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S. ___ v. S. ___ establishes that a guardian ad litem must be appointed to represent a minor child when his paternity is an issue. This requirement is a step forward. It recognizes that the interests of a child in a paternity dispute are significant and helps to ensure that they are presented to the court. Requiring a guardian ad litem in a wide range of cases represents an improvement over the case-by-case, result-oriented approach used by courts before S. ___ v. S. ___.

JAN ROBEY ALONZO

NEGLIGENT INFILCTION OF EMOTIONAL DISTRESS ABSENT PHYSICAL IMPACT OR SUBSEQUENT PHYSICAL INJURY

Molien v. Kaiser Foundation Hospitals

As a member of the Kaiser Health Plan, Valerie Molien visited Kaiser for a routine physical examination. After examination and testing, a Kaiser staff physician concluded that she had contracted an infectious form of syphilis. She was instructed to advise her husband, Stephen, of the test results. She subsequently underwent treatment for the disease, including heavy doses of penicillin. Tests revealed that Stephen had not contracted the disease. It was later discovered that the staff physician’s diagnosis was inaccurate—Valerie did not have syphilis. In the meantime, the misdiagnosis had caused her to become “upset and suspicious that ... [Stephen] had engaged in extramarital sexual activities; tension and hostility arose between the two, ‘causing a break-up of their marriage and the initiation of dissolution proceedings.’”

Stephen sued Kaiser Foundation Hospitals and the diagnosing physician for negligent infliction of emotional distress and for loss of consortium. He did not allege that he suffered any physical injury as a result of the emo-

1. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).
2. Id. at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.
3. Id.
4. Id. at 920, 616 P.2d at 814-15, 167 Cal. Rptr. at 832-33.
5. The court used the terms “mental” distress and “emotional” distress interchangeably. Although the court’s holding refers to “emotional” distress, there is no reason to believe that a cause of action framed in terms of “mental” distress would be treated any differently. See Comment, Negligently Inflicted Mental Distress: The Case for an Independent Tort, 59 GEO. L.J. 1237, 1238 n.7 (1971); RESTATEMENT (SECOND) OF TORTS § 46, Comment j (1965).
tional distress. The trial court sustained a demurrer to the complaint. The court of appeals affirmed on the traditional basis that "[t]here can be no recovery for negligent infliction of emotional distress in the absence of physical injury." The California Supreme Court reversed and held that "a cause of action may be stated for the negligent infliction of serious emotional distress" absent any physical impact or subsequent physical injury.8

Although a variety of objections has been raised against allowing recovery for mental or emotional distress,9 the predominant fear seems to be "the danger of vexatious suits and fictitious claims."10 As a result, various limitations have been imposed on mental and emotional distress claims to assure the genuineness of the claim. One limitation is the "impact" rule. This rule is followed in a minority of states,11 including Missouri.12 It requires that the plaintiff suffer contemporaneous physical impact or injury accompanied by the mental or emotional distress.13 In the absence of any impact, recovery

7. 96 Cal. App. 3d at 475, 158 Cal. Rptr. at 110.
8. 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839. The court also held that the plaintiff stated a cause of action for the loss of consortium based on the mental suffering of the plaintiff's wife. Id. at 931, 616 P.2d at 821-23, 167 Cal. Rptr. at 839-41.
9. The main objections are as follows: (1) mental distress cannot be measured in terms of money, (2) the physical consequences of mental distress are too remote, (3) there is a lack of precedent, (4) a vast increase in mental distress claims would result, and (5) there is a danger of vexatious suits and fictitious claims. W. Prosser, Law of Torts § 54 (4th ed. 1971); Restatement (Second) of Torts § 436A, Comment b (1965).
10. W. Prosser, supra note 9, § 54.
11. Id. at 331 n.64; Kelley v. Kokua Sales & Supply Ltd.: Redefining the Limits to Recovery for Negligently Inflicted Mental Distress, 11 Tulsa L.J. 587, 590 n.12 (1976).

