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Dillon's Other Leg: The Extension of the Doctrine Which Permits Bystander Recovery for Emotional Trauma and Physical Injuries to Actions Based on Strict Liability in Tort

Paul R. Joseph*

I. INTRODUCTION

The scene is a residential street in any California community. The weather being fair, children play out of doors under the watchful eyes of their parents. The traffic typical of a mobile society flows by. On one side of the street an inquisitive toddler returns from a short exploration and begins to cross the street to return to the safety of his1 watching mother. As he carefully crosses the street, a negligently driven car bears down upon him. Unable to get out of the way, the youngster is run down and seriously injured or killed.

The child, of course, would have an action against the negligent driver.2 More significantly for our purposes, since 1968,3 the mother would have an action for her emotional shock and accompanying physical injuries caused by witnessing the negligent injury to her child. The mother's claim is valid even though she was not touched by

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1. "His" and "He" are used for the child plaintiff and "Her" and "She" for the witness-plaintiff for convenience. The "classic" form of this case is a mother who witnesses the injury or death of her child, although the doctrine has not been confined to that particular factual situation.


the car, did not fear for her own safety, and was not within the "zone of danger." 

Now, let us change the situation slightly. The driver did not drive negligently, but rather hit the child because defectively manufactured brakes on his car failed. Here the result is very different, although the town, street, mother, and child are the same. The terrible injury suffered by the child and the equally damaging injuries to the mother are

4. The issue of recovery for mental distress caused by witnessing injury to another is inextricably linked with the historical reluctance of courts to give any recovery for emotional distress. The same reasons for the reluctance are usually given in both situations, and similar rules generally govern the two situations. The early view taken by courts denied recovery to plaintiff for emotional distress unless she was contemporaneously injured physically or at least "touched" in some way. As courts became dissatisfied with that rule, the requirement of physical touching gradually eroded until the least "impact" justified full recovery for both physical and emotional injuries. Eventually some courts began to abandon the impact rule, and it is now in fatal decline. To replace the impact rule many states, including California, decreed that a plaintiff could recover for physical injury caused by negligently inflicted mental distress if the plaintiff feared she would be physically touched. The idea grew that if plaintiff were in the zone whereby she might herself be touched, such recovery would be allowed. It became assumed that at least some of the plaintiff's fear was for herself and that, therefore, recovery was proper. Hence, the rule came to be called the "zone of danger" rule.

The plaintiff who feared for another obviously could not recover under the impact rule. She could recover for the fear of injury to the third party under the zone of danger rule only if she were close enough to the event that her fear was thought to be a mixture of fear for herself and the other person. Since it was impossible to separate the two elements, recovery was allowed for the whole injury. In Reed v. Moore, 156 Cal. App. 2d 43, 45, 319 P.2d 80, 82 (1957) the court explained the rule by saying:

[No recovery is permitted for a mental or emotional disturbance, or for a bodily illness resulting therefrom in the absence of a contemporaneous bodily contact or independent cause of action or an element of wilfulness, wantonness, or maliciousness, in cases in which there is no injury other than one to a third person, even though recovery would have been permitted had the wrong been directed against the plaintiff.

also the same. Yet, because the child's action is against the car manufacturer and is grounded in strict liability in tort, the mother may have no action to recover for her own psychic shock and physical injuries.

This article will examine whether this incongruity in the law has a sensible basis and, if not, whether the relevant legal doctrines should be expanded to allow recovery in the factual circumstances just discussed. The focus of discussion will be California because it was there that the action in negligence for viewing injury to another when the viewer was not in the zone of danger was first recognized in the seminal case of Dillon v. Legg. It was also California that first recognized strict liability in tort in the field of defective products. It was perhaps inevitable that these two doctrines would eventually confront each other in the California courts, as has recently happened. The conflicting holdings in two mid-level appellate cases raise the question which this article will answer: should the Dillon doctrine be available to a plaintiff suffering emotional shock and physical injuries as a result of witnessing the serious injury to a close relative caused by a product manufactured defectively although not negligently? The analysis of this question will present the reasons which many courts have used to justify the refusal to adopt the Dillon doctrine in their jurisdictions. The experience of California and other jurisdictions adopting the Dillon doctrine will be examined to determine the validity of the negative reasons given. An examination of the reasons for and against extending the doctrine to strict liability actions will be made to determine what, if any, special problems are raised by such an extension. In this context the California cases which have discussed the issue will be considered. Although stressing California cases, the arti-

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7. The present state of the law in California is unclear. The California Supreme Court has not ruled on the point, and the lower appellate courts are divided.
icle is equally applicable to all jurisdictions which have adopted the Dillon doctrine or one of its variants, and the case law of other jurisdictions will be examined when relevant to the issue being discussed. Historically, certain reasons for rejecting the doctrine have surfaced each time its adoption has been considered. These reasons should be considered when an extension of the doctrine is contemplated.

II. DILLON AND NEGLIGENCE: PROBLEMS AND SOLUTIONS

It has been a long struggle to persuade courts to recognize a cause of action based upon the observation of negligently-caused injury to another causing emotional shock and physical injuries to the observer. In the years that courts have wrestled with the issue certain reasons for denying liability have been proposed, adopted, and quoted in case after case. More recently, as the cautious trend toward recognition of the tort began to build, these same arguments have been rejected, often out of hand. In writing either the majority or the dissenting opinions on either side of the question, judges often reach into a legal grab-bag, pull out a few standard issues, apply oft-quoted cliches in support of or in opposition to the doctrine, and move on to a decision.

In examining an extension of the Dillon doctrine to the area of products liability, it seems important first to carefully reexamine each issue for and against the doctrine in order to determine which of them,

12. In Dillon, the court ruled that a plaintiff-witness to the negligent injury of another can recover against the defendant only if the witness suffered physical injury as a result of the mental distress and only if the witness (a) was located near the scene of the accident; (b) was closely related to the primary plaintiff; and (c) was injured as a result of a contemporaneous observance of the accident. Dillon v. Legg, 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80. In this article "the Dillon doctrine" is sometimes used in this limited sense, but often it is used generically to indicate recovery by the plaintiff-witness without the specific requirements imposed by the California Court.

13. The general issue of recovery for emotional distress causing physical injuries was debated before the turn of the century. See, e.g., Spade v. Lynn and Boston R.R. Co., 168 Mass. 285, 47 N.E. 88 (1897) (overruled in Dziokonski v. Babineau, 380 N.E.2d 1295 (Mass. 1978)). The specific question of recovery by a witness of negligently caused harm to another was dealt an early blow when recovery was denied in a case involving a mother who, after witnessing the death of her child by a negligently operated motor vehicle, became hysterical and ill, and died as a result of the shock. Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).

14. "Some tendency toward allowing recovery seems to be developing." Dziokonski v. Babineau, 380 N.E.2d 1295, 1300 (Mass. 1978). The Massachusetts court enhanced the trend by adopting and expanding the Dillon doctrine in a case where the plaintiff arrived on the scene soon after her child was negligently run over by an automobile and suffered mental distress and shock which caused her death.
if any, are valid today. In order to do this, each issue must be examined in its negligence context so that the wisdom of the *Dillon* doctrine can be judged, problems it may create can be explored, and solutions to those problems can be proposed.

**A. Lack of Precedent For Extension**

On occasion it has been said that the doctrine should not be recognized because of a lack of precedent.\(^5\) While such an argument may say no more than "nothing that has not been done, may be done," it gains some authority by an appeal to the principles of stare decisis. The argument suggests that the issue having been decided should not be reexamined. In actuality, however, such an appeal flies in the face of the common law system. While one important element in our legal system is the stability provided by stare decisis, an equally important element is the case by case development of law in response to changing conditions.\(^6\)

Generally, a rule correctly decided should remain in force as long as the reasons for the rule continue.\(^7\) To allow the law to change whim-

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15. Schurk v. Christensen, 80 Wash. 2d 652, 497 P.2d 937 (1972). A child, who was sexually molested by a fifteen year old babysitter, told her mother of the experience and caused the mother to suffer mental shock. The mother sued the parents of the babysitter, who knew of the sitter's history of such activity. The court denied the plaintiff's suit but noted that the facts would not have stated a cause of action under *Dillon* and left the door open to consideration of the doctrine when a more appropriate factual pattern presented itself. Significantly, it was the dissent which suggested lack of precedent as a major reason for denying recovery in *Dillon* cases. This reason is often advanced by advocates of the doctrine and as such it may be something of a straw man. Yet, as recently as 1977, in Shepard v. Superior Court, 76 Cal. App. 3d 16, 142 Cal. Rptr. 612 (1977), hearing denied (1978), the dissent noted that no authority existed for allowing the recovery, so perhaps the reason is still considered seriously by some.

16. In his dissenting opinion in Amaya v. Home Ice, Fuel and Supply Co., 59 Cal. 2d 295, 317, 379 P.2d 513, 526, 29 Cal. Rptr. 33, 46 (1963), Mr. Justice Peters noted that: So far as the doctrine of stare decisis is concerned, it is, of course, a sound doctrine, but it is not immutable. Old cases, no matter how numerous, should not stand, if, under modern and different conditions, they cannot withstand the impact of critical analysis. The doctrine of stare decisis should never be used as a substitute for such critical analysis.

17. As one commentator has stated:
Stare decisis is a habit of mind in all walks of life—the professions, business, family life. One does what one has done before in similar circumstances. It gives stability and continuity in all human activity. But when it is obvious that one's previous actions turned out badly, or that circumstances are essentially different, the intelligent human being reviews the problem anew; if, with due consideration to desiderata of stability and continuity, he concludes that something different should be done in the future, a different course is generally charted.

sically would destroy the ability to predict legal outcomes of particular problems—an ability which is an important part of any rational legal system. On the other hand, legal rules are, of themselves, not the sum and substance of our law. Rather, the ratio decidendi of a case consists of the rule of law and the facts which cause the rule to be invoked. When those facts are actually reasons for denying a cause of action and those reasons are no longer valid, a rule denying the cause of action is no longer valid.

The importance of this hypothesis is that it suggests that the merits of legal rules should periodically be examined to determine whether they are still valid. A blanket appeal to a lack of precedent or to the principles of stare decisis ought not to be substituted for such an examination. It is probable that reliance upon the lack of precedent to deny recovery is really an uneasy articulation that other unspecified reasons require a denial of the claim. The validity of the other reasons should control the decision of whether to adopt or to extend the doctrine. Those reasons must be independently considered.


20. It will be generally conceded that if the material facts of a second case are not the same as the first then the rule in the first case will not bind the second. There are cases, however, in which reasons for a decision are treated like material facts which are the basis of the decision. For example, in many Dillon type cases recovery has been denied on the basis of the fact that allowing recovery would lead to fraud. It is reasonable to conclude that in such a case, if fraud is shown not to be a problem then a material "fact" on which the decision was based is missing and, again, the rule in the first case should not bind the decision in the second.

21. As has recently been postulated:

There is a danger in our Anglo-American practice of deciding a particular case before the court and then putting into a judicially announced verbal capsule a generalized principle upon which the case is decided—for example, "No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest." The danger is that the verbal formulation, properly adaptable to the case at bar, will then be given quasi-legislative force and woodenly applied to other cases where the same policy issues are not involved. Too often neglected is a wise precept: "Every opinion must be read in the light of the facts then presented." . . . The key to the Doctrine of Precedent is the old maxim Cessante ratione, cessat ipsa lex.


B. Floodgates of Litigation

It has been suggested by some that adoption of the Dillon doctrine will lead to a massive increase in the amount of litigation. The view seems to be that the vast increase in the number of cases will swamp the courts, rendering them incapable of handling the flow. This being the case, the only practical answer is said to be a denial of all such claims. Many authorities have flatly rejected this rationale for denying liability. The California Supreme Court, for example, dismissed the argument in a few choice words, reasoning that "courts are responsible for dealing with cases on their merits, whether there be few suits or many; the existence of a multitude of claims merely shows society's pressing need for legal redress." This view has gained wide acceptance and has even been noted with approval by at least one court which refused to adopt the doctrine for other reasons.

In fairness, it must be stated that the answer of the California Supreme Court does not entirely dispose of the issue. Although courts do exist to decide cases on their merits and judicial expediency should not, therefore, be the chief basis upon which legal doctrine is formed, it is not completely unreasonable for courts to take cognizance of the volume of litigation that will result from the adoption of a particular legal rule. In a world of limited resources even the judiciary might, at times, be forced to pick and choose between competing litigants, granting a hearing to those with the most pressing claims and denying redress to others. Since legislatures do not show an unlimited willingness to fund the judicial process, it is unreasonable to expect courts to turn a blind eye to this administrative factor.

On the other hand, the denial of a valid claim for the sake of ad-

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24. See Liability to the Bystander, supra note 4, at 1250 ("Mere speculation about an increased burden to the judicial system is a questionable basis on which to foreclose legitimate complaints . . . .").
25. Dillon v. Legg, 68 Cal. 2d at 735 n.3, 441 P.2d at 917 n.3, 69 Cal. Rptr. at 77 n.3.
26. "This court has rejected as a ground for denying a cause of action that there will be a proliferation of claims. It suffices that if a cognizable wrong has been committed that there must be a remedy, whatever the burden of the courts." Tobin v. Grossman, 24 N.Y.2d 609, 615, 301 N.Y.S.2d 554, 560, 249 N.E.2d 419, 422 (1969). Many discredited rationales, such as lack of precedent and floodgates of litigation, continue to haunt discussion of the Dillon doctrine. In one recent discussion of the doctrine, 29 Ark. L. Rev. 562 (1976), the "proliferation of claims" rationale was duly noted with a citation to Tobin, but no mention was made of the fact that Tobin rejected that reason for denying the doctrine.
27. It should be noted that recently released figures on judicial expenditures place California second nationally with a total outlay in 1976 of $281.4 million. Nat'l L. J., May 21, 1979.
ministrative expediency indicates a breakdown of the ability of the judiciary to do its job. It is not something which should ever be done without compelling need. The California Supreme Court was correct in its statement to this extent; since it is the job of courts to hear and decide cases on their merits, whole classes of cases should not be denied a hearing because of administrative factors unless it can be clearly demonstrated that a massive increase in litigation will actually occur and unless such an increase will result in the denial of a forum to more deserving litigants. The burden of proof on this issue rests with those who would deny such claims on administrative grounds.

A review of the authorities shows that no evidence has ever been presented to demonstrate that the volume of litigation will be large or that the courts will be unable to handle the flow of such cases. Generally, the issue is stated as a self evident conclusion, or as part of a list of such conclusions. Actually, the evidence suggests that no great increase in litigation has taken place. If the number of appeals in Dillon cases is any yardstick, the increase in litigation has been infinitesimal. In the eleven years since Dillon was decided, only nineteen cases have been heard in the California appellate courts, a fact which suggests that the volume of litigation has not been a major problem. It appears, therefore, that no evidence exists to support the view that a massive increase in litigation will occur if such cases are heard. Whatever small increase has taken place has been manageable. In the absence of compelling necessity, claims should not be denied for administrative convenience.

