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THE IMPACT OF MOLIEN v. KAISER FOUNDATION HOSPITALS: NEW CONSEQUENCES FOR OLD ACTS?

I. INTRODUCTION

In August 1980, the California Supreme Court allowed a negligence cause of action based solely on emotional distress, without accompanying physical injury. This decision, Molien v. Kaiser Foundation Hospitals,\(^1\) marked a change in existing California law and extended the right to sue in two areas. The court first abolished the long-standing requirement of physical injury contemporaneous with the negligently-caused mental distress. In addition, the mere unreasonable risk of mental or emotional distress was deemed sufficient, in itself, to be tortious conduct. In analyzing the Molien decision, it is necessary to first trace the historical background of the mental distress torts. Molien can then be placed in perspective and the question of whether California is now subjecting a negligent tortfeasor to the spectre of unlimited liability can be answered.

II. STATEMENT OF THE CASE

A. Facts

Mrs. Valerie Molien underwent a routine physical examination at the Kaiser Foundation Hospital. During this examination, one of the hospital staff physicians negligently examined and tested her which resulted in an erroneous diagnosis of infectious syphilis. She was told to advise her husband, Stephen, of the diagnosis. As requested by the physician, Stephen Molien underwent the required blood tests to determine whether he might be the source of his wife's disease. His test results were negative. Subsequently, given what the Moliens believed to be "reliable evidence of a particularly noxious infidelity,"\(^2\) Valerie became increasingly suspicious. Tensions arose between husband and wife. Valerie began proceedings to dissolve the marriage and the Moliens were forced to seek marital counseling.

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1. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).
2. Id. at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.
Upon discovering that the diagnosis was incorrect, plaintiff Stephen Molien sued the staff physician and Kaiser Foundation Hospitals, stating two causes of action: the negligent infliction of emotional distress upon himself as husband, and the loss of consortium occasioned by the negligent diagnosis. The trial court sustained general demurrers to both causes of action and dismissed the case.

B. Issues Presented to the California Supreme Court

On appeal, the California Supreme Court reevaluated the longstanding requirement of a physical injury for claims of both the negligent infliction of emotional distress and loss of consortium. In so doing, the court concentrated on two questions: first, whether a husband could recover for the negligent infliction of emotional distress, unaccompanied by physical injury, due to the erroneous diagnosis of his wife's illness as syphilis; and second, whether he could also recover for loss of consortium, absent physical injury to his wife.

III. Recovery for Emotional Distress Torts Prior to Molien

Courts in the United States traditionally have refused to impose liability for the infliction of mental distress. Judicial steps toward the protection of mental and emotional interests have proceeded at vastly different rates and with a staggering array of approaches, definitions and tests designed to meet the objections made to the recognition of this intangible interest. Courts still attempt to justify pro-plaintiff decisions in order to allay the traditional fears surrounding mental distress recovery: the opening of litigation floodgates; the ease with which such claims might be feigned; and the exposure of defendants to

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5. See, e.g., Wyman v. Leavitt, 71 Me. 227 (1880); Western Union Tel. Co. v. Chouteau, 28 Okla. 664, 115 P. 879 (1911); Knaub v. Gotwalt, 422 Pa. 267, 220 A.2d 646 (1966) (the causal relationship between tortfeasor's negligence and claimant's emotional distress cannot be medically determined); Medlin v. Allied Invest. Co., 398 S.W.2d 270 (Tenn. 1966).

potentially unlimited liability. In addition, legal protection of peace of mind has been characterized as being merely "litigation in the field of bad manners . . . better dealt with by instruments of social control." Therefore, courts have sought to place restrictions on emotional distress recovery.

Many American jurisdictions have retained the requirement of a physical injury either causing or caused by the mental distress in the hope that objectively-manifested physical symptoms will guard against feigned claims and floodgate litigation. A review of cases in these jurisdictions, however, produces a strained myriad of purported "physical" injuries, often no more than a trivial peg on which a favored plaintiff can hang a mental distress claim.

Given an immediate physical injury, plaintiffs have had little difficulty in securing recovery for accompanying psychological injury through the vehicle of "parasitic" damages. Plaintiffs have also

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9. THE RESTATEMENT OF TOXRTS § 46, Comment c (1934) states: The interest in mental and emotional tranquility and, therefore, in freedom from mental and emotional disturbance is not, as a thing in itself, regarded as of sufficient importance to require others to refrain from conduct intended or recognizably likely to cause such a disturbance. Conduct, either of act or omission, which is intended or likely to cause only mental or emotional distress is not tortious.


