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Ochoa v. Superior Court of Santa Clara County: New Grounds or Old Guidelines?

In *Ochoa v. Superior Court of Santa Clara*¹ the California Supreme Court considered the application of *Dillon v. Legg*² in an action brought by a bystander mother for negligent infliction of mental distress. The court rejected the narrow requirement that the shock arise from an observation of a brief and sudden occurrence causing injury to another,³ or in other words, the need for temporal proximity.⁴ Instead, the court held that when the plaintiff observes defendant's negligent conduct, and the injury to the victim, and has a contemporaneous awareness that defendant's conduct or lack of conduct caused the injury a cause of action is stated.⁵ The *Ochoa* court acknowledged the problem of mechanical application of the *Dillon* factors,⁶ yet chose another potentially arbitrary standard of replacement.⁷ This Note will discuss whether the relaxation of the *Dillon* factor of "temporal proximity"⁸ provides a solution to the problems created by the *Dillon* decisions.⁹

Part I of this Note sets forth the facts of *Ochoa* and summarizes the majority and dissenting opinions. Part II presents the legal background of the negligent infliction of emotional distress cause of action for a bystander. Part III analyzes the negligent infliction of emotional distress cause of action in light of the *Dillon* rule. In addition, Part III examines fundamental flaws that exist in both intended and actual application of the *Dillon* decision. This Note concludes that the recent interpretation of the *Dillon* rule by the court in *Ochoa* fails to remedy those flaws.

1. 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985).

2. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

3. *Ochoa*, 39 Cal. 3d at 170, 703 P.2d at 8, 216 Cal. Rptr. at 668.

4. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, §54 at 366 (4th ed. 1971). The "bystander proximity" doctrine holds that harm to a bystander is foreseeable if the bystander has physical, temporal, and relational proximity to the victim and the accident. *Id.*

5. *Ochoa*, 39 Cal. 3d at 170, 703 P.2d at 8, 216 Cal. Rptr. at 668.

6. *Id.* at 178, 703 P.2d at 14, 216 Cal. Rptr. at 674 (J. Grodin, concurring) ("...the *Dillon* guidelines have proved troublesome to the lower courts...").

7. See *infra* notes 154-55 and accompanying text.

8. See *infra* note 82 and accompanying text.

9. See *infra* notes 154-169 and accompanying text.

I. THE CASE

A. *The Facts*

Thirteen-year-old Rudy Ochoa was in the custody of the Santa Clara County juvenile hall for almost a month when he became ill with an apparent cold.¹⁰ Rudy's parents visited him in the infirmary and found him "extremely ill" and experiencing excruciating pain.¹¹ Rudy's mother expressed concern to the juvenile hall authorities that her son was not receiving the necessary treatment but she was assured that Rudy was well cared for.¹² The following day Mrs. Ochoa visited Rudy and found that his condition had worsened.¹³ Rudy appeared dehydrated, his skin was clammy, and he appeared to be convulsing and hallucinating during her visit.¹⁴ Mrs. Ochoa pleaded with the authorities to allow Rudy to be seen by the family physician.¹⁵ She even offered to take Rudy in handcuffs.¹⁶ The juvenile hall authorities refused, insisting Rudy only had the flu and would be given a penicillin shot by the attending physician at the hall.¹⁷ Mrs. Ochoa continued applying cold compresses to Rudy as he continued to scream in pain and vomit.¹⁸ Rudy was not transferred to an intensive care unit, X-rays were not taken, neither blood nor urine tests were performed.¹⁹ In the evening, Mrs. Ochoa was forced to leave Rudy despite his pleas for her to remain. Rudy died the following morning of bilateral pneumonia.²⁰

Mr. and Mrs. Ochoa sued Santa Clara County and four county agents and employees,²¹ alleging nine causes of action.²² The trial court sustained demurrers to all counts relating to negligent infliction of

10. *Ochoa*, 39 Cal. 3d at 162, 703 P.2d at 3, 216 Cal. Rptr. at 663.

11. *Id.* at 163-64, 703 P.2d at 3-4, 216 Cal. Rptr. at 663-64.

12. *Id.* at 163, 703 P.2d at 3, 216 Cal. Rptr. at 663.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 164, 703 P.2d at 4, 216 Cal. Rptr. at 664.

19. *Id.*

20. *Id.*

21. Although the county had assumed that it was no longer in this action, the Ochoas sought a writ of mandate directing the trial court to reverse its order sustaining the demurrers of the county as well as the individual defendants. *Id.*

22. Plaintiffs asserted that they had stated causes of action for intentional infliction of emotional distress. The court held that plaintiffs had not pleaded arguments on the subject, the plaintiffs having wrongly assumed that a cause of action for intentional infliction of emotional distress may be established on the same theory as that of negligent infliction of emotional distress. *Id.* at 165.

emotional distress.²³ The Ochoas petitioned for a writ of mandate to compel trial court to set aside the order.²⁴ The California Supreme Court issued the writ.²⁵

B. *The Opinion*

1. *Majority Opinion*

In *Ochoa v. Superior Court*, the California Supreme Court addressed the issue of whether a bystander may state a cause of action for negligent infliction of mental distress, when the death is not the result of a brief and sudden occurrence viewed contemporaneously by the bystander.²⁶ The court relied upon the seminal case of *Dillon v. Legg* which set forth three factors to be applied in determining whether a defendant owes a duty to a plaintiff who is a bystander based upon foreseeability of risk.²⁷ The first factor is a consideration of the plaintiff's proximity to the accident. The second factor is whether the shock resulted from a direct emotional impact upon the plaintiff resulting from the sensory and contemporaneous observance of the accident or from learning of the accident from others after its occurrence. The third factor to be considered is whether the plaintiff and the victim were closely related.²⁸ The *Ochoa* court acknowledged the existence of the first and third *Dillon* factors. With regard to the second *Dillon* factor,²⁹ however, the findings of the court revealed the injury to Rudy was not the result of a sudden occurrence.³⁰ Cases following *Dillon*, but prior to *Ochoa* held that if the victim's death or injury was not the result of sudden occurrence, no cause of action existed.³¹ The *Ochoa* court, however, did not feel constrained by prior precedent. The court rejected the "sudden occurrence" element in the temporal proximity requirement as an unwarranted restriction on the ability of the plaintiff to recover.³²

23. *Id.* at 164, 703 P.2d at 4, 216 Cal. Rptr. at 664.

