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Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos

By

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During the past two decades, the California Supreme Court has led the nation's courts in creating new paths for tort recovery by injured victims.\(^1\) In the area of negligent infliction of emotional distress,\(^2\) however, the court's holdings have appeared chaotic. While the court has dramatically expanded this tort cause of action, establishing itself as the leader here, as elsewhere, in tort law, it has also analyzed emotional distress in a manner that flatly contradicts these liability-expanding holdings. The consequence has been confusion among lawyers, judges, and commentators who perceive a California case law in disarray. This Article, however, will suggest the means to bring order to this apparent disarray.

In 1968, in *Dillon v. Legg*,\(^3\) California became the first American jurisdiction to hold that a mother who witnesses the negligent infliction of death or injury to her child may recover for her emotional trauma and accompanying physical injury even though she was not within the...
zone of physical danger. Prior to Dillon, American courts had uniformly required that recovery for emotional distress be based on a fear for plaintiff’s own safety because of his or her presence within the zone of physical injury.4 Breaking from this traditional stance, Dillon allowed recovery for a “bystander” plaintiff, who is not within the zone of physical danger but who witnesses an accident and as a result suffers shock that is manifested in physical injury.

The Dillon opinion emphasized the primary importance of foreseeability in establishing liability.5 Emotional distress is foreseeable when a mother witnesses the negligently caused death or injury of her child, even if the mother is not herself physically endangered. From this perspective, the court concluded that the Dillon facts exposed the “hopeless artificiality of the zone-of-danger rule”6 and thus afforded an ideal backdrop for the rule’s internment. Both Mrs. Dillon and her daughter, Cheryl, witnessed the automobile accident that resulted in the death of Mrs. Dillon’s infant daughter, Erin. While Cheryl may have been within the zone of risk, her mother admittedly was not. The trial court granted the defendant’s motion to dismiss for failure to state a cause of action with respect to Mrs. Dillon’s claim and denied such a motion with respect to Cheryl’s claim. In reversing the trial court dismissal of Mrs. Dillon’s cause of action, the California Supreme Court criticized the zone-of-danger rule, which would justify the trial court’s rulings on these motions “merely because of a happenstance that the sister was some few yards closer to the accident.”7

The significance of Dillon’s expansion of liability has been widely noted.8 Dillon has become the leading exposition of the desirability of expanded liability for emotional distress; when other courts have considered the bystander issue, Dillon has provided the justification and methodology for extending recovery beyond the traditional zone-of-

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5. 68 Cal. 2d 728, 739-41, 441 P.2d 912, 919-20, 69 Cal. Rptr. 72, 79-80 (1968).
6. 68 Cal. 2d 728, 733, 441 P.2d 912, 915, 69 Cal. Rptr. 72, 75 (1968).
7. Id.
8. See, e.g., California Citizens’ Commission on Tort Reform, Righting the Liability Balance: Report of the California Citizens’ Commission on Tort Reform 62 (1977): “Among all the celebrated tort decisions in the history of British and American law, many feel that this ruling qualifies as the highest priority yet achieved by the goal of compensation of the injured, as opposed to other objectives in the tort system.”.
danger rule. Even courts reluctant to extend recovery beyond the zone of danger have recognized the importance of the Dillon opinion in analyzing the policy considerations.

While Dillon remains a landmark of expanded liability for emotional distress, California case law has taken a surprising turn. A recent court of appeal case is illustrative. In Hathaway v. Superior Court, plaintiff parents emerged from a house within minutes after their son had touched an electrically charged evaporative cooler. The parents saw their six-year old son lying in a puddle of water, gagging and spitting up. Although the boy had a recognizable pulse, efforts to revive him failed, and the parents watched their son in a "dying state." The court of appeal held that the parents had no cause of action for their emotional distress. Their son was no longer gripping the water cooler and receiving the electrical charge as they observed him writhing on the ground. This holding might be seen as the product of an aberrant court of appeal, undoubtedly unsympathetic to Dillon in particular, and to the general drift of California tort law; the "happenstance" that the boy no longer was touching the cooler seems as "hopelessly artificial" a basis for denying recovery for the foreseeable emotional distress to the parents as was the fact that Mrs. Dillon was a few yards further from the accident than her daughter, Cheryl. Nevertheless, the Hathaway court was confident in its assertion that its decision was representative of a "steady flow" of appellate decisions in California.

California tort law governing recovery for emotional distress appears chaotic, and one source of this chaos is Justus v. Aitchison, a

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12. Id. at 731, 169 Cal. Rptr. at 437.

13. Id.

14. Id. at 734, 169 Cal. Rptr. at 438.

1977 California Supreme Court decision. The Justus court held that a father who suffered shock as a result of watching the negligent delivery of his stillborn infant could not recover under Dillon for his emotional distress. The Justus opinion appears to have repudiated Dillon's methodology and underlying premises. Dillon allowed recovery based on an analysis that imposed an obligation when the traumatic reaction of the plaintiff was reasonably foreseeable to the defendant. While recognizing that "no immutable rule can establish the extent of that obligation for every circumstance of the future," the Dillon court ventured to define guidelines to aid future resolution of the issue of duty based on foreseeability. In Justus, the risk of danger to the plaintiff appeared foreseeable, satisfying the general criterion of liability espoused in Dillon. Nevertheless, the court denied relief, imposing as a prerequisite to recovery factors that in Dillon had been advanced only as guidelines to be considered in determining the issue of foreseeability. Justus seems to require in emotional distress cases an analysis as arbitrary as that employed under the discredited zone-of-danger concept.

The renewed skepticism towards awards for emotional distress apparent in Justus was absent, however, in the California Supreme Court's holding in Molien v. Kaiser Foundation Hospitals. In Molien, the court returned to the Dillon emphasis on the "general principle of foreseeability" in sanctioning recovery for emotional distress for a husband whose wife had been negligently misdiagnosed as having syphilis. Although this holding and rationale appear to undercut Justus, the court nevertheless purported to reaffirm Justus's restrictive treatment of bystander cases. At the same time, however, the Molien court further expanded the emotional distress action by holding, in a departure from prior California law, that a plaintiff who suffers no physical injuries may nevertheless state a cause of action for negligent infliction of emotional distress if that emotional distress is foreseeable and "serious."

This Article suggests that coherence can be found in the apparently chaotic California tort law governing recovery for negligent infliction of emotional distress. First, the Article examines the California
case law, including both the apparent fluctuation in the California Supreme Court's attitude, as indicated by *Dillon, Justus*, and *Molien*, and the impact of this fluctuation on lower court decisions in California. This analysis reveals that, contrary to the implications of *Dillon*, California courts have created an analytically complex regime of arbitrary rules restricting recovery for foreseeable emotional distress. Second, the Article probes the underlying issues of policy that have plagued the California Supreme Court in its attempt to create a rational doctrine in this area, concluding that the complexity and arbitrariness of California emotional distress law can be traced to the court's initial failure to comprehend fully these difficult issues of policy and to its subsequent attempts to meet these issues by incremental adjustments to its *Dillon* holding. Once California case law is understood from this policy perspective, *Dillon, Justus*, and *Molien* emerge as constructive steps in the articulation and resolution of the difficult and subtle policy issues raised by tort actions for emotional distress.

**Dillon, Justus, and Molien**

*The Dillon Landmark*

For the California Supreme Court, recognition of a cause of action for plaintiffs such as Mrs. Dillon, who suffered emotional distress although outside the zone of danger, was a compelling proposition. Thus, in *Dillon v. Legg*, 23 the court critically examined the concept of duty, the widely accepted basis for judicial rejection of such claims. 24 To the court, the duty concept was "not an old and deep-rooted doctrine but a legal device of the latter half of the nineteenth century designed to curtail the feared propensities of juries toward liberal awards."25 In assessing whether the tortfeasor owed a duty to the mother, the court quoted Dean Prosser for the proposition that, because the essential question is "‘whether the plaintiff’s interests are entitled to legal protection against the defendant’s conduct,’ ” the concept of duty represents "‘a conclusion, rather than an aid to analysis in itself.’ ” Duty should be recognized as "‘only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.’ ”26 In prior cases similar to *Dillon*, duty rules had been developed to deny liability because of

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23. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
24. Id. at 730, 441 P.2d at 914, 69 Cal. Rptr. at 74.
25. Id. at 734, 441 P.2d at 916, 69 Cal. Rptr. at 76.
26. Id. (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54, at 332-33 (3d ed. 1964)).
“twin fears that courts [would] be flooded with an onslaught of (1) fraudulent and (2) indefinable claims.”27 The Dillon court concluded that “neither fear [is] justified.”28

As to fraudulent claims, the court admonished that the possibility of some fraudulent claims “does not justify a wholesale rejection of the entire class of claims in which the potentiality arises.”29 Each case should be decided by the jury or trial court on its own merits. To do otherwise would “destroy the public’s confidence . . . by using the broad broom of ‘administrative convenience’ to sweep away a class of claims a number of which are admittedly meritorious.”30 In addition, the court doubted that the problem of fraudulent claims is substantially more pronounced in cases like Dillon than in cases in which a plaintiff fears for his or her own safety or collects damages for mental suffering when the mental injury is an aggravation of, or “parasitic” to, an established tort.31 The court concluded that “we cannot let the difficulties of adjudication frustrate the principle that there be a remedy for every substantial wrong.”32

As to indefinable claims, the court found unconvincing the argument that “definition of liability being impossible, denial of liability is the only realistic alternative.”33 The court asserted that “proper guidelines can indicate the extent of liability” for different fact situations presented in future cases.34 The court emphasized the primary importance of foreseeability of risk in establishing the element of duty in the absence of overriding policy considerations.35 The court cautioned, however, that “[b]ecause it is inherently intertwined with foreseeability such duty or obligation must necessarily be adjudicated only upon a case-by-case basis.”36 No “immutable rule” would suffice to define the extent of a defendant’s obligation in every situation.37

Limiting its holding to a case in which the plaintiff suffered shock

27. Id. at 735, 441 P.2d at 917, 69 Cal. Rptr. at 77. The dissent saw the infinite liability argument as the true basis of the traditional duty rule. Id. at 751-52, 441 P.2d at 928, 69 Cal. Rptr. at 88 (Burke, J., dissenting). The majority, however, summarily rejected this argument. See notes 138-40 & accompanying text infra.
28. Id. at 735, 441 P.2d at 917, 69 Cal. Rptr. at 77.
29. Id. at 736, 441 P.2d at 917-18, 69 Cal. Rptr. at 77-78.
30. Id. at 737, 441 P.2d at 918, 69 Cal. Rptr. at 78.
31. Id. at 737-38, 441 P.2d at 918-19, 69 Cal. Rptr. at 78-79.
32. Id. at 739, 441 P.2d at 919, 69 Cal. Rptr. at 79.
33. Id. at 739-40, 441 P.2d at 919-20, 69 Cal. Rptr. at 79.
34. Id. at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.
35. Id. at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.
resulting in physical injury, the court listed the following factors to be taken into account by courts in assessing the degree of foreseeability of emotional injury to plaintiff: (1) whether the plaintiff was located near the scene of the accident or was a distance away from it; (2) whether the shock resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the accident or from learning of the accident from others after its occurrence; and (3) whether the plaintiff and the victim were closely related or there was an absence of any relationship or the presence of only a distant relationship.38

