Pennsylvania's Approach to Claims for Negligent Infliction of Emotional Distress: Neither Logic Nor Practical Politics

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Seven years after its decision in Sinn v. Burd, the Pennsylvania Supreme Court has answered the question it left for another day. That question asked whether a parent has a cause of action for negligent infliction of emotional distress in instances where the parent does not contemporaneously observe the injury to the child, but rather, comes upon the accident and observes the injured child. This issue has attracted much debate within the Pennsylvania courts as well as within other jurisdictions.

This comment traces the cause of action for negligent infliction of emotional distress from its origination in England to its present status in Pennsylvania. Pennsylvania's approach is then compared to the approaches taken by other jurisdictions. Finally, this comment examines and analyzes the trend toward applying a more flexible approach and explains why such an application is more aligned with modern tort law.

Claim For Nervous Shock In England

The early common law did not recognize a cause of action for fright negligently inflicted in the absence of contemporaneous bodily injury or physical impact upon the plaintiff. Illustrative of this view is the case of Victorian Railways Commissioners v. Coulton. In that case, an action was brought to recover damages for injuries sustained by the plaintiff through the alleged negligence of defendant's servant. Unaware of an oncoming train, the servant in charge

1. This statement is excerpted from the seminal case of Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928). Justice Andrews in his famous dissent in Palsgraf declared: "What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics." Id. at 352, 162 N.E. at 103.
3. Id.
4. See infra note 160-232 and accompanying text.
6. Id. at 225.
of the railway gate instructed plaintiff to drive over the railway crossing. The plaintiff, who narrowly missed being struck, contended that the experience caused him severe shock which resulted in physical injuries. Sir Richard Couch, writing for the Lordships, announced that “[d]amages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot, under such circumstances, . . . be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper.”

This rigid English rule was subsequently abrogated by the British court in the case of Dulieu v. White & Sons. In Dulieu, the plaintiff, who was pregnant, was behind the bar of her husband’s pub when the defendant-servant drove a pair-horse van into the pub. As a consequence, the plaintiff gave premature birth to her child who was born mentally handicapped. Finding the requirement of physical impact to be unreasonable, the British Court promulgated a new theory for recovery for claims of nervous shock. The Dulieu court declared that a plaintiff may recover damages for nervous shock which arises from a reasonable fear of immediate physical injury to oneself.

Several years later, in Hambrook v. Stokes Brothers, recovery for nervous shock was expanded to encompass a parent who feared for the safety of her child but who neither sustained physical impact nor feared physical injury to herself. In Hambrook, a servant of the defendant negligently left a motor lorry unattended and unsecured at the top of a street. As a result, the lorry rushed violently down the street, passing plaintiff’s wife who had only moments before departed from her children. Plaintiff’s wife became frightened for the safety of her children who by that time were out of sight and possibly in the path of the fugitive lorry. Immediately thereafter, she was informed by a bystander that a child,

7. Id.
8. Id.
9. Id.
10. [1901] 2 K.B. 669 (1901). See also Bell v. Great Northern Ry. Co. of Ireland, 26 L.R. Ir. 428, 442 (1890).
11. Id. at 670.
12. Id.
13. Id.
14. Id.
16. Id.
17. Id. at 141-42.
18. Id. at 142.
matching the description of one of her children, had been injured by the lorry. Consequently, plaintiff's wife suffered nervous shock which resulted in her death. The court held that a parent who suffered mental shock from a reasonable fear of immediate physical injury to a child may recover for those damages attendant to the resulting nervous shock.

However, subsequent British courts were reluctant to extend the concept of foreseeability to permit bystander recovery. In Bourhill v. Young, a motorcyclist collided with a motorcar while travelling down a highway. The plaintiff who was standing on a tramway platform 45 feet from the accident heard the noise without seeing the accident and suffered nervous shock resulting in the stillbirth of her child one month later. The British court denied plaintiff's claim for nervous shock holding that the cyclist owed a duty to persons which he could reasonably foresee might be injured, and since plaintiff was not within the zone of danger, the defendant owed her no duty. Lord Porter, distinguishing Hambrook, noted that in that case, the defendant's negligence was potentially dangerous to everyone on the street including the mother who feared that the runaway lorry might injure her children. In Bourhill, however, because the plaintiff was not on the road where defendant drove his cycle negligently, she was not a reasonably foreseeable plaintiff and thus defendant owed her no duty.

Likewise, in King v. Phillips, a taxicab driver backed up his taxi into a boy on his tricycle. The boy's screams were heard by his mother who then saw the tricycle being run over but could not

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19. Id.
20. Id. at 142-43.
21. Id. at 152. The court reasoned that "the defendant ought to have anticipated that if his lorry ran away down this narrow street, it might terrify some woman to such an extent, through fear of some immediate bodily injury to herself, that she would receive such a mental shock as would injure her health. Can any real distinction be drawn from the point of view of what the defendant ought to have anticipated and what, therefore, his duty was, between that case and the case of a woman whose fear is for her child, and not for herself?" Id. See generally, Note, Harv. L.R. 1033 (1936). The American companion case is Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933).
23. Id. at 94.
24. Id.
25. Id. at 118.
26. Id.
27. Id.
29. Id. at 429-30.
see the child (who had avoided the accident).³⁰ The mother, who sustained nervous shock, filed suit against the driver's master.³¹ The British court entered judgment for the defendant.³² Lord Justice Singleton, affirming the decision of the trial court,³³ held that the driver could not have reasonably anticipated that injury could have been caused to the mother by backing up his taxi without looking behind him.³⁴ Therefore, the Lord Justice concluded, the defendant owed no duty to the plaintiff-mother.³⁵

Notwithstanding the narrow interpretation which the Hambrook decision received, other British courts continued to permit recovery for nervous shock where there was neither sustained physical impact nor threatened physical harm to the plaintiff. For example, in Boardman v. Saunderson³⁶ the English Court of Appeal held a defendant liable for the nervous shock sustained by a father after hearing the screams of his son as the defendant drove his automobile over the child's leg.³⁷ The court held that the father's injuries were reasonably foreseeable since the defendant knew that the child was in the yard, that the father was within earshot, and that carelessness on his part might result in injury both to the child and to the father who would come to the child's assistance.³⁸ The defendant, therefore, owed a duty to both the child and the father.³⁹

The outermost boundaries of the foreseeability approach were demarcated in Chadwick v. British Railways Board⁴⁰ where the court permitted recovery for nervous shock sustained by an individual who feared for neither his own safety nor that of his children.⁴¹ In Chadwick, the wife, as administratrix, brought an action for damages for nervous shock sustained by her husband, which

30. Id. at 430.
31. Id.
32. Id. at 437.
33. Id. at 434. Justice McNair, for the court below, followed the decision of the House of Lords in Bourhill v. Young and held that the defendant owed no duty to the mother.
34. Id. at 435.
35. Id. at 435-46.
37. Id. at 1318-19. The defendant and the father and son had gone together to a gas station to pick up the defendant's car. Id. The defendant asked the father to pay the bill. Id. While the father went to the office, the child remained in the courtyard. Id. The defendant then began to back his car out of the garage and failing to see the child, ran over the child's foot. Id. The father heard the child's screams and rushed outside to find his son's foot trapped under the auto's front wheel. Id.
38. Id. at 1320.
39. Id. at 1322.
41. Id. at 919-20.
led to his death, as the result of his efforts in rescuing victims at the scene of a serious railroad accident which occurred 200 yards from his home. The court found that the defendant railroad had been negligent toward its passengers and thus could have reasonably foreseen that the passengers would suffer injury. He found further that it was also foreseeable that someone might try to rescue the passengers and in so doing, suffer injuries. Therefore, the defendant owed a duty not only to its passengers but also to the rescuer.

The most recent pronouncement by the British courts exploring the parameters of liability for emotional distress was set forth in McLoughlin v. O'Brian. In McLoughlin, the House of Lords was confronted with a claim for nervous shock sustained by a mother who was not present at the scene of the accident involving her husband and children. The plaintiff-mother was located at home two miles from the accident when she learned of its occurrence. Subsequently, she was taken to the hospital where she saw the surviving members of the family and learned of one child's death. In the tradition of the British courts each Lord Justice delivered a separate opinion. The crux of these opinions, unanimously favoring the mother's claim, concluded that it was reasonably foreseeable that a parent would receive nervous shock when learning of injuries inflicted on her family. Lord Wilberforce expressed the view that "[t]here can be no doubt that these circumstances, witnessed by the [plaintiff], were distressing in the extreme and were capable of producing an effect going well beyond grief and sorrow." Lord Wilberforce reasoned that to require direct or immediate sight or hearing would be impractical and unjust and that one who comes

42. Id. at 914-15.
43. Id. at 921.
44. Id.
46. Id. at 298.
47. Id. The trial judge held for the defendant finding that the defendant owed no duty of care to the plaintiff because it was not reasonably foreseeable that she would suffer nervous shock. Id. The trial court's holding was upheld on appeal but on different grounds. Id. Lord Justice Stephenson found that the injury was reasonably foreseeable and the defendant owed a duty of care but that recovery was precluded due to policy considerations. Id. Lord Justice Griffiths held that the injury was foreseeable but that the defendant owed a duty of care only to persons near the scene of the accident Id. Lord Justice Cumming-Bruce concurred with both opinions. Id. The plaintiff thereafter appealed to the House of Lords. Id.
48. Id.
49. Id. at 301.
50. Id. at 304.
upon the scene from close proximity should not be precluded from recovery.\textsuperscript{51}

\textit{Development Of The Cause Of Action In Pennsylvania}

The evolution of a cause of action for emotional distress closely parallels that of England. The recognition of such a claim had its genesis in the case of \textit{Ewing v. Pittsburgh Railway Company},\textsuperscript{52} where the Pennsylvania Supreme Court denied recovery for mental suffering absent bodily injury.\textsuperscript{53} The rule enunciated in \textit{Ewing}, later characterized as the impact rule,\textsuperscript{54} precluded recovery for negligent infliction of emotional distress unless the distress was accompanied by physical impact upon the plaintiff.\textsuperscript{55}