24. *Id.*

25. *Id.* at 177, 703 P.2d at 13, 216 Cal. Rptr. at 673.

26. *Id.* at 167, 703 P.2d at 6, 216 Cal. Rptr. at 666.

27. *Id.* at 166, 703 P.2d at 5, 216 Cal. Rptr. at 665.

28. *Id.*

29. See Annots., 5 A.L.R. 4th 833 (1981).

30. *Ochoa*, 39 Cal. 3d at 163-64, 703 P.2d at 3-4, 216 Cal. Rptr. at 663-64. Mrs. Ochoa alleged that the defendant's negligent conduct was omission (i.e., failure to provide adequate medical care for Rudy), rather than commission. *Id.*

31. See *Jansen v. Children's Hospital Medical Center*, 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1973); *Hair v. County of Monterey*, 45 Cal. App. 3d 538, 119 Cal. Rptr. 720 (1976); *Justus v. Atchison*, 19 Cal. 3d 564, 139 Cal. Rptr. 97, 565 P.2d 122.

32. "Such a restriction arbitrarily limits liability when there is a high degree of foreseeability of shock to the plaintiff and the shock flows from the abnormal event." *Ochoa*, 39 Cal. 3d

The *Ochoa* court reasoned that the factors set forth in *Dillon* were mere guidelines to be used in assessing whether the plaintiff was a foreseeable victim of the defendant's negligence.³³ Even though Rudy's death did not result from a brief or sudden occurrence, the defendants could easily foresee that Mrs. Ochoa would be emotionally distressed by their conduct.³⁴ The test of foreseeable victim articulated by the majority was satisfied by the witness observing the defendant's conduct and the child's injury, with the contemporaneous awareness that the defendant's conduct or lack thereof was causing the harm to the child. These elements demonstrate that the defendants had a duty to Mrs. Ochoa as a witness to their negligent acts³⁵ and therefore Mrs. Ochoa should be permitted to recover. An additional factor in the decision of the court was the public policy determination that sudden occurrence restriction arbitrarily limits liability when a high degree of foreseeability of shock to the plaintiff exists.³⁶ Six justices concurred in the majority opinion. Chief Justice Bird wrote a concurring and dissenting opinion.

2. *Dissenting Opinion*

In a separate concurring and dissenting opinion,³⁷ Chief Justice Bird expressed concern that the majority, while properly rejecting the "sud-

at 168, 703 P.2d at 7, 216 Cal. Rptr. at 667. California courts previously held that visual perception of the impact causing death or injury is not required. See *Krause v. Graham*, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977) Plaintiff husband was sitting in his parked car while his wife removed groceries from the trunk. The defendant's car approached the plaintiff's car at high speed, killing plaintiff's wife. The cause of action was granted despite plaintiff's not seeing his wife being struck. This demonstrates that contemporaneous observance of the immediate consequences of a negligent act may be sufficient to allow recovery. See also *Archibald v. Braverman*, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1973), in which plaintiff's 13-year-old son sustained severe injuries as a result of a gunpowder explosion. The plaintiff did not hear or see the explosion but came upon the scene to aid her son immediately after the explosion. Recovery for the mother's emotional distress was allowed. *Id.*

33. *Ochoa*, 39 Cal. 3d at 170, 703 P.2d at 7, 216 Cal. Rptr. at 687.

34. *Id.* at 171, 703 P.2d at 9, 216 Cal. Rptr. at 669.

35. W. PROSSER, *supra* note 4, §54 at 333. A defendant who can reasonably anticipate any harm to the plaintiff owes a duty of care to that plaintiff. *Id.*

36. The *Ochoa* court also rejected the defendant's argument that *Dillon* should not apply since Mrs. Ochoa was voluntarily present where she was likely to be upset by the defendant's conduct. *Ochoa*, 39 Cal. 3d at 171, 703 P.2d at 9, 216 Cal. Rptr. at 669. See *Justus v. Atchison*, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977). In *Justus*, recovery was denied for a father's distress resulting from witnessing the birth of a stillborn fetus. *Id.* Some courts have read dictum in *Justus* to imply that recovery is precluded when the plaintiff is voluntarily at the scene of the traumatic event. See, e.g., *Cortez v. Marcias*, 110 Cal. App. 3d 640, 650, 167 Cal. Rptr. 905, 914; *Austin v. Regents of University of California*, 89 Cal. App. 3d 354, 361, 152 Cal. Rptr. 420, 427 (Jefferson, J., dissenting) (1979). See generally *Nolan and Ursin, Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583, 597 (1982).

37. *Ochoa* 39 Cal. 3d at 181-96, 703 P.2d at 16-27, 216 Cal. Rptr. at 676-87.

den occurrence” requirement, replaced the requirement with another arbitrary limitation.³⁸ As an alternative to the test proposed by the majority, Chief Justice Bird urged the court to apply a test of reasonable foreseeability.³⁹ Chief Justice Bird’s proposed “reasonable foreseeability” test would conform the emotional distress area to other areas of negligence law.⁴⁰ Therefore even in the bystander situation, the defendant owes a duty of care when that defendant can reasonably foresee that serious emotional distress to the plaintiff could result from the defendant’s conduct.⁴¹ Rather than limit liability through the application of arbitrary elements, reasonable foreseeability would provide the limit.

II. LEGAL BACKGROUND

A. Early Case Law: The Impact Rule

The common law did not allow recovery for mental distress arising from negligent conduct.⁴² This rule was based upon the belief that damages for emotional distress were too difficult to measure.⁴³ In addition, case law reflected the belief that recovery for emotional

38. *Id.* at 190, 703 P.2d at 22, 216 Cal. Rptr. at 682 (“Liability should not hinge on the observation of the defendant’s wrongdoing.”).

