. Ry., 180 Mass. 456, 62 N.E. 737 (1902) (plaintiff received slight jolt); Sawyer v. Dougherty, 286 A.D. 1061, 144 N.Y.S.2d 746 (1955) (plaintiff struck by blast of air filled with glass and wooden splinters); Jones v. Brooklyn Heights R.R., 23 A.D. 141, 48 N.Y.S. 914 (1897) (plaintiff hit on head by light bulb recovered for resulting miscarriage). Having lost the first time because of the impact rule, the plaintiff in *Spade* brought a second suit alleging impact. The court, in an opinion by Justice Holmes, avoided the impact issue and denied recovery on an assumption of risk theory. Spade v. Lynn & Boston R.R., 172 Mass. 488, 52 N.E. 747 (1899). For additional New York decisional law falling within the slight impact category, see McNiece, *supra* note 41, at 51-58. For additional Massachusetts cases and a general discussion on this point, see Smith, *supra* note 37, at 300-02; *see also* Hickey v. Welch, 91 Mo. App. 4, 12 (1901) ("courts which deny relief for injuries following fright, are so impressed with the injustice of the rule that they seize on any pretext to allow a recovery—even the most frivolous legal wrong and however slight the immediate harm may be").

49. Porter v. Delaware L. & W.R.R., 73 N.J.L. 405, 63 A. 860 (1906).

50. Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930). *But see* Davis v. Cleveland Ry., 135 Ohio St. 401, 21 N.E.2d 169 (1939) (impact must be sufficiently severe by itself for plaintiff to sue in negligence).

51. In one case, a circus horse "evacuated its bowels" onto the lap of an unsuspecting patron. Instead of abolishing the rule, the court allowed recovery on the basis of impact when it was clear that the plaintiff's emotional injury had nothing to do with the force of the impact. *See* Christy Bros. v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928).

52. One commentator noted that it would be no more difficult to fabricate the existence of a slight impact than to falsify a claim involving no impact at all. McNiece, *supra* note 41, at 31 n.99.

53. 393 Pa. 161, 142 A.2d 263 (1958).

chased by a bull, *Bosley* denied a cause of action because there was no impact.

In New York, which did not abandon the impact rule until 1961,[54] various methods were used to circumvent the rule,[55] including a nuisance theory[56] and a slight variation on the impact rule, the contemporaneous injury rule.[57] The contemporaneous injury rule was applied where fright alone caused the plaintiff to suffer a physical injury, not from within his body nor due to a defendant's "impact," but as a result of an automatic, startled reaction, such as jumping off a carriage negligently placed in the path of an oncoming train.[58] In *Comstock v. Wilson,*[59] the plaintiff's automobile was slightly jolted when struck by the defendent's vehicle. The plaintiff got out of her automobile in an excited manner, and while writing down the defendant's license number, she fell, fractured her skull, and died within a few minutes. The *Comstock* court apparently did not base its decision allowing recovery on the impact from the collision, but instead applied the contemporaneous injury rule.[60]

Rather than employ circuitous methods, other courts were more direct.[61] By the time the Court of Appeals of New York had overruled[62] *Mitchell v. Rochester Railway,*[63] the impact rule had largely

54. Battala v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961), *overruling* Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896).
55. *See* Lambert, *supra* note 41, at 593-97.
56. Dixon v. New York Trap Rock Corp., 293 N.Y. 509, 58 N.E.2d 517 (1944). For a suggestion that the law of nuisance was expanded elsewhere to protect peace of mind, see Goodrich, *supra* note 4, at 511-12.
57. *See, e.g.*, Cameron v. New England Tel. & Tel. Co., 182 Mass. 310, 65 N.E. 385 (1902) (plaintiff, suffering injuries from fright caused by negligently exploded dynamite, started to rise and then fainted and fell); Muncy v. Levy Bros. Realty Co., 184 A.D. 467, 170 N.Y.S. 994 (1918) (plaintiff, frightened by the noise and vibration of a heavy door falling down an elevator shaft, fell and suffered a miscarriage); Ansteth v. Buffalo Ry. Co., 145 N.Y. 210, 39 N.E. 708 (1895) (child stealing a ride on defendant's streetcar was frightened when the conductor yelled "Hey!," lost his grip, and fell under the streetcar, which crushed one of his legs).
58. Twomley v. Central P.N. & E.R.R.R., 69 N.Y. 158 (1877).
59. 257 N.Y. 231, 177 N.E. 431 (1931).
60. On several occasions the New York courts used the contemporaneous injury rule to distinguish *Mitchell*. *See, e.g.*, Schacter v. Interborough R.T., 70 Misc. 558, 127 N.Y.S. 308 (Sup. Ct.), *rev'd on other grounds*, 146 A.D. 139, 130 N.Y.S. 549 (Sup. Ct. 1911); Maloney v. Knickerbocker Ice Co., 229 A.D. 317, 241 N.Y.S. 160 (Sup. Ct. 1930). For an excellent discussion of *Mitchell* and subsequent New York decisional law, see McNiece, *supra* note 41.
61. *E.g.*, Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916); Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941); Green v. T.A. Shoemaker & Co., 111 Md. 69, 73 A. 688 (1909); Purcell v. St. Paul City Ry., 48 Minn. 134, 50 N.W. 1034 (1892); Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 A. 540 (1930); Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890). For collections of cases on the impact rule, see Smith, *supra* note 37, at 207-08 nn. 31-32; Annot., 11 A.L.R. 1119 (1921).
62. Battala v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961), *overruling* Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896).
63. 151 N.Y. 107, 45 N.E. 354 (1896).

been rejected in favor of the zone of danger rule.[64]

B. The Zone of Danger Rule and the Bystander

The zone of danger rule, which originated in *Dulieu v. White & Sons,*[65] attempted to provide an answer to judicial skepticism at emotional injury claims. By requiring a plaintiff to be situated where he would reasonably fear physical injury, courts abolished the actual impact requirement but still addressed fears of false or exaggerated claims. What began as a liberalization of a plaintiff's right to recover, however, was also construed as a restriction. The rule as stated in *Dulieu,* known as "Kennedy's dictum," prevented a plaintiff from recovering damages for emotional injury if he feared for another but not for himself.[66] Despite this limitation, though, the first cases to consider the issue allowed recovery for damages caused by fear for another when the plaintiff was within the zone of physical danger.

