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Drawing the Line: Missouri Adopts the Zone of Danger Rule for Bystander Emotional Distress

Michael Phillips

Drawing the Line: Missouri Adopts the Zone of Danger Rule for Bystander Emotional Distress

Asaro v. Cardinal Glennon Memorial Hospital[1]

Bass v. Nooney Co.[2] established negligent infliction of emotional distress as an independent tort in Missouri.[3] The Missouri Supreme Court, however, left open the question of if and when a bystander can recover under this cause of action.[4] The question remained unanswered for seven years until the *Asaro* decision. This Note will first analyze that decision, then focus on the traditional rules and restrictions on bystander recovery, and finally set forth for consideration a proposed rule that is less restrictive than the one adopted by the Missouri Supreme Court.

I. FACTS

On July 19, 1983, Mrs. Asaro's five-year-old son, Leonard, underwent heart surgery to remove a subaortic fibrous ring.[5] The surgery took place at Cardinal Glennon Memorial Hospital with a staff physician performing the operation.[6] The entire fibrous ring was not removed by the surgery; however, in his post-operative report, the operating physician incorrectly stated that the entire ring was removed.[7]

Due to the presence of the remaining ring portion, Leonard suffered chest pain and fainting spells, just as he had before the operation.[8] The partial ring was damaging his heart.[9] Mrs. Asaro repeatedly informed the doctors of her son's problems, which she realized were symptoms of the presence of the

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1. 799 S.W.2d 595 (Mo. 1990) (en banc).
2. 646 S.W.2d 765 (Mo. 1983) (en banc).
3. *Id.* at 772. *See* Note, *Young v. Stensrude: Fishing Through Bass for the Boundaries of Negligent Infliction of Mental Distress*, 51 MO. L. REV. 598 (1986).
4. *Bass*, 646 S.W.2d at 770 n.3.
5. *Asaro*, 799 S.W.2d at 597. Mrs. Asaro did not personally observe the surgery. Asaro v. Cardinal Glennon Memorial Hosp., No. 56454 (Mo. Ct. App. Jan. 16, 1990) (WESTLAW, MO-CS database).
6. *Asaro*, 799 S.W.2d at 597.
7. *Id.*
8. *Id.*
9. *Id.*

fibrous ring.[10] Because of the incorrect post-operative report, however, her efforts to obtain further medical attention for her son were ignored.[11] To compound the problem, on January 17, 1985, a different staff physician at Cardinal Glennon performed another test on Leonard that indicated that the entire fibrous ring had been removed.[12] The hospital staff relied upon the new test, along with the inaccurate post-operative report, both of which incorrectly indicated that the fibrous ring had been completely removed. As a result, the staff saw no need to pursue further medical testing that would have disclosed the presence of the remaining fibrous ring.[13] Ultimately, on February 25, 1985, more than 19 months after the initial surgery, a surgeon at a different hospital removed the remaining ring portion.[14]

Mrs. Asaro filed suit against the hospital alleging that the doctors were negligent by failing to provide her son with the requisite degree of health care because they failed to remove the ring or to make an accurate report of the operation.[15] Due to this alleged negligence, "she underwent severe, medically diagnosable and significant emotional distress and depression."[16] Mrs. Asaro sought damages from the doctors for the negligent infliction of emotional distress upon her.[17]

The trial court dismissed Mrs. Asaro's petition as failing to state a claim upon which relief could be granted.[18] The Eastern District Court of Appeals reversed and remanded.[19] The Missouri Supreme Court, after granting transfer, held that "in Missouri, a plaintiff may recover for negligent infliction of emotional distress resulting from observing physical injury to a third person

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10. Asaro v. Cardinal Glennon Memorial Hosp., No. 56454 (Mo. Ct. App. Jan. 16, 1990) (WESTLAW, MO-CS database).

11. *Asaro*, 799 S.W.2d at 597.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 596. The original petition was filed by Mr. Asaro, Mrs. Asaro, and Leonard, and contained three counts. *Id* Count I was Leonard's claim for medical malpractice. Count II was Mr. and Mrs. Asaro's claim for medical expenses incurred for the treatment of Leonard, as well as other special damages. Count III was Mrs. Asaro's claim for emotional strain and depression caused by the doctors' negligence in treating Leonard. *Id.* The petitioners voluntarily dismissed Counts I and II. Asaro v. Cardinal Glennon Memorial Hosp., No. 56454 (Mo Ct. App. Jan. 16, 1990) (WESTLAW, MO-CS database).

18. *Asaro*, 799 S.W.2d at 596-97.

