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Negligent Infliction of Emotional Distress: New Horizons After *Molien v. Kaiser Foundation Hospitals*

Traditionally, courts have been reluctant to recognize emotional tranquility as an interest entitled to independent legal protection. Public policy discourages extending any cause of action that may induce fraudulent or trivial claims or that may impose unlimited liability.¹ Consequently, the emotional distress torts, particularly negligent infliction of emotional distress, have evolved slowly.

With the decision in *Dillon v. Legg*² in 1968, California became a forerunner in developing the tort of negligent infliction of emotional distress. In *Dillon*, the California Supreme Court allowed a bystander to recover for negligently inflicted emotional distress. *Dillon* sets forth three factors limiting the scope of duty owed to reasonably foreseeable plaintiffs: (1) close proximity to the scene of the accident; (2) contemporaneous sensory perception of the accident; and (3) a close relationship to the primary victim of the accident.³ Additionally, *Dillon* requires that the plaintiff's emotional distress result in physical injury.⁴ Prior to *Molien v. Kaiser Foundation Hospitals*,⁵ California courts were unwilling to allow recovery in cases factually dissimilar to *Dillon*;⁶ if any *Dillon* requirement was not satisfied, courts denied recovery.⁷

In the 1980 decision of *Molien v. Kaiser Foundation Hospitals*,⁸ the

1. See notes 28-34 and accompanying text *infra*.

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

3. See *id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 81.

4. See *id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

5. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

6. See, e.g., *Hair v. County of Monterey*, 45 Cal. App. 3d 538, 542-43, 119 Cal. Rptr. 639, 641-42 (1975) (parents witness child's injury after defendant oral surgeon's negligence renders child paraplegic); *Jansen v. Children's Hosp. Medical Center*, 31 Cal. App. 3d 22, 24-25, 106 Cal. Rptr. 883, 885 (1973) (parents witness slow deterioration and death of child due to defendant physician's negligent misdiagnosis and treatment); *Wynne v. Orcutt Union School Dist.*, 17 Cal. App. 3d 1108, 1109, 195 Cal. Rptr. 458, 459 (1971) (parents suffer emotional distress when teacher informs class that son terminally ill); *Deboe v. Horn*, 16 Cal. App. 3d 221, 224, 94 Cal. Rptr. 77, 79 (1971) (wife called to emergency room and informed that husband totally paralyzed by auto accident several hours earlier).

7. See, e.g., *Hoyem v. Manhattan Beach City School Dist.*, 22 Cal. 3d 508, 522, 585 P.2d 851, 859, 150 Cal. Rptr. 1, 9 (1978) (no recovery because injury arose antecedent, unobserved tort); *Justus v. Atchison*, 19 Cal. 3d 564, 585, 565 P.2d 122, 136, 139 Cal. Rptr. 97, 111 (1977) (no contemporaneous sensory perception).

8. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

California Supreme Court expanded the parameters of the tort of negligent infliction of emotional distress beyond the bounds set by *Dillon*. In *Molien*, the plaintiff husband recovered damages for emotional distress that he suffered from his wife's being negligently misdiagnosed as having syphilis,⁹ even though his emotional distress was unaccompanied by physical injury. The court declared that a cause of action could be stated for negligent infliction of *serious* emotional distress, regardless of whether a plaintiff suffered resultant physical injury.¹⁰ In rejecting the physical injury requirement, the Supreme Court created a second, independent cause of action for negligent infliction of emotional distress.¹¹

While *Dillon* defines a cause of action for percipient witnesses within the "bystander scenario,"¹² *Molien* creates a second cause of action for those plaintiffs the court classifies as "direct victims" of the negligent conduct.¹³ This comment will examine the ramifications of the cause of action created in *Molien* and will focus particularly on *Molien's* effects on a *Dillon* cause of action. Despite the *Molien* court's attempt to distinguish *Dillon*,¹⁴ a meshing of these two causes of action appears logical and inevitable. Both causes of action redress emotional injury, and while differences exist between direct victim and percipient witness plaintiffs, their similarities are numerous. In light of these similarities, negligent infliction of emotional distress should be redefined as a single cause of action. Once duty is established, a uniform set of elements should be applied to determine whether negligently inflicted emotional distress is actionable.

Today, society places far greater importance on an individual's emotional well-being than was true in the past.¹⁵ In response, courts increasingly are providing legal redress for tortious interferences with plaintiffs' emotional tranquility. Nevertheless, the courts' continuing concern with the policy considerations previously mentioned has stymied the full growth of the tort of negligent infliction of emotional distress. An examination of this tort will reveal that it can be expanded in scope while still maintaining reasonable limitations on the extent of a defendant's liability and providing adequate assurances that only

9. See *id.* at 929, 616 P.2d at 821, 167 Cal. Rptr. at 839.

10. See *id.* at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

11. See *id.*

12. A percipient witness is a person who witnesses an injury to a third party caused by the tortious conduct of the defendant. Typically, a percipient witness is a bystander that witnesses a traffic accident.

13. See 27 Cal. 3d at 921-23, 616 P.2d at 815-16, 167 Cal. Rptr. at 833-34.

14. The court found two different types of plaintiffs in *Dillon* and *Molien* and thus treated the cases as defining two separate causes of action. See *id.* at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834.

15. See notes 26-27 and accompanying text *infra*.

genuine claims will be compensated. To combine and expand the *Dillon* and *Molien* causes of action into a single cause of action, this comment advocates the following changes: Initially, the *Molien* court's definition of a "direct victim" must be expanded.¹⁶ Secondly, *Molien*'s rejection of the physical injury requirement must be extended to *all* emotional distress cases.¹⁷ Finally, the *Dillon* factors of close proximity and contemporaneous sensory perception must be applied with greater flexibility than present law allows in determining whether a duty is owed to percipient witness plaintiffs.¹⁸ Additionally, this comment will examine what remains of the *Dillon* limitations on the tort of negligent infliction of emotional distress and discuss how the courts should address the limitations set forth in *Molien*.¹⁹

HISTORICAL BACKGROUND

To understand the present state of the law regarding negligent infliction of emotional distress and the proposed expansion of this tort, a brief discussion of the underlying policy considerations and the history of emotional distress torts is necessary.

A. Policy Considerations

Early common law refused to recognize a legal right to emotional tranquility.²⁰ Even after courts began to acknowledge that such an interest existed, reluctance to accord this interest legal protection persisted for various policy reasons.²¹

Initially, this reluctance stemmed from the belief that emotional distress was "too subtle and speculative to be capable of admeasurement,"²² if not too trivial an injury with which to burden the judicial system and society.²³ As the court in *Lynch v. Knight*²⁴ stated, "Mental pain or anxiety the law cannot value, and does not pretend to redress,

16. See notes 85-128 and accompanying text *infra*.

17. See notes 129-158 and accompanying text *infra*.

18. See notes 159-179 and accompanying text *infra*.

19. See notes 180-198 and accompanying text *infra*.

20. See generally *Victorian Ry. Comm'n v. Coultras*, 13 App. Cas. 222 (1888), *Lynch v. Knight*, 11 Eng. Rep. 854 (1861); Smith, *Relation of Emotions to Injury: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 194 (1944) [hereinafter cited as Smith].

21. See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* §54, at 327 (4th ed. 1971) [hereinafter cited as PROSSER]; Smith, *supra* note 20, at 228 n.128; Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936) [hereinafter cited as Magruder]; Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L. J. 1237, 1244 (1971) [hereinafter cited as *Independent Tort*].

22. Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40, 41-42 (1956).

23. See generally F. HARPER & F. JAMES, *THE LAW OF TORTS* §18.4, at 1032 (1956); PROSSER, *supra* note 21, §54, at 329; *Independent Tort*, *supra* note 21.

24. 11 Eng. Rep. 854 (1861).

when the unlawful act complained of causes that alone. . . ."²⁵ Today, it is well-recognized that it is no more difficult to measure mental suffering than it is to measure physical pain.²⁶ Additionally, with advances in modern psychology, the triviality argument has now been refuted as an "antiquated concept."²⁷

In addition to the difficulties the early courts had in setting damages and preventing trivial claims, they were also concerned with discouraging fraudulent claims and limiting the potential extent of a defendant's liability, even if the resultant effect of implementing such policies meant that many valid claims would go unredressed. The concerns of fraudulent claims²⁸ and unlimited liability²⁹ remain the strongest policy arguments for limiting recovery for negligent infliction of emotional distress. Recent cases criticize the propriety of barring all claims for fear that some fraudulent claims will be presented.³⁰ The *Dillon* court pointed out that "the possibility that fraudulent assertions may prompt recovery in isolated cases does not justify a wholesale rejection of the entire class of claims in which the potentiality arises."³¹

While courts have been able to grapple with the problem of fraudulent claims, the unlimited liability issue is more complex. Once legal protection is accorded for emotional injury, a line must be drawn at some point so that the burden of liability on defendants is not unreasonable. In the past, courts have devised two tests³² to limit the number of situations in which plaintiffs can recover for emotional distress negligently inflicted:³³ the physical impact or injury test, and the "zone of danger" test. Compliance with these judicially created tests assures courts of the genuineness of a claim.³⁴

25. *Id.* at 863.

26. See *Nashville, C. & St. L. Ry. v. Miller*, 120 Ga. 453, 47 S.E. 959, 961 (1904); PROSSER, *supra* note 21, §54, at 328. See generally Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497, 513 (1922).

27. *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal. App. 3d 917, 933, 122 Cal. Rptr. 470, 481 (1975).