In *Hambrook v. Stokes,*[67] the defendant's negligently unattended lorry ran down a narrow road. The plaintiff's wife saw the truck and feared for her children who she thought were on the road on their way to school.[68] She suffered a miscarriage and died. The husband alleged that his wife feared for her safety, or alternatively, for the safety of their children.[69] The owner of the lorry defended on the basis of Kennedy's dictum.[70] The court determined it was irrelevant to decide for whose safety the wife feared, and thus allowed the husband to recover.[71]

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64. Only three jurisdictions retain the impact rule. *See* Champion v. Gray, 420 So. 2d 348 (Fla. App.), *appeal docketed*, No. 62,830 (Fla. Nov. 5, 1982); Indiana Motorcycle Ass'n v. Hudson, 399 N.E.2d 775 (Ind. App. 1980); Deutsch v. Schein, 597 S.W.2d 141 (Ky. 1980). Illinois and Missouri recently abolished the impact rule. Rickey v. Chicago Trans. Auth., 98 Ill. 2d 546, 457 N.E.2d 1 (1983); Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983). For a discussion of Champion v. Gray see Note, *Negligent Infliction of Emotional Distress—Should the Florida Supreme Court Replace the Impact Rule with a Foreseeability Analysis*?, 11 FLA. ST. U.L. REV. 229 (1983).
65. [1901] 2 K.B. 669. Interestingly, the *Dulieu* court never used the term "zone of danger."
66. The *Dulieu* opinion, authored by Justice Kennedy, stated:
> There is, I am inclined to think, at least one limitation. The shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself. A. has, I conceive, no legal duty, not to shock B.'s nerves by the exhibition of negligence towards C.

Id. at 675. This limitation had its origin in an unreported English decision, Smith v. Johnson & Co., *cited in* Wilkinson v. Downton, [1897] 2 Q.B. 57, 61.
67. [1925] 1 K.B. 141.
68. One child was actually run over by the truck. The court apparently did not consider that fact important to the issue of liability. *See* Magruder, *supra* note 41, at 1039.
69. Hambrook v. Stokes, [1925] 1 K.B. 141, 147.
70. *Id.* at 145.
71. The *Hambrook* court stated:

A Maryland case, *Bowman v. Williams,*[72] is factually analogous to and is often cited in connection with *Hambrook.* In *Bowman,* a runaway truck collided into the basement of the plaintiff's house. It was unclear whether the plaintiff, who watched the collision from upstairs, feared for his own safety or for that of his two young children who were playing in the basement at the time. The defendants contended that the father could not recover for his physical injuries resulting from fright unless his fright was for his own safety.[73] The Court of Appeals of Maryland rejected this argument, citing *Hambrook v. Stokes.*[74] Like *Hambrook, Bowman* indicated that the plaintiff was within the zone of danger.[75] Cases subsequent to *Bowman* have been inconsistent in awarding damages to a plaintiff within the zone whose emotional injury was caused by fear for another.[76]

When a plaintiff is outside the zone of danger, courts have been more reluctant to allow recovery. The first case to squarely address the issue,[77] *Waube v. Warrington,*[78] denied a cause of action on the basis

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> I can find no principle to support the self-imposed restriction stated in the judgment of Kennedy J. in *Dulieu v. White & Sons*, that the shock must be a shock which arises from a reasonable fear of immediate personal injury to oneself. It appears to be inconsistent with [earlier decisions]. It would result in a state of the law in which a mother, shocked by fright for herself, would recover, while a mother shocked by her child being killed before her eyes, could not, and in which a mother traversing the highway with a child in her arms could recover if shocked by fright for herself while if she could be cross-examined into an admission that the fright was really for her child, she could not.

Id. at 157 (footnotes omitted).

72. 164 Md. 357, 165 A. 182 (1933).
73. *Id.* at 400, 165 A. at 183.
74. *Id.* at 401-02, 165 A. at 183-84.
75. The court of appeals in *Bowman* explained:
> Here there was imminent danger of physical contact that confronted the plaintiff, who had visible reason to apprehend that the impending peril caused by the negligent act or omission of the defendants' servants with respect to their duty to him would not only happen but would also crush and damage the building and inflict the threatened physical injury upon his children in the basement and himself in the dining room of the house. There was no basis to differentiate the fear caused to the plaintiff for himself and for his children, because there is no possibility of division of an emotion which was instantly evoked by the common and simultaneous danger of the three.

Id. at 403, 165 A. at 184.

76. *Compare* Lessard v. Tarca, 20 Conn. Supp. 295, 133 A.2d 625 (1957) (allowing recovery) *and* Greenberg v. Stanley, 51 N.J. Super. 90, 143 A.2d 588 (1958) (same) *with* Klassa v. Milwaukee Gas Light Co., 273 Wis. 176, 77 N.W.2d 397 (1956) (denying recovery).
77. In a 1912 case, a bystander outside the zone of danger recovered damages but the court did not directly consider the issue. Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (1912). In *Spearman*, the plaintiff and her husband had just stepped from their mule drawn buggy when the defendant's negligent operation of his automobile frightened the mule and caused it to run away with two of the plaintiff's children still inside the buggy. The plaintiff alleged physical injury caused by her emotional distress at the thought of injury to her children. The court was

that no duty is owed to a bystander outside the zone of danger.[79] In *Waube,* the plaintiff's wife suffered shock and died as a result of seeing her daughter struck by an automobile, though the mother was not herself in danger of being struck. The court held that because of the remote possibility that a third person would be emotionally injured by a defendant's careless use of his automobile, allowing recovery would subject the defendant to disproportionate liability, and would allow fraudulent claims and unlimited liability.[80]

In reaching its decision, the *Waube* court was sharply critical of the 1925 English decision, *Hambrook v. Stokes.*[81] Although *Hambrook* indicated that it considered the plaintiff within the zone of danger, the court implied that its decision was not based on this factor. Rather, the court advocated a traditional negligence approach, based on foreseeability and proximate cause, instead of an arbitrary zone based on policy considerations, to determine the basis for liability in bystander cases.[82] Of the two cases, later decisions sided with *Waube.*[83]

Following *Waube,* the zone of danger rule remained unscathed for over thirty years.[84] The same public policy considerations that failed to sustain the impact rule were embraced by courts wary of increasing litigation. Although clearly the majority rule, the zone of danger rule may have reached its apogee in *Amaya v. Home Ice, Fuel & Supply Co.,*[85] a decision by the Supreme Court of California.

In *Amaya,* the court denied a cause of action to a mother who saw her son run over by a truck. In a paradigm expression of the policy-

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aware of "Kennedy's dictum" since it cited *Dulieu v. White & Sons* in connection with another matter, but it did not address, and apparently the parties did not argue, the status of the plaintiff-bystander.

78. 216 Wis. 603, 258 N.W. 497 (1935).
79. *Id.* at 605, 258 N.W. at 497-98.
80. *Id.* at 613, 258 N.W. at 501.
81. [1925] 1 K.B. 141. *Waube*, which held that *Hambrook*'s majority mistakenly approached the case from the standpoint of proximate cause, adopted the reasoning of the dissent in *Hambrook*. The *Hambrook* dissent stated that it would be a considerable and unwarranted extension of the duty of vehicle owners towards others in or near the highway to include an obligation not to do anything to render them liable to harm through nervous shock caused by the sight or apprehension of damage to third persons. Waube v. Warrington, 216 Wis. 603, 611, 258 N.W. 497, 500 (1935) (quoting Hambrook v. Stokes, [1925] 1 K.B. 141, 163).
82. [1925] 1 K.B. 141, 153.
83. In a Maryland case that is perhaps the most often cited decision in connection with *Waube*, a mother saw her two daughters struck and killed by a vehicle. Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952). The court denied the mother a cause of action in an opinion similar to that in *Waube*. For a further discussion of *Resavage*, see *infra* notes 152-62 and accompanying text. For a listing of cases denying recovery to a plaintiff outside the zone of danger, see Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 304, 379 P.2d 513, 528, 29 Cal. Rptr. 33, 38 (1963).
84. The Supreme Court of California was the first jurisdiction explicitly to reject the zone of danger rule. Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). For a discussion of *Dillon*, see *infra* text accompanying notes 99-104.
85. 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