12. Recovery for emotional distress has been allowed where it was the result of, or “parasitic” to, a violation of a legal right for which other damages were recoverable, most often, the infliction of a physical injury. See Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967) (mental suffering constitutes an element of damages when it follows from the conduct complained of); Denco Bus Lines v. Hargis, 204 Okla. 339, 229 P.2d 560 (1951) (recovery allowed for nervousness and bodily pain caused by bus collision). Such status has often been the predecessor to full recognition: “The treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is today recognized as parasitic will, forsooth, to-morrow be recognized as an independent basis of liability.” I. STREET, THE FOUNDATION OF LEGAL LIABILITY 470 (1906).
maintained their ability to recover when mental distress has been the result of an independent tort such as assault,\textsuperscript{13} false imprisonment,\textsuperscript{14} or where the plaintiff owed the defendant a special duty.\textsuperscript{15}

Until the recognition of the right to recover for the negligent infliction of emotional distress, recovery for psychological injury without physical manifestation had been limited to its intentional infliction, as in the 1920 case of \textit{Nickerson v. Hodges},\textsuperscript{16} decided by the Louisiana Supreme Court. The defendants had buried a container of dirt in the backyard of the plaintiff, an elderly and mentally infirm woman. Telling her of the "pot of gold," they encouraged her to dig it up and watched as she carried it off to city hall. There, she opened it in front of a laughing crowd, discovered the prank, and was publicly humiliated. The outrageous nature of the defendants' conduct gave credibility to her later claim of embarrassment and the court allowed recovery.

Other jurisdictions began to rely on the existence of intentional, extreme conduct as an assurance of the genuineness of an emotional distress claim.\textsuperscript{17} The \textit{Restatement (Second) of Torts} adopted this position in 1948, and extended the cause of action to include both intentional and reckless conduct.\textsuperscript{18} Even with the recognition of intentional infliction of mental distress as an independent tort, recovery could still be predicated on a showing of physical consequences or other independent tort basis.\textsuperscript{19} Jurisdictions adopting the present \textit{Restatement}, however, do not require a physical manifestation or injury if the intentional conduct is directed toward the plaintiff or his immediate fam-


\textsuperscript{15} One of the most typical relationships being that of common carrier and passenger. See, e.g., \textit{Louisville & N.R. Co. v. Bell}, 166 Ky. 400, 179 S.W. 400 (1915). For other relationships giving rise to a special duty, see \textit{Dunn v. Western U. Tel. Co.}, 2 Ga. App. 845, 59 S.E. 189 (1907) (telegraph company and customer); \textit{Wiggins v. Moskins Credit Clothing Store, Inc.}, 137 F. Supp. 764 (D.C.S.C. 1956). \textit{But see} \textit{Slocum v. Food Fair Stores of Fla., Inc.}, 100 So. 2d 396 (Fla. 1958) (no special duty owed to business invitees such as supermarket customer).

\textsuperscript{16} 146 La. 735, 84 So. 37 (1920).


\textsuperscript{18} \textit{Restatement (Second) of Torts} § 46 (1948): "(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

Nevertheless, where the defendant's intentional or reckless conduct has not been such that "an average member of the community... would exclaim, 'Outrageous'" courts have been extremely reluctant to impose liability.22

Given the fears surrounding mental distress recovery in general, and only the traditional duty-foreseeability measure for a negligent defendant's conduct, courts have devised various "tests" by which to evaluate distress claims. Designed to serve as safeguards against unlimited liability, they have often formed impenetrable barriers to otherwise worthy plaintiffs.23 The most common approaches have been the impact rule,24 the zone of danger test25 and, most recently, the Dillon foreseeability test.26

A. Impact Rule

Under the impact rule, the mentally-distressed plaintiff must show an actual physical invasion to recover for its negligent infliction.27 No recovery is allowed, therefore, if the physical injury is merely the product of the emotional distress. In Bosley v. Andrews,28 the plaintiff suffered a heart attack while running from the defendant's bull. Viewing the heart attack as merely the result of her being frightened, the court denied recovery. Had there been some intermediate physical consequence, such as her falling, which could have been targeted as the cause of the attack, recovery might have been granted.