19. Asaro v. Cardinal Glennon Memorial Hosp., No. 56454, (Mo Ct. App Jan. 16, 1990) (WESTLAW, MO-CS database).

only if the plaintiff is within the zone of danger, that is, he was placed in a reasonable fear of physical injury to his own person."[20]

II. INSTANT DECISION

The court began its analysis by noting that this is a case of first impression in Missouri,[21] thus rejecting Mrs. Asaro's argument that she stated a cause of action under *Bass v. Nooney Co.*[22] The court noted that *Bass* "expressly did not decide the question whether a cause of action exists in Missouri when a plaintiff suffers mental or emotional distress upon observing death or injury to a third person caused by a defendant's negligence."[23]

With its desire to abrogate the impact rule, the court saw itself faced with a choice between two alternative rules of liability to "fill the vacuum:"[24] the zone of danger standard and the reasonably foreseeable plaintiff standard.[25]

The court viewed the foreseeable plaintiff standard, which predicates recovery upon whether emotional injury to the bystander was reasonably foreseeable, as being murky and unworkable.[26] The court noted that "a duty of care . . . arises out of circumstances in which there is a foreseeable likelihood that particular acts or omissions will cause harm or injury."[27] But, as noted by Dean Prosser, foreseeability goes "forward to eternity, and back to the beginning of the world."[28] For this reason, the court felt duty should not be defined as being "coextensive with foreseeability," but instead should be more narrowly defined.[29]

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20. *Asaro*, 799 S.W.2d at 596, 599-600.

21. *Id.* at 598.

22. *Id.* at 597-98. *Bass* involved a plaintiff who allegedly suffered emotional distress as a result of being trapped inside a stalled elevator due to the defendant's negligence. The Missouri Supreme Court held that recovery was permitted if the plaintiff could show that: (1) the defendant should have realized that his conduct involved an unreasonable risk of causing the distress; and (2) the emotional distress or mental injury must be medically diagnosable and must be of sufficient severity so as to be medically significant. Bass v. Nooney Co., 646 S.W.2d 765, 772 (Mo. 1983) (en banc).

23. *Asaro*, 799 S.W.2d at 597 (quoting *Bass*, 646 S.W.2d at 770).

24. *Asaro*, 799 S.W.2d at 598.

25. *Id.*

26. *Id.* at 598-99.

27. *Id.* at 598 (quoting Lowrey v. Horvath, 689 S.W.2d 625, 627 (Mo. 1985) (en banc)).

28. *Id.* (quoting Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 24 (1953)).

29. *Id.*

The court believed the zone of danger rule was the preferable standard because the rule "permits recovery according to the defendant's already existing duty of care to the plaintiff," and does not "require the defendant to bear a new duty to a potential foreseeable plaintiff," as would the foreseeable plaintiff standard.[30] In adopting the zone of danger test, the court recognized that it was an arbitrary standard.[31] The court pointed out, however, that it was necessary, under the common law system, for courts to establish rules and limitations of liability "to allow tort law to achieve its purpose of compensating persons injured by the negligence of others without fostering rules of liability which unreasonably inhibit normal human activity."[32]

The court concluded that in Missouri

> a plaintiff states a cause of action for negligent infliction of emotional distress upon injury to a third person only upon a showing: (1) that the defendant should have realized that his conduct involved an unreasonable risk to the plaintiff, (2) that plaintiff was present at the scene of an injury producing, sudden event, (3) and that plaintiff was in the zone of danger, i.e., placed in a reasonable fear of physical injury to his or her own person.[33]

Because Mrs. Asaro's petition contained no assertion that she was placed in danger or faced personal peril by negligent acts of the defendants, the court concluded that she did not fall within the zone of danger standard.[34] Thus, the trial court was correct in dismissing her petition for failure to state a claim upon which relief could be granted.[35]

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30. *Id.* at 599.

31. *Id.*

32. *Id.*

33. *Id.* at 599-600.

34. *Id.* at 600.

35. *Id.* The dissent (Judges Higgins, Rendlen and Billings) argued that this is not a case of first impression in Missouri, but instead falls under the rule enunciated in Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983) (en banc). For a statement of the rule of that case, see *supra* note 22. Mrs. Asaro alleged in her petition that she underwent "severe emotional stress and depression, medically diagnosable and significant," and that "[a]ll defendants should have realized that their conduct . . . involve[d] an unreasonable risk of causing emotional distress or mental injury to Plaintiff." *Asaro*, 799 S.W.2d at 601. Thus, her petition would survive a motion to dismiss under the requirements of *Bass*. *Id.* According to the dissent, the zone of danger requirement is not set forth in Bass, and should not be adopted, as it is an "arbitrary" and "hopelessly artificial" standard. *Id.*

III. BACKGROUND

Medical and psychological experts generally accept that when individuals observe negligent acts resulting in physical injury to another, they will normally suffer a "psychic trauma," that is, "an emotional shock which makes a lasting impression on the mind."[36] This emotional shock can, under certain circumstances, have a serious and debilitating impact on an individual's physical and psychological well-being.[37] Recently, courts have shown increased willingness to allow compensation to bystanders who suffer this emotional distress. Courts are faced with a problem, however. On the one hand, they want victims to be compensated for any emotional distress negligently caused by another. On the other hand, they want to avoid fraudulent claims, unlimited liability, and increased litigation.[38] As a result, courts are faced with the problem of what standards and limitations to apply. Resolving this conflict is not an easy task, and courts have adopted a broad range of rules and limitations. This section considers the rules and limitations adopted by the various jurisdictions.