Dillon through Justus: Guides to Foreseeability Become Duty Limitations

The approach of the Dillon court, emphasizing the determination of foreseeability on a case-by-case basis,39 seemed to ensure that the Dillon holding would not be the last word.40 Courts adopting its approach are encouraged to recognize liability whenever emotional distress is foreseeable, and the Dillon guidelines suggest an analysis to determine foreseeability. Couched in their comparative language rather than phrased as threshold requirements for recovery, the factors Dillon advanced as indicative of foreseeability were intended to be interpreted flexibly to ensure that liability is coincident with foreseeability.41 The emphasis on foreseeability suggests also that liability might be extended beyond the guidelines themselves. Although under the facts of Dillon the plaintiff was near the scene of the accident, contemporaneously observed the accident, and was closely related to the victim of the accident, the court recognized that "facts more subtle than the compelling ones alleged in the [Dillon] complaint" would create a

38. Id. at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.
39. See text accompanying notes 35-36 supra.
40. For example, the Supreme Judicial Court of Massachusetts in 1978 followed Dillon in Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1975), abandoning the zone-of-danger rule with a foreseeability analysis that paralleled Dillon: "Reasonable foreseeability is a proper starting point in determining whether an actor is to be liable for the consequences of his negligence." Id. at 567, 380 N.E.2d at 1302. The Massachusetts court took an expansive view of this approach, holding that a cause of action is stated "where the parent either witnesses the accident or soon comes on the scene while the child is still there." Id. Then, in 1980 the Massachusetts court went even further, holding in Ferriter v. Daniel O'Connell's Sons, Mass. —, 413 N.E.2d 690 (1980), that a cause of action exists even when the plaintiff first saw the injuries in the hospital. Foreseeability again was the premise: "A plaintiff who rushes onto the accident scene and finds a loved one injured has no greater entitlement to compensation for that shock than a plaintiff who rushes instead to the hospital. So long as the shock follows closely on the heels of the accident, the two types of injuries are equally foreseeable." Id. at —, 413 N.E.2d at 697.
41. 68 Cal. 2d at 741, 441 P.2d at 920, 69 Cal. Rptr. at 80.
necessity for courts in future cases to draw lines of demarcation “in the absence or reduced weight of some of the [Dillon] factors.”

Since its decision in Dillon, the California Supreme Court has twice taken the opportunity to discuss extensively the Dillon guidelines. In both cases, the court’s analysis focused primarily on the second Dillon factor, “[w]hether 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.”

The first of these cases, the 1977 decision in Krouse v. Graham, seemed to point to an expansive interpretation of Dillon. In Krouse, the plaintiff husband was sitting in the driver’s seat of his parked car while his wife removed groceries from the back seat. The defendant’s car suddenly approached the plaintiff’s car from the rear at high speed, straddled the curb, and struck and killed plaintiff’s wife before colliding with the parked car. The plaintiff sought recovery for his physical injuries and emotional distress “resulting from his presence at the accident scene, and his perception of [his wife’s] death.” The California Supreme Court in Krouse held that a Dillon cause of action could be sustained even though the plaintiff neither saw his wife being struck by the defendant’s car nor immediately observed the effect of the impact upon her. The court noted first that Dillon “emphasized the primary nature of the element of foreseeability in establishing the essential ingredient of a duty of due care.” The court then noted with approval the appellate court decision in Archibald v. Braverman, which it said had extended recovery to the mother of a child injured by an explosion in which the mother “did not actually witness the tort but viewed the child’s injuries within moments after the occurrence of the injury producing event.” The Krouse court approved the holding of Archibald that the “Dillon requirement of ‘sensory and contemporaneous observance of the accident’ does not require a visual perception of the impact causing the death or injury.”

42. Id., 441 P.2d at 921, 69 Cal. Rptr at 81.
43. Id. at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.
44. 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977).
45. Id. at 74, 562 P.2d at 1029, 137 Cal. Rptr. at 870.
46. Id. at 74-75, 562 P.2d at 1029-30, 137 Cal. Rptr. at 870-71.
47. Id. at 75, 562 P.2d at 1030, 137 Cal. Rptr. at 871.
49. 19 Cal. 3d at 76, 562 P.2d at 1031, 137 Cal. Rptr. at 872 (emphasis the court’s) (quoting Archibald v. Braverman, 275 Cal. App. 2d 253, 255, 79 Cal. Rptr. 723, 724 (1969)).
50. Id.
facts of *Krouse* also satisfied this guideline:

Although [the plaintiff] did not see [his wife] struck by defendant’s automobile, he fully *perceived* the fact that she had been so struck, for he knew her position an instant before the impact, observed defendant’s vehicle approach her at high speed on a collision course, and realized that defendant’s car must have struck her. Clearly, under such circumstances [the plaintiff] must be deemed a percipient witness to the impact causing [his wife’s] catastrophic injuries.51

Thus, the court determined that one could *perceive* an accident without a visual perception of the impact causing the injuries.

The *Krouse* court’s liberal treatment of the “contemporaneous observance” guideline, together with its emphasis on foreseeability and its endorsement of *Archibald*, might have signalled a further expansion of the *Dillon* cause of action. An obvious next step would have been for the California Supreme Court to allow recovery for emotional distress caused by witnessing immediately after an accident the severe injuries experienced by a loved one.52 Instead, in *Justus v. Atchison*,53 the

51. *Id.* (emphasis added).

52. *Krouse* and *Archibald*, read together, can be seen to approve of the extension of recovery to one who was not physically at the scene of the accident when the accident occurred and did not actually witness the injury-producing event. See 19 Cal. 3d at 76, 562 P.2d at 1031, 137 Cal. Rptr. at 872; 275 Cal. App.2d at 255, 79 Cal. Rptr. at 724. The *Krouse* court did emphasize the propriety of the “expression” in *Archibald* that a “visual perception of the impact” was not required, thereby hinting that a perception of the event by senses other than sight might still be required. 19 Cal. 3d at 76, 562 P.2d at 1031, 137 Cal. Rptr. at 872. Nevertheless, the *Krouse* opinion emphasized the language in *Archibald* that the mother did not actually witness the tort “but viewed the child’s injuries within moments after the occurrence of the injury-producing event.” *Id.* (emphasis deleted). The supreme court’s focus on this language could have been interpreted to indicate that persons arriving at the scene of the accident shortly after its occurrence would be allowed to recover even if they had not sensorily perceived the injury-producing event.

The reasoning of the court of appeal in *Archibald*, holding that the shock sustained must be “fairly contemporaneous” with the accident, supports such a conclusion. The court stated: “Manifestly, the shock of seeing a child severely injured immediately after the tortious event may be just as profound as that experienced in witnessing the accident itself.” 275 Cal. App. 2d 253, 256, 79 Cal. Rptr. 723, 725 (1969).

The *Krouse* court’s analysis of two other decisions imposing “temporal limitations” on the *Dillon* requirement that the injury result from the sensory and contemporaneous observance of the accident is not in conflict with this interpretation of *Krouse*. The court noted that, in *Deboe v. Horn*, 16 Cal. App. 3d 221, 94 Cal. Rptr. 77 (1971), “the court denied recovery to a wife who was not present at the scene of the accident and was unaware of her husband’s injury until summoned to the hospital emergency room.” *Krouse* v. *Graham*, 19 Cal. 3d at 76, 562 P.2d at 1031, 137 Cal. Rptr. at 872. *Deboe* seems easily distinguishable from a factual setting involving a person arriving at the scene of the accident shortly after its occurrence. The shock sustained in *Deboe* seems more likely to have been caused by learning of the accident from others after its occurrence than from any sensory and contemporaneous observance of the accident itself and thus seems to fall outside of *Dillon’s* second factor.

In *Powers v. Sissoev*, 39 Cal. App. 3d 865, 114 Cal. Rptr. 868 (1979), the court refused
court’s second opinion addressing the Dillon guidelines, the court retreated to a literal and narrow interpretation of the guidelines.

Presaging this shift by the California Supreme Court was an appellate opinion rendered shortly after Krouse. In Arauz v. Gerhardt, the court of appeal noted that, according to Krouse, visual perception of the impact causing death was not essential. Nevertheless, the court emphasized that “some type of sensory perception of the impact contemporaneous with the accident is necessary to meet the Dillon requirement.” In Arauz, the mother arrived at the scene of the accident within five minutes after the collision that had injured her son. The court denied recovery because she was neither at the scene of the accident at the time of impact nor near enough to perceive the impact contemporaneously. The Arauz court distinguished Archibald, stating that in Archibald “it can be inferred that the mother heard the explosion,” thus having a sensory observance of it. The court thus declined the opportunity to extend Dillon to situations in which a parent witnesses a child’s pain a few minutes after the accident. In so doing, it ignored the emphasis in Dillon and Krouse on foreseeability, and made recovery dependent on strict compliance with the Dillon guideline.

In Justus v. Atchison, the California Supreme Court, turning away from Dillon and Krouse, adopted the approach initiated in Arauz by strictly interpreting the “contemporaneous observance” criterion. The Justus court characterized Krouse as holding that, “although the husband did not actually see his wife being struck by the defendant’s car, he nevertheless perceived the event by other than visual means. It seems to a parent who first learned of the child’s injury 30 to 60 minutes after the accident.” Krouse v. Graham, 19 Cal. 3d at 564, 565 P.2d at 122, 139 Cal. Rptr. at 97 (1977). While seemingly presenting a case closer to that in which a person arrives at the scene of the accident shortly after its occurrence, it is instructive to note that the Powers court refused to extend recovery “to a case such as this where the shock ... resulted from seeing the daughter 30 to 60 minutes after the accident and thereafter under circumstances not materially different from those undergone by every parent whose child has been injured in a nonobserved and antecedent accident.” 39 Cal. App. 3d at 874, 114 Cal. Rptr. at 874. The specter of limitless liability resulting from extending recovery in cases such as Powers affords ample explanation for the supreme court’s distinction of Powers from Archibald. Thus, the court’s treatment of Powers does not undermine the argument that Krouse and Archibald together might be interpreted to permit recovery to persons arriving at the scene of the accident shortly after its occurrence.