Without the requisite contemporaneous impact, even severe

21. Id. at Comment d.
22. See Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344, 347 (1961) ("actions... of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality"); W. PROSSER, supra note 4, § 54, at 327. See also RESTATEMENT (SECOND) OF TORTS § 312, Comment b, which would allow a negligence cause of action where the defendant's conduct has been unreasonably risky only if bodily harm or injury results from such conduct.
25. See notes 32-39 supra and accompanying text.
26. See notes 40-47 supra and accompanying text.
27. The North Dakota Supreme Court stated, "there can be no recovery for the consequences of fright and shock negligently inflicted in the absence of contemporaneous impact." Whetham v. Bismarck Hospital, 197 N.W.2d 678, 684 (N.D. 1972).
psychic injuries have been precluded entirely from compensation. To remedy the injustice done to worthy plaintiffs, the courts have often strained to find "impacts" in implausible situations. Just as with the requirements of a "physical" injury, however, these semantical games have led to confusion and inconsistency, and only a minority of American jurisdictions continues to apply the impact rule.

B. Zone of Danger Test

Due to the problems of the impact rule, some courts began to allow recovery where the defendant’s negligent conduct merely placed the plaintiff in fear of an actual impact, rather than requiring the impact itself. This variation, known as the "zone of danger" test, was adopted in the Restatement (Second) of Torts and is the prevailing view of the majority of American jurisdictions in the United States. This test grafts on to mental distress cases the theory of duty espoused in Palsgraf v. Long Island Railroad and requires plaintiffs to show

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29. E.g., Mitchell v. Rochester Ry., 151 N.Y. 107, 110, 45 N.E. 354, 355 (1896) (citing lack of impact, the court denied recovery to a formerly pregnant plaintiff who had suffered a miscarriage as a result of defendant's runaway horses halting just on either side of her head).

30. In a bizarre but now famous case, impact was found where defendant's horse "evacuated his bowels" onto the plaintiff's lap. Christy Bros. v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928). See also Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931) (plaintiff suffered no physical injury in traffic accident, yet fainted while taking the defendant's name, suffering a skull fracture as a result).


33. RESTATEMENT (SECOND) OF TORTS § 313(2) (1965):

(2) The rule stated in Subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.


35. 248 N.Y. 339, 162 N.E. 99 (1928): "The orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty." Id. at 349, 162 N.E. at 100. Without foreseeability of harm to the person injured, there can be no duty and, therefore, no negligence with
themselves to have been within a zone of foreseeable personal physical danger to establish their claims for mental distress recovery. So long as the plaintiff is within this zone, suffers mental distress and some physical manifestation of that distress, a cause of action may be maintained for the witnessing of danger or injury to another. Zone of danger proponents justify the use of the test on foreseeability grounds, asserting that a defendant who places the plaintiff in fear of impact or physical injury must certainly anticipate emotional distress as a proximate consequence of his negligent conduct.\textsuperscript{36} The leading case in this area is \textit{Waube v. Warrington}.\textsuperscript{37}

In \textit{Waube}, a husband attempted to recover for the death of his wife. Through the window of their home, the wife had seen a negligent driver strike and kill her daughter. She died from the emotional shock of witnessing this accident. The court, relying on \textit{Palsgraf},\textsuperscript{38} found the wife to have been outside the zone of danger and denied recovery. Her lack of physical proximity rendered her presence unforeseeable to the reasonable man and, as such, the defendant owed her no duty.\textsuperscript{39}

C. \textit{The Foreseeability Test: Dillon v. Legg}

The zone of danger test has had its greatest application in third party-bystander cases\textsuperscript{40} and its greatest criticism in \textit{Dillon v. Legg}.\textsuperscript{41} \textit{Dillon} broadened the zone of danger from that area whose inhabitants were exposed to physical injury to encompass those exposed to mental or emotional injury,\textsuperscript{42} otherwise known as the “zone of fright.”\textsuperscript{43}

The facts of \textit{Dillon} were similar to many of the bystander cases decided under the traditional zone of danger approach. Young Erin Dillon was run over by a negligent driver as her mother and sister watched nearby. Both mother and sister sued the driver for their shock regard to that person. Justice Cardozo, for the majority, limited a defendant’s liability to those individuals within the zone of danger, those fearing for their own safety.

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\item \textsuperscript{36} J. Dooley, \textit{Modern Tort Law} § 15.06 at 315 (1977). See Annot., 64 A.L.R.2d 100, 143 (1959).
\item \textsuperscript{37} 216 Wis. 603, 258 N.W. 497 (1935).
\item \textsuperscript{38} See note 35 supra.
\item \textsuperscript{39} 216 Wis. at —, 258 N.W. at 501.
\item \textsuperscript{41} 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
\item \textsuperscript{42} Id. at 736 n.5, 441 P.2d at 920 n.5, 69 Cal. Rptr. at 80 n.5.
\item \textsuperscript{43} See Comment, \textit{A New Application of an Old Tort: Intentional Infliction of Mental Distress Against Physicians and Hospitals}, 83 DICK. L. REV. 243 (1979).
\end{itemize}
and emotional distress. The trial court sustained a motion for judgment on the pleadings against the mother because she was not within a zone of personal physical danger. The court denied a similar motion against the sister, however, because of the possibility that she was in the zone of danger. Mother and sister were only yards apart when the accident occurred, but that distance alone was allegedly enough to bar the mother's claim. The California Supreme Court, citing the “hopeless artificiality of the zone of danger rule,” held that the mother’s cause of action was established, even though she was in no way physically endangered nor put in fear for her own safety.44