Litigation arising out of the Hyatt Regency skywalk collapse in Kansas City, Missouri, on July 17, 1981, see TIME, July 27, 1981, at 26, may result in a re-examination of Missouri's approach to recovery for negligent infliction of mental distress. There have been suggestions that persons attending the tea dance at the Hyatt at the time of the disaster may seek recovery for negligent infliction of mental distress, despite suffering no physical impact from the fallen skywalks.

13. E.g., Spade v. Lynn & B. R.R., 168 Mass. 285, 47 N.E. 88 (1897) (no recovery for mental distress or physical injuries caused solely by such distress when no injury to person from without); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896) (plaintiff denied recovery for fright and subsequent miscarriage caused by uncontrolled team of horses because no immediate personal injury); Zeiniski v. Chimics, 196 Pa. Super. Ct. 312, 175 A.2d 351 (1961) (jostling of occupants of automobile in collision found to be sufficient impact to allow recovery for emo-
is denied.\textsuperscript{14} In some cases, however, the impact requirement has been satisfied by very minor contacts, even though the impact itself caused no real harm.\textsuperscript{15} One frequently cited case found smoke inhalation a sufficient impact to allow recovery for mental distress.\textsuperscript{16}

Absent physical impact, many courts nevertheless allow recovery if the plaintiff has suffered physical harm as a consequence of the mental or emotional distress.\textsuperscript{17} Echoing the rationale for the impact rule, these courts rely on a physical manifestation of the psychic injury to screen out baseless claims.\textsuperscript{18} Such cases generally arise in one of two situations. In the first situa-


17. \textit{See}, \textit{e.g.}, Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933) (plaintiff became very weak and nervous, remained in bed for two weeks, and unable to work for six months); Netusil v. Novak, 120 Neb. 751, 235 N.W. 335 (1931) (plaintiff suffered nervous prostration from threatened attack by defendant’s dog); Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965) (recovery may be had for substantial bodily injury or sickness resulting from defendant’s negligent operation of his automobile if plaintiff in fear for own safety); Lambert v. Brewster, 97 W. Va. 124, 125 S.E. 244 (1924) (plaintiff suffered miscarriage as result of witnessing defendant assault and beat her father); \textit{RESTATEMENT (SECOND) OF TORTS} § 436 (1965).

Some courts have denied recovery for the physical consequences of mental distress on the ground that the subsequent physical injury was not foreseeable. \textit{E.g.}, Justesen v. Pennsylvania R.R., 92 N.J.L. 257, 106 A. 137 (1919); Miller v. Baltimore & O.S.W. R.R., 78 Ohio St. 309, 85 N.E. 499 (1908). \textit{See generally} Hallen, \textit{Damages for Physical Injuries Resulting From Fright or Shock}, 19 VA. L. REV. 253, 253 (1933).

18. One of the major difficulties courts encounter with this approach is in distinguishing a physical injury from a mental one. This distinction is, of course, a crucial one since characterization of the injury as physical is necessary for recovery. \textit{See}, \textit{e.g.}, Sloane v. Southern Cal. Ry., 111 Cal. 668, 680, 44 P. 320, 322 (1896); Annot., 64 A.L.R.2d 100, 104-05 (1959). This fine line between physical and mental
tion, the defendant may be liable to the plaintiff if his negligent act causes mental or emotional distress that the defendant should have realized might result in illness or bodily harm to the plaintiff. The threat of physical harm is created solely by the mental or emotional distress; the plaintiff is not in danger of an impact from some external force. The existence of the mental or emotional distress is important only because it involves a risk of bodily harm to the plaintiff. Additionally, if no bodily harm actually results, there can be no recovery for the mental or emotional distress alone.

The other situation arises in "close call" occurrences when an external force places the plaintiff in fear for his own safety. The theory followed by many courts in this situation has been labeled the "zone of danger" rule.

injuries has resulted in confusion regarding the proper classification of certain injuries. See Comment, supra note 5, at 1241 n.24 & 1259 n.128 (citing, inter alia, Cosgrove v. Beymer, 244 F. Supp. 824 (D. Del. 1965), in which physical manifestations such as dizziness, mild headache, and nervousness were not considered bodily harm). Advancements in medical science have caused courts and scholars to examine critically the medical aspects of mental and emotional distress. See Leong v. Takasaki, 55 Hawaii 398, 411-13, 520 P.2d 758, 766-67 (1974); Simons, supra note 13, at 26 n.112; Comment, supra note 5, at 1248-62.