39. *Id.* at 190, 703 P.2d at 23, 216 Cal. Rptr. at 683. England and Hawaii have held reasonable foreseeability is the appropriate test for determining a defendant’s liability for negligent infliction of mental distress. See *McLoughlin v. O’Brian*, 2 All Eng. Rep. 298 (1982). In *McLoughlin*, plaintiff was told of injuries and death to members of her family resulting from an auto accident, and was severely shocked upon seeing their injured condition at the hospital. The court concluded that no policy considerations existed sufficient to justify limiting the liability of tortfeasors who have caused reasonably foreseeable emotional distress to another. *Id.* See also *Campbell v. Animal Quarantine Station, Etc.*, 63 Hawaii 557, 632 P.2d 1066 (1982). The *Campbell* court upheld an award of damages for emotional distress suffered when plaintiff’s dog died as a result of defendant negligently transporting the dog to a private veterinarian hospital. *Id.* The court indicated no requirement existed that the tortious event be witnessed by the plaintiff. *Leong v. Takasaki*, 55 Hawaii 398, 520 P.2d 758 (1974). *Dillon* guidelines should not bar recovery but only be indicative of the degree of mental distress suffered. *Rodriguez v. State*, 52 Hawaii 156, 472 P.2d 509 (1970). Liability for negligent infliction of emotional distress should be determined by the application of general tort principles. *But see Kelly v. Kokua Sales and Supply, Ltd.*, 56 Hawaii 204, 532 P.2d 673 (1975). Recovery was denied when a grandfather suffered a fatal heart attack when informed that his daughter and granddaughter had been killed in an auto accident in another state. The court required that plaintiff be within a reasonable distance of the accident. *Id.*

40. *Ochoa*, 39 Cal. 3d at 191, 703 P.2d at 23, 216 Cal. Rptr. at 683. See generally *Diamond, Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTING L.J. 477, 504 (1984).

41. W. PROSSER, *supra* note 4, §54 at 333. Unlimited liability would be an unreasonable burden on all human acts. *Id.*

42. See G. GREGORY, H. KALVEN & R. EPSTEIN, *CASES AND MATERIALS ON TORTS* 952 (3d. ed. 1977).

43. *Leibeson, Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. FAM. L. 163, 163 (1976-77) (“...there was no assurance that psychiatric supply

distress would subject defendants to fraudulent claims from an unlimited pool of potential plaintiffs.⁴⁴ Other policy considerations used to deny a cause of action included the difficulty of establishing proximate cause and the fear of increased litigation.⁴⁵

Gradually, however, the concerns that previously prevented recovery for emotional distress weakened. By the turn of the century, courts were allowing recovery for parasitic damages.⁴⁶ Parasitic damages were awarded when negligent conduct of the defendant caused an impact on plaintiff's person resulting in physical injury.⁴⁷ After proving impact, a plaintiff could claim damages for both physical and emotional injury.⁴⁸ The impact requirement reflected the intention of the courts to provide some verifiable guarantee of the validity of plaintiff's claim.⁴⁹ If impact was substantial, the impact theory was defensible. A plaintiff who suffered a serious physical injury could reasonably be expected to experience emotional injury. In application, however, courts permitted recovery for mental trauma even though physical consequences were slight.⁵⁰ The result was that damages for mental distress could be awarded to the victim experiencing a minor impact,⁵¹ while the bystander who suffered severe emotional distress was denied recovery.⁵² Many courts rejected the impact rule, recognizing that the impact requirement did little to increase the guarantee of genuineness of emotional injury.⁵³ The frequent bending of the impact rule and the discontent with the purported justifications for the rule, prompted most jurisdictions to replace it with the zone of danger test.⁵⁴

had become sophisticated enough to satisfactorily establish a cause and effect relationship between the injury and the incident which allegedly gave rise to it.").

44. See *Sinn v. Burd*, 486 Pa. 146, 175-85, 404 A.2d 672, 689-90 (1979) (Roberts, J. dissenting).

45. See e.g., *Tobin v. Grossman*, 24 N.Y.2d 609, 615-16, 249 N.E.2d 419, 422 (1969).

46. W. PROSSER, *supra* note 4 §54 at 330; Magruder, *Mental and Emotional Distress in the Law of Torts*, 49 HARVARD L. REV. 1033, 1049 (1936). The treatment of any element of damages as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor that is today recognized as parasitic will tomorrow be recognized as an independent basis of liability. *Id.*

47. *Dillon*, 68 Cal. 2d 738, 441 P.2d at 919, 69 Cal. Rptr. at 79; STREET, 1 FOUNDATIONS OF LEGAL LIABILITY 470 (1906); RESTATEMENT (SECOND) OF TORTS §456, comment b (1965).

48. *Dillon*, 68 Cal.2d 238, 441 P.2d at 919, 69 Cal. Rptr. at 79.

49. See Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40, 41 (1956).

50. W. PROSSER, *supra* note 4, §54 at 331. Impact had meant a slight blow, a trifling burn, a trivial jolt or jar, dust in the eye, or inhalation of smoke. *Id.*

51. See Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497, 504 (1922). "The magic formula 'impact' is pronounced; the door opens to the full joy of complete recovery." *Id.*

52. W. PROSSER, *supra* note 4, §54 at 333.

53. Comment, *Molien v. Kaiser Foundation Hospitals: California Expands Liability for Negligently Inflicted Emotional Distress*, 33 HASTINGS L. J. 291, 294 (1981).

54. Note, *Negligent Infliction of Emotional Distress in Accident Cases: The Expanding*

B. Zone of Danger

California courts never accepted the impact rule,⁵⁵ opting instead for the zone of danger test.⁵⁶ The impact rule was predicated on the belief that mental distress could not be sustained without some physical injury.⁵⁷ In contrast, the zone of danger test was based on the belief that emotional injuries could not exist without the threat of physical trauma.⁵⁸ Courts, unhappy with the impact rule, sought to expand liability by allowing recovery to a plaintiff who was within an area of potential physical harm at the time of the defendant's negligent act.⁵⁹ A plaintiff could recover not only for injuries sustained as a direct result of a physical impact but also for injuries sustained as a result of emotional harm caused by the plaintiff's fear for personal safety.⁶⁰ Many jurisdictions, including California, justified the expansion of liability on the grounds that since a defendant can reasonably foresee the harm to a person within the zone of danger, a duty of care arises.⁶¹

In *Amaya v. Home Fuel and Ice, Inc.*,⁶² the California Supreme Court addressed the issue of the scope of the zone of danger test. In *Amaya*, the plaintiff was a pregnant mother who witnessed the death of her seventeen-month-old son when he was run over by a truck negligently driven by the defendant. The court denied recovery, noting that no American cases supported recovery for mental distress arising solely from the fear for the safety of another.⁶³ The court

Definition of Liability, 1 W. NEW ENG. L. R. 798 (1979). See also RESTATEMENT (SECOND) OF TORTS, §436 (1966 & Supp. 1977) (listing states that still follow impact rule).