based duty argument versus the traditional negligence approach, the *Amaya* court held that "the negligence issue, i.e., the *violation* of duty,"[86] is for the court and not the jury to decide. Otherwise, were liability defined solely in terms of foreseeability, a jury question would arise since reasonable minds might differ as to whether an injury is foreseeable.[87] The court took the following view of duty: "[d]uty is only a word with which we state our conclusion . . . ."[88] The court indicated that foreseeability of harm is only one factor to be considered in forming that conclusion.[89] With respect to the "administrative factor," the *Amaya* court stated that the problems of proof remained due to inadequate medical knowledge,[90] and expressed the difficulty in determining the time and space requirements the plaintiff's presence must satisfy in relation to the accident.[91] Under its "socio-economic and moral factor" analysis, the court argued that the insurance system could not adequately and fairly absorb the costs of liability,[92] and reiterated *Waube v. Warrington's*[93] position that a defendant's liability to a plaintiff outside the zone of danger would be disproportionate to his wrong.[94]

The *Amaya* decision provoked a lengthy dissent that argued the lack of foundation of the policy considerations underlying the majority's notion of duty.[95] The dissent, which took an approach to duty based on foreseeability,[96] reasoned that an emotionally injured bystander is not an unforeseeable plaintiff.[97] Five years later the

86. *Id.* at 308, 379 P.2d at 521, 29 Cal. Rptr. at 41.
87. *Id.* at 308, 379 P.2d at 520, 29 Cal. Rptr. at 40.
88. *Id.* at 308, 379 P.2d at 521, 29 Cal. Rptr. at 41 (quoting Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953)).
89. *Amaya*, 59 Cal. 2d at 310, 379 P.2d at 522, 29 Cal. Rptr. at 42.
90. *Id.* at 311, 379 P.2d at 523, 29 Cal. Rptr. at 43. For support, the opinion cited Smith, *supra* note 37. *Amaya*, 59 Cal. 2d at 312, 379 P.2d at 523, 29 Cal. Rptr. at 43; *cf.* Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979) (modern medical science can show causal link between event and emotional distress).
91. *Amaya*, 59 Cal. 2d at 312-13, 379 P.2d at 523-24, 29 Cal. Rptr. at 43-44. The time and space requirements considered by the *Amaya* court were suggested by Dean Prosser in W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 182 (2d ed. 1955), and were adopted by California in 1968. Dillon v. Legg, 68 Cal. 2d 728, 740-41, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968); *see infra* note 102 and accompanying text.
92. *Amaya*, 59 Cal. 2d at 314, 379 P.2d at 525, 29 Cal. Rptr. at 45.
93. 216 Wis. 603, 258 N.W. 497 (1935).
94. *Amaya*, 59 Cal. 2d at 315, 379 P.2d at 525, 29 Cal. Rptr. at 45 (Gibson, C.J., Peters & Peek, J.J., dissenting).
95. *Id.* at 324-31, 379 P.2d at 531-35, 29 Cal. Rptr. at 51-55.
96. *Id.* at 323-24, 379 P.2d at 530, 29 Cal. Rptr. at 50.
97. In a much cited opinion, Judge Cardozo stated that the plaintiff's presence, not just his injury, must be foreseeable. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928). Both *Amaya* and *Waube* took the position that an emotionally injured bystander is an unforeseeable plaintiff. *Amaya*, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935); *see also* Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952) (same). Although *Waube* relied on *Palsgraf* for support, one source suggests that another

Supreme Court of California adopted the position of *Amaya's* dissent in *Dillon v. Legg,*[98] the first case to reject the zone of danger rule in favor of the foreseeability standard.

C. The Foreseeability Rule

1. *Dillon v. Legg*[99]

Dillon provided the Supreme Court of California with the ideal factual setting for abandoning the zone of danger rule. The case involved two plaintiffs, one arguably within the zone of danger, and the other clearly not. The plaintiffs, a mother and one daughter, witnessed the death of another family member caused by the defendant's automobile. The *Dillon* court held that it would be fundamentally unfair to allow a cause of action in one case but not in the other. Assuming impact is not necessary, reasoned the court, the zone of danger rule must fail because its only justification is that one within the zone will fear the danger of impact.[100] *Dillon* attacked the traditional arguments against recovery and, because of the lack of precedent, relied on English decisions, principally *Hambrook v. Stokes.*[101] Despite its formulation of a reasonable foreseeability test as the sole criterion for liability, the court added "factors" to be considered for recovery:[102] (1) the plaintiff must be situated near the accident; (2) shock must result from a direct emotional impact upon the plaintiff from a contemporary ob-

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decision, Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921) (Cardozo, J.), is more on point. *See* C. GREGORY & H. KALVEN, *supra* note 1, at 998. In *Wagner*, the plaintiff's brother was thrown from the defendant's train. The train stopped, and plaintiff alighted and walked along a trestle to a bridge in an effort to find his brother. The plaintiff missed his footing and fell. The court said:

> Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer. The state that leaves an opening in a bridge is liable to the child that falls into the stream, but liable also to the parent who plunges to its aid.

Wagner, 232 N.Y. at 180, 133 N.E. at 437-38 (citations omitted). In a recent English decision, the court partially relied on the rescue analogy in rejecting the zone of danger rule, and quoted an excerpt from the above passage. McLoughlin v. O'Brian, 1983 A.C. 410.

98. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (Tobriner, J.). Although Justice Peters authored the dissent in *Amaya*, he quoted the district court of appeal decision in its entirety except for its statement of facts. Amaya v. Home Ice, Fuel & Supply Co., 23 Cal. Rptr. 131 (1962) (Tobriner, J.), *quoted in Amaya*, 59 Cal. 2d 295, 320-32, 379 P.2d 513, 528-36, 29 Cal. Rptr. 33, 48-56 (1963) (Peters, J., dissenting). The district court of appeal decision, and the opinion in *Dillon*, were authored by Justice Tobriner.
99. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
100. *Id.* at 133, 41 P.2d at 915, 60 Cal. Rptr. at 75.
101. *Id.* at 744-46, 441 P.2d at 422-24, 69 Cal. Rptr. at 82-84.
102. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80. The *Dillon* court stated that the reasonable foreseeability test should be applied on a case-by-case basis.

servance of the accident and; (3) the plaintiff and the victim must be closely related. Though not necessarily couched in mandatory terms,[103] the *Dillon* factors have been strictly applied by most courts amenable to the foreseeability standard both in California and elsewhere.[104]