Some courts appear to apply the zone of danger rule, although they do not specifically refer to it by that name. See, e.g., Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933); Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965).
Rather than requiring that the plaintiff be physically touched, the rule allows recovery if the plaintiff was in the zone of physical danger created by the defendant’s negligence and, at the same time, feared for his own safety. The zone of danger test frequently is applied in bystander cases, such as when a mother suffers mental or emotional distress with resulting physical injuries after seeing her child struck by the defendant’s car.25

Under both the impact rule and those cases allowing recovery for physical consequences, the recovery for the mental or emotional distress is viewed as parasitic to the recovery for the physical injuries.26 Courts generally have not extended independent legal protection to mental or emotional suffering caused unintentionally.27

In response to a deficiency in the zone of danger rule, the California Supreme Court, in Dillon v. Legg,28 expanded the scope of recovery for bystanders. The Dillon court identified "foreseeability of the risk" as "the chief element in determining whether [a] defendant owes a duty or an obligation to [the] plaintiff."29 Thus, the plaintiff in Dillon, the mother of a child killed by the defendant’s car, was allowed to proceed to trial on her claim for emotional disturbance and shock and accompanying physical injuries, despite absence from the zone of physical danger.30

Finally, courts, including Missouri,31 have recognized that intentional infliction of mental or emotional distress is an independent cause of action.32


27. See RESTATEMENT (SECOND) OF TORTS § 436A (1965). In two groups of cases, however, the negligent transmission of telegraph messages, such as one announcing death, and the negligent handling of corpses, courts have allowed recovery for mental distress. See W. PROSSER, supra note 9, § 54, at 329-30. These cases are unique, however, because the negligent act involved provided a very high degree of reliability that the plaintiffs suffered genuine mental distress.


29. Id. at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

30. See notes 54-58 and accompanying text infra.

31. Warrem v. Parrish, 436 S.W.2d 670 (Mo. 1969); Pretsky v. Southwestern Bell Tel. Co., 396 S.W.2d 566 (Mo. 1965).

32. E.g., State Rubbish Collectors Ass’n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952) (threats of physical harm and of harm to plaintiff’s business); Turman v. Central Billing Bureau, Inc., 279 Or. 443, 568 P.2d 1382 (1977) (collection agent made repeated badgering telephone calls and referred to plaintiff, a blind woman,
This cause of action is reflected in Restatement (Second) of Torts section 46. Recovery under this theory requires that the defendant intentionally or recklessly cause severe emotional distress by extreme and outrageous conduct.33 Neither contemporaneous physical impact nor resulting physical consequences are necessary for recovery.34

The significance of the court’s holding in Molien is that a plaintiff may state a cause of action for negligent infliction of serious mental or emotional distress, even though he suffers neither a physical impact nor a subsequent physical injury.35 The standard adopted for proof of such an injury, however, is unclear. The court said that it agreed with a decision of the Hawaii Supreme Court, Rodrigues v. State.36 In relying on Rodrigues, the Molien court stated, “ ‘[T]he general standard of proof required to support a claim of mental distress is some guarantee of genuineness in the circumstances of the case.’ ”37

Molien’s characterization of the Rodrigues standard was not entirely accurate. The standard enunciated in Rodrigues was 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.”38 Perhaps the Molien court impliedly adopted this reasonable man standard through its heavy reliance on Rodrigues.39 Nevertheless, this uncertainty could be confusing in future cases, particularly when instructing the jury. Furthermore, the court chose not to specify the types of suffering that constitute “serious” mental or emotional distress.40 The