A. Theories of Recovery

1. The Physical Impact Rule

Under the physical impact rule, plaintiffs may recover only if there has been a physical intrusion upon their body.[39] Thus, an actual touching must occur. As stated by one court, "the infliction of anguish by the negligent injury of another, without physical trauma to the plaintiff would be irremedial.

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36. Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute Between California and New York*, 51 ST. JOHN'S. L. REV. 1, 22 (1976). *See also* Cantor, *Psychosomatic Injury, Traumatic Psychoneurosis, and Law*, 6 CLEV.-MARSH. L. REV. 428, 430-37 (1957).

37. Every person who is subjected to an emotional shock will not necessarily develop a psychological injury. Due to heredity and environment, individuals differ in the degree of and their susceptibility to mental injury. In any event, common emotional situations rarely cause emotional injury to a well adjusted person. Cantor, *supra* note 36, at 432-33.

38. *See* Simons, *supra* note 36, at 12-15.

39. Missouri followed the impact rule for a time, though not by name. That rule was first established in Missouri in the case of Crutcher v. Cleveland, C., C. & St. L. R.R., 132 Mo. App. 311, 111 S.W. 891 (1908). For the origin of the impact rule, see Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896). For a discussion of the history of the impact rule, see Note, *Mental Distress-the Impact Rule*, 42 UMKC L. REV. 234 (1973).

But where the defendant's negligence occasions some personal physical injury to the plaintiff, no matter how slight, the plaintiff may recover for frights, shock, and mental anguish."[40] The nature of this rule makes bystander recovery virtually non-existent, as the victim could bring an action under traditional tort principles. Several policy reasons stand behind the adoption of the physical impact requirement: 1) trivial claims should be eliminated; 2) courts should not be flooded with litigation;[41] 3) claims should not be speculative;[42] and 4) fraudulent claims should be reduced.[43]

Today, most jurisdictions have rejected the physical impact rule,[44] and for good reason. First, due to advances in medical and psychological techniques, emotional injuries are more readily provable and thus emotional distress can be competently established.[45] The court system is able to rely upon this competent medical proof of emotional distress and the trier of fact's ability to detect fraudulent claims.[46] Second, "[w]hether the plaintiff has suffered an impact bears little relationship to the harm—a near miss may be as [emotionally damaging] as a direct hit."[47] Finally, the rule is subject to manipulation by courts.[48] Several have allowed the slightest touch to qualify

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40. Greenberg v. Stanley, 51 N.J. Super. 90, 98, 143 A.2d 588, 597 (1958).

41. *See, e.g.*, 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 & Seashore R.R., 65 N.J.L. 383, 47 A. 561 (1900); Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970).

42. *See, e.g.*, Homans v. Boston Elevated Ry., 180 Mass. 456, 62 N.E. 737 (1902); Nelson v. Crawford, 122 Mich. 466, 81 N.W. 335 (1899); Hickey v. Welch, 91 Mo. App. 4 (1901); Ward v. West Jersey & Seashore R.R., 65 N.J.L. 383, 47 A. 561 (1900); Mitchell v. Rochester, 151 N.Y. 107, 45 N.E. 354 (1896); Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970).

43. *See, e.g.*, Braun v. Craven, 175 Ill. 401, 51 N.E. 567 (1898); Charlie Stuart Oldsmobile v. Smith, 171 Ind. App. 315, 357 N.E.2d 247 (1978); Morse v. Chesapeake & Ohio Ry., 117 Ky. 11, 77 S.W. 361 (1903); 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); Mitchell v. Rochester, 151 N.Y. 107, 45 N.E. 354 (1896).

44. Simons, *supra* note 36, at 7-8; Comment, *Dillon to Ochoa: The Elusive Foreseeability of Emotional Distress*, 27 SANTA CLARA L. REV. 91, 94 (1987). *See generally* C. MORRIS & C. MORRIS, MORRIS ON TORTS 190-96 (2d ed. 1980); W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS 359-66 (5th ed. 1984).

45. Simons, *supra* note 36, at 8.

46. *Id. See* Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

47. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm-A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 488 (1982).

