Tulsa Law Review

Volume 11 | Number 4

1976

Kelley v. Kokua Sales & Supply, Ltd.: Redefining the Limits to Recovery for Negligently Inflicted Mental Distress

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KELLEY v. KOKUA SALES & SUPPLY, LTD.: REDEFINING THE LIMITS TO RECOVERY FOR NEGLIGENTLY INFLICTED MENTAL DISTRESS

INTRODUCTION

For several years, a major controversy has existed in the law of torts concerning the right of a plaintiff bystander to recover for mental and emotional distress suffered as a consequence of witnessing either danger or actual injury to a third person caused through a defendant's negligence.[1] Typically, the question of recovery has arisen in the context of familial relationships as in the case of a mother, near the scene of an accident, who views her child being struck and injured by a negligently driven automobile and suffers mental anguish at the sight.

Although this situation would seem to produce a favorably sympathetic reaction for the plaintiff in any court, quite the opposite result has proven to be the general rule. The law has been slow in extending completely independent tort protection to such witnesses for their mental injuries. A major problem which has inhibited the growth of the law in this area has been the difficulty in formulating a standard of duty which will allow recovery in the appropriate cases of bystander injury, yet not subject the negligent party to essentially unreasonable and unlimited liability exposure to an endless number of potential plaintiffs who, although not directly harmed by the defendant's negligent act, nonetheless suffer mental distress as a result of it.

1. The extensive amount of literature dealing with this subject reflects the intensity of the legal discussion which has surrounded this issue. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54 (4th ed. 1971) [hereinafter cited as PROSSER]; Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944); Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 50 GEO. L.J. 1237 (1970-71); Note, *Negligent Infliction of Mental Distress: Reaction to Dillon v. Legg in California and Other States*, 25 HASTINGS L.J. 1248 (1974); Note, *Traumatic Mental Injury and the Bystander*, 24 S.C.L. REV. 439 (1972); Note, *Torts—Negligently Inflicted Emotional Harm—The Right of Bystanders to Recover Upon Witnessing Injury or Peril of Third Persons—Damages*, 4 ST. MARY'S L.J. 424 (1972); Note, *Torts—Recovery for Physically Manifested Mental Distress—Towards a More Liberal Negligence Approach*, 10 WAKE FOREST L. REV. 187 (1974).

Recently, the Hawaii Supreme Court in *Kelly v. Kokua Sales & Supply, Ltd.*,[2] had an opportunity to consider the implications of this problem when it was presented with a unique situation in which the mental distress providing the basis for the suit was suffered by a "bystander" located thousands of miles from the accident scene. Although this case involved an unusual variation of the bystander situation, the underlying factual elements were tragically familiar.

A mother and her two children were involved in a traffic accident in Hawaii with the defendant's truck. As a result, the mother and one child were killed and the other child severely injured. The cause of the fatal collision was attributed to brake failure of the defendant's vehicle. Several hours after the accident, Theodore Kelley, a California resident and the father-grandfather of the victims, was advised by telephone of their deaths. Shortly thereafter, as a result of his severe mental anguish over the accident, Mr. Kelley suffered a fatal heart attack. The decedent's wife, as administratrix of her husband's estate, and his children filed suit in Hawaii against several defendants[3] basing the action on the tort theory of negligent infliction of serious mental distress. Plaintiffs alleged that the defendants had owed a duty of care to the decedent and that their combined negligence in the traffic accident had proximately caused Mr. Kelley's severe mental distress and subsequent death.[4]

The trial court entered summary judgment for the defendants. On appeal, the Supreme Court of Hawaii affirmed the lower court decision and refused to allow recovery for the decedent's emotional and physical distress, holding that the injuries were not foreseeable and that to allow recovery in such cases would confront negligent tortfeasors with "an unmanageable, unbearable and totally unpredictable liability."[5]

This note will analyze the substantive importance of *Kelley* in attempting to establish more definite yet flexible limits to bystander

2. — Hawaii —, 532 P.2d 673 (1975).

3. Because of the alleged brake failure, the plaintiffs sued a variety of defendants besides Kokua Sales & Supply, Ltd. They included: Oahu Turf & Sprinkler Company, the company that had owned and operated the truck involved in the accident; Erling W. Hedemann, Jr., and Lonnie Williams, principals in Koolau Nursery & Landscaping; International Harvester Company, manufacturer of the truck involved; Hawaiian Equipment and Castle & Cooke, Inc., who had leased the trailer to Oahu Turf & Sprinkler Company; George Kenney, mechanic for the truck; Ian Tekare, temporary administrator of the estate of Anthony Tekare, deceased; George K. Hirata, dba Standard Auto Service, who inspected the truck involved and issued a safety sticker for it; City and County of Honolulu and State of Hawaii, who granted the driver the license to operate the type of vehicle involved in the accident. *Id.* at —, 532 P.2d at 674.

4. *Id.* at —, 532 P.2d at 674.