28. See *id.*; *Spade v. Lynn & Boston Ry.*, 168 Mass. 285, 288, 47 N.E. 88, 89 (1897); *Waube v. Warrington*, 216 Wis. 603, 613, 258 N.W. 497, 501 (1935).

29. See 48 Cal. App. 3d at 934, 22 Cal. Rptr. at 482; *Tobin v. Grossman*, 24 N.Y.2d 609, 615, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558 (1969); 216 Wis. at 613, 258 N.W. at 501.

30. See *Dillon v. Legg*, 68 Cal. 2d 728, 736, 441 P.2d 912, 917-18, 69 Cal. Rptr. 72, 77-78 (1968); *Battalla v. State*, 10 N.Y.2d 237, 241, 176 N.E.2d 729, 731, 219 N.Y.S.2d 34, 37 (1961). See generally PROSSER, *supra* note 21, §54, at 327-28.

31. 68 Cal. 2d at 736, 441 P.2d at 917-18, 69 Cal. Rptr. at 77-78. The courts' initial concern that liability of defendants would be disproportionate to their culpability has proven unfounded in states that now allow recovery for emotional distress. See *Leong v. Takasaki*, 55 Haw. 398, 402, 520 P.2d 758, 764 (1975); RESTATEMENT (SECOND) OF TORTS §436A (1965).

32. The physical injury or impact test, see notes 39-41 and accompanying text *infra*, and the zone of danger test, see notes 57-62 and accompanying text *infra*.

33. See Liebson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. FAM. L. 163, 168 (1977) [hereinafter cited as Liebson].

34. See 48 Cal. App. 3d at 934, 122 Cal. Rptr. at 482 (impact or injury test as guarantee of genuineness).

Emotional distress claims generally arise in one of two situations, either the plaintiff is the primary victim of the defendant's tortious conduct or the plaintiff's emotional distress arises from injury to a third party. The physical injury or impact test is applicable to both situations; the "zone of danger" test is applied only to the latter. Tests employed when emotional distress results to the *primary* victim of a tort will be discussed first because courts initially extended recovery in these cases. A discussion of cases wherein the emotional distress results from harm to a *third person* will follow.

B. History of Emotional Distress Torts

1. Emotional Distress to the Primary Victim of a Tort

Courts have long recognized a cause of action for the *intentional* infliction of emotional distress.³⁵ When a defendant's conduct is extreme and outrageous, courts grant recovery for intentionally inflicted, severe emotional distress absent any consequent physical harm.³⁶ If, however, the conduct in question is intentional and unreasonable, but not outrageous, plaintiffs may only recover when foreseeable physical injury results.³⁷ In the intentional infliction cases, the "outrage" element is the court's assurance of a genuine claim.³⁸

Historically, plaintiffs were compensated for *negligent* infliction of emotional distress only when they demonstrated that some physical injury or impact resulted from the emotional injury.³⁹ The physical injury requirement provided a means of assuring adequate proof of the validity of the claim.⁴⁰ If no physical impact was found, mental distress was compensable only as damages parasitic to damages for physical injury.⁴¹

35. The Restatement (Second) of Torts has recognized such a cause of action. See RESTATEMENT (SECOND) OF TORTS §46 (1965). See generally Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40 (1956); Magruder, *supra* note 21. But see Theis, *Intentional Infliction of Emotional Distress: A Need for Limits on Liability*, 27 DEPAUL L. REV. 275 (1977).

36. See *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal. 3d 493, 498, 468 P.2d 216, 218, 86 Cal. Rptr. 88, 90 (1970); *State Rubbish Collector's Ass'n v. Siliznoff*, 38 Cal. 2d 330, 337-38, 240 P.2d 282, 285-86 (1952); *Cornblith v. First Maintenance Supply Co.*, 268 Cal. App. 2d 564, 565, 74 Cal. Rptr. 216, 217 (1968).

37. See 2 Cal. 3d at 497, 468 P.2d at 218, 86 Cal. Rptr. at 90; 38 Cal. 2d at 336-37, 240 P.2d at 285. *Molien's* rejection of the physical injury requirement, however, should also apply to cases of intentional infliction of emotional distress. Therefore, physical injury should no longer be an absolute requirement for recovery when the defendant's conduct is not outrageous. See notes 129-158 and accompanying text *infra*.

38. See 38 Cal. 2d at 338, 240 P.2d at 286.

39. See 48 Cal. App. 3d at 932, 122 Cal. Rptr. at 481. See generally Magruder, *supra* note 21, at 1036.

40. See *Independent Tort*, *supra* note 21, at 1239. But see *Batalla v. State*, 10 N.Y.2d 237, 241, 176 N.E.2d 729, 731, 219 N.Y.S.2d 34, 37 (1961).

41. See PROSSER, *supra* note 21, §54, at 330; Magruder, *supra* note 21, at 1049.

The treatment of any element of damages as a parasitic factor belongs essentially to a

Even prior to *Molien*, California, as well as most other states, recognized an independent right of recovery for negligent infliction of emotional distress in certain exceptional situations. Courts allowed recovery for emotional distress in cases of negligent transmission of telegrams, particularly when telegrams carried messages of death.⁴² Courts also granted recovery when plaintiffs suffered emotional distress as a result of the negligent mishandling of a corpse.⁴³ In these cases, physical injury was not required for recovery; the circumstances themselves served to ensure that the emotional injury was not feigned.⁴⁴

Recently, California rejected the physical injury or impact requirement for cases in which the plaintiff meets the "substantial damage" test.⁴⁵ If the negligent act caused both emotional distress and substantial damage to another legal interest of the plaintiff, such as a property or financial interest, the plaintiff can recover for emotional distress even though no physical injury or impact occurred.⁴⁶ Substantial damage to another legal interest guarantees the validity of the emotional distress claim⁴⁷ and dispels the necessity of finding physical injury or impact. Recovery for emotional distress in these cases is, however, merely another parasitic form of recovery for injury to an interest that merits independent legal protection.

The courts still adhering to the physical injury or impact test have become more liberal in determining what constitutes physical impact⁴⁸ or injury.⁴⁹ Thus, even in these jurisdictions, the requirement of physical injury or impact has become merely an artificial test rather than a guarantee of genuineness.⁵⁰ Hawaii was the first state to acknowledge

transitory stage of legal evolution. A factor that is today recognized as parasitic will, forsooth, tomorrow be recognized as an independent basis of liability.

STREET, 1 FOUNDATIONS OF LEGAL LIABILITY 470 (1906).

42. See generally *Johnson v. State*, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975); *Russ v. Western Union Tel. Co.*, 222 N.C. 504, 23 S.E.2d 681 (1943). But see generally cases allowing recovery only when mental distress results in physical harm, *Kaufman v. Western Union Tel. Co.*, 224 F.2d 723 (5th Cir.), cert. denied, 350 U.S. 947 (1955); *Western Union v. Speight*, 254 U.S. 17 (1920).

43. See *Allen v. Jones*, 104 Cal. App. 3d 207, 214, 163 Cal. Rptr. 445, 450 (1980).

44. See *id.* at 214-15, 163 Cal. Rptr. at 450; 37 N.Y.2d at 382, 334 N.E.2d at 592, 372 N.Y.S.2d at 642.

45. See *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 433-34, 426 P.2d 173, 179, 58 Cal. Rptr. 13, 19 (1967).

46. See, e.g., *id.*; *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 580, 510 P.2d 1032, 1042, 108 Cal. Rptr. 480, 490 (1973); 48 Cal. App. 3d at 937, 122 Cal. Rptr. at 484.

47. See 66 Cal. 2d at 434, 426 P.2d at 179, 58 Cal. Rptr. at 19; 48 Cal. App. 3d at 937, 122 Cal. Rptr. at 484.

48. Impact has been found in insignificant contact having no real relation to the emotional harm, e.g., *Porter v. Delaware L. & W. R. Co.*, 73 N.J.L. 405, 63 A. 860 (1906) (dust in eyes); *Morton v. Stack*, 122 Ohio St. 115, 170 N.E. 869 (1930) (inhalation of smoke); *Hess v. Philadelphia Transp. Co.*, 358 Pa. 144, 56 A.2d 89 (1948) (electronic shock).

49. See *Vanoni v. Western Airlines*, 247 Cal. App. 2d 793, 797, 56 Cal. Rptr. 115, 117 (1967) (shock to nervous system is physical rather than mental injury).

50. See *Battalla v. State*, 10 N.Y.2d 237, 241, 176 N.E.2d 729, 731, 219 N.Y.S.2d 34, 37

the artificiality of the physical injury or impact requirement. Hawaii accords the interest in freedom from emotional distress independent, as opposed to merely parasitic, legal protection. *Rodrigues v. State*,⁵¹ decided by the Hawaii Supreme Court in 1970, held that a plaintiff was entitled to an independent recovery for emotional harm caused by a defendant's negligence without having to prove physical injury.⁵² In deciding *Molien*, California became the first state to adopt Hawaii's approach eliminating the physical injury requirement in cases when the plaintiff was a *direct* victim of the negligent act.⁵³

Hawaii has also rejected the physical injury requirement in emotional distress cases arising from injury to a third party.⁵⁴ To date, neither California nor any other state has adopted this approach. The following section will discuss the various approaches that states, other than Hawaii, have taken in cases of emotional harm arising from injury to a third party.