Several states,[105] including New York in *Tobin v. Grossman,*[106] rejected *Dillon's* approach and clung to the zone of danger rule. In *Tobin,* a mother who did not witness the accident, but heard the screech of automobile brakes, ran from her home to see her two year old child lying seriously injured in the road. The *Tobin* court rejected the mother's action for mental pain and suffering on the basis that "the indirect harm" of emotional injury is the "risk of living and bearing children."[107] The court, which was concerned with the possibility of imposing unlimited liability, felt that the *Dillon* requirements would not restrain the bounds of liability and predicted that *Dillon's* contemporaneous observance requirement would soon disappear.[108]

Archibald v. Braverman,[109] a California case decided three months after *Tobin,* apparently abandoned *Dillon's* contemporaneous observance requirement. That California was not headed toward unlimited liability, however, is apparent from subsequent decisions. Several court of appeal decisions refused to give much credence to *Archibald.*[110] *Krouse v. Graham,*[111] the first Supreme Court of California decision after *Dillon* to discuss the issue, affirmed the contemporaneous observance requirement, although it extended "observance" to mean

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103. *Id.* at 741, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81.
104. *See, e.g.*, McGovern v. Piccolo, 33 Conn. Supp. 225, 372 A.2d 989 (1976); Gustafson v. Paris. 67 Mich. App. 363, 241 N.W.2d 208 (1976); Perlmutter v. Whitney, 60 Mich. App. 268, 230 N.W.2d 390 (1975).
105. *E.g.*, Welsh v. Davis, 307 F. Supp. 416 (D. Mont. 1969); Jelley v. LaFlame, 108 N.H. 471, 238 A.2d 728 (1968) (per curiam); Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 414, 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) (dictum), *overruled in* Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979); Shelton v. Russel Pipe & Foundry Co., 570 S.W.2d 861 (Tenn. 1978); Guilmette v. Alexander, 128 Vt. 116, 259 A.2d 12 (1969); Grimsby v. Samson, 85 Wash. 2d 52, 530 P.2d 291 (1976).
106. 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).
107. *Id.* at 619, 249 N.E.2d at 424, 301 N.Y.S.2d at 561-62. For a suggestion that New York may be moving from *Tobin* towards *Dillon*, see Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute Between California and New York*, 51 ST. JOHN'S L. REV. 1, 35-39 (1976).
108. *Tobin*, 24 N.Y.2d at 617, 29 N.E.2d at 423, 301 N.Y.S.2d at 560.
109. 275 Cal. App. 2d 253, 78 Cal. Rptr. 723 (1969).
110. *See* Parsons v. Superior Court, 81 Cal. App. 3d 505, 146 Cal. Rptr. 495 (1978); Mobaldi v. Board of Regents, 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976); Powers v. Sissoev, 39 Cal. App. 3d 865, 114 Cal. Rptr. 868 (1974); Jansen v. Children's Hosp. Medical Center, 31 Cal. App. 3d 22, 106 Cal. Rptr. 863 (1973); Comment, *Duty, Foreseeability and the Negligent Infliction of Emotional Distress: Liability to the Bystander—Recent Developments*, 30 MERCER L. REV. 735, 740-41 (1979).
111. 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977).

perception through any of the senses, not just through sight.[112] Cases subsequent to *Krouse* have upheld the *Dillon* requirements.[113]

Some jurisdictions have followed *Dillon*'s foreseeability standard although it remains the minority rule.[114] For example, in *D'Ambra v. United States,*[115] a mother saw her son struck and killed by a mail truck. The United States District Court for the District of Rhode Island added a fourth requirement to the *Dillon* standard: the presence of the plaintiff must be foreseeable.[116] Since the federal court decided that the mother's presence was foreseeable, it certified a question to the Supreme Court of Rhode Island asking whether Rhode Island law would permit a mother outside the zone of danger to recover damages for emotional distress.[117] Because the state court answered in the affirmative, it revived the controversy surrounding duty, proximate cause, and foreseeability. The *D'Ambra* court did not adopt a foreseeability-alone standard such as *Dillon*'s, but was concerned with policy considerations in favor of recovery.[118] It expressed some satisfaction

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112. *Id.* at 76, 562 P.2d at 1031, 137 Cal. Rptr. at 872.
113. *See, e.g.*, Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); Hathaway v. Superior Court, 112 Cal. App. 3d 728, 169 Cal. Rptr. 435 (1980). For a discussion of these decisions and post-*Dillon* California law, see Nolan & Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583 (1981).
114. The Supreme Court of Hawaii was the first appellate court to follow *Dillon*. Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970). *Rodrigues*, however, did not involve a typical bystander outside the zone of danger situation. Rather, the emotional distress was caused by the negligent flooding of the plaintiff's home. But a later Hawaii case, Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974), involved the former situation. In *Leong*, a grandmother saw her grandson struck and killed by an automobile. The Supreme Court of Hawaii clearly rejected the zone of danger rule. *Id.* at 408, 520 P.2d at 765. The defendant alleged that the grandmother could not recover because of the absence of a blood relationship between her and the victim. The *Leong* court disagreed, partly because of Hawaii's unique customs of family living. For other cases following *Dillon*'s approach, see D'Amicol v. Alvarez Shipping Co., 31 Conn. Supp. 164, 326 A.2d 129 (1973); Campbell v. Animal Quarantine Station, 63 Hawaii 557, 632 P.2d 1066 (1981); Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974); Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970); Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981); Culbert v. Sampson's Supermarkets, 444 A.2d 433 (Me. 1982); Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978); Williams v. Citizens Mut. Ins. Co. of America, 94 Mich. App. 762, 290 N.W.2d 76 (1980); Toms v. McConnell, 45 Mich. App. 647, 207 N.W.2d 140 (1973); Corso v. Merrill, 119 N.H. 647, 406 A.2d 300 (1979); Portee v. Jaffee, 81 N.J. 88, 417 A.2d 521 (1980); Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979); D'Ambra v. United States, 114 R.I. 643, 338 A.2d 524 (1975); Landreth v. Reed, 540 S.W.2d 486 (Tex. Civ. App. 1978); Hunsley v. Giard, 87 Wash. 2d 424, 523 P.2d 1096 (1976).
115. 354 F. Supp. 810 (D.R.I. 1973).
116. *Id.* at 819.
117. *See* D'Ambra v. United States, 114 R.I. 643, 338 A.2d 524 (1975).
118. The *D'Ambra* court listed three policy issues—moral, economic, and administrative—as relevant to the question of whether a plaintiff outside the zone of danger can recover damages. D'Ambra v. United States, 114 R.I. 643, 652, 338 A.2d 524, 528 (1975). The court found that because of the potential debilitating effects of psychic injuries in general and since the plaintiff suffered actual emotional harm

with the zone of danger rule,[119] but because of the unique nature of the child-mother relationship the court stated it would "deny psychological reality" to hold the presence of the mother unforeseeable as a matter of law.[120]

In contrast to the Supreme Court of Rhode Island's approach, *D'Amicol v. Alvarez Shipping Co.*[121] adopted *Dillon* in its entirety. And while the federal court in *D'Ambra* advocated a detailed, factor-based analysis into the foreseeability of a plaintiff's presence,[122] another court[123] stated that "when a child is endangered, it is not beyond contemplation that its mother will be somewhere in the vicinity, and will suffer nervous shock."[124] Although courts differed as to whether to require the foreseeability of a plaintiff's presence, and how that criterion should be judged, it was not until 1978 that a court challenged the need of the plaintiff's presence at the scene of an accident.