55. *Cook v. Maier*, 33 Cal. App. 2d 581, 92 P.2d 434 (1939). Recovery was allowed for "injury to the nervous system" arising from an automobile collision on plaintiff's land which caused the plaintiff to fear for his own safety. *Id.* at 584, 92 P.2d at 436. Fright alone is not an "injury" that may be the basis of a claim for damages, but physical injury due to fright is compensable. *Clough v. Steen*, 3 Cal. App. 2d 392, 394, 39 P.2d 889, 890.

56. *Cook*, 33 Cal. App. 2d at 584, 92 P.2d at 436.

57. See *supra* notes 43-53 and accompanying text.

58. The zone of danger rule differs from the impact rule. Under the impact rule, defendant's negligent act had to include a physical impact resulting in injury, while under the zone of danger rule, recovery was allowed if the plaintiff could show a reasonable fear of the impact.

59. See *Cook*, 33 Cal. App. 2d at 584, 92 P.2d at 433. Impact is not necessary for recovery. *Id.*

60. See *Amaya v. Home Fuel and Ice, Inc.*, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

61. Comment, *Limiting Liability for the Negligent Infliction of Emotional Distress: The "Bystander Recovery" Cases*, 54 S. CAL. L. REV. 847, 849 (1981). The zone of danger test did not allow recovery for emotional distress resulting from fear caused by witnessing injury to a third person. Because recovery for emotional harm evolved from the common law of torts, early emotional distress recovery was limited to fear of harm to one's own person. *Id.*

62. 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

63. *Id.* at 302, 379 P.2d at 518, 29 Cal. Rptr. at 38; see also RESTATEMENT (SECOND) OF TORTS, §313 b (1966).

held that legal duty limits liability and that the defendant's duty to plaintiff was to be determined by a balancing of interests,⁶⁴ not solely by the foreseeability of harm to a plaintiff.⁶⁵ In the balance, problems of judicial administration outweigh the protection of the plaintiff's interest in mental security.⁶⁶ The *Amaya* court cited the difficulty of proving the causal connection between the emotional harm and the physical harm.⁶⁷

Additional difficulties arise in developing reasonable limits to the cause of action of a bystander for mental distress.⁶⁸ The *Amaya* court feared recognition of a duty to bystanders would deter socially useful conduct.⁶⁹ The duty would require greater expenditures by the public for insurance.⁷⁰ Limitless liability would penalize defendants far beyond the degree of their degrees of culpability.⁷¹ The zone of danger rule fixed the boundaries for recovery of emotional distress until 1968, when the California Supreme Court replaced the zone of danger test with a test of reasonable foreseeability.⁷²

C. The Dillon Rule

In 1968, the California Supreme Court abolished the zone of danger rule in the landmark decision of *Dillon v. Legg*.⁷³ Plaintiffs, mother and daughter, both witnessed another daughter being hit and killed by a car negligently driven by defendant.⁷⁴ The witnessing daughter was within the zone of danger and could recover for emotional distress caused by fear for her own safety.⁷⁵ The mother, was a few yards away, outside the "zone of danger." Therefore, recovery was denied for the mother's cause of action. The court noted the arbitrariness of the zone of danger rule and observed that the real source of harm causing mental distress was not fear of personal harm, but fear of

64. See 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, TORTS, §493, at 338 (8th ed. 1974).

65. See *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928). The court held lack of foreseeable harm to the plaintiff precluded the existence of duty. *Id.*

66. *Amaya*, 59 Cal. 2d at 310-13, 379 P.2d at 522-24, 29 Cal. Rptr. at 42-44.

67. *Id.* at 326-27, 379 P.2d at 544, 29 Cal. Rptr. at 43.

68. *Id.* at 313-15, 379 P.2d at 524, 29 Cal. Rptr. at 44-45. The court held that a defendant could not be held liable for the endless sequence of results that follow from a single act. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Dillon*, 68 Cal. 2d at 730, 441 P.2d at 914, 69 Cal. Rptr. at 74, (overruling *Amaya*, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33).

73. 68 Cal. 2d 728, 441 P.2d 916, 69 Cal. Rptr. 72 (1968).

74. *Id.* at 731, 441 P.2d at 916, 69 Cal. Rptr. at 76.

75. *Id.*

harm to a third person.⁷⁶ The court found that an arbitrary distance should not preclude the mother from recovery for clearly foreseeable emotional trauma.⁷⁷

The court, reversing *Amaya*,⁷⁸ rejected the approach that a limited legal duty precluded liability to plaintiffs outside the zone of physical danger.⁷⁹ The court felt the zone of danger test placed arbitrary limitations on liability. The court replaced the arbitrary limitation with the principle that the proper method of limiting liability is to hold defendants amenable only for injuries reasonably foreseeable to the defendant.⁸⁰ Therefore, foreseeability of risk becomes the primary means of establishing the element of duty.⁸¹ The *Dillon* court articulated three factors to be balanced in determining whether a defendant should reasonably foresee injury to a bystander: (1) close proximity to the scene of the accident, (2) contemporaneous sensory perception and (3) a close relationship with the primary victim.⁸² Evaluation of the factors would indicate the degree of foreseeability of emotional injury to the plaintiff. The court reasoned that the problems inherent in allowing recovery for negligently inflicted emotional distress to a bystander should be resolved by the use of general tort principles, not by creating exceptions to them.⁸³ In application, however, *Dillon* has led to inconsistent results.

D. Application of Dillon

The *Dillon* court cautioned that the three factors were merely guidelines to be applied on a case-by-case basis.⁸⁴ Later decisions, however, transformed the guidelines into strict requirements.⁸⁵ This mechanical application of the *Dillon* factors has often produced inequitable results.⁸⁶

76. *Id.* at 732-33, 441 P.2d at 916-17, 69 Cal. Rptr. at 76.