55. Id. at 949, 137 Cal. Rptr. at 627.
56. Id. at 948, 137 Cal. Rptr. at 626.
58. Id. at 583, 565 P.2d at 134, 139 Cal. Rptr. at 109 (quoting Krouse v. Graham, 19 Cal. 3d at 76, 562 P.2d at 1031, 137 Cal. Rptr. at 872); see text accompanying note 51 supra.
The Justus court also accepted the Arauz gloss on Archibald, characterizing Archibald as a case in which the mother had contemporaneously heard the explosion. In so doing, the court declined the opportunity to draw upon the expansive implications of Dillon, Krouse, and Archibald. Justus makes it clear that a plaintiff must see, hear or otherwise sensorily and contemporaneously perceive the injury-producing event to recover. Thus, the California Supreme Court in Justus appeared to foreclose recovery by persons who witness injuries shortly after their infliction.

The significance of Justus, however, extends beyond its rejection of Dillon’s applicability to persons arriving shortly after an accident. The Justus court converted the “contemporaneous observance” guideline into an analytically complex duty limitation posing significant hurdles for future plaintiffs. Justus involved claims by fathers who suffered shock as a result of watching the negligent delivery of their stillborn infants. In each case, the plaintiff husband was present in the delivery room in close proximity to his wife. Among the disturbing events witnessed were “the manipulation of the fetus with forceps and by hand, . . . the emergency procedures performed . . . in connection with the attempted Caesarian section, . . . the diminution of the fetal heart tones, . . . the nurse’s anxiety at her inability to monitor them, . . . the prolapsing of the umbilical cord of the fetus . . . and the pain and trauma of his wife. Finally, each [plaintiff husband] . . . was present when the attending physician announced that the fetus had died.”

At issue in Justus was the Dillon guideline, inquiring “[w]hether 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.” This guideline was designed to assist in determining the foreseeability of emotional distress to the plaintiff. The facts of Justus indicate that the plaintiff husband’s distress was foreseeable: the accidental death of the fetus occurred during the allegedly negligent attempted delivery; the plaintiff observed this unfortunate accident; as a consequence, the plaintiff suffered shock and emotional distress.

The Justus court eschewed this straight-forward foreseeability analysis and held instead that the facts did not create a cause of action

59. Id.
60. Id. at 584, 565 P.2d at 135, 139 Cal. Rptr. at 110.
61. Id.
62. Id.
63. 68 Cal. 2d 728, 740-41, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968).
because the plaintiff husband’s anxiety “did not ripen into the disabling shock which resulted from the death of the fetus until he was actually informed of that event by the doctor.” 64 Characterizing the plaintiff husband as a “passive spectator” who had no way of knowing that the fetus had died prior to that moment, the court concluded that the shock “derived not from what he saw and heard during the attempted delivery, but from what he was told after the fact.” 65 The court noted:

Here, although each plaintiff was in attendance at the death of the fetus, that event was by its very nature hidden from his contemporaneous perception: he could not see . . . nor otherwise sense [the injury to the victim] as in Archibald or Krouse. To put it another way, he had been admitted to the theater but the drama was being played on a different stage. 66

Based on this interpretation of the sequence of events, the court concluded that “a shock caused by ‘learning of the accident from others after its occurrence’ will not support a cause of action under Dillon.” 67

Thus, in an action governed by Dillon, a plaintiff must see or otherwise sense the victim’s injury. Although the Justus plaintiff had sensorily perceived by sight and sound all observable physical ministrations of the doctor that led to the death of the fetus, and foreseeably suffered emotional distress, recovery was denied because the plaintiff “could not see the injury to the victim.” 68 In requiring that a plaintiff see or otherwise sense the injury to the victim, Justus appears to require understanding by the plaintiff of the nature of the injuries being suffered by the victim while they are initially being suffered. 69 Physical presence at the scene of the accident and sensory observation of the injury-producing event was not sufficient. Under Justus, a plaintiff could recover only if he or she appreciated, at the time of death of the fetus, that the fetus had died.

The court’s analysis is flawed. It is artificial in its speculation that the plaintiff’s disabling shock occurred only at the moment the plaintiff was informed of the death of the fetus. More realistically, this shock began as anxiety caused by the plaintiff’s observation of the injury-producing event. This anxiety undoubtedly increased as the situation worsened, eventually becoming disabling shock. Fundamentally, the

64. Id. at 584-85, 565 P.2d at 135-36, 139 Cal. Rptr. at 110-11.
65. Id.
66. Id. at 583-84, 565 P.2d at 135, 139 Cal. Rptr. at 110.
68. 19 Cal. 3d at 584, 565 P.2d at 135, 139 Cal. Rptr. at 110.
69. See, e.g., Nazaroff v. Superior Court, 80 Cal. App. 3d 553, 563, 145 Cal. Rptr. 657, 662 (1978) (referring to plaintiff in Justus as “not fully comprehending the event”).
court's analysis alters the Dillon guideline, which it purports to interpret. The Dillon court asked whether shock resulted from "contemporaneous observance of the accident," and did not speak of the observance of the victim's injury. If one defines the "accident" in Justus as the unsuccessful delivery of the fetus, then the plaintiff would seem to fall within the guideline because his emotional distress was caused by his "contemporaneous observance of the accident." This definition and conclusion conform to Dillon's assertion that foreseeability of the risk is of primary importance in determining the existence of a duty. A father foreseeably may suffer emotional distress as a result of watching the delivery of his stillborn infant. In contrast to Dillon's approach and the language of its guideline, Justus requires that a plaintiff perceive the injury, that is, the death, of the fetus at the actual moment that the fetus died in utero. Apart from a plaintiff who because of medical training or other unusual circumstances is capable of diagnosing intrauterine fetal death, a plaintiff suffering emotional distress as a consequence of witnessing a stillbirth will probably be unable to recover after Justus, although the emotional distress is foreseeable.

According to Justus, a plaintiff, regardless of foreseeability, has no cause of action unless he or she meets the following requirements: (1) the plaintiff must see, hear, or otherwise sensorily perceive the injury producing event; (2) the plaintiff must perceive the receipt of the injuries by the victim; (3) moreover, these perceptions must be substantially contemporaneous with the occurrence of both the event and the initial experiencing of the injuries by the victim; (4) the plaintiff must also in fact understand the nature of the injuries being suffered by

70. 68 Cal. 2d 728, 740, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1977) (emphasis added).
71. Id.
72. Id. at 739-40, 441 P.2d at 920, 69 Cal. Rptr. at 80.
73. Such unusual circumstances permitted the court in Austin v. Regents of Univ. of Cal., 89 Cal. App. 3d 354, 152 Cal. Rptr. 420 (1979), to find that a father witnessing an intrauterine death during delivery had stated a cause of action for emotional distress. The plaintiff's wife died prior to the delivery of the unborn child. "[A]fter her death, plaintiff, who was in the delivery room, was able to feel life in the as yet unborn child; he asked the attending physician and nurses to deliver the child but they refused; the child died, and plaintiff was able to ascertain the death by feeling the wife's body." Id. at 357, 152 Cal. Rptr. at 421. The court found Justus "inapplicable" because the father in Austin alleged that he "learned of the death by his own observation of the cessation of life in the fetus and that his shock and distress were occasioned by that sensory and contemporaneous realization of the death." Id. at 358, 152 Cal. Rptr. at 422. The allegations in the plaintiff's complaint upon which the majority distinguished Justus asserted that "upon the death of the plaintiff's wife in the hospital without prior delivery of the unborn child, 'plaintiff and defendants saw and felt the unborn child move' and that 'the unborn baby then died without being born while plaintiff and defendants were present.'" Id. at 360, 152 Cal. Rptr. at 423.
the victim; and (5) this understanding must derive from the sensory and substantially contemporaneous perception of the event. Justus thus repudiates Dillon by reformulating the Dillon contemporaneous observance guideline and, contrary to the focus of Dillon, converting this “guideline” into an inflexible duty limitation on recovery for foreseeable emotional distress rather than considering it as a “factor” relevant to determining whether emotional distress was foreseeable. Dillon’s benign guideline has become a complex analytical labyrinth that may severely restrict recovery in future emotional distress cases.

In addition to its liability-limiting treatment of the Dillon guideline, Justus may also have imposed additional requirements that a plaintiff must meet in an emotional distress action. The first requirement is that a plaintiff’s emotional distress must derive from perception of an accident that can be characterized as a “relatively sudden occurrence.” This additional requirement arose in the context of the Justus court’s discussion of a court of appeal decision, Jansen v. Children’s Hospital Medical Center. In Jansen, a mother had watched the slow but progressive deterioration and ultimate death of her hospitalized child, allegedly caused by negligent misdiagnosis. The court of appeal held that Dillon was inapplicable because there was no “sudden and brief event” that caused the child’s injury and that could “be the subject of sensory perception” by the mother. The California Supreme Court in Justus appeared to approve of the Jansen analysis. It reasoned, however, that the Justus facts presented a “closer case” than Jansen and could be distinguished from Jansen because the accident in Justus “was a relatively sudden occurrence.” Thus, after Justus it can be argued that, to state a cause of action under Dillon, the plaintiff must

74. See 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80. See text accompanying notes 41-42 supra.
75. See text accompanying notes 57-74 supra. Arguably, the restrictive application of Dillon guidelines in Justus extends beyond the Justus court’s reformulation of the contemporaneous observance guideline. As another of its guidelines, the Dillon court had inquired into “[w]hether plaintiff was located near the scene of the accident, as contrasted with one who was a distance away from it.” Id. In Justus, the court restated that factor as “whether the plaintiff was present at the scene of the accident.” 19 Cal. 3d at 582, 565 P.2d at 135, 139 Cal. Rptr. at 110. In applying this factor to the facts in Justus, the court referred to it as a requirement of “physical presence.” Id. Thus, Justus may be interpreted as having converted the Dillon factor of nearness to the accident scene into a requirement that plaintiff be present at the scene.
76. 19 Cal. 3d at 584, 565 P.2d at 135, 139 Cal. Rptr. at 110.
78. Id. at 24, 106 Cal. Rptr. at 884.
79. 19 Cal. 3d at 583, 565 P.2d at 135, 139 Cal. Rptr. at 110.
80. Id. at 584, 565 P.2d at 135, 139 Cal. Rptr. at 110.
allege sensory perception of an accident that is a relatively sudden occurrence.