2. Beyond *Dillon*

In 1978, Massachusetts went from one of the most conservative jurisdictions to the most liberal in this area. *Dziokonski v. Babineau*[125] not only overruled *Spade v. Lynn & Boston Railroad*'s[126] impact requirement, but in the process also rejected strict application of *Dillon*'s requirements.

In *Dziokonski,* a young child was struck by an automobile as she walked away from her school bus. Her mother, who arrived at the scene shortly after the accident, died as a result of her anguish while en route to the hospital with her daughter. In addition, the child's father died as a result of the physical and emotional injuries he suffered because of his daughter's injury and his wife's death. Under a *Dillon*

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accompanied by physical symptoms, it answered the moral issue in favor of recovery. *Id.* at 654, 338 A.2d at 529-30. As to the economic issue, *D'Ambra* stated that perhaps a driver can best bear the cost of injury since he most likely will be insured. *Id.* at 654, 338 A.2d at 530. The court was most concerned with the administrative difficulties of a rule that would allow recovery to one outside the zone. Despite this concern, the court held that the zone of danger rule would be relaxed when a mother witnesses an injury to her child because of the "overwhelming impact of the mother's and child's mental and emotional relationship." *Id.* at 657, 338 A.2d at 531.

119. *Id.* at 656, 338 A.2d at 531.

120. *Id.* at 657, 338 A.2d at 531.

121. 31 Conn. Supp. 164, 326 A.2d 129 (1973).

122. The *D'Ambra* court listed the following factors:

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

D'Ambra v. United States, 354 F. Supp. 810, 820 (D.R.I. 1975).

123. Toms v. McConnell, 45 Mich. App. 647, 207 N.W.2d 140 (1973).

124. *Id.* at 656, 207 N.W.2d at 145 (quoting W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 353 (3d ed. 1964)).

125. 375 Mass. 555, 380 N.E.2d 1295 (1978).

126. 168 Mass. 285, 47 N.E. 88 (1897).

approach, the mother would have failed *Dillon*'s second requirement, contemporaneous sensory observance, and the father would have failed both that criterion and the first requirement, location near the scene of the accident. In allowing the administrator of the parents' estates to maintain an action for each, the *Dziokonski* court held that when a person negligently injures another through the use of an automobile, it is reasonably foreseeable that someone with sufficient emotional attachment to the injured party will be emotionally affected.[127]

Although *Dziokonski* stated that it is per se reasonably foreseeable that a third party will be emotionally affected by a defendant's negligent use of an automobile, it added other requirements to guard against unlimited liability. First, the third party must sustain substantial physical injury and prove that his injury was caused by the defendant's negligence.[128] Second, liability should depend on several factors, such as where, when, and how the injury to the victim entered the plaintiff's consciousness, and to what degree a familial or other relationship existed between the plaintiff and the victim.[129]

Other than Massachusetts, the only other state[130] that has allowed recovery based on a foreseeability standard without the *Dillon* requirements is Hawaii. In *Campbell v. Animal Quarantine Station,*[131] the Supreme Court of Hawaii construed its earlier decisions to require that the *Dillon* requirements be used as an aid to determine the genuineness and degree of mental distress, not as a bar to recovery.[132]

D. Damages Without Physical Injury

In addition to the requirements of the impact, zone of danger, and foreseeability rules, a traditional obstacle for a plaintiff has been the need to show a physical injury. One authority has observed that "[t]he mere temporary emotion of fright not resulting in physical injury is, in contemplation of law, no injury at all, and hence no foundation of an

127. Dziokonski v. Babineau, 375 Mass. 555, 568, 380 N.E.2d 1295, 1302 (1978).
128. *Id.*
129. *Id.*
130. England has also ruled that contemporaneous observance is not a prerequisite to a cause of action. McLoughlin v. O'Brian, 1983 A.C. 410 (decided in 1982 and previously reported in [1982] 2 W.L.R. 982). In *McLoughlin*, the plaintiff's husband and their four children were involved in an automobile accident. The plaintiff was at home at the time and first learned of the accident two hours later. She went to the hospital where she learned that her youngest daughter had been killed and that her husband and her other children had been severely injured. The plaintiff alleged that she suffered emotional distress and accompanying physical injuries. Although Lord Bridge quoted a large portion of *Dillon* in support of the foreseeability standard, he considered *Dillon*'s guidelines to be too rigid. Because the plaintiff was so far removed in time and space from the accident, *McLoughlin* represents the most liberal approach to date.
131. 63 Hawaii 557, 632 P.2d 1066 (1981). For a discussion of *Campbell* see Note, Campbell v. Animal Quarantine Station: *Negligent Infliction of Mental Distress*, 4 HAWAII L. REV. 237 (1982).
132. *Id.* at 561-62, 632 P.2d at 1069.

action."[133] Until recently, all plaintiffs have had to plead and prove the existence, or at least manifestations, of a physical injury; emotional tranquility has not been accorded independent legal protection. Damages for emotional harm have always been parasitic, attached to a recognized, protected invasion of a plaintiff's physical interest.

In 1970, the Supreme Court of Hawaii in *Rodrigues v. State*[134] became the first court to allow recovery in the absence of proof of a physical injury. The *Rodrigues* court noted that if emotional distress is intentionally inflicted, it is entitled to independent legal protection. The court adopted the position in the *Restatement (Second) of Torts* on intentional infliction of emotional distress[135] requiring serious distress, and held that "serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."[136]

In *Molien v. Kaiser Foundation Hospitals,*[137] California abandoned the requirement of physical injury. In *Molien*, the defendant negligently misdiagnosed the plaintiff's wife as having syphilis, and told her to inform her husband. Harmful results to their marriage followed. Like the *Rodrigues* court, the *Molien* court held that sufficient methods of proof other than physical injury exist to prove emotional distress.[138]

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133. Throckmorton, *supra* note 12, at 266.

134. 52 Hawaii 156, 472 P.2d 509 (1970).

135. The RESTATEMENT (SECOND) OF TORTS § 246 comment j (1965), states in part:

> The rule stated in this Section applies only where the emotional distress has in fact resulted, and where it is severe. Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trival emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.

136. *Rodrigues*, 52 Hawaii at 173, 472 P.2d at 520 (1970). This language was later adopted by another Hawaii case, Leong v. Takasaki, 55 Hawaii 398, 570 P.2d 758 (1974).

137. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). For a discussion of *Molien*, see Note, Molien v. Kaiser Foundation Hospitals: *Negligence Actions for Emotional Distress and Loss of Consortium Without Physical Injury*, 69 CALIF. L. REV. 1142 (1981); Comment, *Negligent Infliction of Emotional Distress: New Horizons After* Molien v. Kaiser Foundation Hospitals, 13 PAC. L.J. 179 (1981); Note, Molien v. Kaiser Foundation Hospitals: *Negligent Infliction of Emotional Distress*, 8 PEPPERDINE L. REV. 817 (1981); Note, *Negligent Infliction of Serious Emotional Distress is Cognizable in California as an Independent Tort and an Averment of Physical Injury is No Longer Necessary to Support the Action; An Alleged Emotional Injury to a Plaintiff's Spouse Will State a Cause of Action for Loss of Consortium by the Plaintiff*, 50 U. CIN. L. REV. 200 (1981).