Returning to traditional negligence concepts, the Dillon court abolished the requirement of physical proximity as an absolute barrier to recovery. Liability, according to Dillon, is to be imposed for those injuries, including mental distress, which are reasonably foreseeable.45 Foreseeability is to be determined by three factors:

(1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it.
(2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.46

Dillon did not address the question whether there must be a physical manifestation of the emotional injury, however. Because Mrs. Dillon had suffered a physical injury as a result of her shock, the court expressly confined its ruling to those cases in which physical injury was present.47 Even as it did not establish an absolute rule of liability, the foreseeability guidelines of Dillon provided a springboard for the reassessment and reevaluation of the entire field of emotional distress recovery.

44. 68 Cal. 2d at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.
45. Id. at 740, 441 P.2d at 919, 69 Cal. Rptr. at 79.
47. 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.
D. The Progeny of Dillon: Hawaii

Few jurisdictions outside California have adopted Dillon, either in whole or in part, and some have directly criticized it. Hawaii both accepted Dillon and went beyond it in Rodrigues v. State. In Rodrigues, the state negligently failed to maintain a drainage culvert which caused the flooding of plaintiffs' home and their subsequent emotional distress. The Hawaii Supreme Court held that independent legal protection should be given to the tort of negligent infliction of serious mental distress and adopted the recovery standard as being: "where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."

Four years after this decision, Hawaii, in Leong v. Takasaki, discarded the physical impact or injury requirement and also the need for a blood relationship between plaintiff and victim. In both Rodrigues and Leong, plaintiffs recovered for mental distress which was held to be a reasonably foreseeable consequence of defendant's conduct. Having eliminated all tests, rules and factors other than reasonable foreseeability, Hawaii became the most liberal jurisdiction for emotional distress recovery.

One year after Leong, however, the court feared that the Rodrigues and Leong decisions might come to stand for the proposition that defendants owed a duty of care to refrain from the negligent infliction of mental distress upon any person in the world. It confronted this possibility of "unmanageable, unbearable and totally unpredictable liabil-


51. Id. at —, 472 P.2d at 520.

52. 55 Hawaii 398, 320 P.2d 758 (1974) (in which a young boy was allowed to recover for the negligently-caused death of his step-grandmother which occurred as they were crossing the street).
ity" in *Kelley v. Kokua Sales and Supply, Ltd.*<sup>53</sup> In *Kelley*, the court refused to allow the plaintiff to recover for the death of a California man who suffered a fatal heart attack when he was informed of his daughter and granddaughter's negligently-caused deaths in Hawaii. Stating that the mere requirement of serious mental distress was not enough,<sup>54</sup> the court held that his location was too remote from the scene of the accident. His resulting death was, therefore, not foreseeable. Because of the unforeseeability, the defendant owed him no duty and recovery was denied.<sup>55</sup>

Hawaii, once the vanguard in the mental distress tort area, seemed to be reassessing its position and searching for greater predictability; the opposite effect often occurring under the more flexible, case-by-case approach originally championed by *Dillon*.

IV. DECISION IN *MOLIEN*

In *Molien*, the defense initially invoked the three foreseeability factors of *Dillon* to show that the emotional reaction of Stephen Molien was neither foreseeable nor compensable.<sup>56</sup> Viewing Stephen as merely a third-party bystander to his wife's injury, the defendants were prepared to argue his distance from the scene of the diagnosis and his learning of that diagnosis after its occurrence. The *Molien* court, however, dismissed this theory entirely by making a crucial factual distinction between Stephen Molien and the mother in *Dillon*. Mrs. Dillon was a witness to the injury of another; Stephen Molien "was himself a direct victim of the assertedly negligent act."<sup>57</sup> He was not a bystander to the negligent diagnosis, but a foreseeable victim, thereby rendering irrelevant the arguments of his lack of proximity and non-contemporaneous observance.<sup>58</sup>