The second requirement possibly imposed on *Dillon*-based actions after *Justus* is that the plaintiff be an involuntary witness to the accident. In assessing the merit of the plaintiff's claim in *Justus*, the court stated:

[In the context of this case reliance on *Dillon* seems particularly inappropriate . . . . By its nature the *Dillon* cause of action presupposes that the plaintiff was an involuntary witness to the accident. Yet here, although the complaints are silent on the point, we must assume that each husband was in the delivery room by his own choice.]

The court in *Justus* was not forced to find against the plaintiff based upon this "involuntary witness" criterion because it had previously decided that the plaintiff had failed to meet the "contemporaneous observance" requirement. In cases in which a plaintiff voluntarily exposes himself or herself to the risk of emotional distress, however, the courts may be less sympathetic to demands for compensation for emotional distress.

In summary, *Justus* repudiates the underlying premises and methodological approach of *Dillon*. The *Dillon* guidelines no longer serve as aids to determining foreseeability; they have been transformed into rigid, narrowly construed duty limitations on liability for foreseeable harm. Moreover, *Justus* suggests additional requirements that a plaintiff must meet in an emotional distress action. If *Justus* guides California courts in future cases, the consequence may be that, in practice, California courts will not impose liability any more extensively than courts in zone-of-danger jurisdictions.

The Aftermath of Justus

Two cases decided after *Justus* by California appellate courts illustrate the chaotic state of California tort law governing actions for emo-

81. *Id.* at 585, 565 P.2d at 136, 139 Cal. Rptr. at 111.

tional distress. Each case involved the contemporaneous observance duty limitation. The first of these cases, *Nazaroff v. Superior Court*, demonstrates that *Justus* has not completely vitiated *Dillon*’s expansive approach, but also makes clear how difficult it is today for courts to follow *Dillon*’s lead. In *Nazaroff*, the mother of a three-year old infant sought recovery for physical injuries allegedly caused by emotional distress suffered from witnessing her son being pulled from a swimming pool and from participating in the unsuccessful attempts to revive him. The mother had been searching for her son when she heard a scream from her neighbor’s backyard. The plaintiff attested:

I immediately had the dreadful knowledge that Danny had somehow gotten into the Becker’s swimming pool and he was hurt. . . . I immediately ran toward the pool, and as I was running I saw a person . . . pulling Danny from the pool. . . . By the time I arrived at the pool edge, Nancy Akers had commenced mouth-to-mouth resuscitation. I immediately pushed her aside and commenced mouth-to-mouth resuscitation and heart thumping . . . .

Despite the fact that the mother arrived on the scene after the injury-producing event, the *Nazaroff* court held that these facts stated a cause of action for emotional distress.

The *Nazaroff* court recognized both that the harm to the *Nazaroff* plaintiff was foreseeable and that *Dillon* urged that foreseeability should be of prime concern. The court clearly was sympathetic to an expansive reading of *Dillon*, quoting at length from *Dillon* and emphasizing *Dillon*’s foreseeability language. It also cited approvingly *Archibald*’s statement that the shock to the plaintiff need only be “fairly contemporaneous with the accident.” Nevertheless, the *Nazaroff* court recognized that the weight of California cases had turned away from *Dillon* and that a “strict” application of the “contemporaneous observance” guideline was indicated by *Justus*. The court also noted that the facts in *Nazaroff* presented a more difficult question than *Krouse* because the plaintiff here “was not in a position to directly observe the initial impact of the defendant’s negligence upon the related victim.” In addition, “[t]he attempts to revive the child, and the observation of the degenerating physical condition of the child tend to

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84. Id. at 559, 145 Cal. Rptr. at 659.
85. Id. at 560-62, 145 Cal. Rptr. at 660-62.
86. 80 Cal. App. 3d at 564, 145 Cal. Rptr. at 663 (citing *Archibald v. Braverman*, 275 Cal. App. 2d 253, 256, 79 Cal. Rptr. 723, 725 (1969)).
87. 80 Cal. App. 3d at 565, 145 Cal. Rptr. at 663.
88. See text accompanying notes 44-51 *supra*.
89. 80 Cal. App. 3d at 565, 145 Cal. Rptr. at 663.
fall within the subsequent sensory perceptions found to be too remote in the Jansen and Arauz cases.\textsuperscript{90} Despite these obstacles, the Nazaroff court held that the plaintiff had stated a cause of action. It characterized the issue as whether shock had resulted from "contemporaneous observation of the immediate consequences of the defendants' negligent act," and held that triable issues of fact were present.\textsuperscript{91}

The Nazaroff court's expansive treatment of the contemporaneous observance guideline conforms to the approach suggested by Dillon, but conflicts with the restrictive posture of Justus. One could have a "contemporaneous observation" of "immediate consequences" even if one arrived on the scene after an accident. Indeed, the Justus fathers had a contemporaneous observance of the immediate consequences of the attempted deliveries. In response to this tension, the Nazaroff opinion carefully suggested two interpretations of its facts that would place them as much as possible within the more restrictive case law. First, the court emphasized the plaintiff's declaration that she had "dreadful knowledge" that her son was in the pool when she heard a shout identifying her son as the one in danger.\textsuperscript{92} This shout "may have permitted her to reconstruct the scene . . . . [Thus] her knowledge of what had occurred was derived from her own senses and not from another's recital of an uncontemporaneous event."\textsuperscript{93} In addition, the court observed: "Drowning, or near drowning, though initiated by an immersion, is not an instantaneous occurrence. We cannot say as a matter of law that the injuries resulting from defendants' negligence were not still being experienced at the time the mother first observed her son."\textsuperscript{94}

The second post-Justus case, Hathaway v. Superior Court,\textsuperscript{95} decided after Nazaroff, demonstrates that the Nazaroff attempt to follow the direction charted by Dillon is the exception rather than the rule in California tort law. The restrictive posture of the Hathaway court also demonstrates that the distinctions drawn today by California courts are as arbitrary as those drawn in zone-of-danger jurisdictions. In Hathaway, the plaintiff parents had emerged from a house minutes after their six-year old boy had touched an electrically charged cooler.\textsuperscript{96}


\textsuperscript{91} 80 Cal. App. 3d at 566, 145 Cal. Rptr. at 664.

\textsuperscript{92} Id. at 559, 145 Cal. Rptr. at 659.

\textsuperscript{93} Id. at 566, 145 Cal. Rptr. at 664.

\textsuperscript{94} Id. at 566-67, 145 Cal. Rptr. at 664.

\textsuperscript{95} 112 Cal. App. 3d 728, 169 Cal. Rptr. 435 (1980).

\textsuperscript{96} See notes 11-14 & accompanying text supra.
The similarity to the Nazaroff facts might suggest that triable issues of fact also were present in Hathaway. The court of appeal in Hathaway, however, held to the contrary, adopting the restrictive posture of Justus. It cited Dillon for the recognition that “potentially infinite liability” could occur as a result of its decision.\footnote{Dillon was viewed as setting three requirements for recovery “in an effort to restrict that possibility.”\footnote{Noting Justus as a prominent example, the court concluded that “most of the appellate courts have applied rather strictly the requirement that the injury-producing event itself be observed . . . . A steady flow of Court of Appeal cases have continued to strictly apply a contemporaneous sensory perception requirement of Dillon.”\footnote{The Hathaway opinion illustrates the arbitrary distinctions required of courts using the Dillon guidelines as restrictive duty limitations. For example, Hathaway emphasized that, in Nazaroff, “the mother visually perceived the boy being pulled from the pool while alive,” establishing that “the accident (drowning) was still in progress and was observed.”\footnote{The Hathaway facts were distinguished in that the victim “was no longer gripping the water cooler and receiving the electrical charge”;\footnote{The contemporaneous observance requirement was not}}}}\footnote{97. 112 Cal. App. 3d at 732, 169 Cal. Rptr. at 437 (citing Dillon v. Legg, 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80).} It cited Dillon for the recognition that “potentially infinite liability” could occur as a result of its decision.\footnote{98. 112 Cal. App. 3d at 732, 169 Cal. Rptr. at 437.} Noting Justus as a prominent example, the court concluded that “most of the appellate courts have applied rather strictly the requirement that the injury-producing event itself be observed . . . . A steady flow of Court of Appeal cases have continued to strictly apply a contemporaneous sensory perception requirement of Dillon.”\footnote{99. Id. at 732, 169 Cal. Rptr. at 438. An example of a case strictly applying the “requirement” is Parsons v. Superior Court, 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978). The plaintiffs in Parsons were driving their automobile, closely following defendants’ car, which carried plaintiffs’ two daughters. The court relied upon these facts: “Upon rounding a curve, plaintiffs came upon the wreckage of the [automobile in which their daughters were riding] knowing instantly that their close family members were within and either dead or dying. The father left his car and reached the wreckage wherein lay his daughter before the dust had settled. . . . It was admitted that [plaintiffs] neither saw nor heard the accident take place.” Id. at 509, 146 Cal. Rptr. at 496. The court held that the Dillon “requirement” of a direct emotional impact upon the plaintiffs from sensory contemporaneous observation of the accident had not been met because the plaintiffs “did not hear, see or otherwise sensorily perceive the injury producing event.” Id. at 512, 146 Cal. Rptr. at 498. The automobile carrying the plaintiffs’ daughters had already come to rest against the pole before the plaintiffs rounded the curve in their automobile and observed the wreckage.” Id.} The Hathaway opinion illustrates the arbitrary distinctions required of courts using the Dillon guidelines as restrictive duty limitations. For example, Hathaway emphasized that, in Nazaroff, “the mother visually perceived the boy being pulled from the pool while alive,” establishing that “the accident (drowning) was still in progress and was observed.”\footnote{100. Id. at 732, 169 Cal. Rptr. at 438.} The Hathaway facts were distinguished in that the victim “was no longer gripping the water cooler and receiving the electrical charge”;\footnote{101. Id. at 736, 169 Cal. Rptr. at 440.} thus, the “event which constituted the accident had ended.”\footnote{102. Id.} The contemporaneous observance requirement was not
met because plaintiffs "did not sensorily perceive the injury causing event, that is, the actual contact between the electrically charged water cooler and their son, but only the results of the . . . contact (the injuries) after the accident was over."103

The distinctions drawn by Hathaway are weak, arbitrary, and demeaning of the judicial process. The parents in Hathaway watched their child within minutes of his contact with the electrically charged cooler. The parents watched unsuccessful efforts to revive him. Nazaroff's statement of the pertinent inquiry—whether shock resulted from "contemporaneous observation of the immediate consequences of the defendant's negligent act"104—would seem equally applicable in Hathaway. Significantly, just as drowning is "not an instantaneous occurrence,"105 neither, as the Hathaway court recognized,106 is electrocution. A doctor's declaration had indicated that "electrocution causes death because it interrupts the beating of the heart and the heart muscle itself is denied a blood supply. Depending upon the severity of the electrical shock the process can take time."107 Thus, if the mother in Nazaroff could be said to observe "injuries that were . . . still being experienced,"108 so could the parents in Hathaway. It is clear that the judicial system should not require courts to make the inquiry demanded by Hathaway: was the dying child still grasping the electrically charged water cooler as he lay gagging and spitting up? Post-Justus California case law is so restrictive and repugnant in application that persons sympathetic to Dillon and its premises might prefer the zone-of-danger rule.