2. Emotional Distress Resulting from Harm to a Third Person

Courts are more reluctant to allow recovery in cases when a plaintiff suffers emotional harm that arises out of a defendant's negligence toward a third person than in cases when the plaintiff alone is injured. The potential for fraudulent or trivial claims and unlimited liability is considered a greater danger when the plaintiff is not the primary victim of the defendant's negligent conduct.⁵⁵

In cases of emotional harm resulting from harm to a third person, typically the plaintiff is a bystander-witness to an accident. The minority view requires physical impact to the plaintiff claiming emotional distress and thus denies recovery to physically uninjured bystander-witness.⁵⁶ Today, the majority approach is embodied in the "zone of danger" test.⁵⁷ Although this test does not require actual physical im-

(1969). "Fraudulent claims are not likely to be eliminated by application of the rule, since the slightest impact, or the most attenuated of physical injuries have been found sufficient to satisfy the rule's requirement." *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal. App. 3d 917, 933, 122 Cal. Rptr. 470, 481-82 (1975).

51. 52 Haw. 156, 472 P.2d 509 (1970).

52. *See id.* at 174, 472 P.2d at 520.

53. See notes 77-84 and accompanying text *infra*.

54. *See Leong v. Takasaki*, 55 Haw. 398, 403, 520 P.2d 758, 762 (1974). "[T]he requirement of resulting physical injury is employed as yet another of the artificial devices to guarantee the genuineness of the claim, which may actually foreclose relief to a genuine claim." *Id.* at 404, 520 P.2d at 763.

55. *See Amaya v. Home Ice, Fuel and Supply Co.*, 59 Cal. 2d 295, 314-15, 379 P.2d 513, 524-25, 29 Cal. Rptr. 33, 44-45 (1963). *Accord*, *Tobin v. Grossman*, 24 N.Y.2d 609, 615, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558 (1969); *Waube v. Warrington*, 216 Wis. 603, 613-14, 258 N.W. 497, 501 (1935).

56. Ohio, Tennessee, Missouri, Florida, Kentucky and Georgia have retained the impact rule in this area. *See generally Liebson, supra* note 33, at 168-72.

57. *See, e.g.*, 59 Cal. 2d at 302-03, 379 P.2d at 517, 29 Cal. Rptr. at 37 (subsequently over-

pact to the plaintiff, the plaintiff must have been within such a close range to the accident that there was a high risk of physical impact.⁵⁸ Only in this "near miss" situation is a duty established under the zone of danger test. Furthermore, a plaintiff seeking recovery under the zone of danger theory, although not required to show physical impact, must still prove that the emotional harm caused a physical illness or injury.⁵⁹

As a result, application of the zone of danger rule has often led to anomalous results; typical is *Amaya v. Home Ice, Fuel and Supply Co.*⁶⁰ In *Amaya*, a mother saw a truck run over her child, yet she was denied recovery under the zone of danger rule.⁶¹ Since the mother did not fear for her own safety, but only for that of her child, the defendant incurred no liability for the mother's emotional distress.⁶² California eventually rejected the zone of danger test in *Dillon v. Legg*.⁶³

If the *Dillon* court had applied the zone of danger rule, the mother who witnessed the death of her child would have been unable to recover for the mental anguish she experienced; however, her five year old daughter would have had the right to recover merely because she was standing several feet closer to the place where the defendant's car struck her sister.⁶⁴ Refusing to apply the zone of danger rule, the California Supreme Court held in *Dillon* that a mother could recover for mental distress arising from fear for her child's safety which also resulted in physical injury.⁶⁵ Rejecting the zone of danger test as an arbitrary determinant of duty, the court looked to the foreseeability of the plaintiff's mental injury to ascertain if the defendant owed the plaintiff a duty. The court set forth three guidelines to determine whether risk of injury is reasonably foreseeable: (1) close proximity to the scene of the accident; (2) contemporaneous sensory perception; and (3) a close relationship to the primary victim.⁶⁶

Although many states have chosen not to adopt the California ap-

ruled by *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968)); 216 Wis. at 612-13, 258 N.W. at 500-01.

58. Plaintiffs may recover under the zone of danger test if their emotional harm resulted from fear for their own safety as well as fear for the safety of a third person. See RESTATEMENT (SECOND) OF TORTS §436, Comment f at 459-60 (1965).

59. See 59 Cal. 2d at 302-03, 379 P.2d at 517, 29 Cal. Rptr. at 39; *Leong v. Takasaki*, 55 Haw. 398, 404, 520 P.2d 758, 762 (1974); RESTATEMENT (SECOND) OF TORTS §436A (1965).

60. 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

61. See *id.* at 298-302, 379 P.2d at 514-16, 29 Cal. Rptr. at 34-36.

62. See *id.* at 304-06, 379 P.2d at 518-19, 29 Cal. Rptr. at 38-39. *Accord*, *Webb v. Francis J. Lewald Coal Co.*, 214 Cal. 182, 184, 4 P.2d 532, 533 (1931); *Lindley v. Knowlton*, 179 Cal. 298, 301-02, 176 P. 440, 441 (1918); *Reed v. Moore*, 156 Cal. App. 2d 43, 47, 319 P.2d 80, 81 (1957).

63. See note 65 and accompanying text *infra*.

64. See 68 Cal. 2d at 747, 441 P.2d at 925, 69 Cal. Rptr. at 85.

65. See *id.* at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.

66. See *id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

proach outlined in *Dillon*, a few states have adopted the *Dillon* approach with various modifications.⁶⁷ One state, fearing unlimited liability, however, has expressly rejected the *Dillon* approach. New York, in *Tobin v. Grossman*,⁶⁸ predicted that the *Dillon* factors could not withstand a case-by-case analysis and that *Dillon* would leave California without the means to limit the scope of liability in percipient witness cases.⁶⁹

While New York has rejected the *Dillon* factors as being inadequate safeguards against unlimited liability, California has found that these factors extend sufficient protection. Recognizing that a loose application of the *Dillon* factors might lead to unlimited liability, California courts have demanded strict compliance with the *Dillon* guidelines⁷⁰ and have been reluctant to allow even the slightest deviation. In *Archibald v. Braverman*,⁷¹ however, the court did deviate slightly from the close proximity guideline by allowing recovery to a mother who had appeared on the scene "within moments" after her son had been injured by an explosion.⁷² Nevertheless, extension of *Dillon* beyond *Archibald v. Braverman* has been strongly resisted. In *Powers v. Sissoev*,⁷³ for example, a mother was denied recovery for shock that resulted from seeing her daughter thirty to sixty minutes after injury in an accident.⁷⁴

The courts' strict interpretation of *Dillon* has endured despite the broad language in *Dillon* calling for determinations of foreseeability on a case-by-case basis, analyzing all the circumstances. The *Dillon* court expressly observed that "no immutable rule can establish the extent of

67. Rhode Island has added a fourth factor to the *Dillon* test—foreseeability of the plaintiff's presence. See *D'Ambra v. U.S.*, 354 F. Supp. 810, 820 (D.R.I. 1973). The court listed five factors to determine foreseeability of presence: (1) age of child; (2) type of neighborhood; (3) familiarity of the tortfeasor with the neighborhood; (4) time of day; (5) all other circumstances that would put the tortfeasor on notice of the likelihood of the parent's presence. See *id.* Hawaii has called for a more flexible application of the *Dillon* factors and has rejected *Dillon*'s physical injury requirement. See *Leong v. Takasaki*, 55 Haw. 398, 403-10, 520 P.2d 758, 763-66 (1974). Connecticut's approach closely models *Dillon*. For the approaches of other states see *D'Amico v. Alvarez Shipping Co.*, 31 Conn. Supp. 164, 326 A.2d 129 (1973); *Toms v. McConnell*, 45 Mich. App. 647, 207 N.W.2d 140 (1973).

68. 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

69. See *id.* at 615, 249 N.E.2d at 422, 301 N.Y.S.2d at 558. See generally Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute Between California and New York*, 51 ST. JOHN'S L. REV. 1 (1976). New York has chosen instead to refuse recovery for emotional distress to all percipient-witness plaintiffs. See 24 N.Y.2d at 611, 249 N.E.2d at 419-20, 301 N.Y.S.2d at 555.

70. See text accompanying note 66 *supra*.

71. 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969).

72. Compare *id.* at 256, 79 Cal. Rptr. at 724-25 with *Arauz v. Gerhart*, 68 Cal. App. 3d 937, 948-49, 137 Cal. Rptr. 619, 627 (1977).

In *Arauz*, a mother arrived at the scene of the accident within minutes of its occurrence, but recovery was denied for lack of contemporaneous sensory perception. The court distinguished *Archibald* in that the results of the explosion were so gory that the plaintiff could "mentally reconstruct" the scene of the accident, thus satisfying the contemporaneous sensory perception requirement.

73. 39 Cal. App. 3d 865, 114 Cal. Rptr. 868 (1974).

74. See *id.* at 873-74, 114 Cal. Rptr. at 874.

that obligation for every circumstance in the future."⁷⁵ Not until *Molien*, however, did the California courts apply *Dillon* without blind application of the *Dillon* factors.⁷⁶ In *Molien*, the California Supreme Court stated:

The significance of *Dillon* for the present action lies not in its delineation of guidelines fashioned for resolution of the precise issue then before us; rather, we apply its general principle of foreseeability to the facts at hand. . . .⁷⁷

Just as the significance of *Dillon* is in its general principle, and not in adherence to its guidelines, the significance of *Molien* lies not so much in its rejection of the physical injury requirement and establishment of an independent cause of action for direct victim plaintiffs, as it does in its upholding the principle that emotional distress should be redressed. Just as *Molien* extended *Dillon*, *Molien* itself will be extended.