33. RESTATEMENT (SECOND) OF TORTS § 46, Comment d (1965).
35. 27 Cal. 3d at 930, 616 P.2d at 820-21, 167 Cal. Rptr. at 838-39. Subsequent California cases also have stated this to be the major significance of Molien. See Hathaway v. Superior Court, 112 Cal. App. 3d 728, 737, 169 Cal. Rptr. 435, 440 (1980); Cortez v. Macias, 110 Cal. App. 3d 640, 648, 167 Cal. Rptr. 905, 909 (1980).
37. 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839 (quoting Rodrigues v. State, 52 Hawaii at 172, 472 P.2d at 520).
38. 52 Hawaii at 173, 472 P.2d at 520.
39. See notes 41-46 and accompanying text infra.
40. The court said that “a cause of action may be stated for the negligent infliction of serious emotional distress.” 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839 (emphasis added). Since the judge will determine whether the plain-
task of defining the parameters of serious mental and emotional distress lies with future court decisions.

In deciding *Molien*, the court relied heavily on *Rodrigues*. The plaintiffs in *Rodrigues* recovered money from the State of Hawaii for mental distress suffered as a result of flood damage to their home. The state highway department was found negligent for failing to clear a blocked drainage culvert. The result was an overflow of surface waters that flooded the plaintiffs' home causing extensive damage to the house and furnishings. The plaintiffs, however, suffered no bodily harm. In recognizing the cause of action for mental distress, the Hawaii court said, "We recognize that the interest in freedom from negligent infliction of serious mental distress is entitled to independent legal protection. We hold, therefore, that there is a duty to refrain from the negligent infliction of serious mental distress." Although it appears that Hawaii recognized the *Molien* approach to mental distress ten years prior, *Rodrigues* is distinguishable on the facts. The plaintiffs in *Rodrigues* also recovered money for the property damage to their home—a home they had waited fifteen years to build. Therefore, although the court's language is couched in terms of affording mental distress "independent legal protection," the recovery could be viewed as parasitic to the property damage, with the property damage serving as the guarantee that the mental distress claim was genuine. This fact situation is significantly different from that in *Molien*, in which the emotional distress claim truly was an independent cause of action.

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41. 27 Cal. 3d at 927-30, 616 P.2d at 819-21, 167 Cal. Rptr. at 837-39.
43. *Id.* at 174, 472 P.2d at 520.
44. *Id.* at 157, 472 P.2d at 513.
46. Although the plaintiff stated a cause of action for loss of consortium, the court did not view the emotional distress claim as parasitic to recovery for loss of
Considering the court’s heavy reliance on Rodrigues, it is interesting that the court did not discuss Leong v. Takasaki, another major and more recent Hawaii decision on mental distress. The sole cause of action in Leong was a claim for damages for nervous shock and psychic injuries suffered without accompanying physical impact or resulting physical consequences or manifestations thereof, when [the plaintiff] witnessed his stepgrandmother ... being struck and killed by” the defendant’s automobile. In holding that the plaintiff had stated a cause of action, the court said that “the requirement of resulting physical injury, like the requirement of physical impact, should not stand as another artificial bar to recovery, but merely be admissible as evidence of the degree of mental or emotional distress suffered.” Although Leong was a bystander case, nothing in the language of the decision limited its holding to such cases. The Hawaii court’s willingness to allow recovery by a bystander for mental distress in the absence of both contemporaneous and subsequent physical injury should make the same recovery available to one who is the direct victim of the defendant’s negligent act. Consequently, Leong may have been the true forerunner to Molien and perhaps would have formed a more solid basis for the court’s holding than Rodrigues.

Perhaps the court’s reluctance to rely on Leong stemmed from its characterization of the plaintiff as a direct victim of the negligent diagnosis rather than as a bystander. This distinction was crucial to recovery by the plaintiff. Had the court treated him as a bystander, the three guidelines for bystander recovery laid down in Dillon v. Legg would have precluded recovery.