C. Problems of Proof

Speaking in Amaya v. Home Ice, Fuel and Supply Co., Justice

28. "The 'contention that the rule permitting the maintenance of the action would be impractical to administer... is but an argument that the courts are incapable of performing their appointed tasks, a premise which has frequently been rejected.'" Dillon v. Legg, 68 Cal. 2d at 736, 441 P.2d at 918, 69 Cal. Rptr. at 78 (quoting Emden v. Vitz, 88 Cal. App. 2d 313, 319, 198 P.2d 696, 700 (1948)).

29. Reaction to Dillon, supra note 4, at 1250.

30. See Liability to the Bystander, supra note 4, at 205. ("In fact, the experience of jurisdictions which have rejected the impact rule has been that the anticipated avalanche of litigation has failed to materialize").

31. Since the Dillon decision set out a new cause of action, leaving to lower courts the problem of working out the exact limits of the doctrine, one would expect a higher than normal level of appeals in Dillon cases, especially during the formative years of the doctrine.

Schauer suggested that the difficulty in proving the causal link between the negligent impact to the child and the emotional shock to the watching mother requires that all such claims be denied, noting that "a difficult medical question is presented when it must be determined if emotional distress resulted in physical injury," and that "the resolution of such conflicts often borders on fancy when the causation of alleged psychoneural disorders is at issue." The court believed that the jury will be compelled to rely solely upon the subjective testimony of the plaintiff or at best upon conflicting expert testimony, making the job of the lay fact finders nearly impossible. Even if the causal relation can be adequately proved, the argument continues, psychic injury is impossible to measure monetarily, thus making damages speculative.

Why difficulty of proof should justify denial of the cause of action is unclear. Since causation must be proved by the plaintiff, the difficulty will fall on her and not on the defendant. Proof problems will tend to limit the number of cases in which plaintiff will recover. Difficulty of proof may limit the total number of suits that will be filed under the doctrine. The effects of this should be to limit the burden of liability on defendants and reduce any feared increase in the amount of litigation. Although it may be difficult for plaintiff to win her case, surely the hardest type of case to win is the one in which plaintiff is not even allowed to make her proof. It is probable that opponents of the doctrine actually fear that the fact finder will be forced to rely upon the subjective report of injury by plaintiff or at best upon confusing and conflicting expert testimony, thus granting recovery in cases where it is not warranted.

If the foregoing proof problem creates a fear that such a result will lead to a massive increase in litigation and to massive unfairness, such a view has not been borne out to date in those jurisdictions which have adopted the Dillon doctrine. Both the small amount of appellate litigation and the few victories by plaintiffs suggest that this fear is exaggerated. Some error may still exist, but this is true in all classes of

34. Id. at 312, 379 P.2d at 523, 29 Cal. Rptr. at 43.
36. "[T]he question of proof in individual situations should not be the arbitrary basis upon which to bar all actions . . . . In the difficult cases, we must look to the quality and genuineness of proof, and rely to an extent on the contemporary sophistication of the medical profession and the ability of the court and the jury. . . ." Tobin v. Grossman, 24 N.Y.2d at 616, 301 N.Y.S.2d at 561, 249 N.E.2d at 422 (quoting Battala v. New York, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961)).
37. PROSSER, supra note 4, at 327-28.
38. See notes 23-31 and accompanying text supra.
cases. The notion that fear of error is itself sufficient reason to deny recovery has been rejected by the California courts.\textsuperscript{39}

Although proof problems do not seem to be serious in their effect, the court in \textit{Dillon} may have been responding to the issue by requiring that the injury to the plaintiff be caused by a direct and contemporaneous sensory awareness of the event.\textsuperscript{40} This tends to limit recovery to cases in which the causal relation is both clear and direct. When a mother sees her child run over and suffers emotional shock, the causal connection seems particularly compelling and the chance of error is reduced.\textsuperscript{41}

The view that damages for psychic shock are impossible to measure and are therefore speculative has come under increasing attack in recent years.\textsuperscript{42} Basically the argument rests upon the idea that physical pain is different from mental pain and that while the former can be measured the latter cannot. In light of current understanding of the relation between physical and mental pain, such a view does not carry great weight, since "[i]t is probably true that no symptom or complaint which an individual may have can be differentiated into the purely mental or purely physical. Every physical pain must have some social, cultural, and psychological overtones; and even imaginary pain has physical and physiologic effects on body systems."\textsuperscript{43} Moreover, the con-

\textsuperscript{39} In \textit{Dillon}, the California Supreme Court rejected this argument, reasoning as follows:

Indubitably juries and trial courts, constantly called upon to distinguish the frivolous from the substantial and the fraudulent from the meritorious, reach some erroneous results. But such fallibility, inherent in the judicial process, offers no reason for substituting for the case-by-case resolution of causes an artificial and indefensible barrier.

\textit{Id.} at 737, 441 P.2d at 918, 69 Cal. Rptr. at 78.

\textsuperscript{40} The \textit{Dillon} court established three factors to be used to judge the degree of foreseeability of the injury:

(1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

\textit{Id.} at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80. Each of the factors confines the scope of recovery. The second factor most clearly reflects the concern with possible proof problems.

\textsuperscript{41} "The impact on a mother of a serious injury to her child of tender years is poignantly evident. This has always been so." Tobin v. Grossman, 24 N.Y.2d at 615, 301 N.Y.S.2d at 558, 249 N.E.2d at 422.

\textsuperscript{42} See, e.g., Schurk v. Christensen, 80 Wash. 2d at 662, 497 P.2d at 943 (Finley, J., dissenting).

\textsuperscript{43} Shafer, \textit{Pain and Suffering: How to Evaluate It}, in \textit{1A SUCCESSFUL LITIGATION TECHNIQUES} 64.11 (1978).
nection between the emotional and the physical often means that fear and distress produce objectively observable and diagnosable symptoms, thus making more than the subjective testimony of the plaintiff available to the fact finder:

Today we know that mental anguish and emotional distress are injuries as real and as physical in their causes and effects as those that might be produced by the common law tort of battery. Medical science has learned how to diagnose and, in large measure, how to cure, these injuries. Their existence or non-existence is as susceptible of proof (or disproof) as many physical injuries for which recovery is unquestionably allowed; for instance, a whiplash injury to the neck.44

It seems, therefore, that pain is pain and the problems which exist in attempting to quantify monetary values of mental pain are neither more than nor less than the difficulty in quantifying the value of physical pain. Yet, compensation for physical pain and suffering is an accepted part of tort recovery, while recovery for mental distress is often attacked.45 More incongruous is the fact that even before Dillon recovery was available for mental distress under the zone of danger rule as long as the cause of the injury was fear for oneself. No one would seriously suggest that damages for fear of injury to one's self are easier to quantify than damages for fear of injury to one's child.46 Although there will always be some degree of uncertainty in the area

44. Schurk v. Christensen, 80 Wash. 2d at 661-62, 497 P.2d at 943 (Finley, J., dissenting).
45. For a detailed look at the issues and problems involved see Brody, Negligently Inflicted Psychic Injuries: A Return to Reason, 7 VILL. L. REV. 232 (1961-62); Lambert, Tort Liability for Psychic Injuries, 41 B.U.L. REV. 584 (1961); Leflar & Sanders, Mental Suffering and Its Consequences—Arkansas Law, 32 U. ARK. BULL. 43 (1939); Smith, Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli, 30 VA. L. REV. 193 (1944), Throckmorton, Damages for Fright, 34 HARV. L. REV. 260 (1920-21). See also note 4 supra. Although the general issue of recovery for emotional distress is beyond the scope of this article (because California, in the bystander cases, has confined such recovery to mental distress which causes physical injuries and because within that narrow limitation it has upheld recovery) the debate continues and may prove interesting.
46. In Dillon, the lower court dismissed the claim of the mother because she suffered her injury due to fear for her daughter and not for herself. The claim of the first child's sister was allowed because she was close enough to the accident to be within the zone of danger and, therefore, to have feared both for herself and for her sister. In rejecting the distinction, the California Supreme Court reasoned as follows:

The case thus illustrates the fallacy of the rule that would deny recovery in the one situation and grant it in the other. In the first place, we can hardly justify relief to the sister for trauma which she suffered upon apprehension of the child's death and yet deny it to the mother merely because of a happenstance that the sister was some few yards closer to the accident. The instant case exposes the hopeless artificiality of the zone-of-danger rule.

Dillon v. Legg, 68 Cal. 2d at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.
of proof and qualification of damages the problems seem minor and are not sufficient to warrant a blanket denial of recovery.

D. The Problem of Fraud

The fear that fraudulent claims will be successfully pressed by plaintiffs alleging emotional trauma as a result of their viewing injuries to others has been suggested so frequently that the late Dean Prosser concluded that this is the chief reason for denying such claims. More recently, this reasoning has been regularly rejected. The California Supreme Court stated its view in Dillon v. Legg, reasoning that "the possibility that fraudulent assertions may prompt recovery in isolated cases does not justify a wholesale rejection of the entire class of claims in which that potentiality arises." The court noted that the same fears were rejected in order to allow intra-family tort actions and reiterated that, in most cases, the court's normal fact finding processes were capable of distinguishing the true from the false. Further, it was noted that recovery was already allowed in similar circumstances if the plaintiff suffered injury due to fear for herself. The court saw no reason why the possibility of fraud was necessarily higher when the fear experienced was for the safety of another.

It is important to realize that "fear of fraud" is not an independent reason upon which to deny recovery. Rather, it is a conclusion based upon other supporting reasons. Fraudulent claims may be pressed because there is no way to prove the injury, or because mentally-caused damage is difficult to measure monetarily, or because the flood of resulting litigation will overwhelm the ability of the court to handle the cases. All of the supporting reasons have been discredited leaving no basis to fear that fraud will be a major problem. Of course, as in any other type of case, fraud may take place from time to time, but the fear of isolated instances of fraud does not justify the denial of all claims.

Dillon and the hypothetical that is the basis of this article provide factual situations in which the fear of fraud is low because of the close

47. PROSSER, supra note 4, at 328. See also Dillon v. Legg, 68 Cal. 2d at 751, 441 P.2d at 927, 69 Cal. Rptr. at 87 (Burke, J., dissenting).
48. Reaction to Dillon, supra note 4, at 1249 ("the clear tendency today rejects this reason for limiting recovery").
49. Id. at 736-37, 441 P.2d at 718, 69 Cal. Rptr. at 78.
50. Id. at 736-37, 441 P.2d at 718, 69 Cal. Rptr. at 78.
51. Id. See also Dziokonski v. Babineau, 380 N.E.2d at 1301 ("We have chosen to leave the detection of fraud and collusion to the adversary process").
52. Dillon v. Legg, 68 Cal. 2d at 737-38, 441 P.2d at 918-19, 69 Cal. Rptr. at 78.
connection between the primary plaintiff and the witness-plaintiff which leads to a direct and obvious connection between the defendant's actions and the reaction in the witness-plaintiff. When a mother sees her child run down by an automobile, there can be little doubt that the resulting shock and injury to the mother are genuine. Therefore, to the extent that there is any basis for a fear of fraud, it rests not in the cases before us but rather in other unimagined circumstances. The fear is that, once recovery is allowed in any circumstance, the doctrine will "run away" and continually expand until recovery will be allowed in cases which are so remote and nebulous that fraud will occur. For this to happen all the normal control mechanisms of fact finding will have to have broken down. There is an implicit assumption in the fraud issue that the proof problem in these cases is so difficult that it will defeat the fact finder. As has been noted, this is not correct.

It is, of course, impossible to prove a negative with absolute certainty. It can be said that those opposing the extension have failed to demonstrate that fear of serious fraud is a problem or even that the fear is at all justified. In the years since Dillon, no cry of fraud based upon actual evidence or pointing to specific cases has been presented. It is becoming clear that the danger of fraudulent claims has not become a major problem.

E. Duty-Burden-Proximate Cause

Courts and commentators have sometimes said that the plaintiff in Dillon cases is too remote, that liability out of proportion to fault will

53. Id. at 735-36, 441 P.2d at 917, 69 Cal. Rptr. at 77. ("we certainly cannot doubt that a mother who sees her child killed will suffer physical injury from shock"). California limits recovery for emotional distress to those cases in which physical injuries are caused thereby. This may be an attempt to limit fraudulent claims by requiring observable symptoms before granting recovery. As medical knowledge increases it becomes increasingly questionable whether such a limitation is justifiable on that ground.

54. See notes 32-46 and accompanying text supra.

55. Reaction to Dillon, supra note 4, at 1249. The same point was recently made in Dziokonski v. Babineau, 380 N.E.2d at 1301, the court reasoning as follows:
The facts of cases of this character involve tortious injury to the child and substantial physical consequences to the parent. The tortfeasor is not confronted with the results of a fleeting instance of fear or excitement of which he might be unaware and against which he would be unable to prepare a defense. The fact that some claims might be manufactured or improperly expanded cannot justify the wholesale rejection of all claims. Of course, there is no suggestion that the physical injuries to Mr. and Mrs. Dziokonski were contrived. We reject the idea that tort liability in particular classes of cases must be denied because of the threat of fraud.

be imposed upon defendants,\textsuperscript{57} that the injury to the plaintiff is not proximately caused by the negligence of the defendant,\textsuperscript{58} that no duty is owed to the plaintiff by the defendant,\textsuperscript{59} and that the amount of liability will outstrip the ability of insurance to absorb the claims,\textsuperscript{60} thus defeating the policy rationales of loss shifting. While all these statements are not identical, they are related in that they depend, not so much upon the facts of \textit{Dillon} or the hypothetical which is being considered, but rather upon a policy judgment in response to the possibility of uncontrollable expansion of the doctrine once it gains even the slightest recognition.\textsuperscript{61}

To say that no duty is owed or that the injury is not proximate is merely to state a judicial conclusion, since such terms define the limits of liability set by considerations of policy.\textsuperscript{62} The alleged remoteness of the plaintiff seems to mean no more than that the plaintiff was “unforeseeable” in the sense of \textit{Palsgraf v. Long Island Railroad},\textsuperscript{63} which again states a judicial conclusion rather than the reasons for that conclusion. When one considers the range of risks which a driver creates in speeding negligently through a residential area, one such risk must surely be that a child will be struck in full view of his parents.\textsuperscript{64} The emotional distress and resulting psychic shock and physical injuries which are caused by witnessing the event is a natural consequence of the negligence. Users of the highways are aware of the close relation between mother and child. Psychological concepts have percolated into the consciousness of society to the point where the connection between emotional and physical injury is no longer surprising or unforeseeable.\textsuperscript{65}

\begin{itemize}
  \item \textsuperscript{57} Waube v. Warrington, 216 Wis. 603, 613, 258 N.W. 497, 501 (1935).
  \item \textsuperscript{58} \textit{Prosser}, supra note 4, at 327.
  \item \textsuperscript{59} \textit{Should Recovery Be Allowed}, supra note 35, at 404.
  \item \textsuperscript{60} Amaya v. Home Ice, Fuel and Supply Co., 59 Cal. 2d at 314, 379 P.2d at 525, 29 Cal. Rptr. at 45.
  \item \textsuperscript{61} \textit{Id.} at 313, 379 P.2d at 524, 29 Cal. Rptr. at 44 (“When, as here, a wholly new type of liability is envisioned, our responsibility extends far beyond the particular plaintiff before us, and touches society at large”).
  \item \textsuperscript{62} Both sides of the argument would apparently agree on this point. \textit{Compare} \textit{Dillon v. Legg}, 68 Cal. 2d at 734, 441 P.2d at 916, 26 Cal. Rptr. at 76 (quoting \textit{Prosser}, supra note 4, at 332-33) (concluding that duty “is not sacrosanct in itself, but 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”) \textit{with} Amaya v. Home Ice, Fuel and Supply Co., 59 Cal. 2d at 304, 379 P.2d at 521, 29 Cal. Rptr. at 41 (“there is a legal duty on any given set of facts only if the court or legislature says there is a duty”).
  \item \textsuperscript{63} 248 N.Y. 339, 221 N.Y.S. 912, 162 N.E. 99 (1928).
  \item \textsuperscript{64} Dillon v. Legg, 68 Cal. 2d at 730, 441 P.2d at 914, 69 Cal. Rptr. at 74 (quoting \textit{Prosser}, supra note 4, at 334) (“when a child is endangered it is not beyond contemplation that its mother will be somewhere in the vicinity, and will suffer serious shock”).
  \item \textsuperscript{65} The general concept of legal recovery for such distress is also starting to become more widely known as indicated by the treatment of the issue recently in a popular
\end{itemize}
At the same time, such accidents do not seem to be such a regular occurrence that the number of plaintiffs has been unbearably great.\textsuperscript{66} Children are not, with such regularity, run over in their parents' presence, so as to require a complete bar on such claims to maintain the balance between the insured and the payee.\textsuperscript{67} However desirable the policy of unrestricted utilization of the highway may be, it does not outweigh the interest of parents in being free from the physical injury caused by having their children struck down before their eyes.\textsuperscript{68}

\textsuperscript{66} See Goldstein, You Can Collect For Mental Suffering—Maybe, \textit{Psychology Today} (June 1979).