EXTENDING THE *MOLIEN* CAUSE OF ACTION FOR NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS

A. *Molien v. Kaiser Foundation Hospitals*

In *Molien v. Kaiser Foundation Hospitals*, the defendant physicians negligently misdiagnosed syphilis in examining the plaintiff's wife. They advised her to inform her husband of the diagnosis so that he could come in for blood tests to determine whether he, too, had contracted syphilis. The misdiagnosis led to marital discord and an eventual filing for dissolution of the marriage. As a result of the misdiagnosis and its effects upon his marriage, the plaintiff suffered emotional distress.⁷⁸

Mr. Molien sued for negligent infliction of emotional distress and loss of consortium. The appellate court affirmed the trial court's dismissal of the emotional distress action for failure to show physical injury and failure to meet the *Dillon* test of foreseeability.⁷⁹ The California Supreme Court, in a five to two decision,⁸⁰ reversed on both causes of action. The court held that loss of consortium, based on emo-

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

76. *See Molien v. Kaiser Foundation Hosp.*, 27 Cal. 3d 916, 923, 616 P.2d 813, 816, 167 Cal. Rptr. 831, 834 (1980).

77. *Id.*

78. *See id.* at 919-20, 616 P.2d at 814-15, 167 Cal. Rptr. at 832-33.

79. *See id.* at 918-21, 616 P.2d at 814-15, 167 Cal. Rptr. at 832-33. The cause of action for loss of consortium was not dismissed by the trial court. The California Supreme Court considered this an oversight and amended the dismissal to apply to both causes of action.

80. The new makeup of the California Supreme Court will affect future interpretation of *Molien*. Manuel, J. (concurring) has since died and Clark, J. (dissenting opinion) has left the bench.

tional injury to one's spouse, was actionable.⁸¹ More importantly, the court held that an independent "cause of action may be stated for negligent infliction of serious emotional distress."⁸²

Significantly, the court first rejected the *Dillon* requirement that negligently inflicted emotional distress must result in physical injury or illness.⁸³ Secondly, the court defined Mr. Molien as a "direct victim"⁸⁴ of the defendant's negligence although he was not the primary victim of the misdiagnosis. By defining the plaintiff as a "direct victim," the court established that a duty was owed to the plaintiff without showing that the plaintiff was foreseeable within the bounds set by the *Dillon* factors.⁸⁵

B. Defining Who is a Direct Victim

1. Molien's Definition of a Direct Victim

Rather than overruling *Dillon*, the *Molien* court, in granting recovery without applying the *Dillon* factors, stated that *Dillon* was "apposite but not controlling."⁸⁶ The court then distinguished the plaintiff in *Molien* as a "direct victim," as opposed to the "percipient witness" plaintiff in *Dillon*.⁸⁷ The *Molien* court classified the plaintiff as a direct victim because his emotional distress was reasonably foreseeable;⁸⁸ the defendants knew or should have known that their diagnosis of Mrs. Molien would cause her husband emotional distress.⁸⁹ The defendants therefore owed a duty to the plaintiff to use due care in diagnosing his wife's condition.⁹⁰

81. See 27 Cal. 3d at 932-33, 616 P.2d at 822-23, 167 Cal. Rptr. at 840-41.

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

83. See *id.* at 928, 616 P.2d at 820, 167 Cal. Rptr. at 838.

84. See *id.* at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834. *Accord*, *Johnson v. State*, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975). In *Johnson*, the New York Court used similar language. Plaintiff recovered for mental distress suffered when the defendant-hospital sent a false message of her mother's death to her aunt. In distinguishing the plaintiff from the bystander plaintiff, the court stated:

[I]njury was inflicted by the hospital *directly* on claimant . . . [c]laimant was not indirectly harmed by injury caused to another; she was not a mere eyewitness of or bystander to injury caused to another. Instead, she was the one to whom a duty was *directly* owed by the hospital. . . .

Id. at 383, 334 N.E.2d at 593, 372 N.Y.S.2d at 643. (emphasis added).

85. See 27 Cal. 3d at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834.

86. *Id.* at 921, 616 P.2d at 815, 167 Cal. Rptr. at 833.

87. See *id.* at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834.

88. See *id.* at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.

89. See *id.* at 920, 616 P.2d at 815, 167 Cal. Rptr. at 833. In fact, the doctors told her expressly to inform her husband.

90. See *id.* at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.

2. *Extending Direct Victim Status Beyond Cases of Negligence Affecting the Marital Relationship*

Arguably, the direct victim status given the plaintiff in *Molien* was an exceptional situation because syphilis, as medical evidence of infidelity, is more likely than most diseases to have a direct effect on the marital relationship.⁹¹ Accordingly, the appellate court dissent in *Molien* suggested that the court should grant recovery to a class of plaintiffs limited to spouses who suffer foreseeable emotional and marital harm.⁹²

Several factors, however, point away from confining the *Molien* definition of a direct victim to one who suffers emotional distress because of a foreseeable disruption of the marital relationship. Had the court intended to limit application of its decision to tortious acts of defendants affecting plaintiffs' marital relationships, it could have based recovery on a much narrower holding. The court could have enlarged the scope of the cause of action for spousal loss of consortium to include damages for emotional distress arising from the tortfeasor's conduct. *Rodriguez v. Bethlehem Steel Corporation*,⁹³ was the first case in which California accepted the cause of action for loss of consortium. The court there stated that loss of consortium was "principally a form of mental suffering."⁹⁴ Alternatively, the court could have carved out another exception to the general rule denying independent legal redress for negligently caused emotional distress just as it has done in cases involving mishandling of corpses and negligent transmission of false messages.⁹⁵ The *Molien* court indicated that the circumstances of *Molien* provided adequate indicia of a reliable and genuine claim,⁹⁶

91. See *id.* at 925, 616 P.2d at 817, 167 Cal. Rptr. at 835. An argument might also be made that plaintiff was a direct victim because he feared that he might have syphilis as well. However, the court does not stress this point. Moreover, other non-infectious misdiagnoses may have the same detrimental effect on the marital relationship. See also *Nieman v. Upper Queens Med. Group*, 220 N.Y.S.2d 129 (1961), in which plaintiff was mistakenly informed that lab tests indicated sterility. Under these facts, plaintiff's wife could be classified as a direct victim if the negligent misinformation caused her emotional harm.

92. See *Molien v. Kaiser Foundation Hosp.*, 158 Cal. Rptr. 107, 116 (1979) (Poche, J. dissenting). Similarly, the recent case of *Wynn v. Monterey Club*, 111 Cal. App. 3d 789, 168 Cal. Rptr. 878 (1980), cites *Molien* as authority for allowing recovery for emotional distress that foreseeably arose out of a breach of contract and led to the destruction of plaintiff's marriage. In exchange for the Monterey Club's promise to refuse to allow his wife to gamble, the plaintiff agreed to pay his wife's previous losses for which he was not personally liable. The club breached its promise, knowing that Mrs. Wynn's gambling was prompting the Wynn's marital difficulties. In circumventing California's nonrecognition of a cause of action for alienation of affections, *Wynn* focused on the emotional and marital harm aspects of *Molien*. See *id.* at 800-01, 168 Cal. Rptr. at 883. The dissent in *Molien* recognized that the majority's decision would have the effect of reviving a cause of action of alienation of affections. See 27 Cal. 3d at 936 n.3, 616 P.2d at 825 n.3, 167 Cal. Rptr. at 843 n.3 (Clark, J., dissenting).

93. 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974).

94. See *id.* at 401, 525 P.2d at 681, 115 Cal. Rptr. at 777.

95. See notes 42-44 and accompanying text *supra*.

96. See 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

the same rationale underlay the creation of the other exceptions.⁹⁷

In sum, the court painted in broad strokes by establishing negligent infliction of emotional distress as an independent cause of action.⁹⁸ Consequently, one can infer that the direct victim status accorded the plaintiff in *Molien* is not limited to a syphilis misdiagnosis of one's spouse. Indeed, a direct victim should be defined as a person with a close relationship to the primary victim of the tort, such that a defendant could reasonably foresee that his or her tortious conduct would cause serious emotional distress to that person.⁹⁹ For instance, direct victim status should be accorded to a plaintiff who suffers emotional distress as a result of misdiagnosis of cancer or other terminal illnesses affecting a close relation.¹⁰⁰

3. Extending Direct Victim Status to the Parent-Child Relationship

Attempts have been made to limit direct victim status to the spousal relationship. Traditionally, the husband-wife relationship has been accorded special qualities and privileges not extended to the parent-child relationship.¹⁰¹ In refusing to extend the cause of action for loss of consortium to the parent-child relationship, the court in *Borer v. American Airlines*¹⁰² stated that "[t]he law has always been most solicitous of the husband-wife relationship, perhaps more so than the parent and child relationship. . . . In any event, policy rather than logic is the determinative factor. . . ."¹⁰³ But neither policy nor logic warrant such a narrow interpretation of a direct victim plaintiff.

Because the risk of emotional harm to a parent is as foreseeable as that to a spouse, direct victim status should be extended to the parent-child relationship.¹⁰⁴ No rational basis exists for distinguishing the husband-wife relationship from the parent-child relationship. The par-

97. See *Rodrigues v. State*, 52 Haw. 156, 171, 472 P.2d 509, 519 (1970).

98. See 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839. See also *Lagies v. Copley*, 110 Cal. App. 3d 958, 168 Cal. Rptr. 368 (1980) (*Molien* cited for "broad" principle: "[T]here is a duty to refrain from the negligent infliction of serious mental distress.").

99. Additionally, the same reasoning used to classify plaintiffs as direct victims in cases of negligent misdiagnosis can be applied to cases involving negligent treatment.