The Molien Turnabout

Although the Justus court applied the Dillon guidelines restrictively, thus suggesting an increased skepticism towards awards for emotional distress, the California Supreme Court, in Molien v. Kaiser Foundation Hospitals,109 returned to an expansive posture towards emotional distress. In Molien, the plaintiff alleged that the defendant doctor had erroneously and negligently diagnosed the plaintiff's wife as suffering from an infectious type of syphilis. The doctor instructed Mrs. Molien to tell her husband that she had been so diagnosed, and

103. Id
104. 80 Cal. App. 3d at 566, 145 Cal. Rptr. at 664.
105. Id. at 567, 145 Cal. Rptr. at 664.
106. 112 Cal. App. 3d at 731, 169 Cal. Rptr. at 437.
107. Id
108. 80 Cal. App. 3d at 566, 145 Cal. Rptr. at 664.
109. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).
she did. Suspicions of extramarital sexual relations led to the eventual breakup of the marriage.

Based on these circumstances, the plaintiff husband filed suit, claiming negligent infliction of emotional distress. The plaintiff had to overcome two obstacles: establishing that the defendant owed him a duty and overcoming prior California case law requiring those who seek recovery for negligent infliction of emotional distress to have also suffered some physical injury.110

The court held that the defendant doctor owed the plaintiff husband a duty to exercise due care in diagnosing the plaintiff's wife's condition.111 The court first reiterated Dillon's methodological emphasis on foreseeability: "[In Dillon we] identified foreseeability of the risk as the critical inquiry . . . . [Here] we apply its general principle of foreseeability to the facts at hand, much as we have done in other cases presenting complex questions of tort liability . . . ."112 The court then determined that the risk of harm to the plaintiff was reasonably foreseeable to the defendant. Foreseeability having been determined, the conclusion of duty followed.113

Considering the plaintiff's lack of physical injury, the court announced that "emotional injury may be fully as severe and debilitating as physical harm and is no less deserving of redress . . . ."114 Based on this premise, the court held that a plaintiff who suffers no physical injuries may state a cause of action for negligent infliction of emotional distress if that emotional distress is "serious."115 Serious mental distress might 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."116

Although analytically the Molien court returned to the foreseeability analysis of Dillon, ignoring the restrictive implications of Justus, the

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111. 27 Cal. 3d at 923, 616 P.2d at 816, 167 Cal. Rptr. at 835.
112. Id. at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834-35.
113. Id. at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.
114. Id. at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.
115. Id. at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.
116. Id. at 928, 616 P.2d at 819-20, 167 Cal. Rptr. at 837-38 (quoting Rodrigues v. State, 52 Hawaii 156, 173, 472 P.2d 509, 520 (1970)). Following the lead of the Hawaii Supreme Court, the Molien court observed that plaintiffs might succeed either by proving that the mental distress is of a "medically significant nature" or by establishing "some guarantee of genuineness in the circumstances of the case." 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839; see notes 123-37 & accompanying text infra.
court distinguished the facts in *Molien* from both *Dillon* and *Justus*.

In *Molien*, the plaintiff was not present at the scene of the doctor’s negligence and learned of the diagnosis later from his wife. *Molien* would thus seem to run afoul of the *Dillon* guideline that the plaintiff must contemporaneously observe the accident. The *Molien* court, however, distinguished the facts in *Dillon*: "[I]n *Dillon* the plaintiff sought recovery of damages she suffered as a percipient witness to the injury of a third person . . . . Here, by contrast, the plaintiff was himself a direct victim of the assertedly negligent act." The court concluded that because the plaintiff was a direct victim rather than a percipient witness of the negligent act, *Dillon*’s guideline, as interpreted by *Justus*, was not applicable. Thus, after *Molien*, the *Dillon* criteria are applicable only to "percipient witnesses" to injury—the bystander scenario.

The court’s analysis seems straightforward: to determine if the *Dillon* guidelines are applicable, one need only determine whether a plaintiff is a “direct victim,” or a "percipient witness." Unfortunately, the court’s definition of “direct victim” does not provide any useful distinctions. The court reasoned that the risk of harm to the husband was reasonably foreseeable, and so it followed that “the alleged tortious conduct of defendant was directed to him as well as to his wife. . . . [U]nder these circumstances defendants owed plaintiff a duty to exercise due care in diagnosing the condition of his wife.” Foreseeability of harm is thus offered as the only definition of a “direct victim.”

This definition is obviously inadequate because it fails to exclude percipient witnesses from its ambit. For example, in *Justus*, negligence resulting in a stillbirth posed a reasonably foreseeable risk of harm to the father in the operating room. Under the reasoning of *Molien*, the allegedly tortious conduct of the doctor would be directed to the father as well as to his child. The *Molien* definition of “direct victim,” purporting to distinguish the “bystander scenario,” would thus make the father in *Justus* a “direct victim.” *Justus*, however, was intended to deny recovery to some persons who foreseeably would suffer emotional distress.

The significance of *Justus* lay in converting the expansive, and expandable, *Dillon* guidelines into duty limitations on recovery for

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117. 27 Cal. 3d at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834. *Id.* at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.
118. *Id.* at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834.
119. *Id.*: "By insisting that the present facts fail to satisfy the first and second of the *Dillon* criteria, defendants urge a rote application of the guidelines to a case factually dissimilar to the bystander scenario."
120. *Id.* at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.
121. See notes 63-82 & accompanying text *supra*. 
foreseeable harm. *Molien*, in contrast, allows recovery for emotional harm caused to "direct victims," defined as persons to whom emotional distress is foreseeable. If the *Molien* logic is pursued, nothing is left of *Justus*.

In *Justus*, the court had limited recovery for foreseeable emotional distress, but in *Molien* it returned to the expansive posture espoused in *Dillon*. *Molien* expands liability for emotional distress by abrogating the physical injury requirement in cases of serious emotional distress. By holding that a husband is a direct victim and can recover when a doctor misdiagnoses his wife as having syphilis, the court creates a potentially enormous class of persons who in the future may be able to recover for emotional distress. Plaintiffs can recover for emotional distress without regard to the *Dillon* guidelines if they are "direct victims," and "direct victims" appear to be persons to whom emotional distress is foreseeable. The court asserts that *Dillon-Justus* plaintiffs are distinguishable, but its definition of "direct victim" does not exclude them. Unlike *Justus*, *Molien* reaffirms *Dillon*'s emphasis on foreseeability of the risk as the crucial factor.\(^{122}\)

**A Policy Perspective on California Case Law: False Starts**

In light of the inconsistent approach of the California Supreme Court in *Dillon, Justus*, and *Molien*, California tort law governing recovery for emotional distress appears chaotic. Coherence emerges however, once one views these cases as incremental steps taken to resolve the difficult questions of policy raised by the emotional distress issue. From this perspective, *Dillon* emerges as a first effort to expand recovery for emotional distress. *Dillon* did not, however, satisfy the need to confine this new approach to manageable dimensions. The case law subsequent to *Dillon* addressed this problem.

Traditionally, courts have viewed mental suffering with suspicion, as an affliction whose suspected causes included the moral turpitude, or "sins," of the individual.\(^{123}\) Recently, however, psychic injury has emerged as a medical condition capable of clinical evaluation. Moreover, with the development of tests and diagnostic techniques, especially in the field of psychiatry, commentators have concluded that the existence and severity of psychic harm can be established with medical

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122. 27 Cal. 3d at 922, 616 P.2d at 816, 167 Cal. Rptr. at 834.
certainty and that psychic damage can be causally linked to the shock experienced at having witnessed injury to another.\textsuperscript{124} Dillon reflected this modern perspective in abandoning the zone-of-danger rule.

Yet even modern courts have seen special sources of concern in actions for emotional distress. The \textit{Dillon} court articulated two concerns: mental injury claims are conducive to fraud, and expanded recovery for emotional distress may lead to a multiplicity of claims and unlimited liability.\textsuperscript{125} Dillon, in turn, offered two devices to meet these concerns: the requirement that the plaintiff’s emotional distress result in physical injury, and the requirement that courts, aided by “guidelines,” determine that the risk is foreseeable.\textsuperscript{126} Other courts have followed this lead and have attempted to fashion similar requirements in bystander emotional distress cases.\textsuperscript{127} California Supreme Court case law subsequent to \textit{Dillon} can be seen as an attempt to test and improve these two screening devices. Each of these devices, however, is flawed; the court’s attempts to use them to confine the emotional distress action were false starts.

The Physical Injury Requirement

\textit{Dillon} viewed the physical injury requirement primarily as a safeguard against fraudulent claims,\textsuperscript{128} but that requirement could also be used to screen claims to avoid a flood of litigation and unlimited liability. In \textit{Krouse v. Graham},\textsuperscript{129} the court appeared to attempt to strengthen this screening device by emphasizing that plaintiffs must establish that the “precise cause” of their physical injury is the “shock occasioned by . . . perception of the [accident, as opposed to] understandable feelings of anger and retribution, or . . . feelings of grief and sorrow . . .”.\textsuperscript{130} Treated in this manner, the physical injury require-

\begin{footnotesize}
\textsuperscript{124} See, e.g., Tobin v. Grossman, 24 N.Y.2d 609, 613, 301 N.Y.S.2d 554, 556, 249 N.E.2d 419 (1969) (“mental traumatic causation can now be diagnosed almost as well as physical causation”). See also Recent Development, Torts—Mental Distress, 63 GEO. L.J. 1179, 1184-85 (1975).
\textsuperscript{125} 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
\textsuperscript{126} Id. at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74.
\textsuperscript{128} 68 Cal. 2d at 738 n.4, 441 P.2d at 918 n.4, 69 Cal. Rptr. at 78-79 n.4.
\textsuperscript{129} 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977).
\textsuperscript{130} Id. at 77, 562 P.2d at 1031, 137 Cal. Rptr. at 872. In \textit{Krouse} itself, the court con-
\end{footnotesize}
ment could have become a potent liability-limiting device. By 1980, however, the court had abandoned the hope that the physical injury requirement could serve this function. In *Molien*, the court rejected *Dillon*'s physical injury rule and held that a plaintiff who is the direct victim of the defendant's negligence may state a cause of action solely for negligent infliction of emotional distress, absent physical injury,\textsuperscript{131} if the plaintiff's emotional distress is “serious.”\textsuperscript{132} Although the holding in *Molien* was applied to direct victims, and therefore is not precedent for bystanders,\textsuperscript{133} the *Molien* court's analysis also applies to bystander cases\textsuperscript{134} and demolishes any hope that the physical injury requirement can protect against fraudulent claims or unlimited liability.