\textsuperscript{67} See notes 23-31 and accompanying text supra.

\textsuperscript{68} The importance of the interest in unrestricted use of the highways was formulated during a period in our history when such use was encouraged by cheap fuel and massive highway building programs. As this article is written, California is suffering the worst gasoline shortage since the 1973-74 Arab oil embargo and the sale of gas is rationed using the "odd-even" purchasing system. Federal energy officials can be seen nightly on the news insisting that less use of the highways is the only realistic solution to the energy crisis. Although it is not suggested that this goal be achieved solely through increasing liability of the motorist, it may be time to reevaluate the importance of the freedom of the motorist when balanced against the severe injury to the innocent bystander. It should also be noted that the policy rationales used to deny recovery in mental distress cases had early origins. In Space v. Lynn and B. R. Co., 168 Mass. 285, 47 N.E. 88 (1897), an early influential case in the mental distress area, which was finally overruled in Dziokonski v. Babineau, 380 N.E.2d 1295 (Mass. 1978), the court held that no recovery could be had for physical injuries caused by emotional distress suffered when defendant forced another passenger off its tram, because emotional distress causing physical injuries would only be suffered by overly sensitive plaintiffs. The view that emotional upset is a part of everyday life cannot be denied, but the question remains as to how much emotional distress the average person should be expected to tolerate. The view that all emotional upset should be borne by the plaintiff should be seen in the context of life at the time, the quality of which is suggested in the following passage on English life:

The pedestrian received least consideration of all, and the \textit{Time} of 14 February 1886 recorded that Mr. Dixon Hartland, Member of Parliament, was knocked down while crossing Queen Victoria Street on his way from Blackfriars Station to the House of Commons. Several details of the report call for comment. It was stated that when Mr. Hartland had reached the middle of the road, the defendant suddenly pulled out of his proper line of traffic and tried to pass a vehicle in front of him. The result was that the witness was struck violently in the chest by the shaft of the defendant's cart and knocked down in the mud. From this it is clear that, although the crossing opposite the station was well used, there was no island refuge in the centre of the road on to which the pedestrian could jump to safety. Secondly, although this was a busy street, there was mud in the center of it. In other words, the crossing sweepers, who were supposed to clear the mire and horse dung from the street crossings so that the pedestrians could get from one side to the other without fouling their shoes, had overlooked this part of the street. (The Court did not condemn them in any way for their negligence.) It was the same in Regent Street where, in November 1900, a Monsieur van Branteghem, A Belgian,
The real issue underlying these objections to adoption of the *Dillon* doctrine seems to be not so much the unfairness of allowing recovery in a particular case but rather the potential unfairness in allowing recovery in all possible third party witness cases. There is real concern that the doctrine will prove, in practice, to be uncontrollable and that the expansion of the scope of liability under the doctrine in future cases will result in gross unfairness, making an absolute bar to recovery the only practical alternative. This fear will not easily be dismissed. Many of the reasons discussed earlier for denying recovery in *Dillon* cases were premised, consciously or not, upon just this fear. Many of the proposed solutions to the problems rested upon an unarticulated premise that the doctrine could be judicially controlled so as to allow recovery in deserving cases and to cut off liability when various policy factors require it. The law of torts is, basically, a system of loss shifting and regulation. If a specific rule of recovery would severely upset the balance between the parties and result in liability that is perceived by the courts as grossly unfair, out of proportion, or destructive of other societal interests, then it is appropriate to define defendant's duty in such a way as to cut off such liability.

Thus, the heart of the argument about the *Dillon* doctrine is whether judicially defined controls will be able to structure liability so that appropriate societal interests are maintained. This concern requires more detailed discussion. In the following section the question of whether the *Dillon* doctrine can be controlled will be explored.

### III. CONTROLLING *Dillon*: A CONCEPTUAL APPROACH

The "control" of the *Dillon* doctrine raises the issue of whether recovery will be allowed to an observer of negligent conduct who suffers emotional and physical injuries without, by necessity, extending liability to all the world or at least to such an extent that the burden on defendants will be too great to be borne. This is really the key question in discussing the adoption or extension of the *Dillon* doctrine;

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70. "the law of torts, then, is concerned with the allocation of losses arising out of human activities. . . ."
71. Dean Prosser further reasoned that the endeavor to strike a reasonable balance between the plaintiff's claim to protection from damage and the defendant's claim to freedom of action for his own ends, occupies a large part of tort opinions. *Id.*
the fear that such control will be impossible has led many courts to refuse such an adoption or extension.\textsuperscript{72} The control problem (often called the problem of unlimited liability) is sometimes coupled with other reasons for not adopting the doctrine, such as the potential extension of the doctrine to unforeseeable plaintiffs, its application in cases in which proof is difficult, and its susceptibility to fraud. Stripped of these ancillary matters, the basic fear is that even without problems of fraud or proof, the normal working of the doctrine will result in such a massive expansion of liability that recovery must be denied.\textsuperscript{73} The attack on the doctrine takes two related but not identical forms. First, it is claimed that there is no way to limit the doctrine,\textsuperscript{74} and second, that even if there were ways to limit the doctrine, such means would be arbitrary and unfair to those plaintiffs who will be denied recovery.\textsuperscript{75} In short, it is said that the rule of recovery in such cases must be all or nothing.

The place to begin in considering these questions is with the plaintiff. It is hard to seriously argue that a mother who has her child killed before her eyes is a plaintiff who does not deserve redress. Even the opponents of the doctrine will, at times, concede this point.\textsuperscript{76} A meritorious plaintiff has suffered serious injury admittedly caused by defendant's negligence. The situation is one in which almost everyone instinctively feels that the plaintiff should recover.\textsuperscript{77}

\textsuperscript{72} See, e.g., Tobin v. Grossman, 24 N.Y.2d 609, 301 N.Y.S.2d 554, 249 N.E.2d 419 (1969). In the leading case refusing to adopt the Dillon doctrine, the New York court nonetheless conceded that such concerns as proliferation of claims, fraud, and proof problems were not valid reasons to deny recovery. Instead, the court grounded its refusal to adopt the doctrine on the problem of the scope of liability. The court asserted that logic would extend liability beyond any reasonable limits: "Assuming that there are cogent reasons for extending liability in favor of victims of shock resulting from injury to others, there appears to be no rational way to limit the scope of liability." Id. at 618, 301 N.Y.S.2d at 561, 249 N.E.2d at 425.

\textsuperscript{73} Reaction to Dillon, supra note 4, at 1250. Accord, Guilmette v. Alexander, 128 Vt. 116, 259 A.2d, 12, 15 (1969) ("Recovery must be brought within manageable dimensions").

\textsuperscript{74} Dillon v. Legg, 68 Cal. 2d at 749, 441 P.2d at 926, 69 Cal. Rptr. at 86 (Burke, J., dissenting).

\textsuperscript{75} This latter criticism of the doctrine was most strongly enunciated in the majority opinion in Amaya:

As Professor Prosser concedes, such limitations are quite arbitrary . . . but compelling moral and socio-economic reasons . . . require that a negligent defendant's liability have some stopping point. None has yet been proposed that would be fair to all parties concerned, and the failings of the above quoted limitations suggest that the quest may be an inherently fruitless one.


\textsuperscript{76} Tobin v. Grossman, 24 N.Y.2d at 615, 301 N.Y.S.2d at 558, 249 N.E.2d at 422.

\textsuperscript{77} Prosser, supra note 4, at 334.
It is equally important to note that under conventional negligence doctrine the plaintiff would recover. In general, the scope of defendant's duty includes those foreseeable risks of harm caused by the negligent conduct of the defendant. In this case, although not all possible plaintiffs will be foreseeable, there are certainly some who are. The notion that children in residential neighborhoods will be supervised by a watching parent does not seem unreasonable. The idea that such a watching parent will be severely upset, and perhaps even that she will suffer physical injuries as a result, is also not so unusual as to be unforeseeable to the negligent defendant. Given this, and in the absence of other factors such as assumption of risk or other defenses, under normal principles of negligence the plaintiff mother in Dillon would recover.78

Before Dillon, the denial of the right of recovery of the mother was due to a judicial limitation upon the normal functioning of tort principles. It is suggested that general negligence rules embody the basic policy that negligence on the part of the defendant, resulting in injury to a foreseeable plaintiff, ought to be paid for by the defendant rather than the plaintiff. Such a policy already includes massive limitations upon plaintiff's recovery, because it excludes the numerous cases in which the defendant caused a plaintiff's injury through mere accident, or negligently caused injury to an unforeseeable plaintiff. These plaintiffs would have been compensated under earlier legal principles but were excluded in the early nineteenth century with the rise of the industrial revolution and the accompanying development of the negligence doctrine.79

Consequently, the denial of recovery to a meritorious plaintiff in a Dillon situation must be the result of a more limited duty beyond regular foreseeability principles. Hence, a plaintiff who can prove all the normal negligence elements is being denied recovery because of additional judicially constructed limiting factors. To justify such special limits on duty there should be a serious countervailing policy requiring the limitation. The reason for such limitation is the fear that the doctrine will prove uncontrollable. Unless this fear is justified, such special limitations should not be imposed.

This understanding is important. Not only is the plaintiff meritorious and able to meet all the normal requirements for recovery, but she is also a plaintiff who, on the facts of her case, deserves to

78. Oliphant & Babbit, supra note 67, at 379.
recover. The denial of her claim rests not upon the problems in her own case, but upon potential problems in future cases not before the court.80

This is not to say that courts should turn a blind eye to potential problems. As a conceptual approach, however, the right of recovery should be extended as far toward allowing normal tort doctrines to function as can reasonably be controlled by the courts, so that the burden on defendants will not be impossibly great.81 The importance of validating this conceptual approach lies in the fact that its logic has escaped many of those who criticize the extension of the Dillon doctrine. Typical is the argument made by Laurence E. Oliphant, Jr. and Harold W. Babbit, writing in the Insurance Counsel Journal.82 The authors concede that under general negligence principles the plaintiff-witness would recover:

\[
\text{[N]egligence analysis determines the scope of defendant's duty to a plaintiff in terms of foreseeability. That is, a defendant owes a duty of care to all who might foreseeably be harmed by his negligent conduct. Thus, if a defendant negligently hits a child with his automobile, it is perhaps foreseeable that the child's mother will be in the area of the accident, will see her child hit, and will suffer emotional trauma as a result.83}
\]

Oliphant and Babbit correctly perceive that various arbitrary lines have been drawn by courts to limit recovery. They argue that the doctrine must be controlled and not be allowed to impose liability beyond the collective ability of defendants to pay, since the imposition of

80. See note 63 supra.
81. This same approach has been used by the Supreme Court of California in rejecting the traditional categories of invitees, licensees, and trespassers in formulating the duty owed by a land occupier for personal injuries suffered by a visitor to the premises. In Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968), the court noted that special duty limiters had been created to protect the land occupier and owner from the normal operation of tort principles. The reason suggested was reliance upon the historical place of land in English and American law as it grew in response to feudalism. Deciding that these special reasons were no longer applicable in light of changes in American society, the court determined that regular negligence principles ought to apply. While the posture of the plaintiff will certainly be a factor in establishing the range of foreseeability of harm, it will not be the only factor. In a particular case many factors may be material in demonstrating the scope of defendant's duty. Thus, the approach suggested in this article seems consistent with the approach taken by the California Supreme Court in other areas of the law. It is also noteworthy that in his dissenting opinion, Justice Burke suggested that the decision would lead to unlimited liability. This is the same argument that is faced by the Dillon court. Indeed, it may be that this fear is expressed almost any time that earlier special limited-duty rules are abandoned so that general tort principles may function.
82. Oliphant & Babbit, supra note 67, at 379.
83. Id. at 381.
massive liability would curtail socially useful activity of highway transportation.\textsuperscript{44} So far so good. But the authors apparently see the use of any arbitrary lines to limit recovery as unacceptable, arguing that it must be all or nothing:

This is the primary fallacy of \textit{Dillon}. Like the courts which broke away from the “impact” rule, the \textit{Dillon} court believed the prevailing rule to be illogical and acted to correct it. Yet, it too, was compelled to offer guidelines for future cases which would limit the liability imposed by a strict application of negligence principles. Conceived as a blow against contrivance and artifice, the \textit{Dillon} decision concludes with artificial distinctions of its own in its promulgation of rules for future cases.