77. *Id.*

78. *Amaya*, 59 Cal. 2d at 310, 379 P.2d at 530, 29 Cal. Rptr. at 64.

79. *Dillon*, 68 Cal. 2d at 739, 441 P.2d at 911, 69 Cal. Rptr. at 71.

80. *Id.*

81. *Id.*

82. *Id.* at 740, 441 P.2d at 912, 69 Cal. Rptr. at 72.

83. *Id.* at 746-47, 441 P.2d at 918, 69 Cal. Rptr. at 78. The *Dillon* dissent noted that the *Amaya* court had considered all the issues presented by the plaintiff in *Dillon* and had dismissed them. Additionally, the dissent argued that that the new guidelines were as arbitrary as the previous test. The dissent felt any further adjustments to limiting or extending liability should emanate from the legislature. *Id.*

84. *Id.* at 740, 441 P.2d at 912, 69 Cal. Rptr. at 72.

85. See *infra* notes 91-118 and accompanying text.

86. See *infra* notes 94-110 and accompanying text.

In *Dillon* the second factor, contemporaneous sensory perception, was not an issue because the child was injured in an auto accident within the direct view of her mother.⁸⁷ Additionally, in many cases brought by bystanders subsequent to *Dillon*, the element of a brief and sudden occurrence was not in issue.⁸⁸ A review of these decisions, however, reveals that the courts have applied a mechanical test when the accident was the result of a brief and sudden occurrence.⁸⁹ In *Jansen v. Children's Hospital Medical Center*⁹⁰ the First District Court of Appeal addressed the issue of whether a bystander, to state a cause of action for emotional distress, must show the injury to the primary victim was the result of a brief and sudden occurrence.

In *Jansen*, a mother watched the slow painful death of her daughter in the hospital.⁹¹ After the child's death, the mother learned that the death was the result of a failure by the doctor to diagnose a penetrating duodenal ulcer.⁹² The mother sued alleging negligent infliction of emotional distress. Recovery for the mother's emotional trauma was denied.⁹³ The court concluded that *Dillon* contemplated a brief and sudden event causing injury to the child.⁹⁴ The event must be one subject to sensory perception.⁹⁵ The allegedly negligent misdiagnosis was not the subject of sensory perception by the mother occurring contemporaneously with the injury to her child⁹⁶ and therefore was not within the meaning of a brief and sudden occurrence. Cases following *Jansen* interpreted the mechanical approach to the *Dillon* factors as an attempt to avoid "potentially infinite liability."⁹⁷

The sudden occurrence requirement was again approved by the California Supreme Court in *Justus v. Atchison*.⁹⁸ In *Justus*, a father was present in the waiting room when his child died during birth due to defendant's negligence.⁹⁹ The father brought an action for negligent

87. *Dillon*, 68 Cal. 2d at 731, 441 P.2d at 916, 69 Cal. Rptr. at 76.

88. *Hathaway v. Superior Court*, 112 Cal. App. 3d 728, 169 Cal. Rptr. 435 (1980) (electrocution); *Parsons v. Superior Court*, 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978) (car accident); *Nazaroff v. Superior Court*, 80 Cal. App. 3d 553, 145 Cal. Rptr. 657 (1978) (drowning); *Archibald v. Braverman* 275 Cal. App. 3d 253, 79 Cal. Rptr. 723 (1973) (explosion).

89. See *infra* notes 93-118 and accompanying text.

90. 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1973).

91. *Id.* at 23, 106 Cal. Rptr. at 884.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Justus v. Atchison*, 19 Cal. 3d 564, 582, 565 P.2d 122, 134, 139 Cal. Rptr. 97, 109 (1977).

98. *Id.* at 582, 565 P.2d at 134, 139 Cal. Rptr. at 109.

99. *Id.* at 585, 565 P.2d at 135, 139 Cal. Rptr. at 110.

infliction of emotional distress.¹⁰⁰ Recovery for the father was denied.¹⁰¹ The court held that since the father's shock occurred after the doctor informed him that the baby died, the mental distress did not arise from the observance of defendant's negligent acts.¹⁰² This result shows the strict interpretation of "contemporaneous observance" adopted by the court.¹⁰³ A different interpretation, however, was taken by the court in *Austin v. Regents of the University of California*.¹⁰⁴

In *Austin* the Second District Court of Appeal permitted recovery for a plaintiff father present in the delivery room. *Austin* was factually similar to *Justus*.¹⁰⁵ The court in *Austin*, however, held a "contemporaneous observation" of the event occurred since the father felt the cessation of life with his hand.¹⁰⁶ The different results in *Justus* and *Austin* demonstrate that mechanical application of the *Dillon* factors produce inconsistent results.¹⁰⁷

Additionally, other California cases rigidly applying the *Dillon* factors produced irreconcilable results.¹⁰⁸ In *Hair v. County of Monterey*¹⁰⁹ the First District Court of Appeal strictly interpreted the *Dillon* factors.¹¹⁰ In *Hair*, parents waited in the reception room during the oral surgery on their daughter. The oral surgeon's allegedly negligent treatment rendered the child a paraplegic.¹¹¹ The parents sought recovery for damages for emotional distress arising from the conduct of the defendant.¹¹² The court held the parents did not contemporaneously observe the event, and therefore, denied recovery. The court reasoned that since the parents were in the reception room dur-

100. *Id.* at 586, 565 P.2d at 136, 139 Cal. Rptr. at 111.

101. *Id.*

102. *Id.*

103. *Id.*

104. 89 Cal. App. 3d 354, 152 Cal. Rptr. 420 (1979).

105. Compare *Justus*, 19 Cal. 3d at 585, 565 P.2d at 131, 139 Cal. Rptr. at 110 (1977) with *Austin v. Regents of University of California*, 89 Cal. App. 3d 354, 358, 152 Cal. Rptr. 420, 423 (1979). Both cases involved plaintiff fathers who were present in the delivery room when their children died during birth due to the defendants' alleged negligence. In *Justus*, the court denied recovery since the father's shock occurred after the doctor informed him that the baby had just died. *Justus*, 19 Cal. 3d at 586, 565 P.2d at 136, 139 Cal. Rptr. at 111. However, in *Austin*, the court permitted recovery since the father learned of the death by his own observance. *Austin*, 89 Cal. App. 3d at 358, 152 Cal. Rptr. at 424.