48. Recent Decisions, 17 PEPPERDINE L. REV. 588, 590 (1990).

as physical contact, despite the fact that no physical injury occurred.[49] Clearly the physical impact rule is unnecessary and too artificial for modern usage.

2. The Zone of Danger Rule

The zone of danger rule was established in the famous case of *Palsgraf v. Long Island Railroad Co.*,[50] and allows bystander recovery for emotional distress only upon a showing that the bystander was in the physical zone of danger; that is, that the bystander was "placed in a reasonable fear of physical injury to his or her own person."[51] Thus, the bystander must have been within a definable physical location when the injury producing event occurred for recovery to ensue. No requirement exists that physical impact must occur. Recovery is limited, however, to the emotional distress resulting from reasonable fear of personal, physical injury, not fear for injury to another.[52]

A person located within the zone of danger can recover "because the negligent defendant . . . owed all foreseeable plaintiffs a duty of due care not to endanger their physical well-being."[53] The zone of danger test is used to determine "whether the plaintiff was sufficiently proximate to the defendant's negligent conduct so that injury to the plaintiff could have been reasonably foreseen by the defendant, thereby imposing upon the defendant a duty to act carefully in regard to the class of persons to which the plaintiff belonged."[54] One court summed up the rationale behind the zone of danger rule by saying, the rule is "premised on the traditional negligence concept that by unreasonably endangering the plaintiff's physical safety the defendant has breached a duty owed to him or her for which he or she should recover all damages

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49. *Id.* (citing Note, *Limiting Liability for the Negligent Infliction of Emotional Distress: The "Bystander Recovery" Cases*, 54 S. CAL. L. REV. 847, 849 (1981)); Pearson, *supra* note 47, at 488. *See, e.g.*, Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928); Homans v. Boston Elevated Ry., 180 Mass. 456, 62 N.E. 737 (1902); Porter v. Delaware L. & W. R.R., 73 N.J.L. 405, 63 A. 860 (1906); Zelinsky v. Chimics, 196 Pa. Super. 312, 175 A.2d 351 (1961); *See* W. KEETON, PROSSER AND KEETON ON TORTS § 54, at 363 (5th ed. 1984).

50. 248 N.Y. 339, 162 N.E. 99 (1928).

51. *Asaro*, 799 S.W.2d at 600.

52. *Id.* at 599; *See* Pearson, *supra* note 47, at 485-90.

53. Note, *Putting the Brakes on the Bandwagon: Nebraska Slows Runaway Tort Liability in Bystander Claims of Emotional Distress-James v. Lieb*, 20 CREIGHTON L. REV. 741, 753-54 (1987).

54. Simons, *supra* note 36, at 9.

sustained."[55] If the bystander is outside the zone of danger, then no duty is owed by the negligent actor.

Courts are attracted to the zone of danger rule because of its predictability and the rigid outer boundary of recovery it creates.[56] Critics, however, believe the rule does not further "the policy that negligent defendants should be liable for all harm foreseeably caused by their negligence."[57] Many situations are imaginable where an actor is extremely negligent, severe emotional injury is foreseeable, and the resulting injury is great, but recovery is denied based upon the bystander's location. As a result, the zone of danger rule may be arbitrary and unnecessarily rigid.

3. The Foreseeable Plaintiff Standard

Dillon v. Legg[58] gave birth to the foreseeable plaintiff standard in bystander recovery cases, holding that bystanders who witness accidents can recover for emotional distress even though they did not fear for their own safety.[59] This holding expanded bystander recovery by recognizing the harm caused by "fear for the safety of others as appropriate damages."[60]

Under the foreseeability rule set forth in *Dillon*, courts must, on a case-by-case basis, decide whether an ordinary person would have reasonably foreseen the emotional injury to the bystander due to their negligent act.[61] If no foreseeable injury is present, no duty of care is owed to the bystander.[62] The *Dillon* court set forth three factors courts should consider in determining whether an emotional injury was 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 learning of the accident from others after its occurrence.

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55. Bovsun v. Sanperi, 61 N.Y.2d 219, 230, 461 N.E.2d 843, 847, 473 N.Y.S.2d 357, 361 (1984).

56. Note, *supra* note 53, at 754. *See also* Pearson, *supra* note 47, at 490.

57. Pearson, *supra* note 47, at 485. *See also* Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978); Paugh v. Hanks, 6 Ohio St. 3d 72, 451 N.E.2d 759 (Ohio 1983).

58. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

59. *Id. See also* Comment, *supra* note 44, at 96-97.

60. Pearson, *supra* note 47, at 491.

61. *Dillon*, 68 Cal. 2d at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.

62. *Id.* at 739, 441 P.2d at 919, 69 Cal. Rptr. at 79; *See* VanDeWeghe, *California Continues to Struggle With Bystander Claims for the Negligent Infliction of Emotional Distress: Thing V. La Chusa*, 24 LOY. L.A.L. REV. 89, 93 (1990).