As we have seen, to pursue legal logic in these cases is to pursue an illusory goal.\textsuperscript{5}

Their main point is that \textit{Dillon} is as artificial as the earlier rules and therefore no recovery at all should be allowed. They would presumably argue that no recovery should be allowed without impact to the plaintiff herself.\textsuperscript{86} Such a view fails to focus upon the fact that basic tort principles are already designed to limit liability and under basic tort principles the plaintiff in \textit{Dillon} would recover. The policy of the judiciary, then, should be to extend liability toward normal tort principles as far as can reasonably be controlled.\textsuperscript{87}

Oliphant and Babbit are correct in that all the limitations which courts have used, such as impact and zone of danger, are arbitrary. Those limitations represent a step by step expansion toward the scope of recovery which would be allowed by the normal workings of general tort principles. Far from being a leap into the “fantastic realm of infinite liability,”\textsuperscript{88} the history of the doctrine is that of a cautious growth back toward normal tort principles as the courts became convinced that fears of runaway or overburdensome liability were groundless. If forced to choose between an all or nothing approach many courts will choose an absolute bar to recovery due to fear of the unknown.\textsuperscript{89} If courts may use a process of “controlled growth” it is likely

\begin{itemize}
\item \textsuperscript{84.} \textit{Id.} at 379.
\item \textsuperscript{85.} \textit{Id.} at 384.
\item \textsuperscript{86.} \textit{Id.}
\item \textsuperscript{87.} \textit{Id.} at 382. Although the authors cite with approval the position of the court expressed in Jelley v. LaFlame, 108 N.H. 471, 238 A.2d 728 (1968), that the \textit{Dillon} doctrine would unreasonably burden highway users, they offer no reasons for their approval of that position and no evidence that such a burden has actually manifested itself in the years since the adoption of \textit{Dillon} in California.
\item \textsuperscript{88.} \textit{Dillon} v. Legg, 68 Cal. 2d at 751, 441 P.2d at 928, 69 Cal. Rptr. at 88 (Burke, J., dissenting).
\item \textsuperscript{89.} In Tobin v. Grossman, 24 N.Y.2d 609, 301 N.Y.S.2d 554, 249 N.E.2d 419 (1969), the court conceded that the injury was serious and rejected the argument that problems of fraud, proof, and excessive litigation, justified a denial of recovery. They refused to follow \textit{Dillon}, however, on the ground that unlimited liability would result. In a stinging dissent,
that eventually general tort principles will be adopted.\textsuperscript{90}

The discredited impact requirement\textsuperscript{91} was arbitrary since once there was such an impact, plaintiff could recover for her emotional upset as well.\textsuperscript{92} As courts grew less afraid of emotional distress even the most absurd or technical impacts were allowed to justify recovery.\textsuperscript{93} Also arbitrary are the "fear for self" and "zone of danger" rules.\textsuperscript{94} These rules marked a hesitant step by the courts in the direction of normal tort doctrine. Each allows the inclusion of some additional meritorious plaintiffs while retaining some arbitrary cut-off point to prevent unlimited expansion. The arbitrary limit on liability created by every intermediate rule allows courts the security of testing the doctrine without losing all control over it. The earlier rules were further ex-

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Judge Keating expressed dissatisfaction and puzzlement with the reasoning of the majority, concluding that all the elements necessary for recovery were present in the case, and that the majority's "unlimited liability" argument did not justify a denial of that recovery:

The majority opinion effectively demolishes every legalism and every policy argument which would deny recovery to a mother who sustains mental and physical injuries caused by fear or shock, upon learning that her child has been killed or injured in an accident. It has shown that every element necessary to build a case for tortious liability in negligence is here present. There is an important interest worthy of protection, there is proximate cause, there is injury, and there is foreseeability. Yet, having shown all this, inexplicably, recovery is denied.

The rationalization for the result reached here is the supposed terror of "unlimited liability." The characterization of this argument as a "rationalization" may appear harsh but, nevertheless, it seems fully justified. Not one piece of evidence is offered to prove that the "dollar-and-cents" problem will have the dire effects claimed.

\textit{Id.} at 619-20, 301 N.Y.S.2d at 562, 249 N.E.2d at 424-25 (Keating, J., dissenting).

90. Justice Keating's solution to unlimited liability would be to create limitations upon bystander recovery on a case-by-case basis, using principles of proximate cause and foreseeability as means of avoiding anomalous results. Justice Keating would also require stringent evidence of causation and of actual injury in order to deter spurious claims. \textit{Id.} at 620-21, 301 N.Y.S.2d at 562-63, 249 N.E.2d at 425 (Keating, J., dissenting).

91. PROSSER, \textit{supra} note 4, at 332.

92. \textit{See generally} Reaction to Dillon, \textit{supra} note 4, at 1248.

93. In his treatise on tort law, Professor Prosser elaborates upon some of the "injuries" which plaintiffs used to justify recovery:

"Impact" has meant a slight blow, a trifling burn or electric shock, a trivial jolt or jar, a forcible seating on the floor, dust in the eye, or the inhalation of smoke. The requirement has even been satisfied by a fall brought about by a faint after a collision, or the plaintiff's own wrenching of her shoulder in reaction to the fright. "The magic formula 'impact' is pronounced: the door opens to the full joy of a complete recovery." A Georgia circus case has reduced the whole matter to a complete absurdity by finding "impact" where the defendant's horse evacuated his bowels into the plaintiff's lap.

PROSSER, \textit{supra} note 4, at 331 (citations omitted).

94. In adopting the \textit{Dillon} doctrine, the court in Toms v. McConnel, 45 Mich. App. 647, 207 N.W.2d 140 (1973) characterized the zone of danger rule as artificial and harsh.
panded when, and only when, the courts became convinced through experience that the previous expansion had not proved to be too burdensome.

This is the correct understanding of this area of tort law. The special duty limitations which limit recovery by third parties for emotional distress have no intrinsic significance. Rather, they are merely arbitrary limits, a series of steps established to allow a gradual and controllable experiment with more liberal rules of recovery. The steps are rather like a series of locks, each gradually and cautiously raising a ship toward the eventual goal of lifting the ship to the level of the sea and allowing it to sail freely.

Of course, such a situation is not entirely "fair" to all plaintiffs. With each rule (including the impact rule) some foreseeable plaintiffs, suffering emotional distress as a result of defendants' negligence, will be precluded from recovering. This result cannot be denied. However, each rule is more just than its predecessor because each allows more meritorious plaintiffs to recover and denies recovery to fewer. This is, at least, a movement in the right direction. It is hard to see how it can be fairer to deny recovery to all meritorious plaintiffs rather than to some. This is especially true when the judicial development in this area shows a clear trend toward allowing recovery based upon general tort principles. Although no mid-point in the chain of doctrinal development is completely equitable, allowing the step-by-step development seems to be the only way to permit the doctrine to grow. Courts must be allowed to see, through experience, that runaway liability does not result at one stage before they will feel comfortable in moving on to the next.

It must be concluded then, that it is reasonable to erect arbitrary barriers to recovery (duty definers) because that is the only way the courts can be certain that they can control the scope of the doctrine. Such controls are allowable in order to determine whether policy needs require a continued application of rules more restrictive than the general tort doctrine. On the other hand, such controls should be relaxed in the direction of general tort principles, as the experience of the courts with each set of controls indicates that the problems are not serious and that the special limitations on duty are no longer necessary.

IV. Dillon in California and Elsewhere

In Dillon v. Legg, the California Supreme Court allowed recovery by a mother who suffered physical injury caused by the emotional

95. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
distress of seeing the negligently caused death of her child even though the mother was not in the zone of danger. In so doing, the court took a bold step in the direction of bringing such cases into line with general tort principles. Unfortunately, their explanation of their action has led to widespread misunderstanding which leaves the doctrine open to attack by its opponents.

The court noted that the plaintiff's case was a meritorious one, and that the facts of the complaint would, under normal circumstances, state a cause of action in negligence. The court correctly established that in the absence of overriding policy considerations foreseeability of risk is of primary importance in establishing the element of duty. Unfortunately, the court felt it necessary to appear to be destroying all arbitrary limits on recovery and to be replacing them only with general tort rules:

"We see no good reason why the general rules of tort law, including the concepts of negligence, proximate cause, and foreseeability, long applied to all other types of injury, should not govern the case now before us. Any questions that the case raises "will be solved most justly by applying general principles of duty and negligence, and . . . mechanical rules of thumb which are at variance with these principles do more harm than good." Such a view is, of course, correct. In the absence of overriding fear of the uncontrollability of the doctrine, general tort principles should be allowed to function. The history of the development of the doctrine, as has been seen, has been a movement in this direction. If the court had finally concluded that general negligence principles alone could be trusted to govern the doctrine, its statement would have been welcome.

It becomes apparent upon reviewing the Dillon decision that it is, in reality, merely one more intermediate step. Initially, it should be noted that the court refused to extend recovery for mental distress alone. In-

96. Dillon represents the classic factual pattern. A young child crossed the street and was struck and killed by the automobile of the negligent defendant. There were two plaintiffs, the sister and the mother of the deceased. Both actually witnessed the accident and both suffered mental distress and shock to the nervous system resulting in both mental and physical pain and suffering. The sister was close enough to the scene of the accident to have been within the zone of danger, but the mother, who was further away, was clearly not in the zone of danger. Thus, the court was squarely faced with the question of whether the few feet separating the sister and the mother would be enough to compel denial of the mother's claim. If not, the zone of danger rule would have to fall.

97. See generally Oliphant & Babbit, note 67 supra.
98. Dillon v. Legg, 68 Cal. 2d at 733, 441 P.2d at 916, 69 Cal. Rptr. at 76.
99. Id. at 739, 441 P.2d at 919, 69 Cal. Rptr. at 79.
100. Id. at 746, 441 P.2d at 924, 69 Cal. Rptr. at 84.
stead, the court confined its holding to cases where physical injury results from the mental distress. In such cases, recovery can be had both for the physical injury and for the mental distress.\footnote{101} This requirement seems to be intended to limit the number of claims and to limit recovery to the most serious ones. At the outset it can be seen that the court erected its own set of "arbitrary" duty limiters by holding, as a matter of law, that without physical injuries there will be no recovery for mental distress.\footnote{102} The court, however, went even further. In regular tort cases one expects a number of factors to be considered when deciding whether foreseeability exists. The absence of some factors is balanced by the particular strength of others, and it is normally left to a case-by-case determination as to whether a duty, governed by foreseeability, has been demonstrated.\footnote{103} This is not, however, the approach taken by the California Supreme Court.

In \textit{Dillon}, three factors were articulated which determine the presence of reasonable foreseeability.\footnote{104} Although the connection between the factors and the likelihood of foreseeability is clear, not every case in which one of the factors is absent would truly be unforeseeable. For example,\footnote{105} in the lake country of Indiana it is customary for children to play on paddle boards and small sailboats far out on the lake for many hours at a time. It is also customary for

\footnote{101}{Although the issue was not directly raised in \textit{Dillon} because the plaintiff-mother did suffer physically as a result of the emotional distress, the California Supreme Court subsequently held that physical injuries were a requirement for recovery. \textit{See} Krouse v. Graham, 19 Cal. 3d 59, 77, 562 P.2d 1022, 1032, 137 Cal. Rptr. 863, 873 (1977), in which the following jury instruction was approved:

Ordinarily the law does not permit recovery of damages for physical harm and emotional distress caused by the knowledge of an injury or death of another person.

However, if a plaintiff has suffered an emotional shock resulting in physical harm which was proximately caused by the direct emotional impact from the contemporaneous observation of the immediate consequences of a negligent act which was the proximate cause of injury or death to another person in a relationship such as plaintiff bore to \underline{________}, then such a plaintiff is entitled to recover damages for such physical harm, together with damages for emotional distress, if any. \textit{CAL. JURY INSTRUCTIONS, Civil, No. 12.83 (Supp. Service, Phamphlet No. 2 1976). This doctrine is softened somewhat because "shock to the nervous system" is included among the physical injuries. \textit{Id.} at No. 12.80.}

102. The court also made the recovery of the mother dependent upon liability of the defendant to the child, stating that the defendant could raise against the mother any defense he might have against the child. \textit{Dillon v. Legg}, 68 Cal. 2d at 733, 441 P.2d at 916, 69 Cal. Rptr. at 76.

103. \textit{See} note 90 \textit{supra}.

104. \textit{See} note 40 \textit{supra}.

105. The author wishes to thank Mr. L. H. Joseph Jr. of Los Angeles, California for suggesting this example.
parents of such children to keep watch over their youngsters through telescopes. This is well known to all users of the lake. Defendant, knowing this, drives his motorboat negligently, running down a child on a paddle board. The child is killed. The mother of the boy, watching through a telescope, suffers emotional distress, shock and physical injuries. Because of the Dillon factor, which requires that plaintiff be located close to the scene of the accident, plaintiff will not recover although her injuries were real and the occurrence was clearly foreseeable to the tortfeasor. Under general tort principles the plaintiff would probably recover, but not under Dillon.

The preceding illustrates that Dillon, despite its statements to the contrary, has not completely allowed general tort principles to operate. While moving in the direction of general tort doctrine, the case still erects arbitrary barriers to recovery. Like past rules, this can only be explained as a policy decision for loss shifting, used by the court to control the scope of the doctrine.106

The Dillon court may not have intended such a narrow interpretation. The court spoke of the three factors as “guidelines which will aid in the resolution of such an issue as the instant one.”107 While holding that the three factors would state a cause of action,108 the court did not absolutely decree that the absence of one or more would require dismissal. Interestingly, the three factors seem to have been taken as absolute rules by most of the lower California courts.109 These courts

106. Since the majority in Dillon claimed to be adopting general negligence principles, the dissent was able to attack the majority’s holding on the basis that the three factors adopted by the majority were arbitrary. Of course the dissent is correct; but as has been noted, such arbitrary limitations are acceptable as intermediate steps in the growth of the doctrine toward general tort liability. Each new step in expansion of the doctrine (and its accompanying limitation) allows the court to test the fears of Dillon critics while keeping the social policy balance. When it is seen that the new step does not result in an unbalance or unfairness in practice, the next step can be tried. In that context the arbitrariness of the guidelines can be admitted and justified. Unfortunately, the majority claimed that only general tort principles were being employed, thereby allowing the dissent to justifiably assert: “Upon analysis, [the guidelines] seeming certainty evaporates into arbitrariness, an [sic] inexplicable distinctions appear.” Dillon v. Legg, 68 Cal. 2d at 747, 441 P.2d 926, 69 Cal. Rptr. at 86 (Burke, J., dissenting). It must be stressed, however, that both the zone of danger rule and the Dillon requirements are arbitrary limitations on duty, yet the Dillon rule is closer to general tort principles, and is the better rule even though it still is an intermediate step. As the majority noted, “the history of the cases does not show the development of a logical rule but rather a series of changes and abandonments.” Id. at 746, 441 P.2d at 924, 69 Cal. Rptr. at 84.