As to fraud, the court pointed out that the physical injury limitation is both overinclusive and underinclusive.\textsuperscript{135} The court also implied that the physical injury requirement may be met merely by extravagant pleading and distorted testimony, thus further undermining its practical utility as a screening device for fraud.\textsuperscript{136} These observations also undermine the utility of the physical injury requirement as a liability-limiting device.\textsuperscript{137}

**Foreseeability and the Guidelines**

*Dillon*'s second screening device, the foreseeability criterion aug-

\textsuperscript{131} 27 Cal. 3d 916, 930, 616 P.2d 813, 821, 167 Cal. Rptr. 831, 839 (1980).

\textsuperscript{132} Id.

\textsuperscript{133} Id. at 923, 616 P.2d at 834, 167 Cal. Rptr. at 834.

\textsuperscript{134} The *Molien* court reasoned that contemporary knowledge demonstrates that “emotional injury may be fully as severe and debilitating as physical harm, and is no less deserving of redress . . . .” *Id.* at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832. In addition, the court concluded that an attempted distinction between physical and psychological injury is “artificial,” “arbitrary,” and merely “clouds the issue.” *Id.* at 929-30, 616 P.2d at 821, 167 Cal. Rptr. at 839.

\textsuperscript{135} *Id.* at 928-29, 616 P.2d at 820, 167 Cal. Rptr. at 838. The classification is overinclusive because it permits recovery even where the physical injury is trivial. *Id.* at 928, 616 P.2d at 820, 167 Cal. Rptr. at 838. The physical injury requirement is underinclusive because it “mechanically denies court access to claims that may be valid and could be proved if the plaintiffs were permitted to go to trial.” *Id.* at 929, 616 P.2d at 821, 167 Cal. Rptr. at 838.

\textsuperscript{136} See *id.* at 929, 616 P.2d at 820, 167 Cal. Rptr. at 838.

\textsuperscript{137} *Id.* at 928, 616 P.2d at 820, 167 Cal. Rptr. at 838.
mented by the guidelines, was offered as a means of protecting against unlimited liability. The use of this device, however, has led to results as arbitrary, and at times as restrictive, as in zone-of-danger jurisdictions. The reason for the failure of this device is apparent if one examines carefully the posture of the California Supreme Court in Dillon. The Dillon court was unconcerned with the problem of screening claims to avoid a "'flood of litigation.'" The guidelines were promulgated in the context of expanding recovery for emotional distress and were presented as factors to aid courts in determining foreseeability of this harm. They were not intended to be rigid prerequisites to recovery. When Justus was decided, however, the court was no longer indifferent to the specter of unlimited liability. The unarticulated premise of the court's restrictive holding in Justus was a renewed concern over multiple claims and unlimited liability. This premise was evident in other decisions of this period, notably a pair of decisions refusing to sanction a cause of action for loss of parent-child consortium. The consortium decisions, Borer v. American Airlines and Baxter v. Superior Court, illuminate the court's decision that same year in Justus. Borer and Baxter were decided soon after the liability-expanding case of Rodrigues v. Bethlehem Steel Corp. In Rodrigues, the court overruled precedent and sanctioned a cause of action for loss of consortium by a spouse. As in Dillon, Rodrigues rejected the argument that its holding would lead to unlimited liability, and emphasized the element of foreseeability: "One who negligently causes a severely disabling injury to an adult may reasonably expect that the injured person is married and that his or her spouse will be severely affected by that injury." The holdings and reasoning of Borer and Baxter are in sharp contrast to Rodrigues. In Borer, the court wrote that "foreseeable injury to a legally recognized relationship [does not] necessarily [postulate] a cause of action . . . ." The court was concerned with multiple actions and unlimited liability, in the context of which it wrote:

138. 68 Cal. 2d at 739-42, 441 P.2d at 919-22, 69 Cal. Rptr. at 79-82.
139. Id. at 735 n.3, 441 P.2d at 917 n.3, 69 Cal. Rptr. at 77 n.3.
140. Thus, the court in Dillon emphasized that "the chief element in determining whether defendant owes a duty . . . to plaintiff is the foreseeability of the risk." Id. at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80. The guidelines were merely "factors" to be taken into account "[i]n determining . . . whether defendant should reasonably foresee the injury to plaintiff." Id.
144. Id. at 400, 525 P.2d at 680, 115 Cal. Rptr. at 776.
145. 19 Cal. 3d at 446, 563 P.2d at 861, 138 Cal. Rptr. at 305.
"We cannot ignore the social burden of providing damages for loss of parental consortium merely because the money to pay such awards comes initially from the 'negligent' defendant or his insurer. . . . Realistically the burden of payment of awards for loss of consortium must be borne by the public generally . . . ." To avoid unlimited liability, the court concluded that the law must intervene to delimit liability.  

Just as the consortium decisions refused to follow the clear implications of the foreseeability principle because of the court's express concern over unlimited liability, Justus responded to this concern by "refining" the Dillon guidelines as a screening device for emotional distress claims. Because the guidelines were not designed for this purpose, however, the consequence has been a set of rigid duty rules leading to arbitrary and unseemly results. The holding and underlying rationale of Justus return California to a posture resembling jurisdictions that follow the zone-of-danger rule.  

The Justus court's holding resembles the response by the New York Court of Appeals to the question of unlimited liability in Tobin v. Grossman. Unlike the Dillon court, the Tobin court was troubled by the possibility of "unlimited liability." Writing for the court in Tobin, Judge Breitel retained the zone-of-danger rule. Rather than stating that it was unforeseeable that persons outside the zone of danger would suffer emotional distress, however, the court rejected the theory that in emotional distress cases foreseeability should lead to liability. The court was concerned with unlimited liability: "[F]oreseeability, once recognized, is not so easily limited . . . . [T]he logic of the [foreseeability] principle would not and could not remain confined." As a matter of policy, therefore, the extensive liability implied by the foreseeability principle was viewed as undesirable because it would create an "unduly burdensome liability."  

The Tobin court reviewed the Dillon guidelines from this perspective, concluding that foreseeable harm might occur even if one, or all,
of the *Dillon* guidelines were absent. For example, nonrelatives could foreseeably suffer emotional distress.\(^{152}\) Similarly, "[a]ny rule based solely on eyewitnessing the accident could stand only until the first case comes along in which the parent is in the immediate vicinity but did not see the accident."\(^{153}\) Furthermore, even if one is not in the immediate vicinity but learns of the harm by telephone, harm may still be foreseeable: "The sight of gore and exposed bones is not necessary to provide special impact on a parent."\(^{154}\) The *Tobin* court concluded that any attempt to limit liability will consist of "arbitrary distinctions."\(^{155}\) Of the various arbitrary alternatives, it chose to rely on the zone-of-danger rule. *Dillon*, of course, rejected the zone-of-danger rule precisely because of its arbitrariness. Ironically, *Justus* adopted an equally arbitrary approach, premised on the very policy considerations that underlie *Tobin's* rejection of *Dillon*.

**A Proposed Solution**

Because of the failure of *Dillon's* two screening devices and the California Supreme Court's apparent concern, exemplified by *Justus*, with containing the emotional distress cause of action, it must be determined whether California case law suggests a less arbitrary solution than either *Justus*-style duty limitations or the zone-of-danger rule. *Molien*'s approach to "direct victim" emotional distress cases can and should be adapted to the "bystander scenario." The *Molien* court used foreseeability as the criterion for determining whether a plaintiff is a "direct victim," and held that physical injuries need not be established if such a plaintiff suffers emotional distress that is "serious." This approach should be applied to *Dillon* "bystander" cases. Thus, a person who suffers emotional distress because he or she fears for the safety of another would be able to recover damages if: (1) emotional distress was foreseeable to that person; and (2) the emotional distress actually suffered was serious. Under this proposal, the *Dillon* factors would function as intended by the *Dillon* court: as guidelines to assist in determining foreseeability. Based on these guidelines and other considerations, courts could rule that, as a matter of law, harm to the plaintiff

\(^{152}\) *Id.* at 616, 249 N.E.2d at 423, 301 N.Y.S.2d at 559.

\(^{153}\) *Id.* at 617, 249 N.E.2d at 423, 301 N.Y.S.2d at 560. See notes 39-42 & accompanying text supra.

\(^{154}\) 24 N.Y.2d at 617, 249 N.E.2d at 423, 301 N.Y.S.2d at 560.

\(^{155}\) *Id.* at 618, 249 N.E.2d at 424, 301 N.Y.S.2d at 561. There "appears to be no rational way to limit the scope of liability." *Id.* (paraphrasing W. FROSSLER, HANDBOOK OF THE LAW OF TORTS § 55, at 353-54 (3d ed. 1964)).
was not foreseeable. Mere failure of a plaintiff to meet one or more \textit{Dillon} guidelines, however, would not by itself necessitate such a conclusion.

The \textit{Molien} opinion does not discuss the implications of its decision for bystander cases. The court's analysis, however, clearly supports a conclusion that bystander cases should be resolved by the principles of foreseeability and seriousness. The court's critique of the physical injury requirement and its assertion of the superiority of the seriousness criterion\footnote{See notes 128-37 & accompanying text \textit{supra}; see notes 160-205 & accompanying text \textit{infra}.} is equally applicable in bystander cases. With respect to the \textit{Dillon} guidelines, the \textit{Molien} court properly observed that they are relevant to the "bystander scenario," but not necessarily to direct victims such as the \textit{Molien} husband whose wife was misdiagnosed.\footnote{27 Cal. 3d 916, 923, 616 P.2d 813, 816, 167 Cal. Rptr. 831, 834 (1980).} Moreover, the discussion in \textit{Molien} of these guidelines suggests that in bystander cases the court will return to its \textit{Dillon} posture and use the guidelines as guidelines rather than as inflexible duty limitations on liability for foreseeable harm. Thus, the court characterized the guidelines as "factors bearing on the determination whether the defendant should reasonably have foreseen injury to the plaintiff . . . ."\footnote{\textit{Id.} at 922, 616 P.2d at 816, 167 Cal. Rptr. at 834.} The criterion of reasonable foreseeability "contemplates that courts, on a case-to-case basis, analyzing all the circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen."\footnote{\textit{Id.}}

Use of the twin requirements of foreseeability and seriousness should enable the court to protect against fraud, multiple claims, and unlimited liability without encountering the problems associated with its attempts to adapt \textit{Dillon}'s physical injury requirement and guidelines to this purpose. \textit{Molien} convincingly demonstrates the superiority of seriousness, in comparison with the requirement of physical injury, as a safeguard against fraudulent claims in emotional distress cases.\footnote{See notes 128-37 & accompanying text \textit{supra}; see notes 160-205 & accompanying text \textit{infra}.} Moreover, a seriousness requirement avoids the possibility of a multitude of trivial claims that would burden defendants, insurers, and the court system.