Having contrasted the two cases, the *Molien* court nevertheless re-

54. *Id.* at —, 532 P.2d at 676.
55. *Id.* at —, 532 P.2d at 677. The *Kelley* dissent asserted that the majority had taken a step backward and was once again relying on arbitrary and artificial distinctions regarding liability. *Id.* at —, 532 P.2d at 678 (Richardson, C.J., dissenting).
56. See text accompanying note 46 *supra*. The defense alleged that only the third factor had been met, given the husband-wife relationship of the plaintiffs.
57. 27 Cal. 3d at 921, 616 P.2d at 815, 167 Cal. Rptr. at 833.
58. *Id.* at 923, 616 P.2d at 816, 167 Cal. Rptr. at 834. ("[N]o immutable rule can establish the extent of that obligation for every circumstance in the future.") (quoting *Dillon v. Legg*, 68 Cal. 2d 728, 740, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968)).
lied on the general *Dillon* principle of reasonable foreseeability as defining the defendants’ duty and therefore, the scope of the tortious conduct.59 With this basis, the court had little difficulty finding that the defendants owed a duty of due care to Stephen Molien because the “reasonable physician” should have foreseen the risk of emotional injury to the husband, given the nature of the disease negligently diagnosed.60 With duty, foreseeability and tortious conduct established, the court then had to decide whether, under California law, the plaintiff could recover without showing some sort of physical injury.

Prior to this decision, mental distress plaintiffs had to show a physical manifestation in order to maintain their causes of action.61 Nearly one hundred years ago, in *Sloane v. Southern California Railway*,62 the California Supreme Court held that mental suffering “constitutes an aggravation of damages when it naturally ensues from the act complained of,” although mental suffering, in itself, could not be actionable.63 The *Molien* court cited two principles from *Sloane* which “still pervade the law of negligence”:64 that emotional distress recovery must be limited to parasitic status and that mental distress could be neatly classified as being either physical or psychological in nature.65 As evidence of the pervasiveness of these concepts, the court stated the then-

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59. 68 Cal. 2d at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.
60. 27 Cal. 3d at 923, 616 P.2d at 816-17, 167 Cal. Rptr. at 834-35. California treats family emotional attachments, as well as legal status, as relevant to the determination of foreseeability. See *Mobaldi v. Board of Regents*, 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976) (held foreseeable that a foster mother would suffer severe emotional distress upon seeing her foster child become comatose after receiving a negligently-administered overdose of glucose, where hospital knew of her relationship to the victim). Note also the status of the false imputation of syphilis as slander per se. See Yasser, *Defamation as a Constitutional Tort: With Actual Malicefor All*, 12 TULSA L.J. 601, 605 (1977).

63. *Id.* at 680, 44 P. at 322.
64. 27 Cal. 3d at 924-25, 616 P.2d at 817, 167 Cal. Rptr. at 835.
65. *Id.*
existing law in California, the foundation of which rested on those principles advanced in *Sloane*.66

The *Molien* court first tried to find the policy behind the physical manifestation requirement. It concluded that the physical manifestation was "a screening device to minimize a presumed risk of feigned injuries and false claims."67 Referring to the physical injury requirement as one of the "artificial barriers,"68 the *Molien* majority was convinced that these "presently existing artificial lines of demarcation" were not the only appropriate means of avoiding false claims. The majority criticized the physical injury requirement as being both overinclusive and underinclusive, allowing even the most trivial injury to suffice, yet denying court access to otherwise worthy plaintiffs.69

Following the lead of Hawaii and *Rodrigues* in abandoning the need for physical injury, *Molien* discussed the standard of proof to be used in future mental distress cases: "where proof of mental distress is of a medically significant nature" or where the claim is supported by "some guarantee of genuineness in the circumstances of the case."70 Where available, the court notes, objective medical testimony could be used to substantiate emotional distress claims, but whether or not susceptible to this testimony, the claim is to be a "matter of proof to be presented to the trier of fact."71

Having justified its departure from the earlier cases, the court rec-

66. *Id.* at 925, 616 P.2d at 818, 167 Cal. Rptr. at 836:

There can be no recovery of damages for emotional distress unaccompanied by physical injury where such emotional distress arises only from negligent conduct. However, if a plaintiff has suffered a shock to the nervous system or other physical harm which was proximately caused by negligent conduct of a defendant, then such plaintiff is entitled to recover damages for any resulting physical harm and emotional distress.

*Id.* (quoting BAJI No. 12.80, 6th ed. 1977).