106. *Austin*, 89 Cal. App. 3d at 358, 152 Cal. Rptr. at 424.

107. See *Ochoa*, 39 Cal. 3d at 184, 703 P.2d at 18, 216 Cal. Rptr. at 678 (Bird, C.J. dissenting and concurring).

108. *Id.* at 678 n.3.

109. 45 Cal. App. 3d 538, 119 Cal. Rptr. 639 (1975).

110. *Id.* at 543, 119 Cal. Rptr. at 642.

111. *Id.* at 540, 119 Cal. Rptr. at 640.

112. *Id.*

ing the oral surgery on their daughter, they only saw the resultant injury and not the tort.¹¹³

A different result was reached in *Mobaldi v. Regents of the University of California*.¹¹⁴ In *Mobaldi*, plaintiff brought her foster son to the hospital for tests relating to a congenital kidney defect. While plaintiff held the child, the doctors injected a glucose and dye solution into the child's arm. The dosage diagnosed by the physician was wrong, causing the child to convulse and lapse into a coma.¹¹⁵ The *Mobaldi* court found the facts had satisfied the *Dillon* requirement that plaintiff "perceive[d] by sight and hearing the physical injury to another in her presence caused by the defendant's negligence."¹¹⁶

The recurring inconsistencies of cases led the *Ochoa* court to reject the brief and sudden occurrence requirement developed by California courts after *Dillon*.¹¹⁷ The court held that strict application of the second *Dillon* factor arbitrarily limited liability.¹¹⁸ The factors were aimed at assessing whether the plaintiff was a foreseeable victim of defendant's negligence.¹¹⁹ Rather than requiring a brief and sudden occurrence, which has little bearing on the foreseeability of a plaintiff, the *Ochoa* court permitted recovery when the plaintiff observed defendant's conduct and the child's injury.¹²⁰ Contemporaneous with that observance, the plaintiff must be aware that defendant's conduct was causing harm to the child.¹²¹

III. LEGAL RAMIFICATIONS

The *Ochoa* holding reaffirmed the *Dillon* guidelines, while intended to be flexible, were also a means of guarding against unwarranted extensions of liability.¹²² This flexibility allows recovery whenever harm

113. The *Ochoa* court disapproved of *Hair*, holding that the parents need not be aware of the tortious nature of defendant's action toward the child in order to recover. 39 Cal. 3d at 167, 703 P.2d at 6, 216 Cal. Rptr. at 668.

114. 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976).

115. *Id.* at 578, 127 Cal. Rptr. at 727.

116. *Id.* at 577, 127 Cal. Rptr. at 724.

117. *Ochoa*, 39 Cal. 3d at 168, 703 P.2d at 7, 216 Cal. Rptr. at 667.

118. *Id.*

119. *Dillon*, 68 Cal. 2d at 741, 441 P.2d at 914, 69 Cal. Rptr. at 74. The court stated that the facts of *Dillon* did not raise the issue of whether in the absence or insignificance of some of the other factors, the accident and injury would not be reasonably foreseeable and therefore, defendant would owe no duty of due care to plaintiff. The court left it up to future cases to draw the lines of demarcation upon facts more subtle than the compelling ones alleged in the *Dillon* complaint. *Id.*

120. *Ochoa*, 39 Cal. 3d at 170, 703 P.2d at 8, 216 Cal. Rptr. at 668.

121. *Id.*

122. *Dillon*, 68 Cal. 2d at 739, 441 P.2d at 912, 69 Cal. Rptr. at 72. The principle of foreseeability serves to limit the otherwise potentially infinite liability for any negligent act. *Id.*

is foreseeable to the plaintiff.¹²³ The *Dillon* limitation on unwarranted extensions of liability would therefore be determined by defining the duty of due care a defendant owes to a foreseeable plaintiff. This approach of merging the principles of foreseeability of harm and the foreseeable plaintiff had been criticized by the bench and bar.¹²⁴ The *Dillon* factors, which treat foreseeability of harm as a limiting function, have often produced arbitrary results. The strict interpretation and mechanical application of the factors often have little relation to the principles of foreseeability espoused in *Dillon*.¹²⁵ In light of these criticisms, this Note will discuss the use of *Ochoa* to resolve some of the problems presented by *Dillon*. Potential problems include (1) the function of the factors,¹²⁶ (2) the relationship of the *Dillon* factors to foreseeability of harm to a bystander,¹²⁷ and (3) the success of limiting liability.¹²⁸

1. Function of the Dillon Factors

A potential area for confusion is the lack of direction from the *Dillon* court on the function of the factors. This lack of direction has resulted in inconsistent approaches by subsequent courts.¹²⁹ Some courts appear to require the plaintiff to show the factors as elements of a prima facie case in order to state a cause of action.¹³⁰ If the factors are considered necessary elements of a cause of action, the absence of any one element will result in denial of recovery.¹³¹ This strict application, however, has excluded plaintiffs who suffered emotional distress caused by defendant's negligent conduct even though the suffering was foreseeable.¹³²

Other courts have adopted the approach that the factors are flexible weights to be balanced in order to determine whether recovery should be allowed.¹³³ The court in *Dillon* urged that the factors be used to evaluate the degree to which the accident and the harm was

123. See *supra* notes 41-42 and accompanying text.

124. See e.g., *Ochoa*, 39 Cal. 3d at 179, 703 P.2d at 14, 216 Cal. Rptr. at 674 (Grodin, J. concurring); *Tobin v. Grossman*, 249 N.E. 419 at 422 (1969); *Diamond*, *supra* note 40 at 488.

125. *Diamond*, *supra* note 40 at 488-90.

126. See *infra* notes 131-43 and accompanying text.

127. See *infra* notes 145-55 and accompanying text.

128. See *infra* notes 158-66 and accompanying text.

129. See *supra* note 109 and accompanying text.

130. See *Archibald*, 275 Cal. App. 2d at 256, 79 Cal. Rptr. at 725. The court used the *Dillon* factors as elements of the cause of action and held the plaintiff had met all three and thus was entitled to recover. *Id.* See also *supra* note 90 and accompanying text.