100. See also *Callahan v. Burton*, 157 Mont. 513, 487 P.2d 515 (1971) (husband and wife bring medical malpractice action for misdiagnosis of malignant melanoma of wife's eye); *Hwetling v. Jenny*, 206 Neb. 335, 293 N.W.2d 76 (1980) (husband brings wrongful death action for misdiagnosis of cancer from which wife died); *Mantz v. Follingstad*, 84 N.M. 473, 505 P.2d 68 (1972) (husband and wife sue for medical malpractice and intentional infliction of emotional distress because defendant unnecessarily removed wife's breast).

101. For instance, evidentiary privileges exist to protect the husband-wife relationship, and no corollary privileges exist to protect the parent-child relationship. See CAL. EVID. CODE §§970-973, 980-987.

102. 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977).

103. See *id.* at 446, 563 P.2d at 861, 138 Cal. Rptr. at 305; *Ekalo v. Constructive Serv. Corp. of Am.*, 46 N.J. 82, 92, 215 A.2d 1, 7 (1965).

104. But see *Jansen v. Children's Hosp. Medical Center*, 31 Cal. App. 3d 22, 24, 106 Cal. Rptr. 883, 885 (1973).

ent is within the doctor's contemplation when diagnosing a child.¹⁰⁵ In fact, a doctor usually informs the parent directly of his or her diagnosis. California courts, however, have been reluctant to grant recovery for negligent infliction of emotional distress in a parent-child relationship when the *Dillon* factors are not satisfied.¹⁰⁶ Prior to *Molien*, the courts denied recovery unless the parent was a bystander witness to his or her child's accidental harm. Since *Molien*'s direct victim plaintiff is allowed recovery in circumstances other than the witnessing of a sudden, unexpected accident, the invalidity of denying recovery to non-bystander parent-plaintiffs for negligent misdiagnosis of their children is apparent.

In *Justus v. Atchison*,¹⁰⁷ an expectant father was in the delivery room to witness the birth of his child. While the father was present, a mishap occurred in the baby's delivery as a result of the defendants' negligence. Shortly thereafter, the father was informed of his infant's death.¹⁰⁸ Applying *Dillon*, the court denied recovery since the father did not have contemporaneous sensory perception of the accident.¹⁰⁹ If classified as a direct victim under *Molien*, however, the plaintiff in *Justus* could have recovered. Recovery would have been justified since it is reasonably foreseeable that a father would suffer serious emotional harm from the death of his child. That the emotional harm resulted from the father's being told of the death rather than his actually perceiving what had happened at the moment the infant died would be irrelevant.¹¹⁰ Moreover, there is little doubt that the emotional harm is genuine under such circumstances.

Similarly, application of the direct victim theory would have changed the result in *Hair v. County of Monterey*.¹¹¹ In *Hair*, the child was rendered paraplegic due to the defendant oral surgeon's negligent treatment. The court, strictly applying the *Dillon* guidelines, denied recovery because the parents saw only the resultant injury to their child and not the commission of the tort itself.¹¹² Under the *Molien* direct victim rationale, the defendant would have had a duty to the parents to use due care in treating their child since failure to do so would

105. See also *Molien v. Kaiser Foundation Hosp.*, 27 Cal. 3d 916, 919, 616 P.2d 813, 814, 167 Cal. Rptr. 831, 832 (1980).

106. See, e.g., *Arauz v. Gerhardt*, 68 Cal. App. 3d 937, 949, 137 Cal. Rptr. 619, 627 (1977); *Hair v. County of Monterey*, 45 Cal. App. 3d 538, 543-44, 119 Cal. Rptr. 639, 642 (1975); *Powers v. Sissoev*, 39 Cal. App. 3d 865, 873-74, 114 Cal. Rptr. 868, 874 (1974); 31 Cal. App. 3d at 24, 106 Cal. Rptr. at 884-85.

107. 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977).

108. See *id.* at 584, 565 P.2d at 135, 139 Cal. Rptr. at 110.

109. See *id.* at 585, 565 P.2d at 136, 139 Cal. Rptr. at 111.

110. See *id.*

111. 45 Cal. App. 3d 538, 119 Cal. Rptr. 639 (1975).

112. See *id.* at 543, 119 Cal. Rptr. at 642.

foreseeably cause them serious emotional distress, thereby enabling the parents to recover as direct victims.

In *Jansen v. Children's Hospital Medical Center*,¹¹³ the court refused to allow recovery to a mother under the *Dillon* theory when she suffered emotional distress from witnessing the slow deterioration and eventual death of her daughter that resulted from the defendant's negligent misdiagnosis and treatment.¹¹⁴ The court expressed its concern that allowing recovery would lead to unlimited liability.¹¹⁵ The court displayed the same fears, however, in regard to the husband-wife relationship:¹¹⁶

But to extend the rule of *Dillon* to the entire area of injury to a parent by improper diagnosis of a child's ailment (and perhaps as logically, to the emotional impact upon a spouse and children of an ill parent) is an extreme broadening of the rule which the Supreme Court apparently sought to limit.¹¹⁷

Since *Molien* has extended liability to misdiagnosis in the spousal relationship, it is illogical to contend that the fears expressed by the *Jansen* court render extending protection to the parent-child relationship unacceptable. Adequate safeguards remain to avoid unlimited liability after *Molien*.¹¹⁸ Nevertheless, in cases subsequent to *Molien*, courts have demonstrated an unwillingness to extend the *Molien* cause of action to the parent-child relationship.

In the recent appellate court case of *Cortez v. Macias*,¹¹⁹ a mother sued for negligent infliction of emotional distress resulting from the negligent diagnosis and treatment of her infant son.¹²⁰ The court stated "[t]he language in *Molien* is sufficiently broad, it would appear, to permit similar reasoning to be applied to the facts of the case before us."¹²¹ Nevertheless, the court returned to the *Dillon* test and denied recovery because the mother's emotional shock did not arise from contemporaneous observance of the negligent conduct; rather, it arose from later being told her baby was dead.¹²² In arriving at this decision, the court pointed out that the *Molien* court had cited *Justus v. Atchison* "without overruling, modifying or distinguishing that decision beyond the degree that that court distinguished *Dillon*."¹²³ Thus, the court con-

113. 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1973).

114. See *id.* at 23, 106 Cal. Rptr. at 884.

115. See *id.* at 24, 106 Cal. Rptr. at 885.

116. See *id.*

117. *Id.*

118. See notes 180-198 and accompanying text *infra*.

119. 110 Cal. App. 3d 640, 167 Cal. Rptr. 905 (1980).

120. See *id.* at 664, 167 Cal. Rptr. at 906.

121. *Id.* at 649, 167 Cal. Rptr. at 909.

122. See *id.* at 650, 169 Cal. Rptr. at 910.

123. *Id.* at 649, 167 Cal. Rptr. at 909.

cluded, it was still necessary to apply the *Dillon* test when there is a parent-child relationship between the plaintiff and the primary victim of the negligent misdiagnosis and treatment.¹²⁴

There is support in *Molien*, however, for an alternative approach to the rationale used in *Cortez*. Specifically, the *Molien* court denounced "a rote application of the [*Dillon*] guidelines to a case factually dissimilar to the bystander scenario."¹²⁵ Misdiagnosis of a patient is factually dissimilar to a "sudden and brief event"¹²⁶ such as the auto accident in *Dillon*. Therefore, to require plaintiffs to meet the *Dillon* test in cases involving negligent diagnosis and treatment by physicians is inappropriate. Consequently, the plaintiff in *Cortez* should not have been denied recovery on the grounds stated.¹²⁷ Instead, the court should have classified the plaintiff as a "direct victim" and allowed recovery.

In brief, parents as well as spouses of negligently misdiagnosed and treated patients should be included within the direct victim class of plaintiffs when emotional distress to the plaintiff is reasonably foreseeable. The *Molien* court's direct victim theory should extend recovery for negligent infliction of emotional distress to parents who are not percipient-witness plaintiffs. If classified as a direct victim, a plaintiff should not be required to meet the *Dillon* requirements of contemporaneous sensory perception and close proximity to the scene of the accident.¹²⁸ Thus, with this extension, plaintiffs can state a cause of action for negligent infliction of emotional distress either as a direct victim plaintiff or as a percipient-witness plaintiff.

Molien distinguished *Dillon* only in its application of the *Dillon* factors to determine foreseeability. Compliance with *Dillon* is necessary to establish foreseeability, and thus a duty owed, only when the plaintiff is a percipient-witness, not when the plaintiff is a direct victim.¹²⁹ Once duty is established, either by meeting the *Dillon* guidelines or by classifying the plaintiff as a direct victim, the determination of liability

124. See *id.* at 650, 167 Cal. Rptr. at 910.

125. *Molien v. Kaiser Foundation Hosp.*, 27 Cal. 3d 916, 923, 616 P.2d 813, 816, 167 Cal. Rptr. 831, 834 (1980).

126. See *Jansen v. Children's Hosp. Medical Center*, 31 Cal. App. 3d 22, 24, 106 Cal. Rptr. 883, 884 (1973).

127. *Justus* can be further distinguished because the plaintiff was a "voluntary witness" to the accident. See *Justus v. Atchison*, 19 Cal. 3d 564, 585, 565 P.2d 122, 136, 139 Cal. Rptr. 97, 111 (1977).

128. This is to be distinguished from cases in which a child or spouse is injured in an antecedent accident and the parents or spouse sees only the resultant injury hours later. See generally *Hoyem v. Manhattan Beach School Dist.*, 22 Cal. 3d 508, 585 P.2d 851, 150 Cal. Rptr. 1 (1978); *Deboe v. Horn*, 16 Cal. App. 3d 221, 94 Cal. Rptr. 77 (1971). But see *Capelouto v. Kaiser Foundation Hosp.*, 7 Cal. 3d 889, 892 n.1, 500 P.2d 880, 882 n.1, 103 Cal. Rptr. 856, 858 n.1 (1972) (footnote indicates cause of action might exist for mental distress from witnessing injuries arising from antecedent, unobserved tort if physical injuries result).