During the reign of the impact rule, Pennsylvania courts, as well as courts of other jurisdictions, recognized the harshness and unfairness that resulted from the application of this rule.\textsuperscript{56} Conse-

\begin{itemize}
\item \textsuperscript{51} Id.
\item \textsuperscript{52} 147 Pa. 40, 23 A. 340 (1892). In \textit{Ewing}, the plaintiff alleged that a train collision caused the defendant's railroad cars to derail and be thrown against the plaintiff's house. Id. at 340. The plaintiff claimed that the life threatening incident subjected him to great fright, nervous excitement and distress. Id.
\item \textsuperscript{53} Id. at 44, 23 A. at 340-41. The Pennsylvania Supreme Court, quoting \textit{MAYNE ON DAMAGES} at 74, stated that "the force of the rule is that the mental suffering . . . that grows out of the sense of peril or the mental agony at the time of the happening of the accident, and that which is incident to and blended with the bodily pain incident to the injury, and that apprehension and anxiety thereby induced. In no case has it ever been held that mental anguish alone, unaccompanied by an injury to the person, afforded a ground of action." 147 Pa. at 44-45, 23 A. at 341.
\item \textsuperscript{54} The additional words "a physical impact" first appeared in \textit{Potere v. City of Philadelphia}, 380 Pa. 581, 112 A.2d 100 (1955).
\item \textsuperscript{55} For a discussion of the development of the "impact rule" in Pennsylvania, see Note, 39 TEMP. L.Q. 229 (1966).
\item \textsuperscript{56} Legal scholars who have considered the rule denying recovery in the absence of contemporaneous physical injury or impact are unanimous in condemning it as unjust and contrary to experience. See Comment, Negligently Inflicted Mental Distress: The Case For An Independent Tort, 59 GEORGETOWN L.J. 1237 (1971); PROSSER, \textit{LAW OF TORTS} 328-332 (4th ed. 1971) 2 HARP\textsc{er} & JAMES, \textit{LAW OF TORTS} \S 18.4 at 1031-1039, (1956); McNiece, \textit{Psychic Injury and Tort Liability in New York} 24 ST. JOHN'S L. REV. 1 (1949); Smith, \textit{Relation of Emotions to Injury and Disease, Legal Liability for Psychic Stimuli} 30 VA. L. REV. 193 (1944); Smith & Solomon, \textit{Traumatic Neurosis in Court} 30 VA. L. REV. 87 (1943); Ma\textsc{g}ruden, \textit{Mental and Emotional Disturbance in the Law of Torts}, 40 HARV. L. REV. 1033 (1936); 1936 Report of N.Y. Law Rev. Comm. 375; Green, "Fright" Cases, 27 ILL. L. REV. (1933); HALLEN, \textit{Damages for Physical Injuries Resulting from Fright or Shock}, 19 VA. L. REV. 253 (1933); Wilson, \textit{The New York Rule as to Nervous Shock} 11 CORNELL L.Q. 512 (1926); Goodrich, \textit{Emotional Disturbance as Legal Damage}, 20 MICH L. REV. 497 (1922); Throckmorton, \textit{Damages for Fright}, 34 HARV. L. REV. 260; Burdick, \textit{Tort Liability for Mental Disturbance and Nervous Shock}, 5 COLUM L. REV. 179 (1905); and Bohlen, \textit{Right to Recover for Injury Resulting from Negligence Without Impact}, 41 AM. L. REG. (N.S.) 141 (1902).
\end{itemize}
quently, in an attempt to relax the rule, but yet remain within the ambit of the rule, courts frequently distorted its construction to enable persons genuinely injured to recover. For example, in *Potere v. City of Philadelphia,* the Pennsylvania Supreme Court permitted recovery for emotional distress sustained by a truck driver who suffered only minor physical injuries when the street collapsed. Thus, in *Potere,* the impact rule was extended to permit a cause of action for the negligent infliction of emotional distress where the plaintiff incurred any physical impact, no matter how slight or trivial, and notwithstanding any lack of causal connection between the physical impact and the fright induced injuries.

Because of the inequity of the impact rule, the Pennsylvania judiciary clamored for a more flexible standard for pleading a claim for negligent infliction of emotional distress. This movement was trumpeted by Justice Musmanno's dissenting opinion in *Bosely v. Andrews.* In denying recovery for damages resulting from fright and shock upon being chased by defendant's trespassing bull, the *Bosley* court held that no recovery could be had for injuries resulting from nervous shock or fright or emotional distress absent a physical injury or physical impact. In dissent, emphasizing that a grievous injury may be sustained by a trespassing force which in no way physically touched the plaintiff, Justice Musmanno con-

58. Id. at 584, 112 A.2d at 102. Other jurisdictions have also been guilty of distorting the rule's import. See, e.g., Jones v. Brooklyn Heights R.R. Co., 23 App. Div. 141, 48 N.Y.S. 914 (1897). In *Jones,* the New York Supreme Court held that a sufficient impact had occurred when a small light bulb fell from the ceiling of an automobile onto plaintiff's lap. The plaintiff was permitted to recover for emotional distress occurring as the result of a miscarriage. *Id.*
59. Id. at 584, 112 A.2d at 102. The *Potere* court declared that "where . . . a plaintiff sustains bodily injuries, even though trivial or minor in character, which are accompanied by fright or mental suffering directly traceable to the peril in which the defendant's negligence placed the plaintiff, then mental suffering is a legitimate element of damages." *Id.*
60. See also supra note 55.
62. 393 Pa. 161, 142 A.2d 263 (1958). The majority opinion in *Bosley* made clear that the impact rule was to be given strict obedience.
63. Id. at 162-63, 142 A.2d at 264. Writing for the majority, Justice Bell noted that "to allow recovery for fright, fear, nervous shock, humiliation, mental or emotional distress—with all the disturbances and illnesses which accompany or result therefrom—where there has been no physical injury or impact, would open Pandora's box." *Id.* at 162-63, 142 A.2d at 266.
64. Id. at 187, 142 A.2d at 275-76. Examples provided by Justice Musmanno were a
cluded that the absence of any physical impact should not preclude legal redress. He further declared that obedience to such a doctrine which would “crumble at the slightest touch of instinctive reason and natural justice,” deprived the law of its dignity.

In response to the attacks on the validity of the impact rule, the Pennsylvania Supreme Court reconsidered the wisdom of the rule in the case of *Neiderman v. Brodsky* and abandoned the requirement of actual impact as a prerequisite to recovery for emotional distress. In *Neiderman*, a parent brought an action to recover damages for fright and mental shock which he sustained when his son, who was standing next to him on the sidewalk, was struck by the defendant’s negligently driven automobile. Writing for the majority, Justice Roberts promulgated what has come to be known as the “zone of danger” theory, and held that a plaintiff in danger of personal injury because of the direction of a negligent force, may recover for mental pain, shock and physical injuries attendant to the incident, despite the absence of physical impact.

A short time after its inception, the “zone of danger” rule became threatened by the views of other jurisdictions which permitted emotional distress recovery for a bystander-relative who, although not satisfying the “zone of danger” test, sustained emotional distress and consequent physical injury from witnessing blinding light or a deafening noise. *Id.*

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65. The hallmark of Musmanno’s dissent was his declaration that “I shall continue to dissent . . . until the cows come home.” *Id.* at 195, 142 A.2d at 280.

66. *Id.* Justice Musmanno asserted that continued adherence to the impact rule would be in “violation of the living spirit of the law.” *Id.* at 183, 142 A.2d 274.

67. 436 Pa. 401, 261 A.2d 84 (1970). In *Neiderman*, Justice Roberts responded to Justice Musmanno’s dissent in *Bosley* and brought the cows home. *Id.* at 403, 261 A.2d at 85. In *Neiderman*, plaintiff brought an action for damages which were contributable to the fright and mental shock which the plaintiff sustained when the defendant negligently drove an automobile which skidded onto the sidewalk and struck the plaintiff’s son. *Id.* at 402, 261 A.2d at 84.

68. The first American case to repudiate the requirement of impact for a claim for negligent infliction of emotional distress was *Hill v. Kimball*, 76 Tex. 210, 13 S.W. 59 (1890). *See also* *Purcell v. St. Paul R. Co.*, 48 Minn. 134, 50 N.W. 1034 (1892). In this area of law, Pennsylvania was “[c]lattering close to the caboose instead of cheerfully gliding over the rails immediately behind the locomotive.” *Kraub v. Gotwalt*, 422 Pa. 256, 273, 220 A.2d 646, 648 (1966). *See also* Comment, *Injuries from Fright Without Contact*, 15 CLEV. MAR. L. REV. 331 (1966).

69. 436 Pa. at 402, 261 A.2d at 84.

70. *Id.* at 413, 261 A.2d at 90. Chief Justice Bell filed a dissenting opinion. In his view, the majority’s overruling of the impact rule opened a Pandora’s box out of which will emanate fictitious and exaggerated claims. *Id.* at 414, 261 A.2d at 90. Bell noted that a medical, as well as judicial, “guessing game” was substituted for a well-established rule. *Id.*
harm inflicted upon a close relative. Two early cases to reach the Pennsylvania Superior Court under this expanded theory were *Scarf v. Koltoff* and *Bowman v. Sears Roebuck & Company.* In *Scarf*, a husband was struck and injured by a negligent motorist. His wife, who was not within the "zone of danger," witnessed the accident and suffered shock which led to a heart attack. The superior court held that claimants, who are neither in personal danger of physical impact, nor fear physical impact, have no legal redress for their injuries. Shortly after its decision in *Scarf*, the Pennsylvania Superior Court addressed a similar issue in *Bowman*, wherein a mother sought damages for emotional distress from observing the forcible removal of her daughters from a shopping area by five store employees. That court, adhering to the "zone of danger" test, permitted recovery, noting that the mother’s injuries resulted not only from the detention of her daughters, but also from her own physical fear of physical attack by the same store employees.

The Pennsylvania courts’ fear of advancing new theories of liability in this area was influenced by several policy concerns relating to the difficulty in assessing psychic injuries. As recognized in the landmark case of *Sinn v. Burd*, in which the "zone of danger" rule was expanded to allow recovery for plaintiffs outside the "zone of danger," the particular concerns of the courts for extending liability had been the difficulty which medical science had in proving causation between the claimed damages and the alleged fright; the fear of fabricated or exaggerated claims; the potential for an avalanche of litigation; and unlimited or unduly burdensome liability. In *Sinn*, however, the Pennsylvania Supreme Court recognized that these concerns had been rendered archaic by advances in medical science.