131. Comment, *supra* note 61 at 862.

132. See *Diamond*, *supra* note 40 at 447-93.

133. See *Dillon*, 68 Cal. 2d at 741, 441 P.2d at 92021, 69 Cal. Rptr. at 80-81.

reasonably foreseeable.¹³⁴ By applying the factors on a case-by case basis the court could delineate the area of liability, while excluding the remote and unexpected.

The *Ochoa* decision acknowledges the *Dillon* approach of using the factors on a case-by-case basis.¹³⁵ The *Ochoa* court rejected the sudden occurrence requirement as an unwarranted restriction on the guidelines.¹³⁶ Instead, the court replaced the sudden occurrence requirement with a more relaxed standard.¹³⁷ Therefore, under the new standard of the *Ochoa* court, in order to recover for negligent infliction of emotional distress, Mrs. Ochoa only needed to have seen the defendant's conduct, Rudy's injury, and, during the same period of time, have been aware that defendant's conduct was causing harm to Rudy.¹³⁸

While flexible guidelines have many advantages, they also present disadvantages.¹³⁹ The ultimate function of the factors is to define the limits of liability for negligent infliction of emotional distress.¹⁴⁰ Factors that are too flexible allow for the inclusion of subjective considerations that inevitably lead to inconsistent results.¹⁴¹ The altered view by the *Ochoa* court of the second *Dillon* factor offers little to counter the criticism of the flexibility of the factors.¹⁴²

2. Foreseeability

The *Dillon* factors stress the use of foreseeability of harm to the plaintiff resulting from defendant's negligent conduct as a method of limiting liability to a plaintiff.¹⁴³ Under general tort principles, a plaintiff may recover if the plaintiff show that the defendant owed a duty to the plaintiff because harm to the plaintiff was foreseeable.¹⁴⁴ Under the principle of limited duty, however, recovery may be denied even if the plaintiff is foreseeable. The denial of recovery is based

134. *Id.*

135. *Ochoa*, 39 Cal. 3d at 166, 703 P.2d at 5, 216 Cal. Rptr. at 665.

136. *Id.*

137. *Id.* at 169, 703 P.2d at 8, 216 Cal. Rptr. at 668.

138. *Id.*

139. See Note, *supra* note 53 at 881. Flexible guidelines in bystander recovery cases, such as the reasonable foreseeability test, offer "little guidance to the lower courts in determining the ultimate issue of liability." *Id.*

140. *Ochoa*, 39 Cal. 3d 179, 703 P.2d 14, 216 Cal. Rptr. at 674-75 (Grodin, J. concurring).

141. See *supra* notes 86-123 and accompanying text.

142. *Ochoa*, 39 Cal. 3d at 190, 703 P.2d at 22, 216 Cal. Rptr. at 682 (Bird, C.J. concurring and dissenting).

143. *Dillon*, 68 Cal. 2d at 741, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81.

144. W. PROSSER, *supra* note 4, §53, at 324-25.

upon policy considerations¹⁴⁵ that outweigh the policy of compensating victims of a defendant's negligence. The concept of a limited duty previously focused on a defendant's special status¹⁴⁶ or special categories of defendant's behavior.¹⁴⁷ While the *Dillon* factors seek to limit the duty owed to the plaintiff, the focus is on neither the defendant's status nor the defendant's behavior. Instead, the factors focus on the plaintiff and the fortuitous circumstances in which the plaintiff suffered the harm.¹⁴⁸ A plaintiff who meets the criteria of the *Dillon* factors can recover, but of the three criteria, only one is related to foreseeability of harm to the plaintiff.¹⁴⁹ For example, the requirement of plaintiff's physical proximity to the scene of the accident has little relationship to the foreseeability of harm. There is no evidence to show that being closer to the accident increased the severity of the mental trauma. A mother's emotional distress resulting from an injury caused to her child will be just as great if she is one mile away from the accident as opposed to one foot away.¹⁵⁰ The physical proximity factor functions as an arbitrary limit to liability¹⁵¹ rather than an accurate measure of a foreseeable pool of plaintiffs to whom the defendant should owe a duty of due care.

Additionally, the requirement of sensory and contemporaneous

145. See generally, Leibson, *supra* note 42. Recovery is limited by public policy because of a number of disparate beliefs: (1) the belief that the defendant cannot reasonably be expected to foresee the injury to the plaintiff and is thus under no duty, (2) the belief that to impose such a duty upon a defendant would expose the public to unlimited liability by allowing almost anyone who suffers some emotional injury in connection with the incident to be a potential plaintiff, and (3) the belief that to allow recovery would open the "floodgates of litigation" and swamp the courts with frivolous and fraudulent claims. *Id.* at 167-68. *Cf. Dillon* at 731, 441 P.2d 915, 69 Cal. Rptr. 75. The court reasoned the possibility of fraudulent assertions may improperly allow recovery in isolated cases, but this does not justify the wholesale rejection of an entire class of claims in which that potentiality arises. *Id.* at 736, 441 P.2d 920, 69 Cal. Rptr. 80.

146. "Good Samaritan" statutes, for example, are designed to encourage physicians to treat those with a need for emergency treatment. Therefore, the liability of the doctor for negligent medical care is restricted in "Good Samaritan" cases. Diamond, *supra* note 39, at 488 n.65.

147. The courts are reluctant to impose an affirmative duty to rescue in the absence of a special relationship between the defendant and the plaintiff. See W. PROSSER, *supra* note 4 §56, at 338-50.

148. The plaintiff who is outside the foreseeable zone of physical injury but within the foreseeable zone of psychological injury can recover only if the *Dillon* factors are interpreted rigidly. See Diamond, *supra*, note 40, at 488.

149. The requirement of a close relationship between the victim and the bystander plaintiff is clearly relevant to foreseeability. Diamond, *supra* note 40, at 488.