5. *Id.* at —, 532 P.2d at 676.

recovery and will examine, evaluate and contrast the approaches taken by the Hawaii court and other jurisdictions in their efforts to balance the respective interests of the plaintiff bystander[6] and the negligent defendant.

BACKGROUND—THE TRADITIONAL VIEW

American courts have expressed differing views in confronting the bystander recovery issue with some jurisdictions denying recovery outright,[7] others permitting it within strict limits[8] and still others allowing it liberally.[9] The varying positions taken have, in large measure, resulted from the different interpretations courts have developed in analyzing the concepts of duty, foreseeability and proximate cause. The conservative courts have adopted restrictive views of these traditional negligence determinants. In focusing upon the mental distress issue, they have perceived the duty owed by defendants to bystanders to be either nonexistent or extremely limited. Correspondingly constrained views have been expressed about the foreseeability of such mental disturbances to witnesses of an accident and about the limits to which the actionable effects of the negligent act will be allowed to extend. Conversely, the more liberal jurisdictions have expanded both the duty and foreseeability concepts to allow recovery for emotional distress which has resulted merely from witnessing a traumatic scene.[10]

The traditional approach, often referred to as the "impact theory," has been to deny the right to maintain an action for negligent infliction of mental distress to plaintiffs who have not suffered an actual physical impact by the negligent force.[11] This view, currently followed by a

6. Bystanders for the purpose of this note will be broadly defined to include not only those who actually witness the accident but also those who either happen upon the accident subsequent to its occurrence or, as in *Kelley*, learn of the tragedy after it has happened.

7. *See* note 12 *infra.*

8. *See* note 26 *infra.*

9. California, Connecticut, Hawaii, Michigan and Rhode Island. *See* notes 28-47 *infra* and accompanying text.

10. 38 AM. JUR. 2D *Fright, Shock, etc.* §§ 15, 16 (1968).

11. Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896), is generally considered the leading decision in establishment of the impact rule in the United States. In that case, the court stated:

> Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. . . . [N]o recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury.

Id. at 109-10, 45 N.E. at 354-55. *See also* Southern v. Jackson, 146 Ga. 243, 91 S.E. 28 (1916); West Chicago St. R.R. v. Liebig, 78 Ill. App. 567 (1898); Smith v. Gowdy,

dwindling minority of courts,[12] has been rationalized on grounds of various policy considerations. It has been contended that mental disturbances are not equivalent in severity to demonstrable physical injuries and therefore not entitled to the same degree of legal redress and protection.[13] Further, it has been suggested that to allow recovery for mental distress in the absence of an actual physical impact would result in a flood of easily feigned and unfounded claims of injury, the validity of which both medical practitioners and the courts would have difficulty determining, since direct and visible evidence of the negligent contact would be lacking.[14] Finally, it has been stated that any mental injuries suffered by a witness to an accident would be unforeseeable and that therefore no duty of care would be owed to the plaintiff.[15] Although the harsh effects of this theory have been softened to some degree by allowing recovery for mental distress where there have been slight and even absurd "impacts,"[16] the fact that some impact, no matter how trivial, is required, effectively precludes any recovery for accident wit-

196 Ky. 281, 244 S.W. 678 (1922); Herrick v. Evening Express Pub. Co., 120 Me. 138, 113 A. 16 (1921); Spade v. Lynn & B.R.R., 168 Mass. 285, 47 N.E. 88 (1897); Cohn v. Ansonia Realty Co., 162 App. Div. 791, 148 N.Y.S. 39 (1914); Miller v. Baltimore & O.S.W. R.R., 78 Ohio St. 309, 85 N.E. 499 (1908); Mack v. South Bound R.R., 52 S.C. 323, 29 S.E. 905 (1898); Bowles v. May, 159 Va. 419, 166 S.E. 550 (1932). *See generally* Annot., 64 A.L.R.2d 100 (1959); 38 AM. JUR. 2D *Fright, Shock, etc.* § 13 (1968).

12. PROSSER, *supra* note 1, § 54, at 331 lists the states of Arkansas, Florida, Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, Missouri, Ohio, Virginia and Washington as continued adherents to the impact rule. However, a number of recent decisions indicate that this number has been further reduced. The following states have recently rejected the impact rule: Florida in Stewart v. Gilliam, 271 So. 2d 466 (Fla. Dist. Ct. App. 1972); Maine in Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970); Michigan in Daley v. LaCroix, 384 Mich. 4, 179 N.W.2d 390 (1970); Virginia in Hughes v. Moore, 214 Va. 27, 197 S.E.2d 214 (1973). Although the language is somewhat unclear, the Washington Supreme Court's decision in Shurk v. Christensen, 80 Wash. 2d 652, 497 P.2d 937 (1972), suggests that Washington also can no longer be considered an impact jurisdiction.

13. *See generally* 38 AM. JUR. 2D *Fright, Shock, etc.* § 18 (1968).

14. Spade v. Lynn & B.R.R., 168 Mass. 285, 47 N.E. 88 (1897); Nelson v. Crawford, 122 Mich. 466, 81 N.W. 335 (1899); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896).