71. See infra notes 85, 190 and 198 and accompanying text.
75. Id. at 295-96, 363 A.2d at 1277.
76. Id. at 297, 363 A.2d at 1280.
77. 245 Pa. Super. at 532, 369 A.2d at 755.
78. Id. at 533, 369 A.2d at 757.
80. Id.
81. Id. The claim that medical science is incapable of determining whether psychic damage sustained by the plaintiff and the shock of witnessing the accident are casually linked has been eradicated. See generally Leibson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. FAMILY L. 163 (1977). See also Cantor,
In *Sinn*, a mother who was outside the "zone of danger" brought an action for emotional distress which she sustained as a result of viewing her child being struck and killed by an automobile. In rejecting the proximity limitations of the "zone of danger" test the court applied traditional principles of negligence. Justice Nix, writing for the plurality, held as a matter of law that it was reasonably foreseeable that a parent who witnessed the injury or death of a child would suffer emotional distress. The *Sinn* court relied principally on the California Supreme Court decision in *Dillon v.*

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82. 486 Pa. at 146, 404 A.2d at 678 (1979). Although Sinn v. Burd expanded the "zone of danger rule" in Pennsylvania, this rule is still currently followed by several jurisdictions. See infra note 158 and accompanying text. See generally Winter, A Tort in Transition: Negligent Infliction of Mental Distress, 70 A.B.A.J. 62 (1984). The facts of *Sinn* were that the deceased and her sister were standing alongside the road at the Sinn's mailbox, at which time defendant, operating his automobile, struck the deceased. Id. at 150-51, 404 A.2d at 674-75. Deceased's sister, however, was not struck but was narrowly missed. Plaintiff observed the incident while positioned at the front door of her home. Id. Plaintiff sought recovery for damages she incurred as a result of the emotional distress of witnessing her daughter's death. Id.

83. The case was heard by Chief Justice Eagen and Justices O'Brien, Roberts, Nix, Manderino and Larsen. Justice Nix authored the opinion. Chief Justice Eagen specially concurred and also filed an opinion. Justice Larsen concurred in the result but did not write an opinion. Justice Roberts dissented and filed an opinion in which Justice O'Brien joined.


84. 486 Pa. at 148, 505 A.2d at 679; Chief Justice Eagen, in his concurring opinion, acknowledged the difficulty of circumscribing the outer limits of liability and concluded that recovery should be permitted to a plaintiff if: (1) the plaintiff is closely related to the injured party, such as a mother, father, husband or wife; (2) the plaintiff is near the accident scene and observed it; (3) the plaintiff suffers serious mental distress resulting from witnessing the accident and physical injury or suffers serious mental distress and there is a severe physical manifestation of this mental distress. Note that Chief Justice Eagen would require the negligently inflicted emotional distress to be physically manifested, a point on which *Dillon* and the *Sinn* plurality agree. Justice Roberts, writing in dissent, emphatically rejected Justice Nix's foreseeability test adopted from *Dillon*, quoting Justice Spaeth's notation in Scarf v. Koltoff, 242 Pa. Super. 294, 363 A.2d 1276 (1976), which provided that "'[t]he criteria suggested by Prosser and adopted by *Dillon* are not reasoned but arbitrary, for they are unsupported on any policy capable of uniform application.'" 486 Pa. at 184, 404 A.2d at 692. See generally Justice Roberts' dissent in *Sinn* for a lengthy criticism on the ramifications of that court's decision.
Legg. Specifically, Sinn adopted the three foreseeability factors enunciated in Dillon for determining whether the infliction of emotional distress was reasonably foreseeable. The factors set forth were:

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 direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence;
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.\(^{87}\)

The Sinn court, however, did not consider the right of recovery of a parent who does not observe the actual accident, but rather, learns of the child's injury thereafter.\(^{88}\)

Since the Sinn decision, subsequent Pennsylvania courts have narrowly interpreted the contemporaneous observation factor. For example, in Hoffner v. Hodge,\(^{89}\) the commonwealth court held that the lack of personal observation of an accident precluded recovery for emotional distress.\(^{90}\) Similarly, lack of contemporaneous observation of the accident was determinative in denying recovery in Vattimo v. Lower Bucks Hospital.\(^{91}\) In Vattimo, the commonwealth court held that a parent who is informed by telephone of an accident involving a child, had no cause of action for negligent infliction of emotional distress.\(^{92}\)

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85. 486 Pa. at 152, 404 A.2d at 681, citing Dillon v. Legg, 69 Cal. Rptr. 72, 441 P.2d 912 (1968). See infra notes 159-161 and accompanying text.
86. Id.
87. Id., quoting Dillon, 69 Cal. Rptr. 72, 80, 441 P.2d 912, 920.
88. 486 Pa. at 173 n.21, 404 A.2d at 686 n.21. The Sinn court also chose not to consider the case where the relationship between plaintiff-bystander and the accident victim was more remote. Id.


90. Id. at 279, 407 A.2d at 942.
92. Id. at 6, 428 A.2d at 768. Vattimo presented the commonwealth court with a situation where plaintiff's son, a hospitalized paranoid-schizophrenic, set a fire while negligently
The contemporaneous observation requirement enunciated in Sinn was subsequently interpreted in Bliss v. Allentown Public Library.\textsuperscript{93} In Bliss, the court rejected defendant's motion to dismiss even though the plaintiff did not visually observe the accident to her daughter but rather heard the accident and immediately thereafter viewed the scene.\textsuperscript{94} The court explained that in order to withstand a motion to dismiss, direct visual observation of the accident need not be pleaded.\textsuperscript{95} In noting that the plaintiff had observed the victim immediately prior to the accident and while in the immediate vicinity heard the crashing sound of the accident, the court stated that the plaintiff sufficiently identified herself as a "percipient witness" to state a cause of action for negligent infliction of emotional distress within the meaning of Sinn v. Burd.\textsuperscript{96} "To deny a claim because one's eyes do not view the accident at the precise moment of its occurrence ignores the reality that the sum total of the incident produced the emotional injury for which appellant seeks redress."\textsuperscript{97} The court concluded that a plaintiff who had some form of experiential perception of the accident, did not need visual observation.\textsuperscript{98}

Two years after its decision in Sinn, the Pennsylvania Supreme Court had its first opportunity to address the issue of whether the parent must plead contemporaneous sensory observation of the accident in order to make out a claim for negligent infliction of emotional distress. In Yandrich v. Radic,\textsuperscript{99} the equally divided Penn-

\textsuperscript{93} 497 F. Supp. 487 (1980).
\textsuperscript{94} Id. at 488.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id. at 489.
\textsuperscript{98} Id.
\textsuperscript{100} Id. In Yandrich, the Pennsylvania Supreme Court was equally divided and as a result the judgment of the superior court was affirmed. 286 Pa. Super. 625, 427 A.2d 247 (1980) (Memorandum). The superior court had affirmed the reluctant decision of Judge Dowling of the trial court. The trial court opinion was filed on April 24, 1979, before the supreme court's decision in Sinn which was dated July 11, 1979. Therefore, the trial judge was bound by the zone of danger edict. The court's opinion demonstrated its reluctance to follow precedent, noting that:

"[T]he scope of duty in tort is often defined in terms of reasonable foreseeability of the harm to the plaintiff resulting from the defendant's negligence . . . . Each of these characterizations are mere terms used to define the court's limit on recovery. Certainly one can foresee that the killing of an individual will cause emotional trauma to others. The emotional trauma can be just as real, just as devastating, whether one comes upon the scene and sees the individual on the ground, or whether one sees the
sylvania Supreme Court refused to extend the right of a parent to maintain a claim for emotional distress where the parent was neither a witness to the accident, nor in the immediate vicinity of the accident. Writing in support of affirmance, Justice Wilkinson articulated that the court was "unwilling to abandon the 'zone of danger' in toto and enter a realm of uncertainty with no workable guidelines for recovery."

In his concurring opinion, Justice Nix capsulized what he observed to be the common thread running through the three stages of evolution of the cause of action in Pennsylvania. He observed that in each stage the negligence of the tortfeasor resulted in a "sensory experience" which, in turn, solicited the mental distress.

Justice Flaherty, writing in support of reversal, urged the abandonment of the contemporaneous observation requirement. Justice Flaherty stated that recovery should be permitted where the emotional distress was experienced by a family member who did not witness the injury, but suffered emotional trauma because of it. Utilizing the concept of foreseeability, the opinion in support of reversal emphasized that "whether one was a bystander or whether one came upon the scene and observed the individual on the ground, or whether one saw the individual in the hospital, or in a morgue, or never saw them, none of these situations was any more or less foreseeable than the others."

individual in the hospital or in a morgue or never sees them; none of these situations is any more or less foreseeable than the other.


101. 495 Pa. at 245, 433 A.2d at 459-60.

102. Justice Wilkinson was joined by Justice Roberts. Justice Nix filed an opinion in support of affirmance.

103. Id. at 247, 433 A.2d at 410-61.

104. Id. at 251, 433 A.2d at 463. Justice Nix also stated, as he previously noted in Sinn, that damages were not to be extended to compensate for the grief for solatium emanating from the resulting loss, but rather for injuries resulting from the traumatic impact of the situation that the person witnessed, Id. at 250, 433 A.2d at 462-63.

105. Id. at 256, 433 A.2d at 465. Justice Flaherty was joined by Justices Larsen and Kauffman.

106. Id. at 255, 433 A.2d at 465.

107. Id. at 254, 433 A.2d at 464. Recent cases have directed the Pennsylvania judiciary's attention away from the sensory experience of the plaintiff and have focused upon the event or accident.

In Amader v. Johns-Manville Corp., 514 F. Supp. 1031 (E.D. Pa. 1981), the court found that legal redress was not available to a wife for negligent infliction of emotional distress
Yandrich left the non-witness issue unresolved. In an attempt to clarify this issue the Pennsylvania Supreme Court granted allocatur in the recent cases of *Mazzagatti v. Everingham* and *Brooks v. Decker*.

**Mazzagatti v. Everingham And Brooks v. Decker**

In *Mazzagatti*, the plaintiff’s daughter, while riding her bicycle, was struck and fatally injured by an automobile driven by defendant. At the time of the accident the plaintiff was at work approximately one mile from the accident scene. She was immediately informed of the accident and arrived shortly thereafter. Upon arrival she observed her injured daughter.

Plaintiff brought an action for negligent infliction of emotional distress against the defendant driver. In her complaint she alleged that as a result of her observation of her daughter’s plight she suffered shock and sustained grievous mental pain which resulted in acute depression and nervous condition.

The trial court granted the defendant’s motion for summary judgment stating that under the parameters enunciated in *Sinn v. Burd*, a plaintiff who did not experience and contemporaneously resulting from witnessing her husband’s development of asbestosis. *Id.* The court reasoned that the Pennsylvania Supreme Court in *Sinn* “contemplated a discrete and identifiable traumatic event to trigger recovery.” *Id.* at 1032. Since the emotional injury was not inflicted by a “sudden and violent” accident, the court found that the plaintiff’s claim was insufficient to state a cause of action under Pennsylvania law. *Id.*


Due to the unavailability of the *Mazzagatti* opinion in the Pennsylvania State Reports, citations to that reporter have been omitted. 516 A.2d 672 (1986).