129. See 27 Cal. 3d at 922-23, 616 P.2d at 813, 167 Cal. Rptr. at 834.

under general tort principles should be identical. Accordingly, the *Molien* court's rejection of the physical injury requirement should be extended to the *Dillon* cause of action.

C. The Physical Injury Requirement

In *Molien*, the California Supreme Court observed that refusal to recognize a cause of action for negligent infliction of emotional distress when consequential physical injury was lacking was "an anachronism."¹³⁰ The court further noted that rejection of claims at the pleading stage for lack of physical injury usurped the function of the jury.¹³¹ The court deemed the physical injury requirement "both overinclusive and underinclusive when viewed in light of its purported purpose of screening false claims."¹³² The physical injury requirement is overinclusive in that any physical injury suffices, no matter how insignificant;¹³³ the requirement is underinclusive in that valid, provable claims might be denied at the pleading stage.¹³⁴

The court also noted the difficulty in drawing a line between physiological and psychological injury.¹³⁵ Physicians themselves often have problems in making such differentiations.¹³⁶ Consequently, the *Molien* court concluded:

the attempted distinction between physical and psychological injury merely clouds the issue. The essential question is one of proof; whether the plaintiff has suffered a serious and compensable injury should not turn on this artificial and often arbitrary classification scheme.¹³⁷

Moreover, rapid advances have been made in medicine and in the understanding of mental illness since the court originally formulated the physical injury requirement. Medical science has come to accept that mental injury can be as debilitating as physical injury¹³⁸ and has shown that emotional trauma can be adequately established and measured.¹³⁹

Molien holds that physical injury is not required for recovery for negligent infliction of emotional distress as long as there is some "guarantee of genuineness"¹⁴⁰ found in the circumstances of the case to serve

130. *See id.* at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.

131. *See id.* at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

132. *Id.* at 928, 616 P.2d at 820, 167 Cal. Rptr. at 838.

133. *See id.* *See generally* Magruder, *supra* note 21, at 1059.

134. *See* 27 Cal. 3d at 929, 616 P.2d at 820, 167 Cal. Rptr. at 838.

135. *See id.*; *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 680, 44 P. 320, 322 (1896). *See generally* Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922).

136. *See Independent Tort*, *supra* note 21 at 1241 n.24. *See generally* 27 Cal. 3d at 929-30, 616 P.2d at 821, 167 Cal. Rptr. at 839.

137. 27 Cal. 3d at 929-30, 616 P.2d at 821, 167 Cal. Rptr. at 839.

138. *See generally Independent Tort*, *supra* note 21.

139. *See Independent Tort*, *supra* note 21, at 1248-53.

140. *Accord*, *Rodriguez v. State*, 52 Haw. 156, 172, 472 P.2d 509, 520 (1970); *Ferrara v. Gal-luchio*, 5 N.Y.2d 16, 21, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 999 (1958); *See generally* Com-

as corroborating evidence of the mental injury. The court found the necessary "guarantee of genuineness" in the "objectively verifiable actions by the defendants that foreseeably elicited serious emotional responses in the plaintiff."¹⁴¹ Accordingly, *Molien* mandates that courts now leave to the jury questions of whether a plaintiff's claim is genuine and whether a defendant's conduct caused the plaintiff serious emotional distress.¹⁴²

In discarding the physical injury requirement, California adopted the standard of proof enunciated by the Hawaii Supreme Court ten years earlier in *Rodrigues v. State*:¹⁴³ plaintiffs must show "some guarantee of genuineness in the circumstances of the case."¹⁴⁴ The *Rodrigues* court arrived at this standard by examining the exceptions to the general rule of denying recovery without physical injury or impact.¹⁴⁵ By recognizing that exceptions were created when the particular circumstances of a case guaranteed the genuineness and seriousness of the claim, the court proposed to use these exceptions as examples of trustworthy, compensable claims which could be encompassed within a new, independent cause of action rather than restricting recovery to exceptional situations.¹⁴⁶

California has delegated to the trier of fact the duty of determining the genuineness of a claim and whether there is reliable proof of serious emotional injury.¹⁴⁷ Jurors must rely on their own experience and expert medical testimony in making the "genuineness" determination.¹⁴⁸ In addition, jurors may look for the presence of other guarantees already recognized by the court: (1) physical injury;¹⁴⁹ (2) substantial damage arising from an independent, related cause of action;¹⁵⁰ or (3) outrageous conduct in cases of intentional infliction of emotional distress.¹⁵¹ Although the court created the "guarantee of genuineness"

ment, *Neurosis Following Trauma: A Dark Horse in the Field of Mental Disturbance*, 8 CUM. L. REV. 495, 509 (1977).

141. See 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839. The court found further support for the validity of the claim in that to falsely impute syphilis is slander per se. It appears, however, that the court added this factor merely to bolster their argument; the genuineness and seriousness of the claim could have been sustained without this corroborating factor. See *id.* at 931, 616 P.2d at 821, 167 Cal. Rptr. at 839; CAL. CIV. CODE §46(2).

142. See 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

143. 52 Haw. 156, 472 P.2d 509 (1970).

144. See 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839; 52 Haw. at 172, 472 P.2d at 519-20.

145. See 52 Haw. at 171, 472 P.2d at 519.

146. See *id.* See generally *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

147. See 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

148. See *id.*

149. See *id.* at 926-27, 616 P.2d at 819, 167 Cal. Rptr. at 837.

150. See *id.* For cases involving the substantial damage rule, see note 45 *supra*.

151. See 27 Cal. 3d at 927, 616 P.2d at 819, 167 Cal. Rptr. at 837. For cases involving outrageous intentional conduct, see note 36 *supra*.

test as a substitute for the physical injury requirement in a case involving a direct victim plaintiff, application of the test was not expressly limited to the facts of *Molien*. Rejection of the physical injury requirement and substitution of the "guarantee of genuineness" test may, in effect, be extended to the *Dillon* line of cases.

1. Extension to the Dillon Fact Pattern

In all cases relying on the *Dillon* theory, California courts have maintained physical injury as a "threshold element of recovery."¹⁵² The *Molien* decision, however, calls into question the validity of the *Dillon* requirement that a percipient witness plaintiff must suffer physical injury or illness resulting from emotional harm as a prerequisite to bringing a cause of action for negligent infliction of emotional distress. If jurors can determine the genuineness of a claim without physical injury when the plaintiff is a "direct victim," they are seemingly capable of doing so when the plaintiff is a percipient witness. Physical injury therefore should no longer be an absolute requirement for recovery in *Dillon* cases.

In 1974, Hawaii discarded physical injury as a condition to recovery by a percipient witness. In *Leong v. Takasaki*,¹⁵³ the Hawaii Supreme Court extended its holding in *Rodrigues v. State*¹⁵⁴ to percipient witnesses. In *Leong*, a four year old plaintiff recovered for emotional harm suffered even though he suffered no physical injury from witnessing the death of his step-grandmother when she was hit by the defendant's automobile.¹⁵⁵ Since California closely paralleled *Rodrigues* in deciding *Molien*, a similar expansion in California of *Molien*'s rejection of the physical injury requirement to the *Dillon*-type case would be neither unreasonable nor unexpected. *Molien* itself has left room for such an expansion. The court did not limit the rejection of the physical injury requirement to cases similar to *Molien*; rather, the court rejected physical injury as a requirement for a cause of action for negligent infliction of emotional distress.¹⁵⁶ The distinction made by the court between *Dillon* and *Molien* went only to establishing duty and *not* to rejecting the physical injury requirement.¹⁵⁷

152. *Hair v. County of Monterey*, 45 Cal. App. 3d 538, 542, 119 Cal. Rptr. 639, 642 (1975). See generally *Borer v. American Airlines*, 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977); *Capelouto v. Kaiser Foundation Hosp.*, 7 Cal. 3d 889, 500 P.2d 880, 103 Cal. Rptr. 856 (1972); *Nazaroff v. Superior Court*, 80 Cal. App. 3d 553, 145 Cal. Rptr. 657 (1978).

153. 55 Haw. 398, 520 P.2d 758 (1974).

154. 52 Haw. 156, 472 P.2d 509 (1970).

155. See 55 Haw. at 403, 520 P.2d at 760.

156. See *Molien v. Kaiser Foundation Hosp.*, 27 Cal. 3d 916, 928-30, 616 P.2d 813, 820-21, 167 Cal. Rptr. 831, 838-39 (1980).

157. See *id.* at 922-23, 616 P.2d at 816-17, 167 Cal. Rptr. at 834-35.

In sum, the reasons given for rejecting the physical injury requirement in cases when the plaintiff is a direct victim apply equally to situations involving percipient-witness plaintiffs. The sole purpose of the physical injury requirement is to act as an arbitrary limit on liability, and both *Dillon* and *Molien* sought to eliminate the use of artificial, arbitrary bars to recovery.¹⁵⁸ Thus, after *Molien*, lack of physical injury should no longer bar recovery for negligent infliction of emotional distress; consequently, the *Dillon* physical injury requirement should be discarded.¹⁵⁹

In addition to questioning the physical injury requirement of *Dillon*, *Molien* questions whether California courts should continue to adhere strictly to the *Dillon* factors as a means of limiting the scope of the cause of action for negligent infliction of emotional distress for percipient-witness plaintiffs. *Molien* advocates a more flexible, case-by-case approach in determining whether recovery should be allowed. The next section will examine the effect *Molien* may have on the future application of the *Dillon* factors.