The dual requirements of seriousness and foreseeability are well suited to protecting against unlimited liability. Foreseeability has long been accepted as an adequate screening device in cases in which physi-
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cal injury is immediately caused by the defendant’s conduct. In emotional distress cases, in contrast, courts have assumed that additional protection is necessary. Explicit statements to this effect, such as that of the Tobin court, have failed to offer convincing evidence. As the specter of unlimited liability has repeatedly been raised by opponents of tort reform, it is unclear that it should be given great weight in the present context. Assuming, however, that additional protection is needed in emotional distress cases and that liability is to be denied in some cases in which emotional distress is foreseeable, seriousness provides the proper criterion. Serious emotional distress may require extensive medical treatment and hospitalization, and may interrupt normal work and household duties. This type of loss is associated with cases of physical harm immediately caused by a defendant’s conduct. There is no reason to deny recovery for this type of loss. It is as absurd to anticipate a “flood” of these claims and thus “unlimited liability” as it is to suppose that serious problems of fraud would arise. A rational screening device should select for compensation those cases that are most deserving. In this regard, the seriousness criterion is far superior to the arbitrary duty rules exemplified by either Justus or Tobin. Among instances of foreseeable emotional distress, it is defensible to conclude that, with respect to compensation, serious injury should take precedence over trivial injury. In contrast, it seems arbitrary to deny compensation to a plaintiff whose emotional distress is both foreseeable and serious merely because he or she fails to meet one of the Dillon guidelines. Finally, through the doctrines of foreseeability and seriousness, courts can regulate the number of cases in which liability is assessed, thus negating the prospect of unlimited liability.

Two cases illustrate this approach. First, in Archibald v.

161. See, e.g., Weirum v. RKO General, Inc., 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975). Of course, foreseeability is used in conjunction with doctrines such as proximate cause.


164. Practical considerations are often ignored in discussions of tort actions for emotional distress. The judiciary does not fear trivial actions for physical harm, implicitly recognizing practical realities of the litigation process that act as efficient screening devices. First, attorneys only take cases in which the likelihood of liability and the potential size of the damage award justify their expenditure of time. Second, and in part as a consequence of this fact, the vast majority of persons suffering minor injury in an accident do not attempt to institute litigation. Attorneys who litigate emotional distress cases report that juries are quite skeptical regarding this type of recovery. Thus, these practical constraints should operate even more effectively in cases where the minor injury is emotional.
Braverman, a mother came upon the scene after an explosion had injured her son. The plaintiff-mother's experience is suggested by the court's account of the son's injuries, which included "traumatic amputation of the right hand, the right wrist, and a portion of his right forearm, traumatic amputation of a portion of his left hand, severe lacerations of his body, a grave injury of the right eye, and loss of copious amounts of blood . . . ." Upon observing these injuries, the plaintiff mother "suffered severe fright, shock, and mental illness requiring institutionalization." Second, in Portee v. Jaffee, a 1980 New Jersey case, the plaintiff was the mother of a seven-year old boy who "became trapped in [their apartment] building's elevator between its outer door and the wall of the elevator shaft. The elevator was activated and the boy was dragged up to the third floor." The plaintiff arrived at the scene of the accident after these initial events, but watched as police worked for hours to free her child as he "moaned, cried out and flailed his arms. Much of the time she was restrained from touching him, apparently to prevent interference with the attempted rescue. The child suffered multiple bone fractures and massive internal hemorrhaging. He died while still trapped, his mother a helpless observer." The consequence to the mother was that she "became severely depressed and seriously self-destructive. . . . [S]he attempted to take her own life . . . with a laceration of her left wrist more than two inches deep. She survived . . . but she has since required considerable physical therapy and presently has no sensation in a portion of her left hand. She has received extensive counseling and psychotherapy to help overcome the mental and emotional problems caused by her son's death."

In both Archibald and Portee, emotional distress was foreseeable to the plaintiff mothers; under any conceivable definition, the emotional distress actually suffered was serious. That these plaintiffs should receive compensation from negligent defendants seems compelling. One would not anticipate unlimited liability because of a flood of cases of this type. Nor should there be serious concern that such cases are fraudulent. Yet each of these cases arguably fails to meet Justus's
liability-limiting duty rules. The *Archibald* court allowed recovery, but the *Hathaway* decision suggests that most courts would deny recovery because the plaintiff did not observe the injury-producing event. Similarly, it is not clear that the mother in *Portee* would satisfy the *Justus* criteria. She did not see, hear, or otherwise sensorily perceive the injury-producing event, nor did she perceive the initial receipt of the injuries by her son. The elevator had come to rest on the third floor before she arrived. Furthermore, it is uncertain that she understood the nature of the injuries being suffered by her son while they were actually being suffered. The massive internal hemorrhaging that led to his death was arguably as hidden as were the developments that led to the intrauterine death of the fetus in *Justus*. *Portee* and *Archibald* illustrate the conclusion that, if lines must be drawn, lines based on foreseeability and seriousness are preferable to the arbitrary duty limitations of either *Tobin* or *Justus*.

In retrospect, it appears likely that the *Dillon* court envisioned a seriousness criterion and that its physical injury requirement was a preliminary articulation of such a standard. The proposal set forth here is thus a refinement, rather than a repudiation, of *Dillon*’s physical injury requirement. Support for this contention is found in the court’s 1977 decision, *Borer v. American Airlines*, which refused to allow recovery for loss of parent-child consortium. Although the *Borer* court’s articulated concern over unlimited liability is suggestive of *Justus*’s restrictive posture that same year, the court in *Borer* distinguished emotional distress actions from actions for loss of consortium. The court emphasized that *Dillon* and subsequent decisions required physical injury to the plaintiff, and thus concluded that “*Dillon* and subsequent authority support our [consortium] decision . . . .” In light of the fact that *Molien* only three years later discredited the physical injury requirement, identifying it with nineteenth century courts that lacked the insights provided by modern medical science, the attempted distinction in *Borer* might seem both weak and peculiar. On closer examination, however, it is neither.

Justice Tobriner, the author of both *Dillon* and *Borer*, wrote in

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172. See notes 48-51 & accompanying text *supra*.
173. See notes 95-108 & accompanying text *supra*.
174. See notes 53-82 & accompanying text *supra*.
176. See notes 53-82 & accompanying text *supra*.
177. 19 Cal. 3d at 450, 563 P.2d at 864, 138 Cal. Rptr. at 308.
178. *Id*.
179. *Id*.
Borer that the distinguishing factor between Dillon emotional distress actions and consortium actions is that the former involve physical injury, whereas the latter is "a cause of action founded upon purely intangible injury." Borer thus suggests that Dillon's physical injury requirement was intended to select for compensation emotional distress claims that entailed an element of real, tangible loss. To the Borer court, claims for purely intangible injury are less deserving of compensation than claims for tangible loss because money can never compensate for intangible loss.

[M]onetary compensation will not enable plaintiffs to regain the companionship and guidance of a mother; it will simply establish a fund so that upon reaching adulthood, when plaintiffs will be less in need of maternal guidance, they will be unusually wealthy men and women. To say that plaintiffs have been "compensated" for their loss is superficial; in reality they have suffered a loss for which they can never be compensated; they have obtained, instead, a future benefit essentially unrelated to that loss.

Consistent with Dillon and Borer, the proposal set forth here recognizes that tangible loss is more deserving of compensation than intangible loss. Molien suggests, however, that the seriousness criterion is superior to the physical injury requirement as a guide to emotional distress actions that will, in fact, involve tangible loss. Minor emotional distress, accompanied by slight physical injury, may not entail tangible loss. Conversely, serious emotional distress may entail real tangible loss, even in the absence of physical injury. As illustrated by Archibald and Portee, serious emotional distress may require extensive medical treatment, including in some instances hospitalization, and may disrupt one's ability to perform normal work and household duties. This type of harm is, of course, precisely the type associated with tort actions based not on emotional distress but rather on physical injury immediately caused by a defendant's conduct. The seriousness criterion would sanction recovery in emotional distress cases in which this type of harm occurs.

Moreover, formal adaptation of Molien's seriousness criterion to bystander cases would conform legal doctrine to judicial practice. Even when, as is often the case, seriousness has not been explicitly recognized as a controlling doctrinal element in bystander cases, the results of these cases have tended to correlate with the seriousness of harm suffered by the bystander. For example, in the overwhelming majority of California appellate decisions upholding recovery, emo-

180. Id.
181. Id. at 447, 563 P.2d at 862, 138 Cal. Rptr. at 306.
tional distress has been so serious as to require psychiatric treatment. Conversely, in the overwhelming majority of cases where courts denied recovery, psychiatric care has not been required.

This discussion suggests that a definition of seriousness should, in conjunction with the foreseeability criterion, avoid the prospect of unlimited liability, as well as protect against fraud and trivial claims, by identifying those cases of emotional distress most worthy of compensation. An examination of judicial opinions reveals that courts in recent years have attempted to formulate such a definition. Molien provides the appropriate touchstone with its admonition "that emotional injury . . . as severe and debilitating as physical harm . . . is . . . deserving of redress." The seriousness criterion thus refers to severe and debilitating emotional injury with its attendant painful mental suffering and anguish—injury of grave intensity and duration, as opposed to injury of a trivial and transient nature.


184. The insights of medical science are important in the determination of what constitutes a compensable emotional injury. Nevertheless, this determination is ultimately a legal question involving such pragmatic considerations as the need to limit liability and the ease of application by judges and juries. See note 187 infra.


186. 27 Cal. 3d at 919, 616 P.2d at 814, 167 Cal. Rptr. at 831.


A marked similarity exists between severe emotional distress experienced by bystanders
Molien also suggests that a means of determining whether emotional distress is severe and debilitating is to inquire whether "a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."188

and at least two medically recognized disorders: the post-traumatic stress disorder ("PSD") and abnormal or morbid grief. Molien indicates that one of the emotional injuries to be considered serious is "traumatic neurosis." 27 Cal. 3d at 933, 616 P.2d at 823, 167 Cal. Rptr. at 841. PSD "draws on the earlier concept of . . . traumatic neurosis." Comprehensive Textbook of Psychiatry III 1517 A. Kaplan, M. Freedman, G. Sadock (3rd ed. 1980) (Post-traumatic Stress Disorder, 21.1d, at 1517) [hereinafter cited as Textbook of Psychiatry].