At the time of the accident, the victim was riding her bicycle in a residential area near her home in Whitpain Township. *Id.*

Plaintiff was informed by telephone that her daughter had been involved in an automobile accident. *Id.*

Plaintiff filed a three count complaint in trespass against the defendant. *Id.* Only the second count is the subject of the appeal to the Pennsylvania Supreme Court. *Id.* The first count sets forth a claim for negligent infliction of emotional distress by the victim’s sister who actually witnessed the accident. *Id.* at 674 n.1. The third count alleged that as a result of the injuries sustained by plaintiff-victim’s mother, her husband had been deprived of her society and services. *Id.*
observe a tortious injury to a close relative did not state a cause of action for negligent infliction of emotional distress. On appeal, the Pennsylvania Superior Court affirmed the trial court’s order. In an attempt to clarify its position on the elements required to state a claim for negligent infliction of emotional distress the Pennsylvania Supreme Court granted allocatur.

Brooks v. Decker involved a father who, although he did not witness the accident, came upon the scene only moments thereafter. The father, while en route to meet his son, pulled off the road to yield to an oncoming ambulance. He subsequently followed the ambulance to the scene of the accident. As he exited from his automobile he observed his son's bicycle lying on the ground. Upon further inspection, the father discovered that it had been his son that had been struck by defendant's automobile.

The father commenced an action against the owner and operator of the automobile, seeking damages for negligent infliction of emotional distress. The trial court sustained defendant's preliminary objections and dismissed the father's case because the father had not observed the actual occurrence of the accident. On appeal,

116. Id. Plaintiff additionally averred that she was tortured by flashbacks and nightmares of her injured daughter and suffered from a general inability to sleep. Id. She finally alleged that her acute nervous condition and mental disturbance prevented her from performing her duties of employment. Id.

117. Id. at 674-75. On appeal to the Pennsylvania Superior Court, the plaintiff urged the court to follow the Massachusetts case of Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978), which permitted recovery to a plaintiff-parent who arrived at the scene of the accident and witnessed the injured child. Id. at 675. See supra notes 190-194 and accompanying text. The superior court was unpersuaded by Dziokonski since the Pennsylvania Supreme Court was cognizant of that decision when it decided Sinn v. Burd. Id.

118. 508 Pa. 350, 497 A.2d 609. On appeal, the plaintiff urged that the grant of defendant's demurrer was improper in light of the flexible reasonable foreseeability test that the plaintiff alleged was adopted by the Pennsylvania Supreme Court in Sinn v. Burd. 516 A.2d at 675. Plaintiff explained that the resulting emotional distress derived from her observation of the accident scene only moments after the accident took place was reasonably foreseeable and neither remote nor unexpected. Id. at 676.

119. Due to the unavailability of the Brooks opinion in the Pennsylvania State Reports citations to that reporter have been omitted. 516 A.2d at 1381.

120. Id.

121. Id.

122. Id.

123. Id. Two other counts were enumerated in the plaintiff’s complaint. The first count stated the minor’s claim for personal injuries. Id. at 1381 n.1. The second count stated a claim for the medical expenses incurred by the plaintiff. Id. Both were settled and thus not the subject of the appeal. Id.

124. Id. at 1382. The Honorable Judge David E. Grine of the Court of Common Pleas of Centre County sustained the objections, relying on the precedent set in Yandrich v. Radic. The trial court indicated that while it was constrained by precedent, “this Court fails
the Pennsylvania Superior Court affirmed the trial court's order.¹²⁵

... to see the difference in the emotional trauma suffered by one coming upon the scene of an accident and observing a loved one shortly after impact and that individual witnessing the impact suffered by a loved one." Id.

The trial court also sustained the preliminary objections on the grounds that the plaintiff's action was barred by § 301 of the Pennsylvania No-Fault Motor Vehicle Insurance Act of July 19, 1974, P.L. 489, 40 P.S. § 1009.301(a)(5) (repealed). Id. at 1381 n.2.

At the time this claim arose, section 301 provided that: "Tort liability is abolished with respect to any injury that takes place in this state in accordance with the provisions of this Act if such injury arises out of the maintenance or use of a motor vehicle" with certain specified exceptions. These exceptions include, inter alia, damages for non-economic loss if the accident results in death, expenses for reasonable and necessary medical services in excess of $750.00, cosmetic disfigurement which is permanent and irreparable, and physical or mental impairment which prevents the victim from engaging in his usual activities for more than sixty consecutive days. See 40 P.S. § 1009.301 (a)(5). With regard to Count III brought by appellant in this case on his own behalf, appellant's complaint failed to allege that he met any of the "thresholds" which would permit a suit for such damages. See R. at 7a-8a. Further, plaintiff acknowledges that he "did not plead any injuries specified in the Act." 516 A.2d at 1381-82 n.2. ¹²⁵ 495 A.2d 575 (1985). On appeal to the Pennsylvania Superior Court, the case was heard before Judges Wickersham, Wieand and Del Sole. The majority's opinion was authored by Judge Wieand in which Judge Wickersham concurred. Judge Del Sole filed a dissenting opinion.

Writing for the majority, Judge Wieand noted that the decision of the trial court was in conformity with the present state of law in Pennsylvania. 495 A.2d at at 576. Judge Wieand, relying on Sinn v. Burd and Yandrich v. Radic held that a parent-bystander who had not witnessed the accident did not have a legally recognized cause of action for the negligent infliction of emotional distress. Id. Judge Wieand concluded that if such a cause of action is to be recognized in Pennsylvania it would be the province of the Pennsylvania Supreme Court to so promulgate. Id.

In a dissenting opinion, Judge Del Sole asserted that the Pennsylvania judiciary should recognize a cause of action for negligent infliction of emotional distress whether or not the plaintiff actually witnesses the accident, or comes upon the scene shortly thereafter. Id.

In his analysis, Judge Del Sole first examined the Sinn decision in which the Pennsylvania Supreme Court held, as a matter of law, that the emotional distress suffered by the parent-bystander in viewing an accident was a foreseeable injury and thereafter recognized a cause of action for the negligent infliction of emotional distress. Id. Judge Del Sole further observed that the Sinn court specifically reserved opinion on the question of whether a parent who had not witnessed an injury to his or her child but had received subsequent notification of the incident may recover from the negligent infliction of emotional distress. Id..

Judge Del Sole next discussed the Pennsylvania Supreme Court's decision in Yandrich v. Radic, 495 Pa. 243, 433 A.2d 459 (1981), wherein the court addressed the issue left unresolved in Sinn. 495 A.2d at 578. In Yandrich an evenly divided court held that a parent who had not been in close proximity to the accident nor witnessed the harm caused to his child, but received subsequent notification shortly thereafter, could not maintain a cause of action for negligent infliction of emotional distress. 495 Pa. at 247, 433 A.2d at 461. Thus, Judge Del Sole observed that the issue which is without judicial cognizance is whether the absence of one of the foreseeability factors, more specifically, the contemporaneous sensory observation factor, would sustain a cause of action for negligent infliction of emotional distress. 495 A.2d at 578. In support of his opinion Judge Del Sole enumerated several jurisdictions including New Hampshire (Corso v. Merrill, 119 N.H. 647, 406 A.2d 300 (1979)), Texas (Landreth v. Reed, 507 S.W. 2d 286 (1978)), Massachusetts (Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1975); Ferroter v. Daniel O'Connel's Sons, Inc., 413 N.E.2d 690
The Pennsylvania Supreme Court thereafter granted allocatur.\textsuperscript{126} In discussing these cases, only the opinions in the \textit{Mazzagatti} decision will be referred to since the justices of the \textit{Brooks} court adopted their respective opinions in that case.

Writing for the majority in \textit{Mazzagatti}, Chief Justice Nix discussed why an expansion of the \textit{Sinn} foreseeability test, to encompass a plaintiff-relative who did not experience or contemporaneously observe the accident, would violate basic principles of tort law.\textsuperscript{127} Couching his analysis in terms of duty and proximate cause, Justice Nix recited that a defendant's breach of duty must proximately cause the plaintiff's injury.\textsuperscript{128} Initially bypassing the determination of duty, Justice Nix embarked on a discussion of proximate cause. He explained that a "determination of a duty of care entails an analysis of its integral component, proximate cause."\textsuperscript{129} Simply stated, the Chief Justice took the position that proximate cause was a term of art which merely reflected a "policy judgment as to the appropriate extent of liability."\textsuperscript{130} Therefore, the

\footnotesize{(1980); Barnes v. Geiger, 15 Mass. App. 365, 446 N.E.2d 78 (1983)), and California (Archibald v. Braverman, 275 Cal. App.2d 253, 79 Cal. Rptr. 723 (1963)), which have recognized a cause of action where a parent did not observe the accident injuring a child but arrived upon the scene shortly thereafter. 495 A.2d at 578-79.

In conclusion, Judge Del Sole reasoned that the claim was improvidently dismissed because the emotional trauma suffered by the plaintiff was the same as if he had witnessed the accident. \textit{Id.} at 579. Furthermore, plaintiff's injuries were reasonably foreseeable in light of the negligence of the defendant. \textit{Id.} To permit the case to proceed to trial, in Del Sole's view, would be a natural extension of the principles established in \textit{Sinn}. \textit{Id.}

127. 516 A.2d at 675.
128. \textit{Id.} at 676.
129. \textit{Id.} at 678-79. Justice Nix defined the role of proximate cause or legal cause. Those concepts, he stated, were "applied by the courts to those more or less undefined considerations which limit liability even where the fact of causation can be demonstrated." \textit{Id.}, citing W.P. \textit{Keeton, Prosser and Keeton on Torts} (5th ed. 1984) at 273. Justice Nix also quoted Neiderman, reflecting that "[t]he best statement of the rule was that a wrong-doer was responsible for the natural and proximate consequences of his misconduct." 516 A.2d at 676.

130. \textit{Id.} at 677 n.4. Justice Nix also found that the terms "duty" and "foreseeability" were terms of art reflecting policy judgments. \textit{Id.}

Quoting Prosser and Keeton, the Chief Justice illustrated that the determination of public policy was one "fraught with circumlocution" by stating:

It is quite possible to state every question which arises in connection with "proximate cause" in the form of a single question: was the defendant under a duty to protect the plaintiff against the event which did in fact occur? Such a form of statement does not, of course, provide any answer to the question, or solve anything whatsoever; but it may be helpful since "duty"—also a legal conclusion—is perhaps less likely than "proximate cause" to be interpreted as if it were a policy-free factfinding. Thus, "duty" may serve to direct attention to the policy issues which determine the extent of the original obligation and of its continuance, rather than to the mechanical se-
court based the resolution of this issue on the determination of the policy in Pennsylvania.\textsuperscript{131} That policy is one which seeks to limit unduly burdensome liability.\textsuperscript{132} Revisiting \textit{Sinn}, Justice Nix explained that this public policy or its legal term, proximate cause, found expression in the first two foreseeability factors, that is, whether the plaintiff was located near the accident scene as contrasted with one who was a distance away from it; and secondly, whether the shock resulted from a direct emotional impact upon the plaintiff from the contemporaneous sensory observation of the accident, as contrasted with one who learned of the accident from others after its occurrence.\textsuperscript{133} The court then set forth its rationale for requiring these two factors by stating:

\textit{Id.} at 676-77, quoting \textsc{W.P. Keeton, Prosser and Keeton on Torts} (5th ed. 1984) at 274.