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

108. Id. at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.

109. For discussions of the California decisions subsequent to Dillon, see Witkin, note 4 supra, and Ten Years After, note 56 supra.
have been extremely cautious about extending the doctrine beyond the *Dillon* facts. The approach of these courts has generally been to focus upon whether the particular facts meet the three factors rather than deciding whether other factors exist which outweigh the absence of one of them.110

It must be stressed that what is wrong with *Dillon* is not the courts' continual need to place artificial limits on recovery. Rather, it is that while placing these artificial limits upon recovery, the courts purport to abandon all limits, thus leaving themselves open to criticism and making it difficult to understand the actual process at work. This apparent inconsistency has caused some commentators to assume incorrectly that the California Supreme Court failed to recognize the policy elements in *Dillon*,111 thus making it more difficult to abandon the three guidelines as they prove to be unnecessary for keeping recoveries within socially manageable limits.112

110. Recovery has been denied in a number of cases, because of a failure to meet the three *Dillon* guidelines. See Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977) (plaintiffs were not involuntary witnesses to the events, and the medical significance of the events was not understood until explained to plaintiffs by doctors); Arauz v. Gerhardt, 68 Cal. App. 3d 937, 137 Cal. Rptr. 619 (1977) (plaintiff arrived on the scene five minutes after the accident); Powers v. Sissoev, 39 Cal. App. 3d 865, 114 Cal. Rptr. 868 (1974) (plaintiff saw the injured child thirty minutes after the accident); Jansen v. Children's Hosp., 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1973) (distress was caused over a period of time rather than by a sudden accident); Deboe v. Horn, 16 Cal. App. 3d 226, 94 Cal. Rptr. 77 (1971) (plaintiff was summoned to hospital and told of injuries). By contrast, in Mobaldi v. Board of Regents, Univ. of Cal., 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976), a foster mother was allowed to recover when, as the result of negligent medical treatment performed in her presence, her child became spastic, convulsed, and died in her arms. The court went to great lengths to show that the plaintiff herself acted as the child's mother and was treated as such. In each case, the presence or absence of facts fulfilling the three factors was seen as dispositive. Significantly, Associate Justice Thompson, writing the opinion in *Mobaldi*, saw the issue as "primarily the construction of the guidelines of *Dillon v. Legg*." Id. at 576, 127 Cal. Rptr. at 722. Justice Thompson seemed clearly to understand that *Dillon* retains policy limitations on duty, explaining that "*Dillon* imposes its own court-developed standard characterized as foreseeability, which limits the scope of liability." Id. at 581, 127 Cal. Rptr. at 725.

111. See, e.g., Oliphant & Babbit, supra note 67, at 384 ("For in its preoccupation with legal logic *Dillon* fails to perceive the fundamental problem in this area of the law—striking the proper balance between the injured person and the person who must pay").

112. One of the most interesting struggles involving possible modifications of the guidelines has been waged around the issue of whether a mother, who arrives on the scene soon after her child's injury and suffers injury herself, may recover. The facts involved two of the three *Dillon* factors—the requirement that plaintiff be located near the scene of the accident and the requirement that the injury be caused by a contemporary sensory impact. In Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723, hearing denied (1969), a thirteen year old boy purchased gunpowder from defendant which exploded and caused the boy serious injury. Within moments the mother arrived and suf-
ferred severe emotional and physical shock. The court ruled that observing the injuries within moments after the explosion met the Dillon requirement that the plaintiff be located near the scene of the accident. The court also held that the mother was not required to have actually witnessed the injury-causing event. Rather, the injury to the plaintiff must be reasonably contemporaneous with the injury to the child, as contrasted with an injury caused by plaintiff's being told of the child's injury at a later time. The cause of the mother's injury was the witnessing of her child's injury which meets the "sensory impact" element. Although the opinion attempted to demonstrate that the three factors were not met, it is clear that the case goes beyond the Dillon guidelines. The second factor requires that "the shock [must result] from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident." Dillon v. Legg, 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80. Yet, in Archibald, the accident itself was never observed; only the results were witnessed. Therefore, unlike Dillon, the negligent event does not have to be observed, nor does the event which caused the injury have to be present in the Archibald criteria. Of course, if the California factors were mere guidelines as the California Supreme Court indicated, then Archibald was correctly decided. Although one factor was not met the court believed, in light of the facts of the case (including the speedy arrival on the scene and the horrible sight which greeted the mother upon her arrival) a cause of action had been stated. Since we know, however, that the factors have generally been treated as absolute duty limiters, it is instructive to see how the Archibald case has been treated by later California decisions. In Powers v. Sissoev, 39 Cal. App. 3d 865, 114 Cal. Rptr. 868 (1974), the court declined to grant recovery to parents suffering mental distress when they arrived at the hospital to which their injured child had been taken 30 to 60 minutes after the accident. Interestingly enough, the court did not cite Archibald. In Arauz v. Gerhardt, 68 Cal. App. 3d 937, 137 Cal. Rptr. 619 (1977), where the child was struck by a car and the parents arrived at the scene of the accident within five minutes, the court denied recovery. After reviewing the relevant cases the court concluded that the accident had not been observed, only the aftermath. In part, the Arauz court based its analysis on Jansen v. Children's Hosp. Medical Center, 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1973), which suggested that in Archibald, the mother had heard the explosion, thus giving her a contemporaneous sensory observation of it. Although there is no evidence in Archibald that such an event actually took place, later courts seem to need to force Archibald back within the limits of the three factors and, in the process, demonstrate that the guidelines are considered absolute duty limiters. The lack of evidence for believing that the mother heard the explosion has been pointed out by commentators on many occasions. See, e.g., Simons, supra note 4, at 34. Two recent cases demonstrate the lengths to which courts have gone to make demands of justice square with these holdings. In so doing some errors have been made. In Nazaroff v. Superior Court, 80 Cal. App. 3d 553, 145 Cal. Rptr. 657 (1978), where the child drowned in a swimming pool, there was a triable issue of fact on the mother's claim for mental distress under Dillon. The mother had been out searching for her child when she heard a cry from rescuers who pulled the child from the pool. She then ran to the pool. Significantly, the mother pleaded that when she heard the cry of the rescuer—she "immediately had the dreadful knowledge" of what had taken place. Id. at 559, 145 Cal. Rptr. at 659. Clearly, the pleadings were an attempt to slip between the traps set by the earlier cases for such situations. If she suffered her injury only when she saw her child she risked running afoul of Arauz. If her injury was caused by seeing the deterioration of her child, she would be barred by Jansen. Only by hearing the yell and formulating a picture of the accident could she hope for recovery. The decision in favor of the mother was certainly correct since she was in the area, arrived on the scene almost immediately, and suffered harm from seeing the immediate aftermath of the accident. Under Archibald, without the perplexing Jansen interpretation, she would certainly have
Dillon was the first modern case to allow such recovery.\textsuperscript{113} While expanding liability toward that which would be allowed by general tort principles, the court felt it necessary to retain some measure of control in case the doctrine proved to be more uncontrollable than anticipated. Although the court dismissed the notion that the doctrine would result in a massive increase of litigation, fraud, proof problems, and socially undesirable consequences, the court had no prior history upon which to rely. Because the court could not be absolutely certain that the expansion was wise, it retained a braking mechanism as a hedge against error. It is only now, eleven years after the adoption of the doctrine, that commentators can write with some degree of certainty that the doctrine has not produced the feared problems and that the California court was right.\textsuperscript{114}

It is profitable to compare and contrast the California experience with that of Hawaii. With some experience in watching the California experiment, the Supreme Court of Hawaii concluded that recovery in a Dillon situation could safely be allowed. The fight goes on, however, between those who believe that all artificial barriers should fall, allowing general tort doctrine to function, and those who still believe that some special duty limiters are required to control the scope of liability. In the first two decisions, \textit{Leong v. Takasaki}\textsuperscript{15} and \textit{Rodrigues v.}\n
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\textsuperscript{113} \textit{Prosser, supra} note 4, at 324.

\textsuperscript{114} \textit{See, e.g., Liability to the Bystander}, note 4 \textit{supra}; \textit{Reaction to Dillon}, note 4 \textit{supra}.

\textsuperscript{115} 55 Hawaii 398, 520 P.2d 758 (1974).
State, the Supreme Court of Hawaii pushed beyond Dillon. Chief Justice Richardson attempted to firmly ground such cases in the mainstream of traditional tort theory.

In Leong a child sued for emotional distress caused by watching a step-grandmother killed by a negligently driven car. The court first recognized that the definition of duty was a policy decision. While noting the standard objections to granting such relief, the court rejected them and held that "the trend is a hesitant abandonment of such artificial restrictions and barriers to recovery in favor of a greater reliance on general tort law principles and the contemporary sophistication of the medical profession to test the veracity of the claims for relief." Having said this, the Hawaii court rejected many of the policy limitations in Dillon. The court rejected as illogical the notion that emotional harm must cause physical injuries in order to permit recovery. It recognized that such a requirement is merely an artificial device designed to limit fraudulent claims which often limited

117. Rodrigues involved emotional distress sustained by a plaintiff who had witnessed his property being negligently damaged. The court first noted the policy basis for denying recovery, stating that "the proposition that the interest in freedom from the negligent infliction of mental distress has in fact been protected whenever the courts were persuaded that the dangers of fraudulent claims and undue liability of the defendant were outweighed by assurances of "genuine and serious mental distress." Id. at 170, 472 P.2d at 519. After expressing the belief that "the preferable approach is to adopt general standards to test the genuineness and seriousness of mental distress in any particular case," Id. at 171, 472 P.2d at 519, the court concluded that there is a general duty to refrain from inflicting serious mental distress through negligent conduct:

It can no longer be said that the advantages gained by the courts in administering claims of mental distress by reference to narrow categories outweigh the burden thereby imposed on the plaintiff. We recognize that the interest in freedom from negligent infliction of serious mental distress is entitled to independent legal protection. We hold, therefore, that there is a duty to refrain from the negligent infliction of serious mental distress."

Id. at 174, 472 P.2d at 520. The court, therefore, allowed recovery for mental distress alone, a result which the California courts have been unwilling to reach. Moreover, the court in Rodrigues not only permitted recovery based upon damage to property, but also failed to require the three Dillon factors. In place of these arbitrary limitations, the court stated that "the question of whether the defendant is liable to the plaintiff in any particular case will be solved most justly by the application of general tort principles." Id. Interestingly, one limit still remained. The court defined liability in terms of the foreseeable plaintiff as follows: "serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." Id. at 173, 472 P.2d at 520. This formulation would seem to deny recovery to the eggshell plaintiff although, in most jurisdictions, such a plaintiff will recover. PROSSER, supra note 4, at 261.

118. 55 Hawaii at 407, 520 P.2d at 764.
119. Id. at 403, 520 P.2d at 762.
The court also apparently rejected the three *Dillon* factors as unnecessary, and alternatively relied upon general negligence principles as personified by the "reasonable person" standard. The key question, according to Chief Justice Richardson, was whether a reasonable person would be expected to cope with the mental stress engendered by the circumstances.

The California factors were not used in *Rodrigues* and *Leong* as arbitrary duty limiters. Rather, many factors were considered in order to determine whether plaintiff's inability to cope with the distress caused by defendant's negligence was reasonable. For example, the court in *Leong* discussed the particular nature of the relationship between the plaintiff and the step-grandmother, as well as the history of the extended family in Hawaii, which made the plaintiff's reaction to the events reasonable. In other situations in which no close relationship between the bystander and the primary victim exists, other factors may exist, and liability may or may not be found, depending upon the nature of those other factors. The key is that all factors will be considered, not just a carefully selected few.

In *Kelley v. Kokua Sales and Supply, Ltd.*, an unusual factual pattern tested the court's commitment to its *Leong* view—that all arbitrary limits could now safely be abolished in favor of general tort principles. The employee of one of the defendants drove a truck...
which struck another vehicle, resulting in the deaths of Frances and her child Kailani, as well as serious injury to her other daughter. A relative of Frances called Mr. Kelley, who resided in California, to tell him that his daughter and grandchild were dead and that his other grandchild had been horribly injured. Within an hour or so Mr. Kelley began experiencing chest pains; he died of a heart attack shortly thereafter. In the subsequent wrongful death action, plaintiffs contended that Mr. Kelley's death was a consequence of severe mental distress caused by his being informed of the terrible accident. The trial court granted the defendant's motion for summary judgment and the plaintiffs appealed.

The majority recognized that duty is a policy decision, and that the problem in all such cases is to delineate the scope of the duty which will be allowed. It was clear to the court that if Mr. Kelley could recover, the doctrine would have no limit. Conceivably, allowing recovery in this situation could eventually lead to recovery by Mr. Kelley's wife, a neighbor, or anyone else who was told of the accident. The court decided, therefore, that the complete extension of liability had been premature, and that some rule limiting the scope of liability would have to be formulated.

Speaking through Mr. Justice Kobayashi, the majority distinguished Leong by noting that the circumstances of that case required no special limitations upon liability, other than the requirement that the mental distress be "serious." In Kelley, on the other hand, it was obvious that some additional limitation was necessary in order to avoid the "unmanageable, unbearable and totally unpredictable liability" that would result from permitting plaintiff to recover. The court therefore concluded that since Mr. Kelley's location from the scene of the accident was so remote, the defendants could not reasonably foresee the consequences to him. Thus, the court held that the duty of care enunciated in Rodriques and Leong applies only to those plaintiffs who both meet the standards set forth in those two cases and were located within a reasonable distance from the scene of the accident.

the trailer; a mechanic who worked on the truck; the estate of the deceased truck driver; the company which inspected the truck; and the city, county and state in which the accident took place. Id. at 205, 532 P.2d at 674.

125. Id. at 206, 532 P.2d at 674-75.
126. Id. at 205, 532 P.2d at 674.
127. Id. at 207, 532 P.2d at 675.
128. Id.
129. Id. at 208-09, 532 P.2d at 676.
130. Id. at 209, 532 P.2d at 676.
131. Id.
The Hawaii cases provided a fascinating insight into the policy considerations inherent to this area of tort law. These cases also provide strong support for the position espoused by this article, because it is recognized that the question of whether the doctrine should be extended rests upon whether a given extension will result in unlimited and unreasonable liability.\textsuperscript{132} The implication is that the proper direction is toward extension. Short of that, it is proper to use arbitrary limits on liability as a device to control the scope of the doctrine if that is necessary to allow the maximum number of meritorious plaintiffs to recover.

Interestingly, this same process of extension and debate continues at each stage. Although the holding in \textit{Kelley} is somewhat unclear, the most conservative reading of the case is that the court has adopted the three factors of \textit{Dillon} as control devices. Even if so interpreted, the Hawaii court's rule is still broader than \textit{Dillon's} because, unlike \textit{Dillon}, mental distress alone may be compensated, and the distress can be the product of damage to property as well as injury to another person.

The rule established in \textit{Kelley} may be much broader than the \textit{Dillon} rule, since it is unclear whether the three \textit{Dillon} factors were adopted in their entirety by the \textit{Kelley} court. The majority in \textit{Kelley} requires that plaintiff be near the scene of the accident, and also that the plaintiff meet the \textit{Leong} standards. The key problem is to determine exactly what the \textit{Kelley} court meant when it referred to the \textit{Leong} "standards." In \textit{Leong}, the court had stated:

\begin{quote}
We now hold that when it is reasonably foreseeable that a reasonable plaintiff-witness to an accident would not be able to cope with the mental distress engendered by such circumstances, the trial court should conclude that defendant's conduct is the proximate cause of plaintiff's injury and impose liability on the defendant for any damages arising from the consequences of his negligent act.\textsuperscript{133}
\end{quote}

Crucial to understanding the rule adopted in \textit{Kelley} is the question of whether the status of the plaintiff as a \textit{witness} is one of the standards which future plaintiffs must meet. If it is, then it seems that the "contemporaneous sensory impact" requirement of \textit{Dillon} has been built into the rule in \textit{Kelley}. Further, since some close relationship will always be required between the victim and the witness in order to demonstrate the reasonableness of the plaintiff-witness's reaction

\textsuperscript{132} The court in \textit{Kelley} expressed this concern of creating unreasonable liability as follows: "However, while this duty exists, the problem of the delineation of the scope of the duty (the question as to which particular plaintiffs, proximate-wise to the scene of the accident, is the duty owed) remains for resolution." \textit{Id. See also} \textit{Leong v. Takasaki}, 55 Hawaii 398, 520 P.2d 758 (1974).