APPLICATION OF THE *DILLON* GUIDELINES

A. *Close Proximity and Contemporaneous Sensory Perception*

In cases involving percipient-witness plaintiffs, the *Dillon* guidelines still limit liability. Two of the *Dillon* guidelines, contemporaneous sensory perception and close proximity to the scene, however, should be used in a more flexible fashion. Rather than applying these two guidelines as absolute requirements for recovery, as courts have done in the past,¹⁶⁰ the courts should treat them merely as factors in determining foreseeability and thus duty. Although *Molien* implies that all three *Dillon* guidelines must be met to recover,¹⁶¹ *Dillon* itself called only for the courts to "take into account such factors as the following [list of factors] . . . [t]o indicate the *degree* of the defendant's foreseeability. . . ."¹⁶² Furthermore, the *Dillon* court stated:

158. See *id.* at 927, 616 P.2d at 819, 167 Cal. Rptr. at 837; *Dillon v. Legg*, 68 Cal. 2d 728, 737, 441 P.2d 912, 918, 69 Cal. Rptr. 72, 78 (1968).

159. In the recent case of *Aldaco v. Tropic Ice Cream Co.*, 110 Cal. App. 3d 523, 168 Cal. Rptr. 59 (1980), plaintiff attempted to recover for emotional distress absent resultant physical injury in a *Dillon* bystander situation. The court refused to apply *Molien* because the cause of action arose before *Molien* was decided and instead dismissed the case for lack of physical injury. The court, however, did not suggest that *Molien* would be inapplicable in subsequent cases.

160. See, e.g., *Hoyem v. Manhattan Beach City School Dist.*, 22 Cal. 3d 508, 522-23, 585 P.2d 851, 859, 150 Cal. Rptr. 1, 9 (1978); *Justus v. Atchison*, 19 Cal. 3d 564, 585, 565 P.2d 122, 136, 139 Cal. Rptr. 97, 111 (1977); *Arauz v. Gerhardt*, 68 Cal. App. 3d 937, 948-49, 137 Cal. Rptr. 619, 627 (1977); *Jansen v. Children's Hosp. Medical Center*, 31 Cal. App. 3d 22, 24, 106 Cal. Rptr. 883, 885 (1973).

161. See 27 Cal. 3d at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834.

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

We are not now called upon to decide whether, in the absence or reduced weight of some of the above factors, we would conclude that the accident and the injury were not reasonably foreseeable and that therefore defendant owed no duty of due care to plaintiff. In future cases, the courts will draw lines of demarcation upon facts more compelling than the subtle ones alleged in the complaint before us.¹⁶³

Despite the above-quoted language in *Dillon*, courts have not begun drawing lines to suit fact situations other than the bystander scenario.¹⁶⁴ The *Molien* decision has shown, however, that strict adherence to the *Dillon* guidelines is not necessary to avoid unlimited liability. Foreseeability, and hence duty, can be determined on a case-by-case basis.¹⁶⁵

Hawaii has successfully used the *Dillon* guidelines as mere factors to consider rather than as absolute requirements for recovery. More flexible use of the *Dillon* requirements of close proximity and contemporaneous sensory perception to limit potential liability closely models the Hawaii approach in *Leong v. Takasaki*.¹⁶⁶ The Hawaii Supreme Court, in rejecting the zone of danger rule and in adopting a modified *Dillon* approach, declared that the *Dillon* guidelines should not be used to bar recovery but instead should be used as indicia of the degree of mental distress suffered.¹⁶⁷ Hawaii created an objective standard based on the standard articulated in *Rodrigues*:

[W]hen it is reasonably foreseeable that a reasonable plaintiff-witness to an accident would not be able to cope with the mental stress engendered by such circumstances, the trial court should conclude that defendant's conduct is the proximate cause of plaintiff's injury and impose liability on the defendant for any damages arising from the consequences of his negligent act.¹⁶⁸

Hawaii has set reasonable limitations on the broad definition of duty

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

164. [T]he courts have not often taken the *Dillon* challenge to fashion guidelines appropriate to different kinds of cases involving emotional distress caused by negligence toward another. Some of the medical cases seem only with effort to have been forced down upon the Procrustean bed of "accident" guidelines.

Molien v. Kaiser Foundation Hosp., 158 Cal. Rptr. 107, 115 (1979) (Poche, J. dissenting), *rev'd*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

165. See 27 Cal. 3d at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834; 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80. *Accord*, *Tobin v. Grossman*, 24 N.Y.2d 609, 620, 249 N.E.2d 419, 425, 301 N.Y.S.2d 554, 563 (1969) (Keating, J. dissenting) (limit on case-by-case basis "using proximate cause and foreseeability as a means to avoid anomalous results.").

166. 55 Haw. 398, 520 P.2d 758 (1974). Unlike the Hawaii approach, this comment does not suggest flexible application of the close relationship factor. See notes 187-189 and accompanying text *infra*.

167. See 55 Haw. at 410, 520 P.2d at 766. See generally Comment, *Kelley v. Kokua Sales & Supply, Ltd.: Redefining the Limits to Recovery for Negligently Inflicted Mental Distress*, 11 TULSA L.J. 587 (1976).

168. 55 Haw. at 410, 520 P.2d at 765.

set forth in the *Leong* case. In the same year *Leong* was decided the Hawaii Supreme Court denied recovery for negligent infliction of emotional distress in *Kelly v. Kokua Sales & Supply, Ltd.*¹⁶⁹ In *Kelley*, plaintiff's decedent died of a heart attack in California after hearing that his grandchild in Hawaii had been killed when struck by the defendant's tractor.¹⁷⁰ The court realized that imposing liability in such a situation would place an unreasonable burden on defendants.¹⁷¹ To avoid unreasonably broadening a defendant's scope of duty, the *Kelley* court additionally required the plaintiff to be within a "reasonable distance" of the scene of the accident.¹⁷² The "reasonable distance" requirement allows greater leeway for a case-by-case analysis than do the *Dillon* factors of close proximity and contemporaneous sensory perception as presently applied by the California courts. Thus, Hawaii has demonstrated that limiting liability in percipient witness cases, without strictly adhering to arbitrary guidelines, is not only possible but is also reasonable.¹⁷³

A more flexible approach to determining duty will eliminate many of the injustices of prior decisions. Compare, for instance, the holdings of *Justus v. Atchison*¹⁷⁴ and *Austin v. Regents of the University of California*.¹⁷⁵ Each case involved the death of a child during birth in the plaintiff-father's presence due to the defendants' negligence. In *Austin*, the plaintiff recovered because he felt with his hand the cessation of life.¹⁷⁶ In *Justus*, the court denied recovery because the plaintiff's mental distress occurred only after the doctor *told* him the baby had just died and not from his personal perception of the infant's death.¹⁷⁷ To contend that the plaintiff's emotional distress was any less genuine in the *Justus* case than it was in the *Austin* case is irrational, yet recovery was denied in *Justus* because the *Dillon* factor of contemporaneous sensory perception was not satisfied.¹⁷⁸ By looking at the facts and circumstances of each case, and by using the *Dillon* factors of contemporaneous sensory perception and close proximity as general guidelines, rather than as absolute requirements, courts can limit recovery in a less drastic manner.¹⁷⁹

169. 56 Haw. 204, 532 P.2d 673 (1975).

170. See *id.* at 206, 532 P.2d at 674-75.

171. See *id.* at 208, 532 P.2d at 676.

172. See *id.* at 209, 532 P.2d at 676.

173. See Comment, *Kelley v. Kokua Sales & Supply Ltd.: Redefining the Limits to Recovery for Negligently Inflicted Mental Distress*, 11 TULSA L.J. 587, 602 (1976).

174. 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977).

175. 89 Cal. App. 3d 354, 152 Cal. Rptr. 420 (1979).

176. See *id.* at 358, 152 Cal. Rptr. at 423.

177. See 19 Cal. 3d at 585, 565 P.2d at 136, 139 Cal. Rptr. at 111.

178. See *id.* at 584, 565 P.2d at 136, 139 Cal. Rptr. at 110.

179. See generally Comment, *The Development of Recovery for Negligently Inflicted Emotional*

B. Close Relationship

Although the close proximity and contemporaneous sensory perception factors arguably should be given less emphasis, the third *Dillon* factor, requiring a close relationship of the plaintiff to the primary victim of the tort, should be given greater weight. The close relationship factor seems to be the only *Dillon* guideline that has a rational connection to the scope of duty owed. While the close proximity and contemporaneous sensory perception factors are closely tied to "accident" cases, close relationship is an integral factor in determining duty in all cases of emotional distress in which the plaintiff is not the primary victim of the tortious conduct.¹⁸⁰ Thus, both direct victim and percipient-witness plaintiffs must show a close relationship to the party primarily injured by the defendant. A blood relationship may not be necessary, but the court must be convinced that an emotional attachment exists akin to a familial relation.¹⁸¹ The close relationship requirement reasonably restricts the class of potential plaintiffs because emotional injury to those with a close relationship to the primary victim is more foreseeable than injury to those with a remote or nonexistent relationship. Thus, the close relationship factor should remain as an absolute requirement for recovery and should serve to limit the scope of liability in all cases of negligent infliction of emotional distress in which the plaintiff is not the primary victim of the defendant's tortious conduct.

In addition to the close relationship requirement, there are several other means by which the court can limit liability. The next section discusses the limitations that remain on the newly expanded tort of negligent infliction of emotional distress.