\textsuperscript{132} 416 A.2d at 679 n.9. Justice Nix cited Amadio v. Levin, 509 Pa. 199, 501 A.2d 1085, wherein he explained:

\begin{quote}
Regretably, the concept of a "deep pocket" has become pervasive in this area and has frequently influenced decisions as to when a cause of action should arise and as to the appropriate recovery to allow for the claimed loss. The "deep pocket" theory springs from the "desire to insure that victims of tortious injury can reach a defendant with sufficient wealth to provide adequate compensation." This motive has had a tendency to obscure the basis of the finding of liability and the extent to which reimbursement can be justified. . . . This motive has had a tendency to obscure the basis of the finding of liability and the extent to which reimbursement can be justified. Moreover, another basic fallacy with the thinking of those who propose unlimited expansion of tort recovery is the failure to recognize that it is the consumer public that ultimately must bear the loss for the inflationary spiral that follows in its wake. More frequent judgments with escalating awards creates a situation that all policy holders, and not the insurance companies, ultimately must meet. The rising costs, generated by increasing numbers of law suits and higher judgments, are tolerable provided that the occasion for the injury justifies the action and the recovery reflects the actual loss. If either is out of kilter an undue burden is unfairly passed on to the innocent citizen policy holders.
\end{quote}

\textit{Id.} at 230, 501 A.2d at 1101 (citations omitted).

\textsuperscript{133} 416 A.2d at 679.
[W]here a close relative is not present at the scene of the accident, but instead learns of the accident from a third party, the close relative's prior knowledge of the injury to the victim serves as a buffer against the full impact of observing the accident scene. By contrast, the relative who contemporaneously observes the tortious conduct has no time span in which to brace his or her emotional system.\textsuperscript{134}

As a result, Justice Nix concluded that Pennsylvania adheres to the view that a driver owes a duty of care to those persons within the zone of danger and to those persons who contemporaneously witness an injury to a close relative because it is only in those situations where the driver's conduct could be said to be the proximate cause of the plaintiff's injury.\textsuperscript{135}

Justice Flaherty joined the Chief Justice in affirmance of the lower court's grant of defendant's motion for summary judgment.\textsuperscript{136} Justice Flaherty's concurrence was a complete reversal of his dissenting opinion in \textit{Yandrich v. Radic}.\textsuperscript{137} The reason set forth by Justice Flaherty for vacillating was his concern for tort reform and the plight of the insurance industry.\textsuperscript{138}
Justice Hutchinson concurred in the result but objected to the court’s interjection of foreseeability in the proximate cause analysis.\(^1\) He stated that “the concept of foreseeability determines the scope of duty not causation.”\(^2\) As he explains, “duty...limits the persons to whom an actor is responsible for damage caused by careless conduct...[c]ausation...limits the type of damages for which an actor is responsible.”\(^3\) This case, he contended, involved the actor’s liability for a parent’s grief resulting from the injury to a child and therefore called into question legal cause not duty.\(^4\)

Expounding further, Justice Hutchinson recited that Pennsylvania had replaced the traditional concept of proximate cause with the Restatement (Second) of Torts §430 legal cause.\(^5\) Under this theory, observed Justice Hutchinson, the test looks to the ramifications of the actor’s conduct rather than to its foreseeability.\(^6\) He concluded that foreseeability had no application in the determination of causation, but rather, under the Restatement (Second) Torts §430, what must be determined is whether the actor’s conduct was a substantial factor in bringing about the plaintiff’s harm.\(^7\) Without explanation, Justice Hutchinson summarily con-

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\(^2\) Id., citing Cantwell v. Allegheny County, 506 Pa. 35, 483 A.2d 1350 (1984); and Zilka v. Sanctis Construction, Inc., 409 Pa. 396, 186 A.2d 897 (1963), cert. denied, 374 U.S. 850, 83 S. Ct. 1915, 10 L. Ed.2d 1070 (1963). The Justice stated: “[W]e unequivocally stated the inapplicability of foreseeability to causation” in Dahlstrom v. Shrum, 368 Pa. 423, 428-29, 84 A.2d 289, 292 (1951). The Dahlstrom court stated: “We are in accord with the doctrine that foreseeability has no place when we are considering proximate or legal cause. Foreseeability, however, is an element, as above indicated, when the question of negligence is being considered...[t]he question of foreseeability in connection with proximate cause has no application.” Id. at 428-29, 84 A.2d at 292.

\(^3\) Id. at 428-29, 84 A.2d at 292.


\(^5\) Id. at 681.

\(^6\) Id. The Restatement (Second) of Torts sections describing the test courts use for causation provide:

\(\S\) 430. Necessity of Adequate Causal Relation

In order that a negligent actor shall be liable for another’s harm, it is necessary not only that the actor’s conduct be negligent toward the other, but also that the negli-
cluded that under the Restatement, no causal connection exists where the plaintiff did not contemporaneously observe the accident giving rise to the injury.\textsuperscript{146}

\textsuperscript{146} Id. Although Justice Hutchinson did not specifically declare that in non-contemporaneous observation cases legal cause cannot be shown as a matter of law such a conclusion may be drawn from the facts of this case. Specifically, Justice Hutchinson wrote: “In this case, I would hold that no causal connection satisfying the standard of legal cause described in § 431, . . . has been shown.” \textit{Id.} Thus, at first blush it appeared that Justice Hutchinson had left unclear whether, in his opinion, this particular plaintiff had failed to satisfy the element of causation as a matter of fact or whether in situations where the parent-plaintiff did not contemporaneously observe the infliction of injury upon a child, but came upon the scene shortly thereafter was, as a matter of law, unable to satisfy the standard for causation and thus, the plaintiff’s claim for negligent infliction of emotional distress could be dismissed summarily.

This case involved an appeal from the grant of a summary judgment in the nature of a demurrer. As noted by the court, a motion for summary judgment may only be sustained if the pleading, depositions, answers to interrogatories, and admissions on file, coupled with affidavits, if any, demonstrated that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. \textit{Id.} at 675. The court further recited that it was axiomatic that a demurrer could only be sustained where the complaint, on its face, failed to establish a legal right to relief. \textit{Id.} The court noted that a
Justice Larsen, expressing his disturbance with the majority's concern with the insurance crisis, dissented.\textsuperscript{147} He emphatically exclaimed that for the court to take judicial notice of the plight of the insurance industry\textsuperscript{148} was manifestly inappropriate.\textsuperscript{149} He concluded that "[t]he debate over who or what to blame for the insurance crisis in America should be carried on in the marketplace of ideas and public opinion and in the halls of the legislature, not rashly injected as make-weight rationalization in a judicial opinion offered to justify the denial of redress in the courts to a deserving plaintiff for her injuries."\textsuperscript{150}

Justice Papadakos, writing in dissent, found no distinction between the situations where a parent suffered emotional distress when he or she contemporaneously observed the injury to a child and those instances where the parent did not witness the accident but arrived moments after and observed the injured child.\textsuperscript{151} Citing motion for summary judgment in the nature of a demurrer admitted as true all well-pleaded, material, relevant facts. \textit{Id.} Thus, if the facts as pled stated a claim for which relief could be granted under any theory of law, the demurrer had to be denied. \textit{Id.} In this case, the plaintiff averred that as a result of observing her injured child at the scene of the accident she suffered emotional distress. \textit{Id.} at 674. Thus, accepting these facts as true, summary judgment should have been denied.

The element of causation is normally a question of fact for the jury. However, the question is to be removed from the jury's consideration when it is clear that reasonable minds could not differ on the issue. \textit{Little v. York County Earned Income Tax Bureau}, 333 Pa. Super. 8, 16, 481 A.2d 1194, 1198 (1984), \textit{citing} Topelski v. Universal South Side Autos, Inc., 407 Pa. 339, 180 A.2d 414 (1962); \textit{Restatement (Second) of Torts} § 434(1)(a); \textit{W. Prosser, Law of Torts}, § 45 (4th ed. 1971); and \textit{F. Harper and F. James, The Law of Torts}, Vol 2 § 20.2 (1956). One would be hard pressed to find that a parent who witnessed a severely injured child could not suffer emotional distress. Thus, under Justice Hutchinson's proximate cause analysis, this was a jury question and should have been left for the trier of fact.


148. \textit{Id.} The dissent noted that the majority's concern with the insurance crisis was "cloaked in the guise of concern for the 'consumer public.'" \textit{Id.}

149. \textit{Id.} at 682. Justice Larsen then discussed the differing views regarding the cause and resolution of the insurance crisis. \textit{Id.} at 682-83.

150. \textit{Id.} at 683. Justice Larsen wrote:

It is inappropriate for this Court to gratuitously enter this debate, particularly where no case or controversy or evidence concerning the "insurance crisis" has been presented to us in an adversarial setting designed to test the statistics and theories of both sides of the issue. It is unseemly for this Court to arbitrarily choose sides in the debate and, by dictum, align itself with the insurance industry and attempt to judicially "solve" the enormously complex insurance crisis by denying Ms. Mazzagatti the right to seek recovery for her injuries, distress and deep trauma wrought at the hand of a careless driver.

\textit{Id.}

151. \textit{Id.} Justice Papadakos was joined by Justice Larsen.
the maxim that "one may seek redress for every substantial wrong," Justice Papadakos found that a substantial wrong existed in both situations. Thus, he concluded, a motion for summary judgment was inappropriate because it was a jury question whether the emotional distress actually existed and whether it was caused by the defendant's negligence.