138. The court offered two reasons for not requiring physical manifestations of emotional distress:

> First, the classification is both overinclusive and underinclusive when viewed in light of its principal purpose of screening false claims. It is

In *Culbert v. Sampson's Supermarkets,*[139] the Supreme Judicial Court of Maine overruled a prior decision[140] that required "objective symptomatology." Among other reasons,[141] *Culbert* discarded the requirement of physical manifestations of distress because modern scientific advances have made an emotional injury claim difficult to fabricate.[142] *Culbert* did, however, consider physical manifestations as highly persuasive evidence.[143]

Other jurisdictions have followed the reasoning of *Culbert.*[144] Missouri, in *Bass v. Nooney Co.,*[145] is the most recent state to discard the requirements of proof of a physical injury. The *Bass* court described the rule as illogical and arbitrary,[146] and stated that the requirement was impractical because of the potential difficulty in distinguishing a physical injury from a mental and emotional injury.[147] In lieu of proof of physical injury, an emotional injury must be foreseeable, medically diagnosable, and of medically significant severity.[148] This trend, however, has been resisted elsewhere. For example, Massachusetts still adheres to the requirement of proof of a physical injury.[149]

E. Maryland Law

Maryland refused to accede to the rigidity of the impact rule as early as 1909 in *Green v. T.A. Shoemaker & Co.*[150] This position, how-

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> overinclusive in permitting recovery for emotional distress when the suffering accompanies or results in any physical injury whatever, no matter how trivial. . . . More significantly, the classification is underinclusive because it mechanically denies court access to claims that may well be valid and could be proved if the plaintiff were permitted to go to trial. . . . The second defect in the requirement of physical injury is that it encourages extravagant pleading and distorted testimony.

Molien, 27 Cal. 3d at 928-29, 616 P.2d at 820, 167 Cal. Rptr. at 838.

139. 444 A.2d 433 (Me. 1982).
140. Wallace v. Coca-Cola Bottling Plants, 269 A.2d 117 (Me. 1970), *overruled in* Culbert v. Sampson's Supermarkets, 444 A.2d 433 (Me. 1982).
141. The *Culbert* court paraphrased the passage from *Molien* quoted in *supra* note 138.
142. *Culbert*, 444 A.2d at 437.
143. *Id.*
144. *E.g.*, Chapetta v. Bowman Transp. Inc., 415 So. 2d 1019 (La. Ct. App. 1982); Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979). For a discussion of *Sinn*, see Note, *A Mother Who Witnesses the Act Which Causes Death or Serious Injury to her Child has a Cause of Action for Negligent Infliction of Mental Distress. She Need Not Herself be Within the Zone of Danger Since it is Foreseeable that She Will Suffer Mental Trauma*, 18 J. FAM. L. 643 (1980); Note, *Recovery of Damages for Negligently Caused Emotional Distress Suffered by Bystander Not Precluded Because Outside "Zone of Danger,"* 53 TEMP. L.Q. 944 (1980).
145. 646 S.W.2d 765 (Mo. 1983).
146. *Id.* at 771-72.
147. *Id.*
148. *Id.* at 772-73.
149. Payton v. Abbot Labs, 386 Mass. 540, 437 N.E.2d 171 (1982). *But see* Simon v. Solomon, 385 Mass. 91, 431 N.E.2d 556 (1982) (allowing cause of action when emotional distress caused by reckless conduct).
150. 111 Md. 69, 73 A. 688 (1909).

ever, has not progressed beyond the zone of danger rule. *Bowman v. Williams*[151] stated that a person's fear need not be for himself. Although the *Bowman* court believed the plaintiff was in the zone of danger, it did not indicate whether this fact was dispositive. Despite the imprecision of *Bowman*'s holding, the court of appeals construed it in *Resavage v. Davies*[152] to mean that a plaintiff cannot recover if he is outside the zone of danger.

Resavage, because it represents the classic zone of danger bystander situation, is frequently cited by other courts.[153] In *Resavage,* while the plaintiff was standing on her front porch, she saw an automobile jump a curb and kill her two daughters. In denying a cause of action, the court relied on the *Waube-Palsgraf* considerations of duty, and concluded that no duty extended to the plaintiff.[154] The court distinguished *Bowman* on the ground that the plaintiff in *Bowman* was in the zone of danger,[155] and *Hambrook v. Stokes*[156] on the ground that the defendant in that case admitted a breach of duty.[157]

The dissent in *Resavage* argued not only the undesirability of applying the zone of danger rule to bystanders,[158] but also that previous Maryland decisions mandated that the court not follow the rule.[159] The dissent contended that decisions dating back to *Green v. T.A. Shoemaker & Co.*[160] settled that Maryland allowed recovery for emotional

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151. 164 Md. 397, 165 A. 182 (1933); *see supra* text accompanying notes 72-76.

152. 199 Md. 479, 86 A.2d 879 (1952).

153. *See e.g.*, Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 308, 379 P.2d 519, 520, 29 Cal. Rptr. 33, 40 (1963); Jelley v. LaFlame, 108 N.H. 471, 472, 238 A.2d 728, 729 (1968); Whetham v. Bismarck Hosp., 197 N.W.2d 678, 681 (N.D. 1972).

154. *Resavage*, 199 Md. at 484-85, 86 A.2d at 881-82.

155. *Id.* at 486, 86 A.2d at 882.

156. [1925] 1 K.B. 141.

157. *Resavage*, 199 Md. at 487, 86 A.2d at 883.

158. *Id.* at 495, 86 A.2d at 887 (Delaplaine & Markell, J.J., dissenting).

159. *Id.* at 497-98, 86 A.2d at 888. In addition to *Bowman*, the dissent cited two other decisions: Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951); Great Atl. & Pac. Tea Co. v. Roch, 160 Md. 189, 153 A.2d 22 (1931). In *Roch*, a store manager sent a package containing a dead rodent to a nervous woman customer. Although an employee intentionally placed the dead animal in the package, the court went to great length to allow the case to go to the jury on a negligent mistake theory. The dissent in *Resavage* argued that the court's decision was inconsistent with *Roch* since the court found that a duty existed in the latter but not in the former. *Id.* at 495, 86 A.2d at 887 (Delaplaine & Markell, J.J., dissenting).

Mahnke involved particularly gruesome facts. In that case a young child saw her father fatally shoot her mother. Her father confined her in the same room with the corpse for six days. Thereafter the child's father committed suicide in her presence and, in the process, drenched her in his blood. The *Resavage* dissent conceded that *Mahnke* was perhaps distinguishable since it involved intentionally inflicted emotional distress, but stated that, at least with respect to willfulness, little difference existed between homicide with a gun and homicide by automobile. *Id.* at 496-97, 86 A.2d at 887 (Delaplaine & Markell, J.J., dissenting).