15. This is succinctly expressed in Mitchell v. Rochester Ry., 151 N.Y. 107, 110, 45 N.E. 354, 355 (1896).

16. Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928) (defendant's horse "evacuated his bowels" into the plaintiff's lap); Philadelphia, B & W.R.R. v. Mitchell, 107 Md. 600, 69 A. 422 (1908) (impact against clothing of the plaintiff); Jansen v. Minneapolis & St. L. Ry., 112 Minn. 496, 128 N.W. 826 (1910) (slapping plaintiff over the head with a hat); Porter v. Delaware, L. & W.R.R., 73 N.J.L. 405, 63 A. 860 (1906) (dust in the eyes); Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930) (smoke passing through the plaintiff's nostrils); Hess v. Philadelphia Transp. Co., 358 Pa. 144, 56 A.2d 89 (1948) (electrical shock).

nesses who have suffered impacts only in the sense of an emotional disturbance.

Several judicial opinions have attacked both the rationality and reasonableness of the impact requirement and its purported usefulness in guaranteeing the legitimacy of injuries.[17] Typical of the criticisms is the comment of the Pennsylvania Supreme Court in *Niederman v. Brodsky*[18] in its rejection of the impact rule as arbitrary and illogical:

> It appears completely inconsistent to argue that the medical profession is absolutely unable to establish a causal connection in the case where there is no impact at all, but that the slightest impact . . . suddenly bestows upon our medical colleagues the knowledge and facility to diagnose the causal connection between emotional states and physical injuries.[19]

Other assaults have been directed against the inequitable effects which result from application of the impact theory. The New Jersey Supreme Court, in the leading case of *Falzone v. Busch*,[20] observed that it was unjust and totally inconsistent with established judicial concepts of providing relief where a meritorious injury has been suffered to bar an entire class of claims merely because of the potential for a few dishonest ones.[21] Moreover, as one authority has indicated, "it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the court too much work to do."[22] Additionally, it has been contended that the massive increase in claims that was feared has not materialized in those jurisdictions which have foresaken the impact requirement[23] and that, in any event, substantial refinements in modern techniques for diagnosing and determining the legitimacy of both mental and physical injuries have reduced the opportunity for imposition of fraudulent claims upon the courts.[24]

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17. Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916); Robb v. Pennsylvania R.R., 58 Del. 454, 210 A.2d 709 (1965); Green v. Shoemaker & Co., 111 Md. 69, 73 A. 688 (1909); Daley v. LaCroix, 384 Mich. 4, 179 N.W.2d 390 (1970); Chuichiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 A. 540 (1930); Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); Simone v. Rhode Island Co., 28 R.I. 186, 66 A. 202 (1907); Mack v. South Bound R.R., 52 S.C. 323, 29 S.E. 905 (1898); Trent v. Barrows, 55 Tenn. App. 182, 397 S.W.2d 409 (1965); Savard v. Cody Chevrolet, Inc., 126 Vt. 405, 234 A.2d 656 (1967).

18. 436 Pa. 401, 261 A.2d 84 (1970).

19. *Id.* at —, 261 A.2d at 87 (footnote omitted).

20. 45 N.J. 559, 214 A.2d 12 (1965).

21. *Id.* at —, 214 A.2d at 16.

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

23. *See, e.g.*, Okrina v. Midwestern Corp., 282 Minn. 400, 165 N.W.2d 259 (1969).

24. *See, e.g.*, Stewart v. Gilliam, 271 So. 2d 466 (Fla. Dist. Ct. App. 1972), wherein the court noted:

Although certainly an arbitrary concept, the impact rule was and remains useful to those courts which have retained it, because by their denial of recovery to an entire group of plaintiffs, it enables them to dispense with the difficult problem of determining which bystanders shall or shall not recover. As those jurisdictions which have rejected the impact rule have discovered, once the impact requirement is removed, other standards must be formulated to govern the extent of bystander recovery and defendant liability.

That some limits must be established seems clear, for while it is unjust to totally prohibit any recovery at all to witnesses who have suffered justifiably compensable mental disturbances, it is just as inequitable to hold a defendant liable for every remote manifestation of his negligent act. One eminent authority has stated:

> 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.[25]

THE MAJORITY APPROACH

In dealing with this issue, the majority of courts which now permit recovery for bystander mental distress have adopted the "zone of danger" concept which allows recovery if the plaintiff, while suffering mental anguish upon observing either danger or actual injury to another, simultaneously entertains a fear for his own safety and is within the same zone of physical danger as the victim.[26] This rule appears to have attained its popularity primarily because it provides courts with an

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> [T]he question of proving or disproving causation between the claimed injuries and damages and the alleged fright or shock may indeed have been a difficult undertaking in 1888 when the impact rule was first announced. Such is not the situation today. An extensive review of medical treatises is not necessary in order to recognize that medical science has come a long way since the turn of the century; the changes brought about by modern scientific techniques and the advancement made by modern medicine have been overwhelming. This is particularly true in the refinement of techniques for diagnosing the causal connection between emotional states and physical injuries.