The American Psychiatric Association's third edition of Diagnostic and Statistical Manual of Mental Disorders (DSM-III) recently defined PSD. Critical to the development of this condition is the experiencing of a "stressor [which] must be severe enough to be outside the range of human experience usually considered to be normal. . . . These stressors would all be classified as either extreme . . . or catastrophic." Id. at 1519-21. This disorder often follows the experiencing of a traumatic injury to a loved one. Id. at 1518.

Among the reactions of one suffering from PSD is "some form of diminished or constricted responsiveness . . . ." Id. at 1521. In its more severe form "the patient may complain of an inability to feel emotions of any type, especially those associated with intimacy, tenderness, and sexuality." Id. "Psychic numbing may diminish or destroy interpersonal relationships, such as marriage and family life." Id. at 1523. PSD may lead to complications including the "phobic avoidance of situations or activities resembling or symbolizing the original trauma" and may "handicap the patient occupationally or recreationally." Id. Other complications include "the use of central nervous system depressants, such as barbiturates, tranquilizers and alcohol . . . . which may lead to a chemical or psychological dependency on such drugs. The emotional liability, depressive symptoms, and guilt feelings may result in self-destructing behavior, suicide attempts, or completed suicide." Id.

Just as judicial recognition of emotional distress has been slow in developing, so too has official medical recognition of PSD as a separate and distinct disorder capable of diagnosis and treatment been "late in arriving and long overdue." Textbook of Psychiatry, supra, at 1517. This medical recognition should provide welcome assurance to courts reviewing cases involving injuries of this sort.

Damages for normal grief are not recoverable in bystander emotional distress actions. See Krouse v. Graham, 19 Cal. 3d 59, 72, 562 P.2d 1022, 1028, 137 Cal. Rptr. 863, 869 (1977). Abnormal or morbid grief, however, is a medically recognized emotional disorder which has been described as an exaggeration of the symptoms of normal grief, in terms of duration and intensity, prolonged denial of loss, anxiety, depression, and self-destructive urges. See Textbook of Psychiatry, supra, at 690; see also Lindemann, Symptomatology and Management of Acute Grief, 101 AM. J. PSYCHIATRY 141 (1944). Abnormal grief often is triggered when a person has no time to marshall his or her emotional reserves to deal with the anguish of final separation by death. Thus it may arise because one is a bystander of a negligently caused accident which kills a loved one. When such is the case, abnormal grief would properly be viewed as an element of recoverable emotional distress.

The language might be seen to suggest that a plaintiff's action should be barred unless a "normally constituted person" would suffer emotional distress of a magnitude similar to that suffered by the plaintiff. This result would be inconsistent with the traditional "thin skull plaintiff," under which a defendant takes his victim as he finds him. See Steinhauser v. Hertz Corp. 421 F.2d 1159 (2d Cir. 1970). Retention of the "thin skull plaintiff" rule would
Severe and debilitating emotional injury, for example, may be associated with an inability to return to a normal routine, including an inability to perform usual work, household, or childrearing duties adequately. Another common manifestation of serious emotional distress is a disruption in the person's relationships with friends, associates, and loved ones, including interference with the nurturing aspects of childrearing. One who suffers from serious emotional distress might be characterized as unproductive, distracted, aimless, and prone to fits of temper or emotional outbursts. Among the emotional injuries that should be considered serious are "traumatically induced neurosis, psychosis, chronic depression or phobia." Debilitating emotional injuries may result in somatic manifestations, such as lack of strength, muscle tension, physical exhaustion and the more extreme consequences of heart attacks, miscarriages, and strokes. Psychic injuries seem more consistent with the approach of the Molien court and the quoted Molien language. Thus recovery would be allowed so long as the mental stress actually suffered is of sufficient magnitude to cause a normally constituted person to be unable adequately to cope. The concerns of courts wary of retaining a thin skull plaintiff rule in emotional distress cases, see Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976), should be met by requiring that some emotional distress to the plaintiff be foreseeable and that the emotional distress in fact suffered be serious.
manifestations of serious emotional distress might include severe depression, suicidal tendencies, nightmares, and neurotic fears of something connected with the victim's injuries.\textsuperscript{195}

This listing of common reactions to and manifestations of severe and debilitating emotional injury is not intended to be exhaustive; rather, it is illustrative of those types of disorders often associated with serious emotional distress. These characteristics, as well as the severe and debilitating standard, are drawn largely from our analysis of judicial efforts to compensate deserving victims, often, as in \textit{Archibald}, in the face of precedents weighing heavily against recovery.\textsuperscript{196} The concept of severe and debilitating emotional injury proposed here is an exposition of the commonality among such cases. Leading jurisdictions in emotional distress cases have begun to articulate standards for recovery embodying this concept, and these courts also have identified characteristics similar to those listed here to determine the existence of emotional injury sufficiently serious to warrant compensation.\textsuperscript{197}

With respect to questions of proof, \textit{Molien} again offers sound guidance. Proof that the emotional distress caused by fear for the safety of another is severe and debilitating may, but need not, be accomplished by the introduction of expert medical testimony.\textsuperscript{198} Expert medical testimony could establish, for example, that the plaintiff suffers from a


\textsuperscript{196} The courts have sometimes characterized these elements of damage as the physical manifestations necessary to support a claim. Separating purely psychological manifestations of severe emotional distress from its somatic presentation is difficult at best. "It is now clearly recognized by medical experts that mental injury and physical injury are not separate and distinct types of harm. All emotional disturbances necessarily possess some physical aspect." Comment, \textit{Negligently Inflicted Mental Distress: The Case for an Independent Tort}, 59 GEO. L.J. 1237, 1259 n.128 (1971).

\textsuperscript{197} See note 185 & accompanying text supra.

\textsuperscript{198} 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.
recognizable psychiatric illness of a debilitating nature.\textsuperscript{199} Even if a plaintiff does not introduce expert medical testimony, however, he or she may establish the seriousness of emotional distress through the circumstances of the case. The \textit{Molien} court spoke of "some guarantee of genuineness in the circumstances of the case,"\textsuperscript{200} and suggested that objectively verifiable facts could enable a factfinder to conclude that the defendant's actions caused genuine and serious emotional distress.\textsuperscript{201} In \textit{Molien}, such facts included the negligent conduct of the doctor and the gravity of a false imputation of syphilis.\textsuperscript{202} In a bystander case, objectively verifiable evidence regarding seriousness might be provided by fellow employees, associates, friends, family members, and others who could testify about disruption in a person's relationships or about an inability to perform his or her usual duties. In addition, proof that a plaintiff fell within one or more of the \textit{Dillon} guidelines might provide a guarantee of genuineness to corroborate a plaintiff's claim. For example, the fact that a mother helplessly watched the infliction of death or serious injury on her small child would tend to corroborate her claim of serious emotional distress.\textsuperscript{203} On the other hand, compliance with the \textit{Dillon} guidelines is not necessary for such corroboration. Moreover, factors not incorporated into those guidelines, such as \textit{Archibald}'s appalling nature and seriousness of the injury to a loved one, might provide corroboration.\textsuperscript{204} In short, the seriousness criterion permits a wide variety of means of proof. As \textit{Dillon} cautioned over a decade ago with respect to the foreseeability criterion, seriousness must also be adjudicated on a case-by-case basis; no "immutable rule" can adequately resolve all cases.\textsuperscript{205}

**Conclusion**

Since \textit{Dillon v. Legg},\textsuperscript{206} the California Supreme Court has grappled with the problem of defining a cause of action for bystander emo-

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\textsuperscript{199} See P.S. Atiyah, \textit{Accidents, Compensation and the Law} 78 (2d ed. 1975). Under \textit{Molien}, a plaintiff may prove that his or her emotional distress is severe and debilitating by establishing its "medically significant nature." 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839 (quoting Rodrigues v. State, 52 Hawaii 156, 172, 472 P.2d 509, 520 (1970)).

200. 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839 (quoting Rodrigues v. State, 52 Hawaii 156, 172, 472 P.2d 509, 520 (1970)).

201. 27 Cal. 3d at 930-31, 616 P.2d at 821, 167 Cal. Rptr. at 839.

202. \textit{Id}


205. 68 Cal. 2d at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.

206. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
tional distress that would compensate deserving plaintiffs while avoiding the dangers of fraud, trivial claims, and unlimited liability. Dillon suggested two devices to assist in this task: the requirement of physical injury and the guidelines. Subsequent cases have attempted to refine each device, but each device has proved inadequate. Arbitrary and unseemly results in emotional distress cases have been the consequence of this experimentation. In contrast, a careful examination of case law, especially in light of the court's approach to emotional distress issues in *Molien v. Kaiser Foundation Hospitals*, suggests a means of defining a standard for recovery in bystander cases that will both meet the concerns implicit in cases such as *Justus v. Atchinson* and allow compensation of deserving plaintiffs.

An examination of the case law suggests that two principles should govern cases in which persons suffer emotional distress due to fear for the safety of another—foreseeability and seriousness. Employed together, these concepts will adequately limit the class of potential claims. Sanctioning recovery in bystander cases in which emotional distress is foreseeable and serious conforms the law to the *Molien* court's observation that emotional injury that is "as severe and debilitating as physical harm . . . is no less deserving of redress." Abstract discussions of emotional distress actions often overlook a fact that clearly emerges from an examination of appellate cases: emotional distress results in real, tragic harm and can lead to hospitalization and incapacitation. The law should recognize the seriousness of this injury and allow compensation even if a plaintiff fails to meet one of the Dillon guidelines. Dillon envisioned these guidelines only as aids in determining foreseeability and such is their appropriate use. They need not be used as rigid duty limitations because the seriousness criterion adequately protects against fraud, trivial claims, and unlimited liability by requiring severe and debilitating harm. The law would thus identify injuries whose severity and duration are grievous rather than trivial and transient. By so doing, recovery would be allowed when it is most deserving. Moreover, the law would at last conform to Dillon's admonition that the emotional distress issue should be governed by "the general rules of tort law, including the concepts of negligence, proximate
cause, and foreseeability, long applied to other types of injury."\textsuperscript{210} The problem would be solved "by the application of the principles of tort, not by the creation of exceptions to them."\textsuperscript{211}

\begin{footnotes}
\textsuperscript{210} 68 Cal. 2d at 746, 441 P.2d at 924, 69 Cal. Rptr. at 84.
\textsuperscript{211} Id. at 747, 441 P.2d at 925, 69 Cal. Rptr. at 85.
\end{footnotes}