> (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.[63]

The *Dillon* court did not intend these factors to be rigid requirements, but rather loose guidelines to aid case-by-case determinations.[64]

The foreseeable plaintiff standard is based upon general negligence principles,[65] and does not proceed from the same premise as the impact and zone of danger rules.[66] Courts recognize that, with this standard, the bystander's emotional injury is caused by fear for the safety of another person, and liability is not predicated on actual or anticipated physical intrusion upon the bystander.[67]

The foreseeable plaintiff standard has been criticized as an expansion of the rules of liability and damages.[68] As stated by the *Asaro* court, the "[z]one of danger [rule] permits recovery according to the defendant's already existing duty of care to the plaintiff, [while the foreseeable plaintiff standard] require[s] the defendant to bear a new duty to a potential foreseeable plaintiff."[69] This "new duty" is seen by some courts as an invitation to both unlimited liability and an avalanche of litigation inundating the court system.[70] The foreseeable plaintiff standard has also been criticized as being a "murky standard"[71] because it has not been consistently applied.[72]

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

64. *Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80; Mobaldi v. Regents of Univ. of Cal., 55 Cal. App. 3d 573, 581, 127 Cal. Rptr. 720, 726 (1976).

65. *Dillon*, 68 Cal. 2d at 746, 441 P.2d at 924, 69 Cal. Rptr. at 84.

66. Note, *Bystander Recovery in Illinois for the Negligent Infliction of Emotional Distress: Rickey v. Chicago Transit Authority*, 15 LOY. U. CHI. L.J. 453, 464 (1984).

67. *Id.*

68. Pearson, *supra* note 47, at 491-501; Guilmette v. Alexander, 128 Vt. 116, 259 A.2d 12 (1969).

69. *Asaro*, 799 S.W.2d at 599.

70. *See* Thing v. La Chusa, 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

71. *Asaro*, 799 S.W.2d at 598.

72. *See* Pearson, *supra* note 47, at 491-501; *Asaro*, 599 S.W.2d at 598-99.

B. Limitations on Recovery

1. Physical Manifestation

To ensure genuine claims, many courts require the plaintiff to show physical manifestations directly caused by the emotional distress.[73] Examples of physical manifestations considered by some jurisdictions include weight loss, sleeplessness, intense nervousness, personality changes, nerve tissue degeneration, miscarriage, nervous breakdown, or paralysis.[74]

Due to advances in the medical and psychological fields regarding diagnosis and provability of emotional injury, a minority of courts have started retreating from the physical manifestation requirement.[75] These courts accept that severe mental distress can occur without accompanying physical symptoms, and that there are other ways to assure genuineness of the emotional distress.[76]

2. Sudden Impact

Courts adopting even the most liberal theory of bystander recovery still require the mental injury to stem from a traumatic shock, as opposed to chronic stress.[77] The cause of the emotional distress "must be a single, sudden, or unexpected event; a shock to the bystander's mental and psychological equilibrium; or a trauma or 'blow' to his nervous system."[78] Medical authority exists, however, that supports the proposition that chronic stress is even more damaging to a bystander's emotional well-being than is traumatic

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73. Simons, *supra* note 36, at 12; Comment, *supra* note 44, at 95-96; Note, *supra* note 66, at 470. *See also* RESTATEMENT (SECOND) OF TORTS §§ 313(1)(b), 436A comment b (1965).

74. Comment, *supra* note 44, at 96, 109 (citing Robb v. Pennsylvania R.R., 210 A.2d 709 (Del. 1965); F. HARPER & F. JAMES, THE LAW OF TORTS § 18.4 (1956)).

75. Simons, *supra* note 36, at 12; Note, *supra* note 66, at 471.

76. *See, e.g.,* Molien v. Kaiser Found. Hosps. 27 Cal.3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980); Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974); Culbert v. Sampson's Supermarkets Inc., 444 A.2d 433 (Me. 1982); Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979); *see* Leibson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. FAM. L. 163, 164 (1976); Comment, *Dillon Revisited: Toward a Better Paradigm for Bystander Cases*, 43 OHIO ST. L.J. 931, 940 (1982).