Id. at 472.

25. PROSSER, *supra* note 1, § 54, at 334.

26. *See* Hopper v. United States, 244 F. Supp. 314 (D. Colo. 1965) (interpreting Colorado law); Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963); Robb v. Pennsylvania R.R., 58 Del. 454, 210 A.2d 709 (1965); Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965); Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969); Guilmette v. Alexander, 128 Vt. 116, 259 A.2d 12 (1969); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935); Annot., 64 A.L.R.2d 100, 143 (1959).

opportunity to give some measure of relief to the plaintiff-witness within relatively defined boundaries while at the same time limiting the defendant's scope of duty and ultimate liability to those who are foreseeably within the orbit of danger.

Efforts to permit recovery beyond the rigid lines of the zone of danger have repeatedly been resisted because of the fear that once recovery is allowed outside the zone of danger, there would be no rational method to limit recovery and defendants then would be subjected to a degree of liability out of proportion to their culpability.[27] Notwithstanding this concern, there is a growing trend to move away from the zone of danger rule toward a utilization of more flexible and liberal standards of recovery.

THE LIBERAL MOVEMENT

The first jurisdiction to specifically reject the zone of danger rule was California in *Dillon v. Legg*.[28] In overruling its earlier holding in *Amaya v. Home Ice, Fuel & Supply Co.*[29] in which it had adhered to the zone of danger rule, the supreme court in *Dillon* held that recovery should be granted to a plaintiff-mother for the mental and subsequent physical distress she suffered as a result of witnessing her daughter's death in an automobile accident, although she herself had suffered no actual impact and was outside the zone of physical danger. In reaching this conclusion, the court noted the harsh and arbitrary result which would ensue from application of the zone of danger rule to the factual situation in *Dillon*. For although both the mother and a sister of the victim had witnessed the accident and suffered essentially the same traumatic mental injuries, the sister would be allowed to recover since she had been within the zone of danger, while the mother, just outside the zone, would be denied any recompense at all.[30]

Recognizing the implications of its holding, the court attempted to allay fears of creating a situation of unlimited liability of defendants by establishing a set of criteria to limit the extent of bystander recovery, basing it upon the defendant's foreseeability of injury to the plaintiff. The factors cited as crucial in this determination were:

> (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it.

27. Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).
28. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
29. 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).
30. 68 Cal. 2d at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.

> (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.[31]

In formulating this standard, the court indicated that each case would have to be resolved by application of the criteria to the particular factual situation presented to the court.[32]

Although the approach taken in *Dillon* has provided increased flexibility in determining bystander recovery, reaction to this decision has generally indicated that other jurisdictions have not been persuaded that the barriers erected to prevent unreasonable imposition of liability upon defendants adequately achieve that goal. The majority of courts which have considered the *Dillon* holding have rejected it.[33] The New York Court of Appeals in *Tobin v. Grossman*,[34] in declining to follow the *Dillon* lead employed reasoning which generally reflects the majority opinion in this area. In expressing the concern that the limits of recovery could be progressively expanded under the *Dillon* rationale due to a lack of established parameters, the court stated:

> Any rule based solely on eyewitnessing the accident could stand only until the first case comes along in which the parent is in the immediate vicinity but did not see the accident. Moreover, the instant advice that one's child has been killed or injured, by telephone, word of mouth, or by whatever means, even if delayed, will have in most cases the same impact. The sight of gore and exposed bones is not necessary to provide special impact on a parent. . . . [T]he logical difficulty of excluding the grandparent, the relatives, or others *in loco parentis*, and even the conscientious and sensitive caretaker, from a right to recover, if in fact the accident had the

31. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

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

33. Jelly v. LaFlame, 108 N.H. 471, 238 A.2d 728 (1968); Whetham v. Bismarck Hospital, 197 N.W.2d 678 (N.D. 1972); Guilmette v. Alexander, 128 Vt. 116, 259 A.2d 12 (1969). The Court of Appeals of New Mexico in Aragon v. Speelman, 83 N.M. 285, 491 P.2d 173 (Ct. App. 1971), refused to adopt the *Dillon* holding but indicated a willingness to reconsider its position if it was presented with the appropriate case in which to do so. The Washington Supreme Court in Shurk v. Christensen, 80 Wash. 2d 652, 497 P.2d 937 (1972), expressed a similar sentiment. It is apparent that the Washington court has not yet found the appropriate case. Its recent decision in Grimsby v. Samson, 85 Wash. 2d 52, 530 P.2d 291 (1975), expressly rejected the *Dillon* rationale.