68. 27 Cal. 3d at 926, 616 P.2d at 818, 167 Cal. Rptr. at 836. California has also relied on other traditional means to guarantee the sincerity of a plaintiff's claim, such as requiring an independent cause of action other than personal injury, *see*, *e.g.*, Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d 917, 122 Cal. Rptr. 470 (1975); or showing extreme, outrageous and intentional conduct, *see*, *e.g.*, Alcorn v. Anbro Engineering, Inc., 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970); Guillory v. Godfrey, 134 Cal. App. 2d 628, 286 P.2d 474 (1955); State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952).

69. 27 Cal. 3d at 928-29, 616 P.2d at 820, 167 Cal. Rptr. at 838.

70. *Id.* at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

71. *Id.*
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recognized the negligent infliction of emotional distress as an independent cause of action, thereby allowing Stephen Molien to pursue his claim.

V. Analysis

Immediately following its announcement, the Molien decision provoked a wide range of criticism and comment.72 Questions ranged from whether the decision would result in greater justice or chaos, the ultimate effect on jurisdictions other than California, and whether case-by-case adjudication of foreseeability would be panacea or placebo.

Molien is not simply a wild card in the hundred-year history of emotional distress cases. Each trend or test, such as impact, zone of danger, Dillon, and the requirement of a physical injury, has been an attempt to answer the same question posed by the court in Molien: "to what extent should the law permit recovery of damages for the negligent infliction of emotional distress?"73 Molien is merely another attempt to provide relief for the truly worthy plaintiff. The problem with all of the approaches in this area, however, is how the court is to determine who is indeed "worthy," given the imprecise, intangible nature of the interest sought to be protected. It is a classic example of the competing policies of tort law, deterring intrusions into the plaintiff's personal interest, yet correlating the liability of the defendant only to the extent of the degree of culpability involved.74

In theory, the position taken by the Molien majority is admirable for its expressed rejection of the traditional mechanical devices such as the impact rule75 and the zone of danger test.76 Given its desire to make California what might be termed a "barrier-free" jurisdiction for emotional distress claims, however, the majority devotes most of its opinion to what was done in the past and what should not be done. The extent to which the law should affirmatively allow recovery, however, remains just as evasive, just as illusive, as before Molien.

Future California cases relying on Molien which involve the negligent infliction of emotional distress will certainly use foreseeability-defined duty as the critical factor in determining liability. If the plaintiff has suffered an injury to a legally protected interest, recovery will not be based on such former requirements as impact, physical manifesta-

73. 27 Cal. 3d at 918-19, 616 P.2d at 814, 167 Cal. Rptr. at 832.
74. See PROSSER, supra note 4, at 23.
75. See text accompanying notes 27-31 supra.
76. See text accompanying notes 32-39 supra.
tion or zone of danger. Molien sees these devices as invalid, mechanical controls used by courts to justify fears which the Molien majority finds outmoded: (1) the fear of floodgate litigation; (2) the possibility of feigned claims; and, (3) unlimited liability for defendants. Proponents of Molien will first point out that increased litigation, while not a valid reason for denying protection to recognized interests,77 has not overwhelmed the courts in the post-Dillon years with an overabundance of emotional distress claims.78 In addition, advances in medical knowledge, unknown to prior generations, have provided new means by which emotional injury may be measured and evaluated. Future medical testimony will shift from having to define what is a "physical" injury,79 to the availability of objective evidence or corroboration to validate the severity of the distress claimed.80

The fear that defendants in emotional distress cases will be subjected to potentially unlimited liability cannot be so easily allayed.81 The failure of the Molien majority to answer its own question of the extent of liability raises serious doubts about how juries are to be guided in their assessment of a claim. While determinations of "reasonable foreseeability" will be the province of the court,82 the determi-