160. 111 Md. 69, 73 A. 688 (1909).

injuries when proximately caused and foreseeable by the defendant.[161] The dissent also believed that the plaintiff's fear in *Bowman,* or possibility of fear, was not dispostive.[162]

Since *Resavage,* the Court of Appeals of Maryland has not been presented with analogous facts.[163] In *Dageforde v. Potomac Edison Co.,*[164] the issue of bystander recovery was not squarely before the court of special appeals since the plaintiffs failed to prove negligence. Consequently, the *Dageforde* court expressed no opinion as to whether a person outside the zone could maintain an action.[165]

III. ANALYSIS AND PROJECTION

A. National Trends

Although it has perservered for nearly a hundred years, the impact rule is all but extinct today. Missouri and Illinois recently abandoned the impact rule,[166] and it is presently under review by the Supreme Court of Florida.[167] At present, only three states adhere to the rule,[168] and of these Kentucky recently defined impact to include the taking of x-rays.[169] The rule is neither practical nor logical. Those states that have discontinued the rule have seen no real increase in litigation.[170] In addition, the existence of impact neither makes an emotional injury more proximately caused nor easier for the jury to determine damages. The continued existence of the rule is largely due to a strong desire to adhere to precedent rather than a defense of its merits. Under the weight of almost unanimous disapproval it seems likely that the impact rule will soon disappear entirely.

Though the complete demise of the impact rule seems imminent, continued controversy exists between the zone of danger and foreseeability rules. The foreseeability standard, while the minority approach, represents an unmistakable and perhaps irresistible trend since the arguments for retaining the zone of danger rule in bystander cases simply appear invalid.

The first argument in support of the zone of danger rule is that the

161. *Resavage*, 199 Md. at 489, 86 A.2d at 884 (Delaplaine & Markell, J.J., dissenting).
162. *Id.* at 492, 86 A.2d. at 885.
163. *Cf.* White v. Diamond, 390 F. Supp. 867, 873 (D. Md. 1974) (federal district court remarked that Maryland's law was clear and dismissed the complaint involving a plaintiff outside the zone of danger).
164. 35 Md. App. at 37, 369 A.2d at 93 (1977).
165. *Id.* at 44, 369 A.2d at 97.
166. The impact rule was abandoned in Illinois in Rickey v. Chicago Trans. Auth., 98 Ill. 2d 546, 457 N.E.2d 1 (1983), and in Missouri in Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983).
167. Champion v. Gray, 420 So. 2d 348 (Fla. App. 1982), *appeal docketed*, No. 62,830 (Fla. Nov. 5, 1982).
168. *See supra* note 64.
169. Deutsch v. Schein, 597 S.W.2d 141 (Ky. 1980). The Kentucky court's approach is unsatisfactory since it reflects an obvious displeasure with the impact rule.
170. *See* McNiece, *supra* note 41, at 41 n.102.

emotionally injured bystander is an unforeseeable plaintiff. The zone of danger rule was predicated on the assumption that emotional harm is unlikely to be suffered by a person who does not fear for his own safety. While generally true, the application of this proposition to bystander cases is unwarranted. A mother who watches her child struck by an automobile may fear solely for the child, regardless of whether the mother is in the zone of physical danger. Therefore, no sound reason exists to hold that a bystander is unforeseeable as a matter of law. Cases, such as *Waube v. Warrington*[171] and *Resavage v. Davies,*[172] that have relied on *Palsgraf v. Long Island Railroad*[173] in holding an emotionally injured bystander to be unforeseeable as a matter of law, have misinterpreted *Palsgraf*'s conception of duty. In *Palsgraf*, the defendant did not owe a duty to the plaintiff because her presence was unforeseeable. While an emotionally injured bystander may very well be unforeseeable, it does not follow that this will always be so. A case-by-case approach based on foreseeability would allow a plaintiff to present his case and have a jury decide whether the defendant's conduct created an unreasonable risk of emotional harm.

The second and most frequently offered reason in support of the zone of danger rule is that as a policy no duty should extend to a plaintiff outside the zone. The same policy considerations that led states to abolish the impact rule, however, appear to be equally unsupportive of the zone of danger rule. Medical science has advanced to the point that it is increasingly difficult for a plaintiff to falsify a claim for emotional injury.[174] When an emotional injury exists, a plaintiff can prove its causal connection to a negligent act with reasonable certainty.[175] An adoption of the foreseeability approach would allow the plaintiff to prove the extent and source of his injury. States that have followed the foreseeability rule have not experienced a significant increase in litigation and liability has been reasonably circumscribed.[176]

Fears of unlimited liability have not been confined to those states that follow the impact or zone of danger rules. The majority of states that have adopted the foreseeability approach since *Dillon v. Legg* have fashioned its "factors"[177] in determining foreseeability into strict requirements.[178] While factors such as location near the scene of an accident, contemporaneous observance of the accident, and a close relation to the victim are all highly relevant in bystander cases, they should not be inflexibly applied when the facts of a particular case warrant other-

171. 216 Wis. 603, 258 N.W. 497 (1935).
172. 199 Md. 479, 86 A.2d 879 (1952).
173. 248 N.Y. 339, 162 N.E. 99 (1928).
174. Sinn v. Burd, 486 Pa. 146, 159-62, 404 A.2d 672, 679-80 (1979).
175. *Id.* at 158-60, 404 A.2d at 678-79.
176. *See* Campbell v. Animal Quarantine Station, 63 Hawaii 557, 565, 632 P.2d 1066, 1071 (1981); Sinn v. Burd, 486 Pa. 146, 169-73, 404 A.2d 672, 684-86 (1979).
177. *See supra* text accompanying notes 102-04.
178. *See supra* text accompanying note 104.

wise. An immediate trend toward the *Dziokonski v. Babineau*[179] version of the foreseeability standard where the "*Dillon* requirements" were not applied, is questionable, however. Although Massachusetts later reaffirmed *Dziokonski,*[180] Hawaii[181] has been the only other foreseeability rule jurisdiction to forego the *Dillon* approach. As for those states that follow the impact or zone of danger rules, although it is unlikely that they will make a quantum leap to the *Dziokonski* approach, they will likely adopt the *Dillon* approach.

In addition to the arbitrary criteria of the impact and zone of danger rules, courts should also abolish the requirement of proof of a physical injury. Manifestations of a physical injury may be persuasive evidence of emotional distress, but it is not the exclusive or even necessarily the best method of proof. Conceivably, it may be easier for a plaintiff in one case to prove his emotional injury through a lack of ability to cope with stress, than a plaintiff in another case where physical manifestations are present. Moreover, many states recognize the independent tort of intentional infliction of emotional distress, which does not require proof of physical injury.[182] There does not appear to be a valid distinction in the types of proof required when the conduct complained of is negligent rather than intentional, since the problems of proof are the same.

B. Maryland Law

Although Maryland follows the zone of danger rule, such a course was not inevitable. The *Resavage* court read *Bowman* very restrictively. Even if *Bowman* was grounded upon a duty theory as contended by the *Resavage* court, it is not immediately clear why a duty should extend to a plaintiff inside the safety of his home but not to a plaintiff standing on her porch.[183] Maryland law has traditionally been hostile

179. 375 Mass. 555, 380 N.E.2d 1295 (1978).

180. Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (1980). For a discussion of *Ferriter*, see Note, *The Wife and Children Of an Injured Employee May Recover Damages from a Negligent Employer for Loss of Consortium and for Negligent Infliction of Mental Distress if the Shock of Viewing the Injuries at the Hospital Shortly After the Accident Caused Substantial Physical Injury, Even Though the Employee Receives Workmen's Compensation Benefits*, 50 U. CIN. L. REV. 237 (1981); Note, *Expanding Loss of Parental Society and Negligent Infliction of Emotional Distress—Allowing Recovery Despite Worker's Compensation Exclusive Remedy Provisions*: Ferriter v. Daniel O'Connell's Sons, Inc., 13 U. TOL. L. REV. 1401 (1982).

181. Campbell v. Animal Quarantine Station, 63 Hawaii 557, 632 P.2d 1066 (1981).

182. *See* Comment, *Negligently Inflicted Emotional Distress: The Case for an Independent Tort*, 59 GEO. L. REV. 1237, 1243 (1971).

183. The *Resavage* court took a geographical approach to duty. It agreed that no duty should have existed in *Waube* since the plaintiff was not in the highway. *See* Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935). The court contrasted *Waube* to *Spearman*, where the plaintiff was in the highway. *See* Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (1912). The *Resavage* court, however, ignored that the plaintiff in *Spearman* was not in the zone of danger, and that *Spear-*

to the expediency reasons that underlie the zone of danger approach,[184] and while *Resavage* remains the law, there are indications that Maryland may be headed toward a more liberal approach. For instance, in *Vance v. Vance,*[185] the husband left his wife and two children for another woman after eighteen years of marriage. After the wife obtained a decree for alimony and child support, the husband filed a motion to strike the decree and annul the marriage on the ground that their marriage was void since he was not divorced from his first wife at the time he married his present wife. The wife then brought suit against her husband for damages due to emotional distress as a result of her husband's negligent misrepresentation concerning his marital status at the time of their marriage. The court discussed Maryland cases on negligent infliction of emotional distress, including *Green v. T.A. Shoemaker & Co*[186] and *Bowman v. Williams,*[187] but curiously omitted *Resavage v. Davies.*[188] The *Vance* court intimated that Maryland does not support the traditional policy reasons against recovery of damages based on emotional distress.[189] Although the facts of *Vance* are dissimilar to a bystander situation, the court could have used the same policy reasons relied upon by *Resavage* to deny liability. That the court treated the case as any other negligence action may suggest that Maryland will not follow the zone of danger rule in subsequent cases. Also, while *Vance* reaffirmed *Bowman*'s requirement of a physical injury, it gave a liberal interpretation to the term "physical."[190]

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man, contrary to the court's view, did not allow recovery on a concession of duty. For a discussion of *Spearman*, see *supra* note 77. The court in *Resavage* explained that the Supreme Court of Washington allowed recovery in a 1935 case because a mother was apprehensive that a runaway truck would strike her house and injure her son, as in *Bowman*. *See* Frazee v. Western Dairy Products, 182 Wash. 578, 47 P.2d 1037 (1935). The *Resavage* court distinguished *Frazee* from Cote v. Litawa, 96 N.H. 174, 71 A.2d 792 (1950), where the accident occurred in front of the house, as in *Resavage*.

184. *See, e.g.*, Green v. T.A. Shoemaker & Co., 111 Md. 69, 81, 73 A. 688, 692 (1909) ("[t]he argument from mere expediency cannot commend itself to a Court of justice, resulting in the denial of a logical legal right and remedy in *all cases* because in *some* a fictitious injury may be urged as a real one") (emphasis in original); Bowman v. Williams, 164 Md. 397, 403-04, 165 A. 182, 184 (1933), *supra* note 47.
185. 286 Md. 490, 408 A.2d 728 (1979).
186. 111 Md. 69, 73 A. 688 (1909).
187. 164 Md. 397, 165 A. 182 (1933).
188. 199 Md. 479, 86 A.2d 879 (1952).
189. *Vance*, 286 Md. at 499-500, 408 A.2d at 733.
190. As the *Vance* court stated:

> We think it clear that *Bowman* provides that the requisite 'physical injury' resulting from emotional distress may be proved in one of four ways. It appears that these alternatives were formulated with the overall purpose in mind of requiring objective evidence to guard against feigned claims. The first three categories pertain to manifestations of a physical injury through evidence of an external condition or by symptoms of a pathological or physiological state. Proof of a 'physical injury' is also permitted by evidence of a 'mental state,' a conclusion consistent with the holdings in the *Green*, *Bowman* and *Roch* cases. In the context of the

IV. CONCLUSION

The decisional law pertaining to negligent infliction of emotional distress, particularly bystander cases, illustrates what may happen when unnecessarily doctrinaire approaches, based on policy considerations, are substituted for traditional negligence criteria. The adoption of arbitrary standards such as the impact and zone of danger rules were well-intentioned efforts at addressing fears of unlimited liability and false claims, but many deserving plaintiffs were left without a remedy, thus undermining the most fundamental premise of tort law—every wrong should have a remedy. Attempts to clarify the law, though, have met with stubborn and increasingly successful resistance. While fears of increased and contrived claims may be logical given the nature of the injury, these fears are unfounded. Courts that have recognized this proposition have relaxed rigid rules, but the foreseeability standard that has been substituted in their stead has not been completely free of arbitrary criteria. While certain factors, such as proximity to and observance of the accident, relationship to the victim, and physical symptoms, may be valuable indicia of the merits of a complaint, courts should not apply them so inflexibly as to preclude an otherwise provable claim.

The best approach may be to treat negligent infliction of emotional distress as any other negligence action, employing the criteria of foreseeability and proximate cause, keeping in mind the inherent difficulties of proof of injury and extent of damages to be awarded. While it is difficult to determine the bounds of liability in emotional injury cases, the judicial problems in this regard are not unique to claims of emotional harm and must be approached with both sensitivity and confidence that justice will be done. Nor should the judiciary abdicate its function in favor of legislative action. Too often a plaintiff is suspended between the court's refusal and the legislature's reluctance to address a controversial cause of action. Negligent infliction of emotional distress remains a common law tort action, and unless assumed by the legislature, the responsibility remains with the judiciary to decide the merits of a plaintiff's claim. This should be done on a case-by-case basis by using traditional tort concepts.

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Bowman rule, therefore, the term 'physical' is not used in its ordinary dictionary sense. Instead, it is used to represent that the injury for which recovery sought is capable of objective determination.

Id. at 500, 408 A.2d at 733-34 (note omitted). The court found that in addition to symptoms of an ulcer, the plaintiff had physical manifestations of a physical injury as shown by her deteriorated physical appearance (unkempt hair, sunken cheeks, and dark eyes). *Id.* at 501, 408 A.2d at 734. Moreover, *Vance* held that the expert medical testimony is not a prerequisite for a cause of action for emotional distress. *Id.* at 502-03, 408 A.2d at 734-35.