**Claims For Negligent Infliction Of Emotional Distress In Other Jurisdictions**

As early as the fourteenth century, in the English case of *I. de S. et ux. v. W. de S.*, courts have permitted recovery for a wrongful invasion of one's right to emotional tranquility. Traditionally, damages from emotional distress were parasitic to an underlying tort action. The two theories which were rooted in such jurisprudence were the impact rule and the zone of danger test. The first of these two theories, the impact rule, required the plaintiff to establish the existence of the tort of battery before damages for emotional distress could be sought. Similarly, the zone of danger test

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152. Id. at 683-84. Quoting Justice Flaherty's dissent in *Yandrich*, Justice Papadakos stated:

There should be no hesitation to permit recovery for the emotional distress experienced by a parent who, although he did not witness the accident, nevertheless, experienced emotional trauma because of his son's injury. There is substantial injury in both cases. Who can say that the emotional strain experienced by the parent witnessing the death of his child is greater than the emotional strain experienced by a parent sitting helplessly in a hospital while his child dies? Certainly, the experiences of the parents are different, but each has an inescapable common element: the child is dead. *Yandrich* at 253-54, 433 A.2d at 464. He further wrote that "[while] the author of these views had since abandoned them, I am proud to adopt them as my own to pick up the torch in the agon which would insure that the injured can find redress in our courts for the harms done them." 516 A.2d at 684.

153. Id. On the issue of solatium, Justice Papadakos agreed with the majority that grief alone was not compensable by money damages; however he noted that "the existence of actual physical or mental harm must be left to finding of the jury based upon evidence presented to it." Id.


155. Noting that emotional tranquility is a valid interest which deserves legal protection, one commentator writes:

In our increasingly complex society, the orderly and normal functioning of a man's mind is as critical to his well-being as physical health. Indeed, a sound mind within a disabled body can accomplish much, while a disabled mind in the soundest of bodies is rarely capable of making any substantial contribution to society. Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEORGETOWN L.J. 1237, 1237 (1971) (footnotes omitted).

156. See HARPER, LAW OF TORTS § 67 at 154-56 (1933).

157. Those jurisdictions which still adhere to the impact rule include: District of Columbia, see Asuncion v. Columbia Hosp. for Women, 514 A.2d 1187 (1986); Georgia, see
required the existence of the tort of assault before such damages could be considered.\textsuperscript{158}

It was not until the seminal case of \textit{Dillon v. Legg} that an American jurisdiction abandoned the traditional concepts of assault and battery and applied traditional principles of negligence in order to recognize a claim for emotional distress of a bystander. In \textit{Dillon}, the California Supreme Court permitted a parent who witnessed the death of her child caused by defendant’s negligence to recover for her emotional trauma and physical injury although the parent herself did not fear imminent physical harm.\textsuperscript{159} The touchstone of that court’s analysis was duty and foreseeability. The court explained “[s]ince the chief element in determining whether the defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk, that factor will be of prime importance in every case.”\textsuperscript{160} In determining whether the defendant should have reasonably foreseen the injury to the plaintiff, or in other terminology, whether the defendant owed a duty of care to the plaintiff, the court set forth three foreseeability factors.\textsuperscript{161}

Each of these factors has attracted much debate, but none has been more controversial than the contemporaneous observation factor. The following discussion focuses on this factor.

While the zone of danger test was once the widely favored rule, a substantial and rapidly growing number of jurisdictions have rejected it as a vehicle to preclude recovery in bystander cases.\textsuperscript{162}

\begin{footnotesize}
\begin{itemize}
    \item 159. Dillon v. Legg, 69 Cal. Rptr. 72, 441 P.2d 912 (1968).
    \item 160. \textit{Id}. at 80, 441 P.2d at 920.
    \item 161. \textit{See supra} note 87 and accompanying text.
    \item 162. \textit{See infra} notes 190-219 and accompanying text.
\end{itemize}
\end{footnotesize}
Those states have adopted some form of a foreseeability approach. While some states, like Pennsylvania, have subscribed to *Dillon's* foreseeability factor's and have rigidly interpreted and applied them, other subscribing jurisdictions have been more generous in their interpretation of the parameters of the *Dillon* factors. More specifically, while some states require contemporaneous observation of the event causing injury, other states do not require observation of the incident at the precise moment of its occurrence.

In analyzing the jurisdictions which have confronted the issue of whether recovery may be allowed where the plaintiff did not witness the accident, the California decisions since *Dillon* will first be reviewed. Only months after the *Dillon* decision, a California court, in the case of *Archibald v. Braverman*, was faced with the task of defining the parameters of the contemporaneous observation factor. In *Archibald*, the court held that a mother who came upon her injured child only moments after he had been injured by an explosion satisfied the contemporaneous observation factor of *Dillon*. The court held that "the shock sustained by the plaintiff must be fairly contemporaneous with the accident rather than follow when the plaintiff is informed of the whole matter at a later date." Further, the court reasoned, "the shock of seeing a child severely injured immediately after the tortious event may be just as profound as that experienced in witnessing the accident itself."

The *Archibald* decision was subsequently supported by the California case of *Nazaroff v. Superior Court*. In *Nazaroff*, the plaintiff, while searching for her son, walked by a neighbor's house and heard the scream, "It's Danny!" She ran some 30 feet to the pool and while running saw Danny being pulled from the pool. She pushed aside a person giving Danny mouth-to-mouth resuscitation and took over efforts to save him. Reversing summary judg-

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163. See infra notes 220-228 and accompanying text.
164. See supra note 162.
165. See supra note 163.
166. 79 Cal. Rptr. 723 (1969).
167. Id. at 725.
169. Id.
171. Id. at 659.
172. Id.
173. Id.
ment for the defendant, the Nazaroff court concluded that failure to see or hear the accident resulting in injury or death to a close relative did not bar a claim of negligent infliction of emotional distress. The court held that the record "demonstrates that there are triable issues to carry to the jury as to whether the alleged physical harm to the mother resulted from an emotional shock proximately caused by the direct emotional impact from the contemporaneous observation of the immediate consequences of the defendant's negligent act, which was the proximate cause of the injury and death of her son."174

The parameters of the contemporaneous observation factor were subsequently broadened in Nevels v. Yeager.175 The Nevels case involved a truck driver who ran a stop sign and struck a car in which the plaintiff's children were riding.176 Plaintiff, who was at home, was phoned by a third party and arrived on the scene within five minutes, whereupon she observed her child lying in a street full of blood and screaming while being attended to by paramedics.177 Reversing the lower court's grant of defendant's motion for summary judgment, the California Superior Court refused to find, as a matter of law, that the arrival of a loved one on the scene of an accident would not be foreseeable and who in such a situation may well suffer shock contemporaneous with the accident.178

However, subsequent California decisions have retreated from these earlier decisions. For example, in Ebarb v. Woodridge Park

174. Id. at 664. The court reasoned:

The shout from the pool area may have permitted her to reconstruct the scene, as well as did Mrs. Archibald and Mr. Krouse. Her knowledge of what had occurred was derived from her own senses, and not from another's recital of an uncontemporaneous event. Drowning, or near drowning, though initiated by an immersion, is not an instantaneous occurrence. We cannot say as a matter of law that the injuries resulting from defendants' negligence were not still being experienced at the time the mother first observed her son. The evidence is conflicting as to the time of and the circumstances existing at her arrival. She must, of course, establish that she suffered physical injury, and that the physical injury resulted from an emotional shock suffered at the original discovery of her son's plight, contemporaneously with the receipt of his injury, and not from the subsequent realization of the irreversible progress of that injury and her ensuing grief and sorrow on his death.

145 Cal. Rptr. at 664 (emphasis added).
176. Id. at 301.
177. Id.
178. Id. at 305. Appeal of this case to the California Supreme Court is pending. (L.A. 31901, hg. granted Apr. 26, 1984).
Emotional Distress Claims

179. a boy drowned in a pool when his arm became jammed in a drain.180 His sister saw a firetruck driving towards the site and realized something was wrong.182 She was then told that her brother had died.183 Shortly thereafter she saw his body floating in the pool.184 In affirming the lower court’s grant of defendant’s summary judgment motion, the court declined to expand Dillon’s bystander factor to include a family member who witnessed the result or the effects of an accident and not the accident itself.185

The confusion among the California judiciary has not yet been clarified. Demonstrative of the jurisdiction’s continued confusion is the most recent case of Thing v. LaChusa,185 which appears to be in direct conflict with Ebarb. Thing involved a parent who was in her kitchen when her daughter rushed into the kitchen and yelled, “They hit Johnny.”186 The parent ran from her home and pushed through the crowd that had formed and saw her injured son lying in the street.187 Reversing the trial court’s grant of defendant’s summary judgment motion, the court held that there existed triable issues of fact for the jury whether the parent’s physical harm resulted from emotional distress proximately caused from her contemporaneous witnessing of the immediate consequences of the defendant’s negligence.188

Other jurisdictions have also addressed the scope of the contemporaneous observation factor in situations where the plaintiff did not actually witness the happening.189 The most frequently cited case permitting recovery in such circumstance is the Massachusetts decision of Dziokonski v. Babineau.190 In Dziokonski, a parent, who lived in the immediate vicinity of an accident involving her daughter, went to the accident scene and witnessed her injured

180. Id. at 752.
181. Id.
182. Id.
183. Id.
184. Id. at 755.
185. 231 Cal. Rptr. 439 (1986).
186. Id.
187. Id.
188. Id. at 445.
189. These jurisdictions consist of Alaska, California, Iowa, Kansas, Massachusetts, Michigan, Montana, New Jersey, New Mexico, Pennsylvania, Rhode Island, Texas and Wyoming.
daughter lying on the ground. As a result, the mother suffered emotional shock which led to her death. The Supreme Court of Massachusetts held that "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." The court concluded that a parent stated a claim "where the parent either witnesses the accident or soon comes on the scene while the child is still there."

Other jurisdictions as well as commentators have proffered, al-

191. 380 N.E.2d at 1296. This action was brought by the administratrix of the mother's estate alleging that the death of the parent was the result of physical injuries caused by the emotional distress which were caused by the injuries to the child by the defendants' negligence. Id. at 1295. The superior court granted defendants' motion to dismiss for failure to state a claim, from which the administratrix appealed. Id.

192. Id. at 1296. The mother died while riding in the ambulance that was transporting her daughter to the hospital. Id.

193. Id. at 1302. Additionally, the Massachusetts Supreme Court stated that there must exist "substantial physical injury and proof that the injury was caused by the defendant's negligence." Id. The requirement that the emotional distress physically manifest itself has also been a subject of debate among the jurisdictions. See infra note 233 and accompanying text.

194. Id. See also Ferriter v. Daniel O'Connell's Sons, 381 Mass. 507, 413 N.E.2d 690 (1980). The Ferriter court held that "[a] plaintiff who rushes onto the accident scene and finds a loved one injured has no greater entitlement to compensation for that shock than a plaintiff who rushes instead to the hospital." Id. at 697. Further, the court noted that so long as the shock followed "closely on the heels of the accident," the two types of injury were equally foreseeable. Id. Thus, the court concluded, the plaintiffs' claims fell within the principles of proximity set out in Dziokonski and therefore the motion for summary judgment should have been denied. Id.