77. It is the business of the law to remedy wrongs that deserve it, even at the expense of a "flood of litigation;" and 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.
Prosser, supra note 17, at 877.
79. See notes 10-11 supra and accompanying text.
80. See Tobin v. Grossman, 24 N.Y. 2d 609, 613, 301 N.Y.S.2d 554, 556, 249 N.E.2d 419 (1969), in which the court stated, "Mental traumatic causation can now be diagnosed almost as well as physical traumatic causation." But cf. 27 Cal. 3d at 935, 616 P.2d at 825, 167 Cal. Rptr. at 843 (Clark, J., dissenting) ("No empirical evidence exists that psychiatrists and jurors have since become better equipped to evaluate the traumatic effect of psychic stimuli."); Smith, Relation of Emotions to Injury and Disease, 30 VA. L. REV. 193, 212 (1944) (warning that an "eagerness to be progressive may cause extravagant credulity and injury to scientific standards of proof"). See generally Goodrich, Emotional Disturbance as Legal Damage, 20 MICH. L. REV. 497 (1922); Smith, Problems of Proof in Psychic Injury Cases, 14 SYRACUSE L. REV. 586 (1963); see also Cantor, supra note 8, at 435 ("very rarely today can a malingerer recover damages").
81. Accord, Corso v. Merrill, 119 N.H. 647, 406 A.2d 300, 305 (1979) ("[t]he most convincing policy reason and the one most often mentioned is the threat of unlimited and burdensome liability if the courts permit recovery.") (quoting Jelley v. LaFlame, 108 N.H. 471, 238 A.2d 728 (1968)).
82. 27 Cal. 3d at 922, 616 P.2d at 816, 167 Cal. Rptr. at 834 ("Such reasonable foreseeability . . . contemplates that courts on a case-by-case basis, analyzing all the circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen. The courts thus mark out the areas of liability, excluding the remote and unexpected.") (quoting Dillon v. Legg, 68 Cal. 2d 728, 741, 441 P.2d 912, 921, 69 Cal. Rptr. 72, 81 (1968)). See generally Comment,
nation of whether and to what extent the defendant's conduct caused the emotional distress is to be left to the jury. With reasonable foreseeability established, jurors will be asked to rely on their own experiences to assess whether there is "some guarantee of genuineness in the circumstances of the case." The highly subjective nature of this evaluation is in contrast to former questions of impact or whether the plaintiff was in a zone of danger. While some may cite this shift in responsibility as being the death knell for outmoded policy-based barriers, others may see it as an open door to unpredictable and potentially unlimited liability, where no definitions remain for the scope of tortious conduct.

Even as Molien may be placed on the general Dillon continuum in its fairness-to-plaintiff underpinnings, the majority summarily dismissed the need to apply Dillon's three-factor requirement to Stephen Molien. The majority found Stephen to be a direct victim of the tortious conduct, and not a mere bystander. Yet, this distinction becomes blurred to the point of non-existence elsewhere in the opinion. The majority refers to cases of third-party bystander recovery to support its position, yet did not forthrightly discuss whether or how a future plaintiff's status as a bystander should be taken into account in an emotional distress context. Was Stephen Molien judicially sidestepped into being a "direct" victim, thereby avoiding Dillon's three-factor scrutiny which he could not have overcome?

It is the spectre of unlimited liability which provokes the dissent of Justice Clark. With Justice Richardson concurring, he states that the majority has allowed, "for the first time—a money award against one who unintentionally disturbs the mental tranquility of another." Within the framework of this single decision, the battle lines are once

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83. 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839 (citing with approval Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509, 520 (1970)).
84. See text accompanying note 46 supra.
85. Justice Clark cautions that "the majority cannot escape the Dillon requirement that even though foreseeable, emotional trauma must result from physical injury to another." 27 Cal. 3d at 934 n.1, 616 P.2d at 824 n.1, 167 Cal. Rptr. at 842 n.1 (Clark, J., dissenting).
86. Only the third factor, that of a close relationship with the victim, could have been satisfied, had the Dillon bystander analysis been applied to Stephen Molien. Cf. Johnson v. State, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975) (daughter recovered for emotional distress sustained when hospital negligently misinformed her that her mother had died. The court, however, analogized her situation to two exceptions to the general rule of non-recovery; the negligent transmission by a telegraph company of a message announcing death and the negligent mishandling of a corpse; finding her to be the one to whom the duty was directly owed.).
87. 27 Cal. 3d at 933, 616 P.2d at 823, 167 Cal. Rptr. at 841 (Clark, J., dissenting).
again drawn in century-old fashion. Justifying the traditional, pre-
*Molien*, California approach, Justice Clark refers to the commonplace
nature of psychic disturbances, the problem with their objective mea-

sured and legislative prerogative in the creation of new causes of
action. 88 Fearing, as did the dissent in *Dillon*, that California courts
were entering a “fantastic realm of infinite liability,” 89 Clark
prophesizes that the *Molien* majority has managed to “overstretch the
new elasticity proclaimed by the *Dillon* majority.” 90

Where the majority treated the requirement of physical injury as a
“barrier,” 91 the dissent deems it a “safeguard,” 92 preventing juror
abuse, whose judgment is thought to be less reliable when the defend-
ant’s conduct has been less than intentional, extreme and outrageous. 93
Commenting further on the appropriateness of punishing the negligent
conduct of the physician, Clark asserts that “the imposition of liability
is far disproportionate to the degree of culpability” 94 and that it is soci-

ety which will bear the cost “by sanctioning claims for hurt feelings.” 95
But even with the expressed concerns over the rejection of the physical
manifestation requirement, there is a perceptible trend in other juris-
dictions away from impact and zone of danger, into the case-by-case