34. 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

> grave consequences claimed, raises subtle and elusive hazards in devising a sound rule in this field.[35]

The fears expressed in *Tobin* appeared well founded in light of a California appellate court decision which, one year after *Dillon*, concluded in *Archibald v. Braverman*[36] that actual witnessing of the tortious act by the bystander was not necessary before recovery would be granted. In *Archibald*, a mother sued to recover damages for her emotional distress suffered as a consequence of viewing her son's injuries sustained in an explosion which had just occurred but had not been witnessed by the plaintiff. In holding for the plaintiff, the court appeared to disregard the fact that there had been no "sensory and contemporaneous observance of the accident,"[37] one of the criterion to recovery explicitly mentioned in *Dillon*. *Archibald* exemplified the difficulties inherent in creating and consistently applying rules to limit recovery once the zone of danger distinction has been removed. Although the California courts in two subsequent cases[38] declined to further expand recovery beyond the parameters established in *Archibald*, this attitude of judicial restraint has not resulted in any increased acceptance of the *Dillon* approach by those courts initially hostile to it.

To date, only a few jurisdictions have adopted the general philosophy of liberalized bystander recovery outlined in *Dillon*. It is apparent from a review of these decisions that controversy continues about the acceptability of the rules established by the California court and problems remain in devising guidelines to recovery outside the zone of danger. Only Connecticut, in *D'Amicol v. Alvarez Shipping Co.*,[39] has accepted without modification the *Dillon* approach.[40] The Court of

35. *Id.* at 616, 249 N.E.2d at 423, 301 N.Y.S.2d at 559.

36. 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969).

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

38. Wynne v. Orcutt Union School Dist., 17 Cal. App. 3d 1108, 95 Cal. Rptr. 458 (1971) (parents of terminally ill child alleged they had suffered mental distress after the boy's schoolteacher had made an ill-advised disclosure of the child's condition to his classmates who then questioned the child about his illness. The child, who was unaware of his condition, then asked his parents if he was going to die. The parents alleged that this questioning by their child was the seminal cause of their distress. In denying recovery the court distinguished the case from *Dillon* by indicating that there was no alleged injury to the child and no breach of duty in disclosing the information to his classmates. *Id.* at 1111, 95 Cal. Rptr. at 459); Deboe v. Horn, 16 Cal. App. 3d 221, 94 Cal. Rptr. 77 (1971) (recovery denied plaintiff-wife who neither witnessed the accident nor arrived at the scene after it occurred, but who alleged mental distress as a result of being informed of her husband's condition when summoned to the hospital).

39. 31 Conn. Supp. 164, 326 A.2d 129 (Super. Ct. 1973).

40. *Id.* at —, 326 A.2d at 130.

Appeals of Michigan, in noting that it was difficult and practically impossible to create definite rules for limiting bystander recovery has concluded that it will simply evaluate each case as it is presented and determine from an examination of its facts whether recovery is warranted or not.[41] The decisions of the Rhode Island federal district court in *D'Ambra v. United States*,[42] and the Hawaii Supreme Court in *Rodrigues v. State*[43] and *Leong v. Takasaki*[44] have provided the most complete analysis and greatest contrast in their consideration of the criteria utilized in *Dillon*.

In *D'Ambra* recovery was allowed for a mother who had suffered emotional distress accompanied by physical symptoms as a consequence of seeing her infant son struck and killed by a mail truck. In rejecting both the impact and zone of danger requirements, the court accepted the three criteria approach of *Dillon* toward determining foreseeability but added a fourth element by requiring that the *presence* of the bystander also be foreseeable by the negligent party. In this determination, the court indicated several factors that should be considered: (1) the age of the child; (2) the type of neighborhood in which the accident had occurred; (3) the tortfeasor's familiarity with the neighborhood; (4) the time of day; and (5) any other factors which would put the defendant on notice of the plaintiff-witness' presence.[45] In thus concluding that foreseeability of the bystander's presence as well as foreseeability of injury had to be shown before recovery would be allowed, the *D'Ambra* court endeavored to further restrict the duty owed by the defendant thereby limiting the extent of his liability within boundaries more conservative than those suggested in *Dillon*.[46]

41. Toms v. McConnell, 45 Mich. App. 647, 207 N.W.2d 140 (1973). The court stated:

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

Id. at —, 207 N.W.2d at 144-45.

42. 354 F. Supp. 810 (D.R.I. 1973).

43. 52 Hawaii 156, 472 P.2d 509 (1970).

44. 55 Hawaii 398, 520 P.2d 758 (1974).

45. 354 F. Supp. at 820.

46. The continued vitality of the presence element formulated by the district court in *D'Ambra* is subject to some doubt, at least in the jurisdiction of Rhode Island. After the district court's decision, an appeal was taken to the United States Court of Appeals for the First Circuit. In attempting to determine whether the district court had correctly construed Rhode Island law, the court of appeals certified to the Rhode Island Supreme Court the question whether the factual situation in *D'Ambra* would entitle the

HAWAII'S ANALYSIS OF THE MENTAL DISTRESS ISSUE

Hawaii, in contrast to the conservatism expressed in *D'Ambra*, has on the basis of the *Rodrigues* and *Leong* decisions exceeded California in becoming the most liberal jurisdiction permitting bystander recovery. In *Rodrigues*, the Hawaii Supreme Court allowed compensation for the emotional injuries suffered by the plaintiff homeowners in viewing the severe flood damage caused to their home as a result of the state's negligence in failing to promptly clear a blocked drainage culvert. In concluding that recovery was warranted even in situations where the mental distress did not result in physical injury, the court recognized that an individual's interest in freedom from negligent infliction of serious mental distress was entitled to independent legal protection.[47] The opinion did not distinguish between mental distress suffered as a consequence of witnessing injury to another and that suffered by viewing destruction of one's own property.