\textsuperscript{133} \textit{Leong v. Takasaki}, 55 Hawaii at 410, 520 P.2d at 765.
Bystander Recovery

(although not necessarily a relation of blood), such an interpretation would, for all practical purposes, mean that the *Dillon* factors had been adopted in *Kelley*.

It seems unlikely that the requirement that plaintiff be a witness is one of those standards. If it were, *Kelley* would have been decided on that basis, and there would have been no reason for the court to construct additional requirements to exclude the California plaintiffs. More likely, *Leong* requires that the plaintiff suffer severe distress, determined by whether or not a reasonable person would be able to cope with the distress.\(^{134}\) *Kelley* requires that the plaintiff so affected be located within a "reasonable" distance from the scene of the accident.\(^{135}\) These requirements, when read together, would seem to include a plaintiff who arrived on the scene some time after the accident or who suffered the distress upon being told of the accident later as long as she had been nearby at the time.\(^{136}\)

Although Hawaii may not be ready to abandon all specially crafted judicial controls on the doctrine, the rules that have been adopted in that state move beyond *Dillon* and aid in the progression of the law toward normal tort principles. Because the controlling rules are expressed more generally than in California, it may be easier to abandon them as the court becomes convinced that such rules are no longer necessary and that normal tort principles can act to control the doctrine without other special rules designed to limit duty.\(^{137}\)

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\(^{134}\) *Id.*

\(^{135}\) *Kelley v. Kokua Sales and Supply, Ltd.*, 56 Hawaii at 209, 532 P.2d at 676.

\(^{136}\) The *Dillon* requirements would preclude recovery in these situations.

\(^{137}\) The duty-foreseeability analysis used by the California courts springs from the majority opinion in *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), in which Justice Cardozo focused upon whether it was foreseeable that defendant's negligent conduct would harm the plaintiff. In Cardozo's view, if the plaintiff was not foreseeable, it followed that no duty could exist to the plaintiff and, therefore, defendant's conduct could not be negligent toward her. The proximate cause analysis present in the Hawaii cases espoused by Chief Justice Richardson in his *Leong* and *Kelley* opinions is represented by Judge Andrews' dissenting opinion in *Palsgraf*. That view holds that if the defendant's negligent conduct could reasonably be expected to cause harm to anyone, then a duty exists to the entire world to refrain from such conduct. Any limitations upon recovery are policy decisions on loss shifting and nothing more.

Conceptually, the Andrews approach would appear to be more society-oriented; it permits society to disapprove of wrongful conduct by branding that conduct as negligent, even though the defendant is not required to compensate the victim because of a policy decision that the chain of causation will be followed only so far. This result is quite different from the Cardozo view, which concludes that if the victim is not foreseeable, the conduct is not wrongful (negligent) as to that victim.

In addition, the two theories place the burden of liability control upon different parts of the legal system. Duty is generally defined as a matter of law, and a court, in setting the scope of that duty, has the opportunity to predict the effect of the definition upon future
A more restrictive approach was taken by the Federal District Court for the District of Rhode Island in *D’Ambra v. United States.*¹³⁸ In that case, the plaintiff—mother heard the impact of a mail truck striking her son and saw the child slip under the front wheels of the vehicle. Chief Judge Pettine determined that the issue of recovery for emotional distress from viewing the negligently caused injury to another had not been decided in the state and proceeded to consider resolution of the issue.¹³⁹ Judge Pettine noted the essential merit in plaintiff’s claim,¹⁴⁰ and rejected many of the classic objections to the doctrine.¹⁴¹ He recognized that the key issue in the consideration of the cases and to create additional artificial barriers as liability limiters. Over-cautious courts may be prone to excessive zeal in restricting duty out of fear of the possible future extension of liability. The result of this could be to deny recovery to meritorious plaintiffs. Proximate cause, on the other hand, is usually determined by the trier of fact, and is not susceptible to being defined in terms of an absolute rule. Thus, under the proximate cause analysis, particular decisions may be more responsive to the equities involved in a particular case, without establishing a binding rule for future cases in which the factual nuances are different.

In his dissenting opinion in *Kelley,* Chief Justice Richardson argued that if an interest such as the right to be free from emotional distress is deemed to be entitled to protection, courts should not interfere with the normal workings of tort law by imposing judicially created rules and duty limiters. *Kelley v. Kokua Sales and Supply, Ltd.,* 56 Hawaii at 211-13, 532 P.2d at 677-78 (Richardson, C.J., dissenting). This reasoning may have been motivated by Justice Richardson’s belief that the majority’s holding in *Kelley* interfered with the normal working of the litigation process, and that future meritorious plaintiffs will be deprived of a remedy unnecessarily. It is quite possible that the jury, after hearing the evidence in *Kelley,* would have concluded that the injury was not the proximate result of the defendant’s negligence. Further, the jury may have concluded that there was no severe mental distress as required by the *Leong* decision, and thus recovery would have been denied under that theory. In either case, the plaintiffs would not have recovered, and the need for the appellate court’s creation of artificial barriers to recovery would have been obviated.

The approach actually applied by the majority seems to combine elements of both the duty-proximate cause and foreseeability theories, since the court speaks in terms of duty being a policy issue with no reference to foreseeability, while also referring to duty and its connection with proximate cause. It is possible that the majority reacted too strongly to its view of the equities involved in the *Kelley* case, as well as to their own fear that no mechanism existed in the duty-proximate cause approach to control the scope of recovery. In any event, it is unfortunate that the experiment with the Andrews approach was cut short in Hawaii—a longer period of time in which to compare the development of the doctrine in the context of California’s foreseeability approach with its development under Justice Richardson’s duty-proximate cause approach would have been instructive to everyone who is struggling to understand the judicial Janus of duty and causation.

¹³⁹ Id. at 815.
¹⁴⁰ Id. at 818 (quoting Throckmorton, *Damages for Fright,* 34 HARV. L. REV. 260, 264 (1920-21)).
¹⁴¹ Id. Fraud, for example, was one of these objections which was quickly rejected.
doctrine was whether it could be controlled.\textsuperscript{142} His opinion validated the approach of drawing arbitrary lines to circumscribe the scope of the doctrine when the court feels that it is necessary to do so in order to allow as many meritorious plaintiffs as possible to recover.\textsuperscript{143}

Although the court essentially adopted the \textit{Dillon} doctrine in allowing plaintiff to recover, Judge Pettine expressed concern that the \textit{Dillon} factors might not confine the doctrine sufficiently to avoid unlimited liability. He, therefore, adopted a somewhat more cautious approach, concluding that while the experience in California did not justify the fears of unlimited liability, and although no major problems had been observed in the jurisdictions which had adopted the doctrine, some limitation upon the scope of duty was needed in addition to those already employed by the California Supreme Court. In \textit{Dillon}, the court had held that the presence of the mother near her child was foreseeable as a matter of law.\textsuperscript{144} The district court in \textit{D'Ambra} was not prepared to go that far:

\begin{quote}
[\textit{This Court}, unlike the court in \textit{Tobin}, believes that the criteria set forth in \textit{Dillon} for evaluating the foreseeability of the injury sufficiently serve to define the parameters of the cause of action, with one additional prerequisite—that the presence of the parent must also be foreseeable. \textsuperscript{145}]
\end{quote}

Judge Pettine went on to establish a series of factors which could be used to determine the foreseeability of the presence of the witness, including the age of the primary victim, the neighborhood involved, the familiarity of the tortfeasor with the area, and the time of the injury.\textsuperscript{146} Significantly, however, the court avoided turning guidelines into rigid rules by creating a fifth factor to include "all other circumstances which would have put the tortfeasor on notice of the likely presence of a parent."\textsuperscript{147}

On appeal the Court of Appeals for the First Circuit certified the question of liability to the Rhode Island Supreme Court. Speaking through Justice Doris, the Rhode Island court then held that the mother was entitled to recover.\textsuperscript{148} In its analysis the court wrestled

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\textsuperscript{142} \textit{Id.} The court noted that problems of disproportionate and burdensome liability really rested upon whether the doctrine could be adequately limited in scope.

\textsuperscript{143} \textit{Id.} at 819.

\textsuperscript{144} \textit{Dillon} v. \textit{Legg}, 68 Cal. 2d at 738, 441 P.2d at 921, 69 Cal. Rptr. at 81.

\textsuperscript{145} \textit{D'Ambra} v. \textit{United States}, 354 F. Supp. at 819.

\textsuperscript{146} \textit{Id.} at 820.

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} \textit{D'Ambra} v. \textit{United States}, 114 R.I. 643, 338 A.2d 524 (1975). The question certified to the Rhode Island court was as follows:
with the concept of "foreseeability" and decided that it was too vague a concept upon which to base a decision. Instead the court focused on policy aspects, noting the merit in the parent's claim and the seriousness of the injury that had occurred. Although not ready to state broad rules of foreseeability, the court acknowledged that "where a mother actually witnessed the death of her child, the resulting mental distress can hardly be deemed so fantastic or freakish as to make imposition of liability a moral outrage." The court found that the closeness of the relationship between mother and child outweighed the negligent tortfeasor's inability to foresee her presence in every case. The additional limiting factor of foreseeability of presence, suggested in the district court opinion, was rejected.

Curiously, the mother's recovery seems to be a special exception to the zone of danger rule which may, otherwise, have been left undisturbed. While approving the zone of danger theory, the court created confusion by also stating that the requirements of location and contemporaneous sensory impact constituted the zone of danger rule. This anomaly casts doubt upon the court's holding.

May a non-negligent plaintiff mother, who is foreseeably in the vicinity of her minor child but not in the child's zone of danger, recover damages for mental and emotional harm accompanied by physical symptoms, caused by observing the death of her child resulting exclusively from the negligence of defendant in driving the truck which struck the child, although she suffered no physical impact?

Id. at 646, 338 A.2d at 525-26.

149. The court declined to adopt either the Cardozo view or the Andrews view although expressing some preference for the former as a more "functional approach." Id. at 649, 333 A.2d at 527.

150. Id. at 650, 338 A.2d at 528 ("Given the wide disparity . . . between what courts have found to be 'foreseeable' when faced with actual negligence problems, any strong reliance on this concept as a device to distinguish close factual patterns would seem to be misplaced").

151. Id. at 654, 338 A.2d at 529. This discussion is consistent with the majority's underlying position that the basic issue for the courts in delineating the scope of the duty is to determine who should bear the loss. Id. at 648, 338 A.2d at 527.

152. Id. at 656-57 n.7, 338 A.2d at 531 n.7.

153. Id. at 657, 338 A.2d at 531 ("If this relaxation of the zone-of-danger limitations on liability is viewed as the exception and not the rule, we do not find the administrative difficulties posed by bystander recovery to be insurmountable").

154. Justice Kelleher, who concurred in a separate opinion, seemed similarly puzzled as to the basis of the decision:

While the Chief Justice and my brothers Paolino and Doris discuss the issue presented to us in terms of foreseeability, their ultimate conclusion seems to rest upon a variety of moral, economic, and administrative policy considerations. I use the word "seems" advisedly. My doubt as to the actual underpinnings of their opinion is the cause for this particular literary effort.

Id. at 658, 338 A.2d at 532 (Kelleher, J., concurring). Justice Kelleher went on to argue that foreseeability was the proper approach and that the doctrine should be adopted with...
Apparently, Rhode Island, in *D'Ambr*, adopted the most hesitant step beyond the zone of danger rule. It seems possible that other extensions of the *Dillon* doctrine could follow when other compelling factors warrant, especially in light of the court's refusal to establish general rules for the doctrine and the court's justification for extension of the doctrine by focusing upon the particularly compelling nature of the mother-child relationship. It will be interesting to observe whether recovery in *D'Ambr* represents only a narrow exception to older tort rules or whether it represents an experimental step, leading to more general recovery once the court realizes that a broader rule can be controlled.

Recently, Massachusetts joined the growing ranks of jurisdictions adopting some variant of the *Dillon* doctrine. In *Dziokonski v. Babineau*, a mother suffered physical injury from mental distress caused by seeing her injured daughter at the scene of the accident in which her child had been negligently run down. The Massachusetts court reviewed and rejected the impact rule, overruling *Spade v. Lynn & Boston Railroad* in the process. Further, in considering and rejecting the zone of danger rule, the court refused to adopt a rule which "absolutely denies recovery to every parent for whatever negligently caused, emotionally based physical injuries result from his concern over the safety of or injury to his injured child."

In rejecting the zone of danger rule the court noted the classic objections to the doctrine but focused its discussion upon the issue of unlimited liability. While admitting that the zone of danger rule allows easy administration, the court also recognized that the rule unnecessarily cuts off many foreseeable plaintiffs.

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156. *Id.* at 1296. The case went beyond *Dillon* factually, and it is unclear whether the facts in *Dziokonski* would have even stated a cause of action under Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723, *hearing denied* (1969), a California case which permitted a post-accident witness recovery. See note 112 supra.
158. *Id.* at 1300. The court acknowledged that the zone of danger rule is commendable to the extent that it permits a relatively easy determination of the persons who might recover for emotionally-caused bodily injury, but concluded that the rule is an "inadequate measure of the reasonable foreseeability of the possibility of physical injury resulting from a parent's anxiety arising from harm to his child." *Id.* In the court's view, the reasonable foreseeability of such a physical injury to a parent cannot turn on whether that parent was or was not a reasonable prospect for a contemporaneous injury because of the defendant's negligent conduct. For that reason, the *Dziokonski* court concluded that the zone of danger rule "lacks strong logical support." *Id.*
Agreeing with Dillon that foreseeability is the key to defining duty, the court also reasoned that some limiting factors were necessary to avoid granting recovery to an overly broad class of potential plaintiffs. The court acknowledged the role played by the Dillon factors in regulating the scope of liability, and while these three factors were referred to with approval, it is not clear whether they were adopted. Instead the court formulated a somewhat more liberal rule that seemed to incorporate both Dillon and Archibald but did not confine the factors which may be used to demonstrate the requisite duty. At the same time an artificial barrier was maintained to allow continued judicial control:

[W]e conclude that the allegations concerning a parent who sustains substantial physical harm as a result of severe mental distress over some peril or harm to his minor child caused by the defendant's negligence state a claim for which relief might be granted, where the parent either witnesses the accident or soon comes on the scene while the child is still there.

While it is impossible to know how restrictively later courts will interpret this concise formulation by the Supreme Judicial Court of Massachusetts, that court may be showing the way in the development of a doctrine controlled by general tort principles. The varied approaches undertaken by all of the courts grappling with this area of tort law demonstrate the step-by-step movement toward allowing recovery to be based upon general tort principles and the intermediate

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160. Id. at 1302 ("it is reasonably foreseeable that, if one negligently operates a motor vehicle so as to injure a person, there will be one or more persons sufficiently attached emotionally to the injured person that he or they will be affected").