77. Simons, *supra* note 36, at 16. *See, e.g.,* Owens v. Childrens Memorial Hosp., 480 F.2d 465 (8th Cir. 1973).

78. *Owens*, 480 F.2d at 465. (citing Selzer, *Psychic Disabilities Following Trauma*, 1970 LEGAL MED. ANN. 389, 398-401).

shock.[79] Despite this authority, the necessity of a traumatic shock is ingrained in the law of torts and is likely to remain for some time.[80]

3. Contemporaneous Observation

Dillon, which established the foreseeable plaintiff standard, also set forth guidelines for courts to use in case-by-case determinations of whether bystander emotional distress was reasonably foreseeable. One factor is "[w]hether the shock resulted from a direct emotional impact upon [the] plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence."[81] Recovery may not be allowed unless the plaintiff was near enough in time and distance to observe the accident.[82]

The observation factor was not intended to be used as a strict test or rigid requirement, but most courts have used it as such.[83] Other courts view the factor merely as a guideline, so the closer the plaintiff is to observing an accident, the more likely his or her claim will be allowed.[84] In addition, "observation" has been interpreted by some courts to mean "perception." Thus, the plaintiff need not actually witness the accident visually, but need only perceive that the negligent actor is harming the victim, such as by hearing the occurrence of the injury.[85]

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79. *Id*. at 465 (citing Selzer, *supra* note 78, at 399). *See also* Selzer, *Psychological Stress and Legal Concepts of Disease Causation*, 56 CORNELL L. REV. 951, 952-54 (1971).

80. Simons, *supra* note 36, at 17.

81. Dillon v. Legg, 68 Cal. 2d 728, 740-41, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968).

82. Note, *supra* note 66, at 467.

83. Comment, *supra* note 44, at 97-98. *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); Cortez v. Marcias, 110 Cal. App. 3d 640, 167 Cal. Rptr. 905 (1980); Parsons v. Superior Court, 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978).

84. Comment, *supra* note 44, at 98. *See, e.g.*, Austin v. Regents of the Univ. of Cal., 89 Cal. App. 3d 354, 152 Cal. Rptr. 420 (1979); Nazaroff v. Superior Court, 80 Cal. App. 3d. 553, 145 Cal. Rptr. 657 (1978); Mobaldi v. Regents of the Univ. of Cal., 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1975); Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969); Ferriter v. Daniel O'Connell Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (1980); Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978); Landreth v. Reed, 520 S.W.2d 486 (Tex. Civ. App. 1978).

85. Comment, *supra* note 44, at 101. *See, e.g.*, Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969).

Rationale for the observation rule is twofold. First, as stated by the *Dillon* court, "the degree of foreseeability of the third person's injury is far greater in the case of his contemporaneous observance of the accident than that in which he subsequently learns of it."[86] Second, without this limitation the negligent actor could be liable to a multitude of people who were not at the scene of the accident, but suffered some sort of emotional distress upon learning the news. The result would be unlimited liability.[87] Conversely, courts that apply the location requirement loosely believe plaintiffs who arrive on the accident scene shortly after its occurrence suffer emotional distress as severe as bystanders who witness the incident, and should therefore also be compensated.[88]

4. Close Relationship

Under the guidelines set forth in *Dillon*, courts are to consider the closeness of the relationship between the bystander and the victim in determining the reasonable foreseeability of emotional distress.[89] The more attached the bystander is to the victim, the greater the chance of serious emotional injuries.[90] Therefore, the close relationship factor ensures that the emotional distress claim is genuine, while at the same time places a limit on liability.[91] In addition, it is more foreseeable to the negligent actor that a bystander will suffer emotional distress when observing injury to a close relative.[92] There are relatively few cases interpreting the sufficiently close relationship guideline.[93]

IV. ANALYSIS

A. The Proposal

A better rule is to adopt a zone of emotional danger standard, which is a modification of the reasonably foreseeable plaintiff standard found in *Dillon*. To curtail unlimited liability and reduce the number of potential claims, a few

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

87. Comment, *supra* note 44, at 95. *See* Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

88. Note, *supra* note 66, at 469. *See, e.g.*, Archibald v. Braverman, 275 Cal. App. 2d 253, 256, 79 Cal. Rptr. 723, 725 (1969).

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

90. Note, *supra* note 66, at 466 (citing Comment, *supra* note 76, at 942).

91. *Id.*

92. *Id.*

93. Peairs, *supra* note 47, at 497.

limitations should apply: (1) the presence of the bystander must be reasonably foreseeable to the tortfeasor; (2) the likelihood of emotional injury must be reasonably foreseeable to the tortfeasor; (3) a reasonable bystander must be likely to suffer the emotional distress; and (4) the emotional distress must be serious. This proposed rule allows bystander recovery while avoiding unduly burdensome liability. Both policy considerations as well as the bystander's interest in emotional well-being are recognized.