The liberal movement begun in *Rodrigues* was continued and expanded in *Leong*, a case involving the more traditional situation of bystander injury. The plaintiff, a ten-year-old child, saw his stepgrandmother being killed as they crossed a highway. Although not physically injured, an action was brought on his behalf to recover damages for his nervous shock and psychic injuries suffered in witnessing the fatal accident.[48] The trial court dismissed the action on the grounds that

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plaintiffs to recover. The supreme court in D'Ambra v. United States, — R.I. —, 338 A.2d 524 (1975), answered in the affirmative but expressed some reservations about the presence element established by the district court:

> [The district court] added to the *Dillon* factors the requirement that the presence of the plaintiff be foreseeable. While this addition may be theoretically necessary to make the outward limits of the duty conform to the risk reasonably to be perceived . . . it should be realized that the scope of liability is or should be determined by more factors than those relevant only to a defendant's culpability. To require that the presence of the plaintiff or mother be "foreseeable" would mean distinguishng [*sic*] between the case of a very young child whose mother may be presumed to be about and the teenaged victim who is presumed to be on his own . . . between a mother witnessing the accident from behind a tree and a mother standing in full view of the defendant-driver. While the outside limitations of the cause of action must of necessity be somewhat arbitrary, they need not be completely irrational.

Id. at —, 338 A.2d at 531 n.7 (citation omitted). This is not to suggest that the presence element has lost all significance; it reflects an evolutionary development in this area of the law and may be persuasive logic for other courts.

47. 52 Hawaii at 174, 472 P.2d at 520.

48. The plaintiff had never consulted a doctor for treatment of the alleged mental disturbance. However, the court concluded that the "plaintiff's statements that his grades in school had dropped immediately after the accident but had subsequently risen to their previous level and that he thinks about the accident at times are indications of possible psychic damage." 55 Hawaii at —, 520 P.2d at 761.

there could be no recovery for mental distress without resulting physical injury. The supreme court reversed and affirmed its previous holding in *Rodrigues* that mental distress did not have to manifest itself physically before recovery would be allowed. Furthermore, the court established the new principle that absence of a blood relationship between the victim and the plaintiff-witness was an insufficient reason to automatically foreclose recovery by the plaintiff.[49] Upon remand, the plaintiff should therefore be permitted the opportunity to prove both the nature of his relationship to the victim and the extent of mental distress he had suffered as a result of viewing her death.[50]

The explicit findings in *Rodrigues* and *Leong* that a plaintiff bystander may recover for mental distress which has not resulted in physical injuries and which may have been produced by shock at viewing destruction to an inanimate object or witnessing the death of a non-blood related victim, taken alone, indicate a substantial movement beyond *Dillon*. However, the greatest difference between the Hawaii court and California and Rhode Island courts concerns the methods used to determine recovery and liability in bystander situations.

In a distinct departure from the rule oriented approaches toward foreseeability established in *Dillon* and *D'Ambra*, the Hawaii court has not established a distinct set of rules to govern bystander recovery, but has instead employed the indefinite "reasonable man" standard in ascertaining the foreseeability of injury, the extent of the duty owed and in determining the issue of proximate causation. This unwillingness to follow the approaches of the California and Rhode Island courts was explained in *Leong*. In observing that the *Dillon* and *D'Ambra* tests focused on foreseeability standards rather than on a proximate cause standard, the *Leong* court indicated that their criteria would not be controlling in Hawaii, since making recovery contingent upon the defendant's actual knowledge of the plaintiff's presence was merely establishing another variant of the zone of danger concept. "[F]oreseeability of [the bystander's] and the victim's presence to the defendant should not be employed by a trial court to bar recovery but should at most be indicative of the degree of mental stress suffered."[51]

In both *Leong* and *Rodrigues*, the court concluded that the issues of liability and recovery would be determined by concentrating on the

49. *Id.* at —, 520 P.2d at 766.
50. *Id.*
51. *Id.* at —, 520 P.2d at 766.

degree of mental distress suffered by the bystander. Recovery in both cases was based upon the premise that serious mental distress could result from the defendants' negligent actions. In *Leong*, the court explained the application of this concept:

> [W]hen it is reasonably foreseeable that a reasonable plaintiff-witness to an accident would not be able to cope with the mental stress engendered by such circumstances, the trial court should conclude that defendant's conduct is the proximate cause of plaintiff's injury and impose liability on the defendant for any damages arising from the consequences of his negligent act.[52]

Although it did not develop any specific time and spatial factors to indicate more precisely the extent to which liability would be expanded or limited, the court felt that by restricting recovery to only those situations in which serious mental distress had resulted from the negligent act, it had established a suitable standard for permitting liberal recovery while preventing the extension of liability beyond reasonable limits.[53] The conclusion is inescapable that the court's reliance upon this standard was based upon the belief that usually severe mental distress could only be suffered by a plaintiff who had actually witnessed the negligent act and had been present at the scene of the accident. The reasonableness of the severity of mental distress standard was subjected to a severe test when the court was presented with the atypical and plainly unanticipated factual situation in *Kelley*.