195. For example, Prosser states in PROSSER ON TORTS (4th ed.) § 54:

It seems sufficiently obvious that the shock of a mother at danger or harm to her child may be both a real and a serious injury. All ordinary human feelings are in favor of her action against the negligent defendant. If a duty to her requires that she herself be in some recognizable danger, then it has properly been said that when a child is endangered, it is not beyond contemplation that its mother will be somewhere in the vicinity, and will suffer serious shock. There is surely no great triumph of logic in a rule which permits recovery for anxiety about an unborn child, and denies it once the child is born, or compensates for distress at the discovery of ransacked furniture but not the body of a murdered sister. Yet it is equally obvious that if recovery is to be permitted, there must be some limitation. It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one man were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as his friends. And obviously the danger of fictitious claims, and the necessity of some guarantee of genuineness, are even greater here than before. It is no doubt such considerations that have made the law extremely cautious.

Some limitations might, however, be suggested. It is clear that the injury threatened or inflicted upon the third person must be a serious one, of a nature to cause severe
though in varying degrees, that the plaintiff need not actually witness the accident in order to recover for emotional damages. The jurisdictions which have been confronted with such a case and have so held include Alaska,\textsuperscript{196} New Jersey,\textsuperscript{197} Texas\textsuperscript{198} and Wyoming.\textsuperscript{199}

In the Alaska case of \textit{Tommy's Elbow Room Inc. v. Kavorkian},\textsuperscript{200} a daughter accompanied her father to a function.\textsuperscript{201} Thereafter, the daughter left the function and the father stayed behind.\textsuperscript{202} On his way home the parent-plaintiff noticed that there had been an accident.\textsuperscript{203} When he arrived home and discovered that his daughter was not yet there he drove back to the accident scene to discover police and medical technicians attempting to remove her from the smashed automobile.\textsuperscript{204} Holding that the plaintiff was entitled to present jury instructions for negligent infliction of emotional distress, the Alaska Supreme Court concluded that it could not be said "as a matter of law that it was not reasonably foreseeable that a [plaintiff], would appear at the scene of the accident."\textsuperscript{205}

Similarly, the New Jersey Superior Court was faced with a situation where the parent-plaintiff lacked contemporaneous sensory observation of the accident. In \textit{Mercado v. Transport of New Jersey},\textsuperscript{206} the court held that the element of contemporaneous ob-

\footnotesize{mental disturbance to the plaintiff, and that the shock must result in actual physical harm. The action might, at least initially, well be confined to members of the immediate family on the one endangered, or perhaps to husband, wife, parent, or child, to the exclusion of mere bystanders, and remote relatives. As an additional safeguard, it might be required that the plaintiff be present at the time of the accident or peril, or at least that the shock be fairly contemporaneous with it, rather than follow when the plaintiff is informed of the whole matter at a later date.  

\textit{Id.} at 334-35 (footnotes omitted) (emphasis supplied).

\textsuperscript{197} Mercado v. Transport of New Jersey, 176 N.J. Super. 234, 422 A.2d 800 (1980).
\textsuperscript{198} Landreth v. Reed, 570 S.W. 2d 486 (1978); General Motors Corp. v. Grizzle, 642 S.W. 2d 837 (1982); and City of Austin v. Davis, 693 S.W. 2d 31 (1985).
\textsuperscript{199} Gates v. Richardson, 719 P.2d 193 (1986).
\textsuperscript{200} 727 P.2d 1038 (1986).
\textsuperscript{201} \textit{Id.} at 1040.
\textsuperscript{202} \textit{Id.}
\textsuperscript{203} \textit{Id.}
\textsuperscript{204} \textit{Id.}
\textsuperscript{205} \textit{Id.} at 1043.
\textsuperscript{206} 176 N.J. Super. 234, 422 A.2d 800 (1980). In \textit{Mercado}, the court was called upon to determine the applicability of the \textit{Portee} doctrine to a parent who had not observed the injury to her child but came upon the scene shortly thereafter. The \textit{Portee} doctrine originated in \textit{Portee v. Jaffee}, 84 N.J. 88, 417 A.2d 521 (1980), where the New Jersey Supreme Court held that a mother who watched her seven year old son suffer and die when he became trapped in an elevator could recover damages for mental distress, even though she was not subjected to any risk of physical harm. \textit{Id.} at 98-99, 417 A.2d at 526-27. The court
ervation was satisfied when a parent learned of an accident in which her infant son was struck by a bus, minutes after when her daughter rushed into her home to inform her, she thereafter hurried outside and saw her son in the street severely injured and unconscious. The court clarified that the requirement of contemporaneous observation "relates not to witnessing the moment of actual impact, but to witnessing the suffering victim."

Under Texas law the requirement of a contemporaneous observation of the accident giving rise to the emotional distress has also been liberally construed. In Landreth v. Reed it was held that the actual observation of the accident was unnecessary if there was some experiential perception of the accident other than learning of it from others after its occurrence. Likewise, in City of Austin v. Davis, a father who was intensely involved in a search for his son and who subsequently found him at the bottom of an airshaft was permitted recovery. The court noted that the plaintiff "was brought so close to the reality of the accident as to render [his] experience an integral part of it," and therefore, the plaintiff ex-

set forth four elements which need to be proved for recovery:
(1) the death or serious injury of another caused by defendant’s negligence;
(2) a marital or intimate familial relationship between plaintiff and the injured person;
(3) observation of the death or injury at the scene of the accident; and
(4) resulting severe emotional distress.

Id. at 101, 417 A.2d at 528.

207. 176 N.J. Super. at 236-37, 422 A.2d at 801. But see Bischoff v. Kohlrenken, 185 N.J. Super. 548, 449 A.2d 1347 (1982). In Bischoff, the court held that a parent may not recover for emotional distress under the principles enunciated in Portee, where she neither witnessed the automobile accident nor came upon the scene but rather visited her severely injured son at the hospital shortly after the accident and before his death. Id. at 553, 449 A.2d at 1350.


209. 570 S.W. 2d 486 (1978). In Landreth, the plaintiff sought recovery for emotional distress suffered when she witnessed efforts to resuscitate her drowned sister. Id. at 488.

210. Id. at 470. According to the Landreth court, such a perception on the part of the plaintiff existed. Id. That court further explained:

In seeing [the victim] brought from the pool in an emergency situation fraught with life or death drama, together with the traumatic shock of witnessing the desperate but unsuccessful attempts to save [the victim’s] life, [plaintiff] was brought so close to the reality of the accident as to render her experience an integral part of it. Such an experience is far different from the case where one seeks damages for his grief or agony at merely seeing the dead body of a loved one, or upon learning of the death from others after its occurrence.

Id.(emphasis added).

211. 693 S.W.2d 31 (1985).
212. Id.at 32-33.
213. Id. at 34, quoting Landreth, supra.
Experienced sufficient perception of the accident to satisfy the contemporaneous observation requirement. 214

The most recent jurisdiction to join these courts is Wyoming. In Gates v. Richardson, 218 a child who was riding his bicycle was struck by an automobile and seriously injured. 216 The mother and the daughter of the victim both brought an action for negligent infliction of emotional distress suffered when they arrived at the accident scene only moments after it occurred and found the child in the street, severely injured and bleeding. 217 Adopting the rationale of the Massachusetts case of Dziokonski, the Wyoming Supreme Court noted that “[t]he essence of the tort is the shock caused by the perception of an especially horrendous event.” 218 The court explained:

It is more than the shock one suffers when he learns of the death or injury of a child, sibling or parent over the phone, from a witness, or at the hospital. It is more than bad news. The kind of shock the tort requires is the result of the immediate aftermath of an accident. It may be the crushed body, the bleeding, the cries of pain, and, in some cases, the dying words which are really a continuation of the event. The immediate aftermath may be more shocking than the actual impact. Therefore, we hold that the plaintiff can recover if he observed the infliction of serious bodily harm or death shortly after its occurrence but without material change in the condition and location of the victim. 219

Some jurisdictions which have adopted the Dillon foreseeability factors, specifically the contemporaneous observation factor, have rigidly construed it to require that the plaintiff actually witness the accident at the precise moment it occurred. Along with Pennsylvania, these jurisdictions include Iowa, 220 Kansas, 221 New Mexico 222 and Rhode Island. 223

214. Id. See also Dawson v. Garcia, 666 S.W.2d 254 (1984) and Apache Ready Mix Co., Inc. v. Creed, 653 S.W.2d 79 (1983). These cases involved emotional distress claims by plaintiffs who were unconscious at the precise moment of the incident and thus did not observe the incidents. Both courts permitted recovery finding actual observation unnecessary due to the high degree of involvement the plaintiffs had with the incident giving rise to the injuries.


216. Id. at 194.

217. Id.


For example, in *Ramirez v. Armstrong*,\(^{224}\) the New Mexico Supreme Court held that a cause of action for negligent infliction of emotional distress existed for the children who witnessed an automobile strike and kill their father but not for the other child who was not present at the scene of the accident but viewed him after the accident.\(^{225}\) Similarly, in *Oberreuter v. Orion Industries, Inc.*,\(^{226}\) the Iowa Supreme Court in affirming the lower court's grant of defendant's motion to dismiss the plaintiff's claim for negligent infliction of emotional distress, held that "recovery for negligent infliction of emotional distress is intended to compensate plaintiff... for the emotional trauma caused by plaintiff's visceral participation in the event. It is the added horror of witnessing (and possibly endlessly reliving) the tragedy that is compensable."\(^{227}\) The court therefore concluded that the element of contemporaneous perception was "required to insure that plaintiff will have been subjected to the added shock required to sustain the cause of the action."\(^{228}\)

While a number of jurisdictions have had an opportunity to address a non-witness case, there are a significant number of jurisdictions that have not confronted such a case but have nonetheless espoused a test which may allow a non-witness to recover for negligent infliction of emotional distress.\(^{229}\) Some of these jurisdictions have evaluated the *Dillon* factors as indicative of the degree of the defendant's liability.\(^{230}\) Other jurisdictions have more clearly

\(^{224}\) 673 P.2d 822 (1983).
\(^{225}\) Id. at 824.
\(^{226}\) 342 N.W.2d 492 (1984).
\(^{227}\) Id. at 494.
\(^{228}\) Id. In *Versland v. Caron Transport*, 671 P.2d 583 (1983), and *Kinard v. Augusta Sash & Door Co.*, 336 S.E.2d 465 (1985), Montana and North Carolina appear to have applied the *Dillon* foreseeability factors so as to deny recovery to a plaintiff who did not contemporaneously observe the accident.
\(^{229}\) These jurisdictions include Connecticut, Florida, Hawaii, Maine, Missouri, Michigan, Nebraska, Nevada, New Hampshire, Ohio and Washington.
\(^{230}\) These jurisdictions apparently adhere to the following *Dillon* rationale: Obviously defendant is more likely to foresee that a mother who observes an accident affecting her child will suffer harm than to foretell that a stranger witness will do so. Similarly, the degree of foreseeability of the third person's injury is far greater in the case of his contemporaneous observance of the accident than that in which he subsequently learns of it. The defendant is more likely to foresee that shock to the nearby, witnessing mother will cause physical harm than to anticipate that someone distant from the accident will suffer more than a temporary emotional reaction. All these elements, of course, shade into each other; the fixing of obligation, intimately tied into the facts, depends upon each case.