LIMITATIONS ON THE NEW CAUSE OF ACTION OF NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS

This comment has proposed expanding the negligent infliction of emotional distress cause of action by enlarging the direct victim class of plaintiffs, rejecting the physical injury requirement for percipient witnesses, and relaxing the application of the *Dillon* factors of close prox-

Distress Arising from Peril or Injury to Another: An Analysis of the American and Australian Approaches, 26 EMORY L.J. 647, 676-79 (1977). But see *Hathaway v. Superior Court*, 112 Cal. App. 3d 728, 736-37, 169 Cal. Rptr. 435, 440 (1980); PROSSER, *supra* note 21, §54, at 335. In *Hathaway*, decided subsequent to *Molien*, the court denied recovery for failure to meet the contemporaneous sensory perception requirement of *Dillon*. The plaintiff parents ran out of their house and found their child electrocuted by a negligently installed water cooler.

180. See generally Liebson, *supra* note 33, at 197.

181. See *Mobaldi v. Board of Regents of Univ. of Cal.*, 55 Cal. App. 3d 573, 582, 127 Cal. Rptr. 720, 726 (1976) (foster mother recovers for witnessing negligent medical treatment of foster child). *Accord*, *Leong v. Takasaki*, 55 Haw. 398, 410, 520 P.2d 758, 766 (1974) (recovery by plaintiff for witnessing death of step-grandmother).

imity and contemporaneous sensory perception. Expansion of the tort, however, need not result in unlimited liability. The *Molien* decision and its proposed implications release negligent infliction of emotional distress from the straightjacket of arbitrary tests formerly used to limit liability without disturbing the underlying policy considerations. The more flexible limitations that remain are adequate safeguards against unlimited liability and fraudulent or trivial claims.

A. Duty and Causation Limitations

Molien propounds a principle of flexibility in determining whether a claim for negligent infliction of emotional distress is actionable. Hence, *Molien*'s case-by-case approach potentially extends the scope of duty owed. In addition, a flexible application of the *Dillon* factors of close proximity and contemporaneous perception allows courts to find a duty owed in a greater number of situations.

Despite the potential for establishing duty more readily, the court, nevertheless, can foreclose the plaintiff from recovery at the outset by finding that no duty exists.¹⁸² Accordingly, courts can determine that a plaintiff is not a reasonably foreseeable direct victim or percipient witness. Thus, duty limitations still exist on the tort of negligent infliction of emotional distress. *Molien* and its proposed implications on the *Dillon* factors simply give courts discretion in determining whether a duty is owed. Instead of barring recovery for failure to meet an artificial test, courts should now weigh all the facts and circumstances in each case in making the duty determination.

Additionally, as in any other tort, the principle of proximate causation will limit the scope of the cause of action for negligent infliction of emotional distress.¹⁸³ A plaintiff may find it difficult to prove that a defendant's tortious conduct proximately caused the emotional distress suffered. This is especially true in cases involving plaintiffs who are strongly predisposed to suffering emotional illness or injury. The court can limit a defendant's liability to hypersensitive plaintiffs by applying an objective standard that restricts liability to emotional distress an ordinary person would suffer.¹⁸⁴

In *Rodrigues*, the Hawaii Supreme Court created an objective standard to limit liability to emotional distress a reasonable person would suffer: "Serious mental distress may be found where a reasonable man,

182. See *Wynne v. Orcutt Union School Dist.*, 17 Cal. App. 3d 1108, 1111, 95 Cal. Rptr. 458, 459 (1971) (parents suffered emotional distress when teacher disclosed to class that child was terminally ill. Court held no duty owed).

183. See Comment, *Neurosis Following Trauma: A Dark Horse in the Field of Mental Disturbance*, 8 CUM. L. REV. 495 (1977); *Independent Tort*, *supra* note 21, at 1258.

184. But see *Smith*, *supra* note 20, at 260.

normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.”¹⁸⁵ Although the California Supreme Court did not expressly adopt Hawaii’s objective standard in the *Molien* decision, such acceptance may be inferred from the court’s adoption of the cause of action for negligent infliction of serious emotional distress based on the *Rodrigues* decision.¹⁸⁶ Under this standard, a hypersensitive plaintiff will not recover for emotional distress beyond that which a reasonable person would suffer.

In addition to the courts’ power to limit the scope of the cause of action for negligent infliction of emotional distress by limiting defendants’ duties and by applying a reasonable man standard, the jury also possesses limiting controls. The jury will determine whether adequate proof of serious emotional distress exists on the facts of a case.

B. Adequate Proof of Serious Emotional Distress

The *Molien* decision limits the new cause of action for negligent infliction of emotional distress to cases in which there is adequate proof of *serious* emotional distress.¹⁸⁷ Courts can thereby extend recovery within reasonable limits and avoid potential recovery for trivial or frivolous claims.¹⁸⁸ In personal injury claims, the degree of injury merely determines the amount of compensation; in emotional distress claims the degree of injury indicates whether there is an actionable tort at all.¹⁸⁹ Consequently, the definition of *serious* emotional distress will determine the extent of recovery allowed.¹⁹⁰

The Hawaii Supreme Court, in *Rodrigues*, fashioned the requirement of serious emotional distress into an objective standard.¹⁹¹ Hawaii derived its objective standard from the standard stated in the Restatement (Second) of Torts¹⁹² for determining *severe* emotional dis-

185. *Rodrigues v. State*, 52 Haw. 156, 173, 472 P.2d 509, 520 (1970).

186. See *Molien v. Kaiser Foundation Hosp.*, 27 Cal. 3d 916, 930, 616 P.2d 813, 821, 167 Cal. Rptr. 831, 839 (1980).

187. See *id.* at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

188. But see Theis, *Intentional Infliction of Emotional Distress: A Need for Limits on Liability*, 27 DEPAUL L. REV. 275, 291-92 (1977).

189. See 27 Cal. 3d at 928, 616 P.2d at 819, 167 Cal. Rptr. at 837; *Independent Tort*, *supra* note 21, at 1255.

190. See *Independent Tort*, *supra* note 21, at 1255 n.102; Comment, *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases*, 35 U. CHI. L. REV. 512, 517 (1968).

191. See note 185 and accompanying text *supra*.

192. See RESTATEMENT (SECOND) OF TORTS §46, Comment j at 77 (1965): “The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and duration of the distress are factors to be considered in determining its severity.”

stress for *intentional* infliction of emotional distress.¹⁹³ In view of the similarity between the Hawaii and Restatement standards, "severe" and "serious" in this context may be inferred to have analogous meanings. Thus, definitions of *severe* emotional distress found in cases of intentional conduct can assist in defining *serious* emotional distress in cases of negligent conduct.¹⁹⁴ Hence, severe or serious means "substantial or enduring, as distinguished from trivial or transitory."¹⁹⁵ Although juries will determine if there is sufficient proof of serious emotional distress, courts can confine the area of jury decision by giving accurate definitions in jury instructions.

As stated in *Molien*, the jury must find not only *serious* emotional distress but also some "guarantee of genuineness" in the circumstances of the case to support a finding of serious emotional distress.¹⁹⁶ This added evidentiary protection not only limits the number of recoverable claims, but also guards against recovery for fraudulent claims.¹⁹⁷ Thus, unless juries can point to some aspect of the plaintiff's case that serves to guarantee genuineness, juries will presumably deny recovery.

CONCLUSION

This comment has demonstrated that the new independent cause of action for negligent infliction of emotional distress reasonably can be expanded without disturbing public policy considerations that have previously been invoked to deter such expansion. The new cause of action treats the *Dillon* and *Molien* fact patterns as two branches of a single tort. Thus, once the court establishes a defendant's duty by classifying the plaintiff as a direct victim or a percipient witness, it can apply the remaining elements of the tort identically. Therefore, *Molien*'s rejection of the physical injury requirement regarding "direct victims" should apply equally to percipient-witnesses. Additionally, expanding the class of plaintiffs who can commence actions under this new tort by broadly defining "direct victims" and by flexibly applying the *Dillon* factors of close proximity and contemporaneous sensory perception appears appropriate. At the same time, the class of potential plaintiffs should be limited to primary victims themselves or to those with a sufficiently close relationship to a primary victim of the tort.

193. See *Rodrigues v. State*, 52 Haw. 156, 173, 472 P.2d 509, 520 (1970).

194. See also *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970); RESTATEMENT (SECOND) OF TORTS §46 (1965).

195. 10 Cal. App. 3d at 397, 89 Cal. Rptr. at 90.

196. See *Molien v. Kaiser Foundation Hosp.*, 27 Cal. 3d 916, 930, 616 P.2d 813, 821, 167 Cal. Rptr. 831, 839 (1980).

197. See also FED. R. EVID. 804(b)(3). "Corroborating circumstances" must be shown in order for declarations against penal interest to be admissible as a hearsay exception.

In summary, the elements necessary for recovery under the proposed cause of action of negligent infliction of emotional distress are as follows: (1) plaintiff must be a direct victim or percipient witness; (2) plaintiff must have a close relationship to the primary victim (if not actually the primary victim); (3) plaintiff must suffer serious emotional harm; (4) the circumstances must provide a guarantee of the genuineness of the claim; and (5) plaintiff's emotional distress must be caused by defendant's negligence.

"Legal history shows that artificial islands of exceptions created from the fear that the legal process will not work, usually do not withstand the waves of reality and, in time, descend into oblivion."¹⁹⁸

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198. *Hambrook v. Stokes*, 1 K.B. 141, 158-59 (1923).