The perplexing problem faced by the court was how to reconcile its established standard to the *Kelley* facts. In *Rodrigues* and *Leong* the court had determined that one owed the duty of care to refrain from the negligent infliction of serious mental distress. In those two cases the issue of liability had been analyzed primarily by a consideration of the severity of the mental distress suffered by the plaintiffs. Consistent application of this same reasoning to *Kelley* could only have resulted in a favorable decision for the plaintiffs. Clearly, any mental injury which resulted in a fatal heart attack constituted mental distress sufficiently severe to permit recovery under the liberal interpretations of *Rodrigues* and *Leong*. Since serious mental distress had resulted, logically, it would follow that the defendants' had breached their duty and were liable for the decedent's injury. While conceding that the language used in *Leong* could have been construed to mean that the defendants

52. *Id.* at —, 520 P.2d at 765.
53. *Id.* at —, 520 P.2d at 764-65.

owed a duty of care to refrain from the negligent infliction of serious mental distress upon a person located anywhere in the world, the *Kelley* court avoided such an unreasonable result by recognizing that merely focusing upon the severity of the mental distress suffered would not realistically limit the liability of the defendants.[54]

Consequently, the court recognized the need to augment its previous standard and accordingly treated *Kelley* as an opportunity to further delineate the scope of duty owed by negligent parties.[55] The court indicated that liability would be imposed for negligent infliction of serious mental distress only when the plaintiff's injuries were reasonably foreseeable to the defendant.[56] In applying this analysis to *Kelley*, the court stated:

> [A] reevaluation of the various considerations pertinent to the question of an untrammeled liability of the appellees leads this court to conclude, as a matter of law, that the appellees did not owe a duty to refrain (duty of care) from the negligent infliction of serious mental distress upon Mr. Kelley.
>
> Stated in a different terminology, but reaching the same conclusion as above, we hold that the appellees could not reasonably foresee the consequences to Mr. Kelley. Clearly, Mr. Kelley's location from the scene of the accident was too remote.[57]

The court concluded that the duty of care outlined in *Rodrigues* and *Leong* would be applied in any future cases where the plaintiffs met the standards stated in those decisions and were located within a reasonable distance from the scene of the accident.[58]

The dissenting justice contended that the standard previously established should have been consistently applied in determining liability in *Kelley*.[59]

> I believe that *Rodrigues* and *Leong* sufficiently defined the boundaries of liability by only allowing claims for *serious*

54. — Hawaii at —, 532 P.2d at 676.
55. In this regard the court noted:

> In both [*Rodrigues* and *Leong*], this court adhered to the principle that where the serious mental distress to the plaintiff was a reasonably foreseeable consequence of the defendant's negligent act, the defendant is liable.
>
> However, while this duty exists, the problem of the delineation of the scope of duty (the question as to which particular plaintiffs, proximate-wise to the scene of the accident, is the duty owed) remains for resolution.

Id. at —, 532 P.2d at 675.
56. *Id.* at —, 532 P.2d at 676.
57. *Id.*
58. *Id.*
59. *Id.* at —, 532 P.2d at 677 (Richardson, C.J., dissenting).

> *mental distress.* The facts on the record are particularly compelling and well established the genuineness and seriousness of mental distress. This is not a situation which merely caused emotional trauma short of physicial injury. . . . There can be no doubt that said decedent suffered mental distress severe enough in impact so as to induce a fatal heart attack. I cannot contemplate a result which renders appellees' alleged negligence blameless at the outset and which summarily denies recovery by decedent's surviving widow and children.[60]

In concluding his argument, he criticized the effect of the majority's holding as a reestablishment of "a scheme of arbitrary distinctions as to where liability ends" that had been expressly rejected in *Rodrigues*.[61]

Although absolute consistency in the application of legal standards is generally a laudable goal, the dissent's argument for such strict consistency in determining liability in *Kelley* appears unreasonable in view of the factual situation present in that case. Under his view, the final result of the defendant's negligence—the severity of mental distress suffered by the injured party—would be the controlling consideration in determining liability. In the absence of any geographical and time limitations between the occurrence of the tortious act and its ultimate consequences, it seems apparent that this would not be a logical method in all cases to restrain the extension of liability beyond reasonable limits.