161. Id.

162. Id. The court reasoned that "[i]t does not matter in practice whether these factors are regarded as policy considerations imposing limitations on the scope of reasonable foreseeability ... or as factors bearing on the determination of reasonable foreseeability itself." Id. This reasoning was applied by the court in concluding that "in cases of this character, such factors are relevant in measuring the limits of liability for emotionally based injuries resulting from a defendant's negligence." Id.

163. The court enumerated the factors relevant to the imposition of liability as follows:

In cases of this character, there must be both a substantial physical injury and proof that the injury was caused by the defendant's negligence. Beyond this, the determination whether there should be liability for the injury sustained depends on a number of factors, such as where, when, and how the injury to the third person entered into the consciousness of the claimant, and what degree there was of familial or other relationship between the claimant and the third person.

Id. (citation to Dillon omitted and emphasis supplied).

164. Id.

165. We do not know, for example, whether the doctrine is limited to parent and child.
device of using arbitrary duty limiters. Extension of the doctrine can

166. In Toms v. McConnell, 45 Mich. App. 647, 207 N.W.2d 140 (1973), where the court allowed an action by a mother who saw her child struck and killed by defendant's negligently driven truck, the court squarely confronted the charge that the rules of recovery might be arbitrary: "Where the interests of justice require, the courts of this State have never been timorous in promulgating rules, albeit arbitrary, to meet the situation presented." Id. at 654, 207 N.W.2d at 144. Interestingly, while validating the approach of controlling the doctrine through the use of arbitrary rules stopping somewhere short of general tort principles, this is not the approach the court actually used. There was no explicit adoption of the Dillon court's three factors and while noting that the case before it involved the actual witnessing of the accident by the mother plaintiff, the court declined to establish general rules to limit liability. Instead, the court reasoned as follows:

We note at the outset that devising one hard and fast rule for limiting bystander recovery in mental suffering cases would be difficult and complex if not impossible. However, we need not and indeed should not attempt to pose and solve a myriad of hypothetical factual situations relative to cases of this nature which may or may not arise in the future. The problem of limiting liability will be best surmounted and will be more justly resolved for all concerned by treating each case on its own individual facts.

Id. at 655, 207 N.W.2d at 144-45. The issue has continued to be a source of conflict in the Michigan Court of Appeals. In Perlmutter v. Whitney, 60 Mich. App. 268, 230 N.W.2d 390 (1975), the defendant negligently crashed his car, injuring his young passenger. The court denied a cause of action by the parents of the injured youngster for mental distress caused by concern for their child, because the distress was not caused from witnessing the accident. The parents were not on the scene or in the area, and they suffered over the course of time as they cared for the child. In a restrictive holding, the court declared that only if the parents actually witnessed the accident could they recover. In Gustafson v. Faris, 67 Mich. App. 363, 241 N.W.2d 208 (1976), the court denied recovery to the mother of a young child struck by a car. In so doing, however, the court rejected the rule in Perlmutter as too restrictive, reasoning as follows:

It would seem that there could be no argument that a rule which allows recovery for emotional suffering and resulting physical injury to a mother who witnesses the death of her child, but would deny recovery for emotional suffering and resulting physical injury to a mother who does not witness the death of her child but arrives on the scene of the accident shortly thereafter is nothing but a poor arbitrary rule at best. While it is true that a distinction is probably necessary in order to prevent a tide of litigation based upon questionable claims, it appears that the correct rule, although likewise arbitrary, should be a little less restrictive than that adopted by the Court in Perlmutter.

Id. at 367-68, 241 N.W.2d at 210. The court went on to adopt the factors suggested by Dean Prosser and which were adopted in Dillon. In holding for the defendant the court reasoned that "the complaint does not allege that the injury to the individual plaintiffs was fairly contemporaneous with the accident." Id. at 369, 241 N.W.2d at 211. The court used two California cases to explain the meaning of "fairly contemporaneous," Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723, hearing denied (1969) (plaintiff arrived on the scene within moments and recovered) and Powers v. Sissoev, 39 Cal. App. 3d 865, 114 Cal. Rptr. 868 (1974) (the plaintiff arrived thirty minutes after the accident and did not recover). In Miller v. Cook, 87 Mich. App. 6, 273 N.W.2d 567 (1978), the injury to the child was intentional and the parents argued that they should recover even though their injury was not fairly contemporaneous with the child's injury. The court disagreed, holding that the Gustafson analysis applied whether the injury to the child was intentionally or negligently caused.
be tried by a court unwilling to make the entire leap to regulation by
general tort principles alone. Through this gradual development,
courts will be able to see through experience that extending the doc-
trine beyond the zone of danger rule does not lead to unlimited or
disproportionate liability. When a jurisdiction experiences a history of
success in dealing with one such extension its courts will feel more
comfortable with experimenting with a further extension. Through this
process courts will gain experience and learn not to fear the doctrine.

Many of the classic reasons for denying recovery (lack of precedent,
fraud, floodgates, and proof problems) are simply not valid; other
reasons (too burdensome, unlimited liability) are merely expressions of
the fear that the doctrine may prove uncontrollable in practice. This
author’s view is that the control devices of torts, including duty, causa-
tion and the standard defenses which are available, will supply suffi-
cient control devices to keep the doctrine within proper bounds.
Hopefully, the area of bystander recovery for emotional distress caused
by viewing injury to another will eventually merge with and be
governed by general tort law.

The courts’ testing of the doctrine through partial extensions is im-
portant because it provides actual proof, beyond mere logical argu-
ment, that only general tort principles are needed to insure recovery
by only meritorious plaintiffs. Each extension that has been made
(from impact to fear-for-self zone of danger to Dillon and beyond)
without unlimited and uncontrollable liability resulting has been ac-
companied by evidentiary proof that the doctrine was controllable
under general tort law. The evidence grows stronger as the arbitrary
limits on recovery more closely approximate general tort rules.

The California experience demonstrates that the three Dillon factors
effectively limit recovery and that new jurisdictions permitting a
bystander to recover should, therefore, adopt a rule that goes at least
as far. Of course, as Rhode Island demonstrates, if a court remains

167. Pennsylvania is the most recent jurisdiction to permit bystander recovery for the
shock and trauma associated with viewing the child’s negligently-caused death or injury.
In Sinn v. Burd, 404 A.2d 672 (Pa. 1979), an automobile operated by defendant struck a
young girl who had been standing beside a rural road, hurling her through the air and
causing injuries which resulted in her death. Id. at 674. The victim’s mother witnessed the
accident from a position near the front door of her home. Id. In an action filed against the
driver of the car by the victim’s parents, the mother sought damages for the emotional
distress she experienced as a result of witnessing her daughter’s death. No allegations
were made that the emotional distress was manifested in physical injury to the mother.
Id. at 674-75. The trial court sustained defendant’s demurrer to that portion of the com-
plaint which sought such damages, reasoning that because the child’s mother was not
within the zone of danger, she was precluded from recovering damages for her emotional
unconvinced that the *Dillon* factors will be adequate to control the doctrine, other more restrictive methods of control are available.

Other jurisdictions such as Massachusetts and Hawaii have pushed beyond *Dillon* and moved closer to regular tort rules. Just as the *Dillon* experiment was watched with great interest so too will these new extensions be examined. The doctrine will probably continue to grow in the negligence area through the process of gradually expanding steps. But as the negligence side of the doctrine grows the incongruity of allowing bystander recovery in negligence while denying it under other theories will surface. Given this, it should come as no


On appeal, the Pennsylvania Supreme Court reversed, holding that recovery of damages for negligently-caused mental trauma would not be precluded simply because the plaintiff was outside the zone of danger of being struck by the negligent force. In an opinion by Justice Nix, the court engaged in an extensive analysis of the various social and legal policies relevant to a consideration of whether bystander recovery should be permitted. The court initially rejected the argument that permitting recovery by third parties for emotional distress would result in problems of proof, reasoning that the advancements made in medical and psychiatric science during the twentieth century now make it possible to supply a causal link between the psychological damage suffered by a bystander and the shock of trauma associated with his having witnessed the accident. *Id.* at 678-79. For much the same reason, the court rejected defendant's argument that a cause of action for third party emotional distress would be susceptible to fraud, noting that the available medical and psychiatric methods make it very difficult for a malingerer to recover damages. *Id.* at 679-80 (citing Cantor, *Psychosomatic Injury, Traumatic Psychoneurosis, and Law*, 6 CLEVE.-MAR. L. REV. 428, 435 (1957)). As to defendant's contention that permitting bystander recovery would result in a flood of similar litigation, Justice Nix characterized this fear as "specious," stating that the argument "does not offer a legitimate consideration and ... the anticipated consequences are grossly overstated." *Id.* at 680 n.12.

The remainder of Justice Nix' opinion dealt with the issue characterized by him as being "the heart of the controversy"—the formulation of methods for limiting recovery in order to avoid unlimited or unduly burdensome liability. Following the lead taken by the Supreme Court of Hawaii in Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974), the majority in *Sinn* adopted the requirement that in order for a bystander's emotional trauma to be compensable, there must be "serious mental distress." *404* A.2d at 683. Justice Nix quoted with apparent approval the Hawaii court's definition of serious mental distress "as being properly found where a reasonable person 'normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances' of the event." *Id.* See notes 118-22 and accompanying text *supra*. Finally, as to the method by which the Pennsylvania court would limit the scope of liability, Justice Nix concluded, relying heavily upon the analysis embodied in the *Dillon* decision, that "the application of the traditional tort concept of foreseeability will reasonably circumscribe the tortfeasor's liability in such cases." *404* A.2d at 684. In the court's view, the relevant question of foreseeability in situations involving mental distress sustained by a bystander would be "whether the emotional injuries sustained by the plaintiff were reasonably foreseeable to the defendant." *Id.*
surprise that courts have begun to consider the area where the incongruity is most apparent—the application of the Dillon doctrine to cases based on strict liability in tort. It should also come as no surprise that this consideration began in California, the state which has the longest history of successful experimentation with the doctrine in negligence.

V. DILLON AND STRICT LIABILITY: RECENT CASES

Recently, two California cases have considered the extension of the Dillon doctrine to actions grounded in strict liability in tort. A review of these cases is appropriate because their conflicting holdings have set the stage for eventual resolution of the issue by the California Supreme Court.

In Park v. Standard Chem Way Co., plaintiff-husband was seriously injured when a drain cleaner exploded during normal use. The husband sued the manufacturer, distributor and retailer, claiming that the product was defective because it did not warn of the possibility of explosion in normal use. Plaintiff-wife also sued, claiming, inter alia, that she suffered emotional distress, shock and physical injuries upon finding her injured husband. The retailer demurred to the cause of action since no negligence was alleged. The court conceded that the husband's claim was valid in strict liability under the rule of Greenman v. Yuba Power Products, but held that the wife's claim was not actionable under Dillon absent an allegation of negligence. The holding is troubling since no analysis is offered and the facts of the case did not necessitate it.

The issue of the extension of the Dillon doctrine to strict liability was allocated a mere two paragraphs in the opinion. The rule was

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169. Id. at 48-49, 131 Cal. Rptr. at 338-39.
170. Id. at 49, 131 Cal. Rptr. at 339.
171. Id. at 50, 131 Cal. Rptr. at 339.
174. Those two paragraphs contain no detailed or meaningful discussion of the issue.

Appellant's cause of action against Curb appears to be grounded on the doctrine enunciated by Dillon v. Legg, which permits a close relative of the victim of an accident caused by the negligence of a third person who is present or in the zone of danger at the time to recover against the negligent party for mental and emotional pain and suffering by the relative. And secondly on the doctrine of loss of consortium recently enunciated in California in Rodriguez v. Bethlehem Steel Corp. [sic].

Dillon v. Legg does not apply for the following reasons. The complaint is based on strict liability, warranty, and negligence of Standard Chem Way Company, the
stated but not justified or explained. There was no discussion for or against extending the doctrine and no rationale for the denial was offered. The court essentially denied the cause of action solely because of a lack of precedent for such an extension, a reason which has been shown earlier to be unsatisfactory. Moreover, there was absolutely no necessity for the court’s broad holding. Plaintiff-wife alleged that she returned from work approximately two and one-half hours after the explosion and found her husband permanently scarred on his arms, torso, and legs. The emotional distress was caused by hearing about the accident from her husband and from seeing the aftermath hours later. The facts fail two of the three Dillon requirements. The wife was not near the scene of the accident, and more importantly, she had no contemporaneous sensory impact of the accident. Even if the action had been based upon negligence, no recovery would have been available under Dillon. This being so, Park seems to be a particularly inappropriate vehicle for the consideration of the doctrine. In the absence of any legal analysis on the point and in view of the facts of the case, Park stands essentially for the proposition that what has not before been done should not be done.

Shepard v. Superior Court offered facts somewhat more conducive to a consideration of the extension issue. Father, mother and their children were driving in their Pinto which allegedly was defectively manufactured so as to contain a defect in design or manufacture of the rear door locking mechanism. Because of the defect, and upon being struck by another car, the rear door opened, causing two of the children to be thrown out, one of whom was run over by another automobile. Here the parent-plaintiffs were present at the time of the accident. They witnessed the events and hence had a contemporaneous perception of it. The relationship of the plaintiff to the deceased was of the closest kind. The case would have stated a cause of action under Dillon had the defect been caused by the negligence of the manufacturer. Curb is joined as a retailer of the product involved. Nothing in the complaint suggests any negligence on the part of Curb and appellant was not in the zone of danger at the time of the accident.

Id. at 50, 131 Cal. Rptr. at 339 (citations omitted).

See notes 15-22 and accompanying text supra.

See note 40 supra. It is possible that the brief reference to plaintiff’s being outside the zone of danger, in the passage quoted in note 174 supra, is intended to imply that the three factors are not met. If so the passage is far from clear.


Id. at 18-19, 142 Cal. Rptr. at 613-14. The intervening negligence of the second driver, however, clouds the case factually. It is, perhaps, not the best case upon which to base an extension of the doctrine for that reason.
manufacturer. Also, the facts satisfied the *Greenman* requirements for an action in strict liability, which provide that "a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."\(^{160}\)

In light of these facts the court concluded that defendant "Ford owes a duty to petitioners on the related theories of strict liability and warranty."\(^{181}\) In so holding the court correctly noted that the policy rationales of strict liability were served by the result.\(^{182}\) Additionally, the court examined the causation chain from the defective product to the injured plaintiff and found that the injury was within the scope of foreseeable risks run by the manufacturer in marketing a defective product.\(^{183}\) Uniquely, the case involves physical injury caused by the mental distress of witnessing injury to another, and in many ways is similar to any other products case. Here, a bystander has suffered physical injury caused by a defect in a product. The question is, who should bear the loss? The same basic policy rationales apply to this case as to other product liability actions.\(^{184}\)

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182. *Id.* at 21, 142 Cal. Rptr. at 615.
183. *Id*.
184. In *Brandenburger v. Toyota Motor Sales*, Inc., 162 Mont. 506, 513 P.2d 268 (1973), Mr. Justice Harrison enumerated a number of these basic policy rationales as follows:
   (1) The manufacturer can anticipate some hazards and guard against their recurrence, which the consumer cannot do.
   (2) The cost of injury may be overwhelming to the person injured while the risk of injury can be insured by the manufacturer and be distributed among the public as a cost of doing business.
   (3) It is in the public interest to discourage the marketing of defective products.
   (4) It is in the public interest to place responsibility for injury upon the manufacturer who was responsible for its reaching the market.
   (5) That this responsibility should also be placed upon the retailer and wholesaler of the defective product in order that they may act as the conduit through which liability may flow to reach the manufacturer, where ultimate responsibility lies.
   (6) That because of the complexity of present day manufacturing processes and their secretiveness, the ability to prove negligent conduct by the injured plaintiff is almost impossible.
   (7) That the consumer does not have the ability to investigate for himself the soundness of the product.
   (8) That this consumer's vigilance has been lulled by advertising, marketing devices and trademarks.