150. See Leibson, *supra* note 43, at 166-68. See also *Ochoa*, 39 Cal. 3d at 184, 703 P.2d at 18, 216 Cal. Rptr. at 678. (Bird, C.J. dissenting). "Why should the parents in *Hathaway* . . . , who arrived on the scene moments after the crucial event, (be) denied recovery, when the parents in *Nazaroff* and *Archibald*, who also arrived moments after the accident, have been permitted recovery?" *Id.*

151. Diamond, *supra* note 39, at 489.

perception or temporal proximity has little relationship to the foreseeability of harm to the plaintiff.¹⁵² For example, the foreseeability of distress to a mother is the same whether the distress is caused by perceiving the results of defendant's negligent behavior or shock arising from the perception of the impact to her child. The only factor consistent with foreseeability of harm to the plaintiff is close relationship or relational proximity.¹⁵³

The *Ochoa* court extended liability to situations in which plaintiff is aware that defendant's conduct caused injury to a child and perceived, first hand, both the defendant's conduct and the child's injury.¹⁵⁴ That extension, however, does not create any greater correlation with the foreseeability of harm analysis than the previous sudden occurrence factor. The shock arising from perception of defendant's conduct and the child's injury caused by that conduct is no more foreseeable than the shock that would have resulted if Mrs. Ochoa had been told of her son's illness and death the day Rudy died.¹⁵⁵

3. Limitation on Liability

Historically, limiting liability for negligent infliction of mental distress to bystanders has been a major concern of the courts.¹⁵⁶ Emotional distress is thought too subtle and speculative to be capable of measurement, creating difficulty in measuring damages.¹⁵⁷ Fears of fraudulent claims created further barriers to liability for mental distress.¹⁵⁸ Modern developments in medicine and psychiatry have reduced the possibility of fraudulent claims.¹⁵⁹ The need to limit liability, however, remains

152. Compare *Nazaroff*, 80 Cal. App. 3d at 562, 145 Cal. Rptr. at 657, with *Hathaway*, 112 Cal. App. 3d at 736, 169 Cal. Rptr. at 435. The *Nazaroff* court took a more flexible view of the *Dillon* guidelines, permitting recovery where the mother saw her son pulled from the swimming pool but had not seen the child while he was drowning. "*Dillon* created [not] parameters but merely guidelines." *Id.* 80 Cal. App. 3d at 562. In *Hathaway*, using a strict application of the *Dillon* factors, the court permitted no recovery where a mother arrived on the scene to find her son dying of electrocution. The court held that she did not "sensorily perceive the injury-causing event..., the actual contact between the electrically charged water cooler and [the child], but only saw the results of the contact." *Id.* 112 Cal. App. 3d at 736. See *supra* note 88 and accompanying text.

153. See *supra* note 151 and accompanying text.

154. *Ochoa*, 39 Cal. 3d at 170, 703 P.2d at 8, 216 Cal. Rptr. at 668.

155. See *supra* note 150 and accompanying text.

156. See *supra* note 145 and accompanying text.

157. *Id.*

158. *Id.*

159. J. FLEMING, INTRODUCTION TO THE LAW OF TORTS, 51 (1967). See also Prosser, *Insult and Outrage* 44 CAL. L. REV. 40, 41 (1956).

a prime concern of the courts.¹⁶⁰ Society can not redress all harms.¹⁶¹ Additionally, the entire scope of human activity would be unreasonably burdened if no limits were placed on liability.¹⁶²

The *Dillon* court, focusing on foreseeability, expected the three factors to act as a screening device to limit liability.¹⁶³ Conflicts arise, however, when the factors are applied flexibly to allow recovery for reasonably foreseeable plaintiffs while at the same time those factors are used to limit the defendant's liability to the otherwise foreseeable plaintiff. Sensing the conflict, many post-*Dillon* courts opted for the mechanical application of the factors based on policy concerns warranting limitations on liability.¹⁶⁴ Although foreseeability may be effective in determining liability, the use of foreseeability renders the *Dillon* factors ineffective as a limit to liability.¹⁶⁵ A pure foreseeability standard under traditional tort principles focuses on the foreseeability of harm to others.¹⁶⁶ The limit of liability for harm caused is based upon limiting potential plaintiffs to those who will be foreseeably harmed as a result of defendant's negligent conduct.¹⁶⁷ The *Ochoa* rejection of the brief and sudden occurrence standard did not necessarily resolve the difficulties produced by the *Dillon* court.¹⁶⁸ The California policy decision to limit liability will most likely be achieved by a narrow application of the factors.¹⁶⁹

CONCLUSION

The rejection by the California Supreme Court of the brief and sudden occurrence requirement of *Dillon* is justified by case law and sound public policy.¹⁷⁰ The *Dillon* factors were intended as guidelines based upon the foreseeability of harm to the plaintiff.¹⁷¹ The factors

160. See *supra* note 145 and accompanying text.

161. *Amaya*, 59 Cal. 2d at 314-15, 379 P.2d at 319-20, 29 Cal. Rptr. at 43. See *supra* note 66 and accompanying text.

162. W. PROSSER, *supra* note 4, §54 at 334.

163. See *supra* notes 73-83 and accompanying text.

164. See *supra* notes 84-121 and accompanying text. These cases demonstrate that the inflexible approach has presented several problems. *Id.*

165. *Id.*

166. See W. PROSSER, *supra* note 4, §43 at 267.

167. *Id.*

168. *Ochoa*, 39 Cal. 3d at 178, 703 P.2d at 14, 216 Cal. Rptr. at 674. Justice Grodin agreed with Chief Justice Bird that many unanswered questions remain concerning the scope of the *Dillon* guidelines. *Id.*

169. Unless the factors are closely related to foreseeability of harm to a plaintiff, the factors will be used mechanically, causing arbitrary results. See *Diamond*, *supra* note 39, at 478.

170. *Ochoa*, 39 Cal. 3d at 181, 703 P.2d at 16, 216 Cal. Rptr. at 676, (Bird, C.J. concurring and dissenting).

171. See *supra* notes 84-118 and accompanying text.

are flawed, however, and in practice have been applied mechanically with arbitrary results.¹⁷² They provide little guidance to lower courts. The *Ochoa* court recognized the flaws caused by mechanical application of the factors.¹⁷³ The court attempted to remedy the problems by liberalizing the requirements necessary to state a cause of action for negligent infliction of emotional distress. The *Ochoa* court did little, however, to resolve the numerous questions concerning application of those guidelines.

Sharon Clyde Dutton

172. See Diamond, *supra* note 39, at 478-80.

173. *Ochoa*, 39 Cal. 3d at 168, 703 P.2d at 7, 216 Cal. Rptr. at 667. Arbitrary restrictions on liability when shock to a plaintiff is highly foreseeable unduly frustrates the goal of compensation. *Id.*