68 Cal.2d at 740-41, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81.

*See, e.g.*, *State v. Eaton*, 710 P.2d 1370 (1985) (adopted the *Dillon* factors to assist in
tipped their hand. For example, in *Champion v. Gray*, the Florida Supreme Court held that the plaintiff was directly involved in the event causing the original injury. "If such a person sees it, hears it, or arrives upon the scene while the injured party is still there, that person is likely involved."

*Physical Manifestation of the Negligently Inflicted Emotional Distress*

The great majority of jurisdictions which recognize a remedy for emotional distress require that the psychic trauma be manifested physically. However, these jurisdictions do not agree on what calculating the degree of foreseeability of the emotional harm to a plaintiff bystander resulting from defendant's conduct; *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985) (adopted the view expressed by the Massachusetts case of *Ferriter v. Daniel O'Connell's Sons*, Inc., 381 Mass. 507, 413 N.E.2d 690 which declared that plaintiff was entitled to compensation for negligent infliction of emotional distress as long as the shock followed closely on the heels of the accident); *Culbert v. Sampson's Supermarkets*, Inc., 444 A.2d 433 (1982) (imposition of liability is ultimately a factual determination which must be made on a case by case basis; the *Dillon* test should not be applied formally to bar arguably valid claims); and *Pugh v. Hanks*, 6 Ohio St. 3d 72, 451 N.E.2d (1983). The *Dillon* factors were not intended to be fixed guidelines which an aggrieved bystander was required to satisfy in order to recover; rather, the factors were to be taken into account by courts in assessing the degree of foreseeability of emotional injury to the plaintiff.


In *Champion*, the Florida Supreme Court abandoned the impact rule.


232. 478 So.2d at 20. Under Pennsylvania law, as well as other jurisdictions, the *Champion* case would be distinguishable from non-witness cases because the facts in *Champion* indicate that the plaintiff heard the impact and then went to the accident scene. *Id.* at 18.

The *Champion* court also required that there existed "significant discernible physical injury, ... caused by psychological trauma resulting from a negligent injury imposed upon a close family member within the sensory perception of the physically injured person, is too great a harm to require direct physical contact before a cause of action exists." *Id.* at 18-19 (footnote omitted). The court further emphasized the requirement that a "causally connected clearly discernible physical impairment must accompany or occur within a short time of the psychic injury." *Id.* at 19 (footnote omitted).

In a case decided on the same day as *Champion*, the court vacated a judgment in favor of the plaintiff because his emotional distress was not physically manifested. *Brown v. Cadillac Motor Car Div., General Motors Corp.*, 468 So.2d 903 (1985).
constitutes “physically manifested.” While some jurisdictions require that the emotional distress result in serious physical harm others merely require that the emotional distress by physically manifested in some degree.\textsuperscript{234}

In the years following \textit{Sinn}, there has been much confusion among the Pennsylvania appellate courts on whether the mental disturbance must be physically manifested in order to state a cause of action for negligent infliction of emotional distress. In \textit{Sinn} itself, Justice Nix noted that “[a]dvancements in modern science lead us to further conclude that physical injury is capable of being proven despite the absence of a physical manifestation of such injury.”\textsuperscript{235} However, this was not the view of the court. Chief Justice Eagen, who specifically concurred, proffered that severe physical manifestation of the emotional distress was an essential component of the cause of action.\textsuperscript{236} Justice Roberts, in his dissenting opinion in \textit{Sinn}, provided that:

[I]f there is no reasonable measure of plaintiff’s pain, then any recovery will be essentially speculative. Then, too, the nature of our society requires of each of us a remarkable degree of emotional fortitude. It is not unreasonable to draw the line between that degree which is required and that which is not by reference to that emotional distress which causes serious physical injury or harm. And it cannot be denied that if not the genuineness, then at least the intensity and thus the nature of the injury, may be difficult to assess where it causes no physical injury.\textsuperscript{237}

\textit{Banyas v. Lower Bucks Hospital,}\textsuperscript{238} and \textit{Vattimo v. Lower

caused that distress has relied on three assumptions: (1) emotional distress which does not manifest itself physically is normally trivial; (2) physical harm guarantees the genuineness of the claim; and (3) the defendant’s fault (i.e., its negligence) is not so great as to require making good a purely mental disturbance.

This view is in keeping with the \textit{Restatement (Second) of Torts} § 436A, comment b (1965), which provides: “If the actor’s conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.”

The Restatement rule is followed by the majority of the American courts. \textit{See Prosser, supra}, at 330.

For an excellent analysis within this area, \textit{see Comment, Negligent Inflicted Mental Distress: The Case for an Independent Tort}, 59 \textit{Georgetown L.J.} 1237 (1971).


\textsuperscript{235} \textit{See supra} note 80.

\textsuperscript{236} 486 at 174, 404 A.2d at 686-87.

\textsuperscript{237} \textit{Id.} at 177-78, 404 A.2d at 688.

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Bucks Hospital, Inc. were early forecasts of the conflict on this issue between the Pennsylvania courts. Relying upon the Restatement (Second) of Torts § 436A, the Banyas court found that because the plaintiff's complaint did not aver physical harm, a claim for negligent infliction of emotional distress could not lie. In contrast, the Pennsylvania Commonwealth Court in Vattimo declared that if emotional harm to the plaintiff in fact resulted, fortuitous avoidance of physical harm did not foreclose the question of the tortfeasor's liability.

Subsequent Pennsylvania appellate court decisions continued to illustrate the confusion on this issue. While the greater weight of authority dictates that the mental harm suffered must physically manifest itself, other Pennsylvania courts have held to the contrary.

Proposal For A New Approach

Pennsylvania's rigid application of the Dillon factors is antithetical to the concept of foreseeability. Since the landmark case of Palsgraf v. Long Island R.R., foreseeability has been accepted as a template for duty. In turn, foreseeability has been used by the courts to limit duty for policy reasons. The underlying policy for limiting duty in the context of negligent infliction of emotional distress is the concern of imposing unduly burdensome liability upon the tortfeasor. However, "[a] policy which is relied on to narrow the scope of the negligent tortfeasor's duty must be justified by cogent and intelligible consideration, and must be capable of defining the appropriate limits of liability by reference to factors which are not purely arbitrary. Pennsylvania's approach is founded in neither logic nor policy.

In Mazzagatti, the Pennsylvania Supreme Court realized its application of the Dillon factor of contemporaneous observation lacked logical support. This is evidenced by Chief Justice Nix's attempt to distinguish between denying recovery for negligent inflic-
tion of emotional distress where the plaintiff does not witness the injury to a child but rather learns of the incident and subsequently arrives at the scene and the situation where the plaintiff actually witnesses the accident. The Chief Justice reasoned that in the former factual situation the plaintiff's "prior knowledge of the injury to the victim serves as a buffer against the full impact of observing the accident scene" since he has time to brace his emotional system. However, this rationale is fatally weakened by the Brooks case. In Brooks, the plaintiff alleged emotional distress when he came upon the accident scene without prior knowledge of its occurrence and observed his injured son. Thus, under the rationale expressed in Mazzagatti the plaintiff in Brooks lacked the prior notice to enable him to brace his emotional system. Ignoring its own reasoning, the Brooks court affirmed the grant of defendant's motion to dismiss.

Often the search for legal certainty obstructs the law's pursuit of justice. Pennsylvania's continued arbitrary application of the concept of foreseeability in claims for negligent infliction of emotional distress would result in such an obstruction.

The Pennsylvania Supreme Court should abandon its efforts to rationalize the propriety of the contemporaneous observation requirement for stating a claim for negligent infliction of emotional distress. More specifically, the court should follow the lead of other jurisdictions which do not require the plaintiff to plead contemporaneous observation of the event in order to state such a claim.

Along with the Dillon factors, the court should also utilize other factors as guideposts for determining whether the plaintiff was a foreseeable victim of the defendant's negligent conduct, or in other parlance, whether the defendant owed a duty of care to the plaintiff. In addition to the Dillon factors the court should consider the setting in which the defendant acted negligently; that is, is the forum in which the defendant acted one in which it is likely that a parent or relative would be present. For example, it is foreseeable that if one drives negligently through a residential area someone is likely to be seriously injured and it is also foreseeable that a parent or relative may witness the incident or immediately come upon the accident scene and consequently suffer serious emotional distress. The court should also consider when and under what circumstances the plaintiff came into consciousness of the injured victim.

246. Mazzagatti, supra, at 680.
247. Brooks, supra, at 676.
That is, was there prior knowledge of the accident; how much time had elapsed between the time the plaintiff was notified and the time the plaintiff observed the victim; did the plaintiff observe the accident scene unchanged; and how severe were the injuries to the victim. Different weight may be accorded to those factors which are more likely to cause emotional distress if they exist, although the non-existence of one such factor should not be dispositive of the foreseeability inquiry. The application of these factors must be made on a case-by-case basis.

The type of damages which should be recoverable for negligent infliction of emotional distress are those which become manifested in a serious physical condition and which can be shown to be causally linked to the defendant's negligent conduct. Also to be compensable are those injuries which although they do not become physically manifested, result in a serious psychological disorder. To allow otherwise would be to totally ignore the advancements in the modern medical field.

This author contends that an application of this approach to the two present cases, while *Brooks* being more persuasive, should have survived a motion to dismiss on the basis of foreseeability, for both plaintiffs were reasonably foreseeable.248

These guidelines set forth above would provide the court with a vehicle which would advance the relevant policy, in that it it would not impose unduly burdensome liability, while concurrently being rooted in logic.

*Brian Fulginiti*

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248. However, the damages claimed in both respective cases are not the type which would solicit legal redress. Thus, while the motion to dismiss on the basis of foreseeability should not have been granted, it is urged that such a grant would have been proper if based on the injuries alleged.