B. The Standard

Under the zone of physical danger rule, a person who suffers extreme emotional distress upon observing the negligent infliction of injury to a loved one may recover, while a second party suffering identical injuries may not, simply because the second party was a few feet further from the incident.[94] This result is too arbitrary and cannot be tolerated. If the negligent actor can reasonably foresee that the bystander's observation of serious injury to another may cause severe emotional injury, then recovery should be allowed. Legal scholars generally accept that emotional injury to bystanders is indeed a foreseeable result of negligent conduct.[95]

The reasonably foreseeable plaintiff standard is the only rule of bystander recovery that allows compensation for emotional distress suffered solely for being placed in fear for the safety of another.[96] The impact and zone of danger rules do not allow such recovery.[97] Foreseeability is a more realistic approach, because it recognizes that the real reason bystanders suffer emotional distress is because they are perceiving the tortious injury of another, not because of fear for personal safety.[98] This emotional injury does not depend upon whether bystanders were placed in danger of physical injury.[99] Whether the plaintiff was located within the physical zone of danger is not relevant to the amount of emotional injury suffered.[100]

If emotional distress is a foreseeable consequence of a particular negligent act and emotional injury results, the applicable zone of danger should be one of emotional distress, rather than physical injury.[101] A zone

94. Simons, *supra* note 36, at 10.

95. Note, *supra* note 66, at 481. *See* Tobin v. Grossman, 24 N.Y.2d 609, 613, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 559 (1969).

96. *See* Leibson, *supra* note 76, at 196; Simons, *supra* note 36, at 11; Note, *supra* note 66, at 455.

97. *See* Note, *supra* note 66, at 461.

98. *Id.*

99. *Id.*

100. Simons, *supra* note 36, at 10.

101. *Id.* at 10-11.

of physical danger is relevant to define a duty for physical harm.[102] Likewise, a zone of emotional danger should be relevant in defining a duty for emotional harm.[103] To use a zone of physical danger to limit a negligent actor's liability for emotional injuries is not practical.[104]

The proposed standard restricts the duty of care owed by a negligent actor to a reasonably foreseeable emotional zone of danger.[105] To recover, the plaintiff must be located in this zone. The foreseeable zone of emotional distress is defined as the area in which emotional distress may be reasonably anticipated.[106] This zone is not limited to a defined physical area around the victim because trauma does not depend on proximity to the negligent act.[107] Thus, the foreseeable zone of emotional danger is different, and in most cases larger, than the foreseeable zone of physical danger.[108]

C. Policy Considerations

One fear of the foreseeability standard often cited by courts and commentators is that if this liberal rule of bystander recovery is adopted, the number of fraudulent claims will increase. This fear of fraudulent claims is not valid, as legal scholars generally agree that courts would not be subjected to a flood of false claims if the foreseeability standard were adopted.[109]

Since the first implementations of the zone of danger rule, tremendous advances in the medical field regarding the diagnosis and understanding of emotional trauma have taken place.[110] These advances greatly reduce the chances that trivial or fraudulent claims will succeed.[111] Courts can rely on the medical profession's expertise and the judicial system's ability to weed out false claims, rather than the overly restrictive zone of danger rule.[112] To deny recovery based on fear of fraudulent claims penalizes honest persons and shows a lack of faith in the judicial system.[113]

Another policy consideration mitigating against bystander recovery is the fear of a proliferation of claims. The adoption of the foreseeable zone of

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102. *Id.* at 9.
103. *Id.*
104. *Id.*
105. *Id.* at 10.
106. *Id.*
107. *Id.*
108. *Id.* at 9. *See* Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970).
109. *See* Note, *supra* note 66, at 480.
110. *See id.* at 464.
111. *Id.* at 480.
112. *Id.*; Comment, *supra* note 44, at 110-11.
113. Simons, *supra* note 36, at 13.

emotional danger rule does not guarantee that courts will be flooded with litigation. Even if the court system's caseload would increase, an individual who is injured by a negligent actor is entitled to a remedy.[114] As stated by Dean Prosser,

> [i]t is the business of the law to remedy wrongs that deserve it, even at the expense of a flood of litigation; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the grounds that it will give the court too much work to do.[115]

D. Limitations

One limitation not necessary for the foreseeable zone of emotional danger standard is the requirement that there exist physical manifestations of emotional injury. Advances in the medical profession regarding diagnosis and provability of emotional injury make the requirement of a physical manifestation accompanying emotional injury unnecessary.[116] Better ways prevail to ensure genuine claims. Another limitation not necessary for the foreseeable zone of emotional danger standard is the requirement that the bystander witness the event as it unfolds. The emotional trauma of seeing a loved one shortly after an accident can be just as severe as if the bystander witnessed the injury as it occurred.[117] What amount of time must pass before a person arriving on the scene will be denied recovery depends on the circumstances and should be decided on a case-by-case basis.[118]

Compensation should not be allowed for every emotional harm that occurs in daily living, but there should be some point at which individuals will be allowed a remedy for the denial of their right to emotional tranquility.[119] In bystander cases, the line needs to be drawn at serious emotional distress.[120] Otherwise, a tortfeasor would be faced with unlimited liability.