Inherent in these policy considerations is not the nature of the transaction by which
As has been shown, it is not enough to demonstrate that under the normal workings of the strict liability doctrine the plaintiff would recover, even if such recovery would further the policy rationales of the doctrine. It must also be determined whether any valid objections to the extension of the doctrine exist to outweigh plaintiff's claims. The majority in Shepard did not discuss any of the classic objections to the Dillon doctrine although many of these, in addition to new ones, were raised by Justice Kane in a dissenting opinion. The objections of Justice Kane included lack of precedent, intent of products liability to compensate physical injuries only, difficulty of proving damages, fraudulent claims, lack of moral blame or fault, and liability out of proportion to industry's ability to pay or insurance to absorb. The majority in Shepard began the job of analysis, but failed to pursue it through careful examination of the objections raised by Justice Kane in his dissenting opinion. The validity of those objections in the strict liability context must be examined as a necessary precondition to the extension of the doctrine.

VI. DILLON'S OTHER LEG

In considering the extension of the Dillon doctrine to strict liability for defective products it becomes apparent that at least some of the objections are not new. In fact, they are the same ones which have been raised ever since recovery for emotional distress and accompanying physical injuries was first contemplated. They have surfaced regularly as each liberalization of the doctrine has been considered. To the extent that these objections have been discussed earlier in the article they will receive little attention here. Lack of precedent, fraud and proof problems are such objections. There is nothing inherently

the consumer obtained possession of the defective product, but the character of the defect itself, that is, one occurring in the manufacturing process and the unavailability of an adequate remedy on behalf of the injured plaintiff.


185. 76 Cal. App. 3d at 22-27, 142 Cal. Rptr. at 616-19 (Kane, J., dissenting).

186. For a discussion of these issues in the negligence context, see notes 15-22 and 32-55 and accompanying text supra. Much of that discussion applies to the strict liability context. Only where the difference in the basis of the action materially changes the analysis need the issues be further discussed. Logically, if an issue has been discredited in the negligence context, and if no additional elements are raised because of the change in the basis of the claim from negligence to strict liability, then the issue is also discredited in the strict liability context.
more difficult in proving mental distress caused by a defective product than mental distress caused by defendant's negligence. Recalling the prior hypotheticals, it is clear that the cause of the injury—the negligent operation of the vehicle on the one hand and the defective manufacture of it on the other—have little to do with proof of injury. In both cases the same car crashes into the same child, causing the same degree of emotional distress in the watching mother. It is the sensory impression of the accident which causes the injury to the mother and not the particular cause of the accident. Indeed, it is doubtful whether the mother will know the legal cause of the injury until later. Since no special problems in proving the validity of the mental distress exist, these reasons against extension carry no more weight in strict liability than in negligence. Previously, such problems have not been viewed as serious, and have been rejected by the California courts. The fear of fraud rests upon the problems of proof, a problem which appears to have little substance. The lack of precedent has also been discussed and rejected, as has the fear that the amount of litigation will prove unmanageable.

An interesting contention raised by the dissenting opinion in Shepard is that the policy of strict liability is to compensate physical injuries only. Although Justice Kane did not explain the reason for this view it should be noted, as the Shepard majority did, that in California only emotional distress resulting in physical injuries may be compensated under Dillon and that any extension of the doctrine to strict liability actions would carry this same limitation.

Justice Kane believed that dicta in Dillon foreclosed strict liability recoveries. This belief was founded upon the Dillon court's statement

188. 76 Cal. App. 3d at 23, 142 Cal. Rptr. at 616 (Kane, J., dissenting).
189. The only California case cited by Justice Kane to support his contention is Seely v. White Motor Co. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), which dealt with whether economic loss could be recovered in a strict liability action. The court saw a difference between expecting that a product will not injure the plaintiff and expecting that the product will merely fail to meet the economic expectations of the purchaser. The latter, they believed, was more properly left to claims based upon warranty. In this context Seely does not seem to be strong authority against allowing a recovery for emotional distress in strict liability actions. Emotional injury to the plaintiff is surely closer to physical injury than to mere commercial loss.
190. This is so because the court in Shepard adopted the Dillon doctrine in toto, including the three factors and other duty limitations. Shepard v. Superior Court, 76 Cal. App. 3d at 19, 142 Cal. Rptr. at 614.
191. Id. at 25-26, 142 Cal. Rptr. at 618-19 (Kane, J., dissenting).
that the basis for claims "must be the adjudicated liability and fault of defendant." In fact, this comment was made in the context of a claim by the defendant in Dillon that the contributory negligence of the child partly caused the accident. In that context the Dillon court made clear that any successful defense against the child would foreclose the recovery by the plaintiff witness. The entire Dillon cause of action, therefore, was made contingent upon the successful claim by the child. The view of the Dillon majority was that since the basis of the mother's claim is the harm caused by defendant to the child which the mother witnessed, it would be incongruous to find that the harm done to the child was not legally compensable while the mother received compensation for viewing that self-same injury. The same logic would hold that if the defect in the product were not the cause of the injury to the child, or if the child misused the product so as to preclude his recovery, no secondary action by the mother for viewing the injury could be maintained.

In this context, the comment by the Dillon court upon which Justice Kane relies in Shepard was not addressed to questions of strict liability and was not intended to foreclose such recovery. Rather, the comment was part of a larger statement firmly conditioning the mother's recovery, under whatever theory, upon the requirement that the child himself be entitled to recover. It must be concluded that Justice Kane took the sentence out of context and used it to justify what appears to be the true basis for his dissent in Shepard, which is a hostility to the whole doctrine of strict liability in tort:

Paying heed to economic realities rather than our own fancy, the courts as a matter of judicial policy must stop the further extension of strict liability of entrepreneurs, at least to areas where, as here, the determination of damages is speculative and conjectural rather than real and definable.

Leaving aside the fact that it has been shown that such damages are not speculative or conjectural and that they can be defined and proved, Justice Kane's attack upon strict liability in tort still remains. But it is a questionable method of reforming the products liability area to arbitrarily declare a moratorium upon legitimate claims. Even the United States Department of Commerce, which has attempted to accomplish many reforms in products law, has noted that the current uncertainty in the area has led to "[p]anic 'reform' efforts that would

192. Dillon v. Legg, 68 Cal. 2d at 733, 441 P.2d at 916, 69 Cal. Rptr. at 76.
193. Id.
194. 76 Cal. App. 3d at 29, 142 Cal. Rptr. at 620 (Kane, J., dissenting).
195. See notes 32-46 and accompanying text supra.
unreasonably curtail the rights of product users." An absolute ban on further development of the strict liability doctrine would seem to be such an uncalled for panic reaction.

Once again there is a meritorious plaintiff-mother who witnesses her child's death or serious injury. Her right to recover for her own injury is difficult to deny. Clearly, the defect in the product caused a real and acute injury. Under normal operation of strict liability principles in California the mother would recover. The preferred approach to tort problems is to allow the general principles of tort recovery to function without placing special limitations upon duty. If some strong policy considerations demand limitations, they should be as consistent with general tort principles as is possible. As has been demonstrated, many of the objections to the doctrine are invalid.

Given this, the real issue emerges. This issue has arisen before in the negligence context, and is implicit in the comments of Justice Kane in Shepard. Can the extent of liability and the scope of the doctrine be controlled in strict liability? While most people would grant recovery to the plaintiff-mother in our hypothetical case, and while the number of such plaintiff-mothers is probably not so large as to unduly burden American industry, the real fear lurking below the surface is that the doctrine, once allowed, will have no stopping point and that courts will be unable to adequately control the extent of liability. The fear is that in later unimagined cases the number of potential plaintiffs and the extent of the manufacturer's liability will be too burdensome. Once it is demonstrated that the doctrine can be controlled in negligence, the fear of unlimited liability under that theory becomes groundless. However, this does not guarantee control of the doctrine in the strict liability context. This final problem must be considered if courts are to risk the extension.

VII. DILLON AND STRICT LIABILITY: CONTROLLING THE DOCTRINE

Under Shepard, the Dillon doctrine has been extended to cases in which the plaintiff-witness suffers emotional harm and physical injuries from viewing the injury to another when the injury to the other is caused by a defective product. How can the doctrine be controlled?

Many of the control devices in Dillon are equally applicable to situations involving strict liability, since the plaintiff-witness must have suf-

197. See 76 Cal. App. 3d at 20, 142 Cal. Rptr. at 614.
198. See Part III supra.
199. See notes 178-85 and accompanying text supra.
ferred physical injuries as a result of her emotional distress. This device alone rules out many potential plaintiffs. Secondly, the three Dillon factors of relationship, location, and contemporaneous sensory impact apply to these cases. The history of these requirements in relation to standards of negligence demonstrates that only a limited class of plaintiffs will recover under these rules. When interpreting these rules, courts have indicated that an accident or other sudden trauma-causing event is required for recovery. A lingering event (such as a hospital stay) will not suffice, nor will being told of the event as opposed to perceiving it in person.200

As has been demonstrated, the three Dillon factors have been viewed as binding rules of duty. The absence of any one factor seems to be enough to indicate that plaintiff may not recover under Dillon. It follows that the rules must be viewed not merely as guidelines in establishing foreseeability, but as special judicially-created rules to limit a duty which would otherwise exist under general tort principles.201 In this context, the application of the rules to strict liability cases is acceptable. Any rules required by courts which allow them to control the doctrine are acceptable. The arbitrary lines should be drawn as far toward allowing the operation of normal tort doctrine as the courts can adequately control.202 The maximum number of meritorious plaintiffs should recover while not unduly burdening the ability of the manufacturing process to absorb the cost.

The three factors, then, are an attempt to control the scope of liability both in negligence and in strict liability. While not perfect, they will

200. It has been suggested that the three factors are inappropriate in a strict liability context because the factors are guides to defining foreseeability in negligence. See 17 Duq. L. Rev. 535 (1978-79). The basis of this suggestion is that the three factors may be appropriate as duty definers in Dillon, but are inappropriate in the context of strict liability cases such as Shepard, because foreseeability is not at issue in such cases. Id. at 542. The fundamental error in this approach is that the three factors formulated by the court in Dillon are primarily duty limiters, rather than duty definers. Moreover, foreseeability is not entirely foreign to strict liability. See, e.g., Elmore v. American Motors Corp. 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969) (strict liability for defective products extended to bystanders where the injury to the bystanders was reasonably foreseeable).

201. Not only will the three Dillon factors give the court the control it wants over the scope of the doctrine; they will also keep the recovery in strict liability co-extensive with that allowed in negligence. Because one of the purposes of strict liability is to eliminate plaintiff’s proof problems in negligence, see 17 Duq. L. Rev. at 542-43, it would be incongruous to allow such recovery in negligence but to deny it merely because plaintiff’s action is based on strict liability.

202. It is to be hoped that eventually the California Supreme Court will abolish the three factors and allow general tort principles to function both in negligence and strict liability cases; no evidence of this has been seen to date. It may be left to courts such as those in Hawaii, Massachusetts, and Michigan to lead the way in that direction.
hold the scope of recovery in strict liability to that now allowed in negligence. The advantage is that experience with the Dillon doctrine in negligence has shown that, with these restrictions, the level of liability will not be excessive and the number of plaintiffs will not be large. The same should be true in strict liability. In general, the doctrine can be circumscribed by the use of the same controlling factors that are used in negligence. Courts adopting Shepard should do so to the same extent and with the same rules as that particular jurisdiction applies in Dillon cases.

For jurisdictions that desire to adopt the Dillon doctrine in strict liability cases, but which are not yet convinced that the negligence control factors will be adequate, more cautious controlling rules can be formulated. One possible approach would be that used by the Supreme Court of Rhode Island, confining recovery to mothers, parents or some other narrow group. If the number of plaintiffs recovering under such a rule is not unreasonably large, further extensions can be contemplated. Another possible approach would be to focus upon the type of product that is involved and to ask whether the manufacturer could foresee that a close relative would witness injury caused by that defect. For example, a manufacturer of a home appliance, such as a washing machine, would be expected to foresee that the product would be used in proximity to children and parents, making it likely that an injury from a defect could injure a child with his parents looking on. In contrast, a crane used only for loading holds of cargo ships is not the kind of product which is used in the vicinity of parents and children. Therefore, a plaintiff-parent, who observes his child injured by such a product, and sustains emotional injury as a result, is not as foreseeable. This might justify erecting a barrier to such recoveries.

This author believes that none of the above special limitations upon strict liability recovery are necessary and that general strict liability principles, with all the normal allowable defenses, will contain the doctrine to manageable levels. The above control devices are offered only to show that it is possible to construct such limits in the strict liability context just as has been done by a number of jurisdictions in the negligence area. In California, the first extension of the doctrine to strict liability should probably be accomplished by following the Shepard approach of making recovery in strict liability co-extensive with recovery in negligence and using the same limitations. As the doctrine is extended in negligence, it should be extended in strict liability as well.

203. See notes 148-54 and accompanying text supra.

204. This last approach has little connection to general theory of strict liability but is offered as one additional example of an arbitrary line which could be drawn as an interim step toward controlling the scope of recovery in strict liability cases.
VIII. CONCLUSION

In *Dillon*, the California Supreme Court took an important step in moving third party emotional distress recovery into the mainstream of tort doctrine. By crashing through the zone of danger rule, California has led the way in an experiment that is leading more and more courts toward the application of general tort principles to this area, which has always suffered under burdensome and unnecessary special limitations. While not the final step in the process, it is a vital part of the doctrinal development. Since *Dillon*, the California experience has demonstrated that California was correct to risk the extension. The fears of many were proved to be groundless and the predicted problems failed to materialize.

Now it is time to risk the next extension of the doctrine—an extension that is necessary to eliminate an incongruity in the law. Again, many predict problems and dire results if such an extension is made, but these results seem unlikely. Various judicially created control devices can circumscribe the doctrine to avoid unfairness while allowing meritorious plaintiffs to recover. *Shepard*, then, was correctly decided. Following the rationales and rules of strict liability, the court equalized the rules of tort recovery while adopting realistic rules to restrict recovery to manageable levels. Although not the final step in the development of the doctrine, the *Shepard* approach continues to carry the trend in the right direction.