The *Kelley* majority realistically recognized that liability could not be extended to provide recovery for every remote manifestation of the negligent act, no matter how severe the mental distress suffered by the remote party. In reaching the conclusion that some scheme of time and location must be utilized to govern witness recovery, the court did not adopt the more defined standards of either *Dillon* or *D'Ambra*, but instead determined that a plaintiff-bystander must be located within a reasonable distance from the scene of the accident before his mental distress will be actionable.

Through the utilization of the indefinite term "reasonable," it is apparent that the court did not wish to place precise and absolute limits on the geographical parameters to be established but desired instead to retain the flexibility of judgment permitted through the use of the "reasonable" standard. Clearly, a contrary finding would have negated the entire underlying basis of the earlier decisions in *Rodrigues* and, more particularly, in *Leong* wherein the court strongly expressed the

60. *Id.* at —, 532 P.2d at 678 (emphasis in original).
61. *Id.*

inclination to avoid the development of rigid and arbitrary barriers toward determining bystander recovery.[62] What denotes a reasonable distance presumably will be decided by the court as it contemplates the various factual situations presented to it in future cases. Ultimately, as the court itself indicated, questions concerning reasonable proximity and the scope of duty owed must be resolved by weighing the considerations of policy which favor the bystander's recovery against those which favor limiting the negligent party's liability.[63]

In balancing those interests in *Kelley*, the court firmly decided that the policy considerations favored a limitation on the defendants' liability. The significance of this finding should not be minimized. With its holding the Hawaii court has established more specific yet flexible limits to the outward expansion of liability evidenced in *Rodrigues* and *Leong* and has created increased predictability in the application of its standard by the exclusion of remote and geographically distant plaintiff claims for mental distress. In view of the fears which have been expressed about the inability of courts to limit liability without resort to restrictive standards of recovery, *Kelley* is persuasive evidence that, even in the absence of strict and arbitrary rules, courts can and will rationally limit the extension of liability when it is reasonable and necessary to do so.

By showing that even a very liberal court will not continually extend the parameters of a defendant's liability to unreasonable limits, the *Kelley* decision may encourage some jurisdictions, like Oklahoma, which have been hesitant about adopting more liberal standards in this area, to reappraise their positions and possibly move toward development of more equitable and less arbitrary methods of determining bystander recovery for mental distress.[64]

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62. 55 Hawaii at —, 520 P.2d at 766.

63. — Hawaii at —, 532 P.2d at 675.

64. Oklahoma has consistently adhered to a conservative position with respect to the right of a plaintiff-bystander to recover for his mental distress in witnessing injury to another. The leading Oklahoma case on this subject is Van Hoy v. Oklahoma Coca-Cola Bottling Co., 205 Okla. 135, 235 P.2d 948 (1951). In *Van Hoy*, the plaintiff gave a bottle of Coca-Cola containing a dead mouse to his friend. The friend became ill; the plaintiff alleged that this, in turn, frightened him, causing severe mental distress accompanied by nausea and stomach aches. In denying the plaintiff recovery, the Oklahoma Supreme Court stated what remains the definitive law in Oklahoma:

> " 'In law mental anguish is restricted, as a rule, to such mental pain or suffering as arises from an injury or wrong to the person himself, as distinguished from that form of mental suffering which is the accompaniment of sympathy or sorrow for another's suffering or which arises from a contemplation of wrongs committed on the person of another. Pursuant to the rule stated, a husband or wife cannot recover for mental suffering caused by his or her sympathy for the other's suffering. Nor can a parent recover for mental distress and anxiety on account of physical injury sustained by a child or for

CONCLUSION

Courts continue to struggle in their attempts to resolve the issue of how far a defendant's liability should be extended to provide recovery for the mental distress suffered by bystanders. Although there is unanimity in the belief that some limits must be developed to govern the extent to which liability will be imposed upon negligent wrongdoers, divergent opinions exist concerning what those limits should be and how they should be determined.

The arbitrary and frequently unjust results which ensue from attempts to define absolutely the limits of liability, as exemplified in the impact and zone of danger theories, suggest that new standards must be implemented to produce a more equitable method of determining recovery and liability in mental distress cases. Although it seems apparent that it will be impossible to devise a system which is completely equitable in all respects, this is not to suggest that attempts to do so should be abandoned and a retreat made back to the conservative security of the zone of danger rule. All aspects of the law are continually evolving to reflect the changes which occur in society at large. The same process must continue in this highly controversial area of tort law.

Although the controversy will continue, it can be hoped that increasing attention will be focused upon the Hawaii court's analysis of the mental distress issue. The logical conclusions reached by that court should provide a useful example of the type of standards which must be developed to realistically and equitably resolve the conflicting goals of affording plaintiffs the opportunity to recover for legitimate claims of serious mental distress while, at the same time, limiting the actionable effects of defendants' negligence within reasonable boundaries.

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anxiety for the safety of his child placed in peril by the negligence of another.' " *Id.* at 136, 235 P.2d at 949.

In view of the substantial recent developments in this area of the law in other jurisdictions, it is hoped that the court will reanalyze its position when presented with an opportunity to do so in a proper case.