Some mental distress is an inescapable part of life and should not be compensated. But when a negligent actor causes unusual or severe mental harm, liability should ensue.[121] The proposed cutoff is a simple one: A

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114. *See* Note, *supra* note 66, at 462 (citing Tobin v. Grossman, 24 N.Y.2d 609, 615, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558 (1969)).

115. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH L. REV. 874, 877 (1939).

116. Simons, *supra* note 36, at 12. *See* Note, *supra* note 66, at 478-79.

117. *See* Note, *supra* note 66, at 469.

118. *See* Comment, *supra* note 44, at 111-12.

119. Note, *supra* note 66, at 481.

120. Comment, *supra* note 44, at 107.

121. *Id.* at 108.

bystander suffering from serious emotional distress will be compensated, a bystander not suffering from serious emotional distress will not.[122] Defining serious emotional distress will be the difficult task.[123] Some courts have tried to provide workable definitions of serious distress. According to the Restatement (Second) of Torts, temporary fright, nervous shock, nausea, grief, rage and humiliation are not considered serious.[124] Ultimately, the court system must rely on the medical profession's judgment and the trier of fact's ability to recognize what constitutes serious emotional distress.

The reasonably foreseeable plaintiff standard recognizes that courts should not allow compensation to every bystander who suffers emotional injury due to injury or death of a loved one by a negligent actor.[125] Recovery is limited to close family members because it is foreseeable that they may suffer serious emotional distress.[126] Those who are not related to the victim are not likely to suffer serious emotional distress, but only sorrow for a brief amount of time.[127] Close family members have a much greater chance of suffering severe harm, and thus are more deserving of recovery.[128] The requirement that the bystander be a close family member, however, should only be loosely adopted. There are many instances where a bystander can have a strong emotional attachment, yet not be a close relative or family member. Fiances and cohabitants are two examples of persons who may have strong enough emotional ties to be deserving of recovery. Courts must examine the circumstances of each case to determine whether the relationship between bystander and victim can be characterized as a strong emotional attachment.

Another issue that requires consideration is the bystander's preexisting mental condition. Some individuals have conditions that make them more susceptible to emotional trauma than the average individual.[129] Should a negligent actor be held liable for a bystander's severe emotional injuries if, under the circumstances, a reasonable person would not have suffered serious emotional distress? In a traditional tort case, the negligent actor must take the victim as he finds him.[130] Any lack of mental stability is irrelevant.[131]

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122. *Id.* at 107.

123. *Id.* at 108-10.

124. *Id.* at 109 (citing RESTATEMENT (SECOND) OF TORTS § 436A comment c (1966)).

125. Note, *supra* note 66, at 482-83.

126. *Id.* at 482.

127. *Id.*

128. *Id.*

129. *See* Simons, *supra* note 36, at 26-27.

130. *Id.* at 26.

131. *Id.*

Bystander cases, however, should be viewed in terms of the foreseeability of the type and extent of damages.[132] Thus, recovery will only ensue if a reasonable person would suffer serious emotional distress under the circumstances.[133] In addition, foreseeability requires that the type and extent of emotional distress be reasonably foreseeable by the negligent actor for the actor to be held liable.[134]

Finally, to curtail unlimited liability and to satisfy the theory of foreseeability, the requirement that the bystander's presence be reasonably foreseen by the negligent actor should be imposed.[135] This requirement was adopted by the Hawaii Supreme Court, which listed factors to consider in determining whether a parent's presence at the scene of an accident was foreseeable: "(1) the child's age; (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) any other factors which would put the tortfeasor on notice of the witness' presence."[136]

V. CONCLUSION

The time has come for courts to recognize bystander emotional distress for what it truly is: fear for the safety of another, rather than fear for one's own safety. The zone of emotional danger was formulated with this view in mind, and is a more realistic standard than is the zone of physical danger.

In recognition of important policy considerations, courts adopting a standard must draw a line where bystanders will be allowed a cause of action, and where they will not. Under the zone of emotional danger standard, if emotional distress is a reasonably foreseeable consequence of a particular negligent act, then liability will ensue. The only limitations necessary are: (1) the presence of the bystander must be reasonably foreseeable to the tortfeasor; (2) the likelihood of emotional injury must be reasonably foreseeable to the tortfeasor; (3) a reasonable bystander must be likely to suffer the emotional distress; and (4) the emotional distress must be serious. The zone of emotional danger, with the suggested limitations, is a workable rule and is the only rule consistent with policy considerations while recognizing and protecting a bystander's interest in emotional well-being.

MICHAEL PHILLIPS

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132. *Id.* at 26-27.

133. *Id.* at 28.

134. *Id.* at 26-27.

135. *See id.* at 30-31.

136. Leong v. Takasaki, 55 Haw. 398, 409, 520 P.2d 758, 765 (1974).