88. *See also* Hoyem v. Manhattan Beach City School District, 22 Cal. 3d 508, 523-28, 585
P.2d 851, 860-63, 150 Cal. Rptr. 1, 10-13 (1978) (setting forth the policies and philosophies of
Justices Clark and Richardson, dissenting therein as in *Molien*).
89. 27 Cal. 3d at 934, 616 P.2d at 824, 167 Cal. Rptr. at 842 (Clark, J., dissenting) (quoting
*Dillon v. Legg*, 68 Cal. 2d 728, 744, 441 P.2d 912, 928, 69 Cal. Rptr. 72, 88 (1968) (Burke, J.,
dissenting)). This quote is actually attributable to the majority opinion in *Amaya v. Home Ice,
90. 27 Cal. 3d at 924, 616 P.2d at 823, 167 Cal. Rptr. at 841 (Clark, J., dissenting).
91. *Id.* at 926, 616 P.2d at 818, 167 Cal. Rptr. at 836.
92. *Id.* at 934, 616 P.2d at 824, 167 Cal. Rptr. at 842 (Clark, J., dissenting).
93. *Id.* (referring to the majority’s reliance on *Silznoff*).
Rptr. 33, 45 (1963); *Bauer, The Degree of Moral Fault as Affecting Defendant’s Liability*, 81 U. Pa.
L. Rev. 586 (1933).
95. 27 Cal. 3d at 936, 616 P.2d at 825, 167 Cal. Rptr. at 843 (Clark, J., dissenting). In a
footnote to his dissent, Justice Clark stated that the net effect of the judgment was to permit
recovery for what actually amounted to a negligent alienation of affections, a cause no longer
recognized in California. *Id.* at 936 n.3, 616 P.2d at 825 n.3, 167 Cal. Rptr. at 843 n.3. The
general sentiments of Justice Clark are paralleled by the dissent in *Sinn v. Burd*, 404 A.2d 688 (Pa.
1979):

Here, if there is no reasonable measure of plaintiff’s pain, then any recovery will be
essentially speculative. Then, too, the nature of our society requires each of us a remark-

able degree of 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 genuine-
ness, then at least the intensity and thus the nature of the injury, may be difficult to assess
where it causes no physical injury.

*Id.* at 672 (Roberts, J., dissenting).
foreseeability evaluation of Dillon. This liberalization, coupled with recent medical advances, will make it increasingly difficult for courts to justify any of the existing, arbitrary, prerequisites to recovery.

VI. CONCLUSION

The development of emotional distress law has been described as varying from “the spirit of extreme caution to hesitant experimentation.” 96 The first mental distress cases brought with them a plethora of fears and predictions of future problems, for which arbitrary and mechanical tests were designed. Such requirements as physical impact, zone of danger and outrageous conduct have proven to be unwieldy, with often inequitable results. In Dillon, the California Supreme Court departed from the still-prevailing zone of danger test. Molien, in abolishing the physical injury requirement, represents an even further departure. In order to pursue a cause of action, all that an emotionally distressed plaintiff must show is that the injury was reasonably foreseeable and that the resulting distress was serious. Having abolished the physical injury requirement, California must now rely on juror judgment and on such words as “foreseeability” and “genuineness” to place limitations on a defendant’s liability.

Is the recognition of a new tort for the negligent infliction of emotional distress, in the words of Justice Clark, merely creating “new consequences for old acts” 97 and a step into the “fantastic realm of infinite liability” 98 as prophesied by the dissenters in Dillon? Acceptance of the Molien standards will most certainly be hindered by its failure, once again, to define the extent to which a negligent defendant can be held liable. But by placing Molien on the historical continuum of emotional distress law, the trend is clear. The artificially-created barriers to recovery for the negligent infliction of emotional distress are being dismantled. Given the century-old fears surrounding the recognition and later protection of this interest, it is not surprising that this process is proceeding at less than a revolutionary rate. But the direction is unfailingly toward the application of traditional negligence principles, with the concepts of duty, breach, causation and injury, unfettered by additional requirements. The consequence for the “old acts” is by no

97. 27 Cal. 3d at 937, 616 P.2d at 826, 167 Cal. Rptr. at 844 (Clark, J., dissenting).
98. 68 Cal. 2d 728, 744, 441 P.2d 912, 928, 69 Cal. Rptr. 72, 88 (1968) (Burke, J., dissenting).
means a new one; *Molien* merely representing a further step toward classic negligence analysis for emotional distress claims.

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