The plaintiffs in Dillon, the mother and sister of a deceased child, witnessed the defendant’s car strike and kill the child. The trial court recognized that the sister had a cause of action for emotional shock and resulting physical injuries because she may have been in the zone of physical danger at the time of the accident. The trial court denied recovery to the

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47. 55 Hawaii 398, 520 P.2d 758 (1974).
48. The next major Hawaii decision on mental distress after Leong was Kelley v. Kokua Sales and Supply, Ltd., 56 Hawaii 204, 532 P.2d 673 (1975).
49. 55 Hawaii at 399, 520 P.2d at 760.
50. Id. at 413, 520 P.2d at 767.
51. Id. at 403, 520 P.2d at 762.
52. See note 53 and accompanying text infra.
53. 27 Cal. 3d at 923, 616 P.2d at 816, 167 Cal. Rptr. at 834.
54. 68 Cal. 2d 728, 740-41, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968).
55. Id. at 732, 441 P.2d at 915, 69 Cal. Rptr. at 75.
mother, however, because she was not in the zone of physical danger, although she was just a short distance away.\textsuperscript{56} The California Supreme Court found such a result anomalous and allowed the mother to proceed to trial on the basis that her emotional shock was a foreseeable result of the defendant's negligence.\textsuperscript{57} The \textit{Dillon} court said that similar cases should be guided by three factors: whether the plaintiff was located near the accident scene, whether the plaintiff observed the accident, and whether there existed a close relationship between the plaintiff and the victim.\textsuperscript{58}

When \textit{Dillon} was decided, the court expressly confined its holding to cases in which the plaintiff suffered a physical injury as a result of the emotional shock.\textsuperscript{59} Because the \textit{Molien} court painstakingly distinguished \textit{Dillon},\textsuperscript{60} the question arises whether bystander recovery for emotional distress under \textit{Dillon} still requires a resulting physical injury.\textsuperscript{61} The \textit{Molien} court used very broad language to discard the requirement of resulting physical injury.\textsuperscript{62} Although not specifically stating so, it seems inherent in the court's opinion that the absence of a physical injury should not bar a claim for mental or emotional distress, even in a bystander case.\textsuperscript{63}

Both \textit{Rodrigues} and \textit{Leong} may be read as recognizing an independent cause of action for negligent infliction of mental distress without any manifesting physical injury. \textit{Molien}, however, is the first case which squarely holds that a direct victim of a negligent act may recover solely for mental or emotional suffering.\textsuperscript{64} In so doing, the California Supreme Court has rejected limitations\textsuperscript{65} that have been criticized as arbitrary and artificial.\textsuperscript{66}

\textsuperscript{56} \textit{Id.}

\textsuperscript{57} \textit{Id.} at 747, 441 P.2d at 925, 69 Cal. Rptr. at 85.

\textsuperscript{58} \textit{Id.} at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

\textsuperscript{59} \textit{Id.} at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

\textsuperscript{60} 27 Cal. 3d at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834.

\textsuperscript{61} Prosser suggests that resulting physical harm should remain a requirement for bystander recovery. Although he states that such a requirement admittedly is arbitrary, he indicates that it would be necessary to protect potential defendants from undue liability. W. PROSSER, supra note 9, § 54, at 335.

\textsuperscript{62} 27 Cal. 3d at 929-30, 616 P.2d at 820-21, 167 Cal. Rptr. at 838-39 ("In our view the attempted distinction between physical and psychological injury merely clouds the issue. The essential question is one of proof; whether the plaintiff has suffered a serious and compensable injury should not turn on this artificial and often arbitrary classification scheme.").

\textsuperscript{63} The three \textit{Dillon} guidelines for bystander recovery, see note 58 and accompanying text \textit{supra}, will remain intact. \textit{See} Hathaway v. Superior Court, 112 Cal. App. 3d 728, 737, 160 Cal. Rptr. 435, 440 (1980); Cortez v. Macias, 110 Cal. App. 3d 640, 648-49, 167 Cal. Rptr. 905, 909 (1980). The effect of \textit{Molien} on \textit{Dillon} would be to remove the resulting physical injury requirement from bystander recovery.

\textsuperscript{64} 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

\textsuperscript{65} \textit{See} notes 9-34 and accompanying text \textit{supra}.