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Bystander Recovery for Mental Distress

COMMENTS

BYSTANDER RECOVERY FOR MENTAL DISTRESS

I. INTRODUCTION—RECOVERY FOR MENTAL DISTRESS GENERALLY

"Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone . . . ."[1] This often quoted statement of Lord Wensleydale rather accurately represented the common law reluctance to recognize mental tranquillity as an independent interest worthy of legal protection.[2] Accordingly, early American cases denied recovery where only mental injury was the basis of damages.[3] The objections to such recovery have been several:[4] (1) Mental distress and its consequences were deemed too remote and, hence, were not causally related to the act in question because they lacked tangibility and depended upon the individual peculiarities of the person injured. (2) Mental distress was so difficult to prove that it was considered immeasureable in terms of money damages. (3) No precedent allowed recovery. (4) Public policy seemed to dictate that actions for mental distress be suppressed in order to avoid an imagined flood of spurious litigation. These arguments, however, have been effectively "demolished"[5] as the law evolved[6] to the modern position that "[f]reedom from mental disturbance is . . . a protected interest . . . ."[7]

Thus, although there is now an accepted legal duty upon one to refrain from a wrongful invasion of another's mental tranquillity, much of the scope of this duty remains undefined. What constitutes a "wrongful invasion"? Does the right of one to enjoy freedom from such interference extend to acts directed at certain or all third parties? Further, may a bystander recover for mental

1. Lynch v. Knight, 11 Eng. Rep. 854, 863 (H.L. 1861).

2. Lord Wensleydale's statement has been criticized: "In so far as the generalization is true, it can hardly be based upon the reason indicated, namely, that the law cannot put a monetary value upon the interest in question . . . ." Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv. L. Rev. 1033 (1936).

3. E.g., Williamson v. Central of Ga. Ry., 127 Ga. 125, 56 S.E. 119 (1906); Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898); Kalen v. Terre Haute & I.R.R., 18 Ind. App. 202, 47 N.E. 694 (1897); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896); Chittick v. Philadelphia Rapid Transit Co., 224 Pa. 13, 73 A. 4 (1909); Memphis St. Ry. v. Bernstein, 137 Tenn. 637, 194 S.W. 902 (1917).

4. W. Prosser, Torts § 55, at 346-47 (3d ed. 1964) [hereinafter cited as W. Prosser]; McNiece, Psychic Injury and Tort Liability in New York, 24 St. John's L. Rev. 1, 9-10 (1949) [hereinafter cited as McNiece].

5. W. Prosser at 346-47.

6. It has been suggested that this evolution occurred in four stages, mental distress being successively treated as (1) an element of "parasitic" damages, (2) a separate, intentional tort, (3) a limited liability upon those engaged in a "common calling," and (4) a liability upon the public generally. Amdursky, The Interest in Mental Tranquillity, 13 Buffalo L. Rev. 339 (1964) [hereinafter cited as Amdursky].

7. Ferrara v. Galluchio, 5 N.Y.2d 16, 21, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 999 (1958).

distress occasioned by witnessing danger or injury to another caused by defendant's negligent conduct? While the interest in mental tranquillity generally has been well analyzed,[8] some examination of the historical background of this interest is needed to understand bystander recovery because such recovery appears to depend upon the policy considerations each jurisdiction employs in justifying protection of the interest.

II. Mental Distress with Concurrent Bodily Injury—"Parasitic" Damages

The rigid rule at common law denying recovery for mental injury was not applied where the mental distress was alleged as a "parasitic" component of damages.[9] In *Blake v. Midland Ry.*,[10] a wrongful death action was brought by the decedent's widow as administratrix against the defendant railroad for the latter's negligence in causing a railway accident. The trial judge instructed the jury that they were to consider whether they would confine themselves to the plaintiff's pecuniary loss or include as damages the anxiety plaintiff suffered as a result of her husband's death. The jury returned a verdict for plaintiff which included an award for mental injury. On appeal, it was held that compensation should have been limited to pecuniary loss on statutory grounds.[11] But, it was said by Coleridge, J., that "[w]hen an action is brought by an individual for a personal wrong, the jury, in assessing the damages, can with little difficulty award him a solatium for his mental sufferings alone, with an indemnity for his pecuniary loss."[12] American decisions have generally been in accord with this dictum.[13] Thus, where the defendant's negligence has caused physical injury to

8. See Bohlen, Fifty Years of Torts, 50 Harv. L. Rev. 725 (1937); Goodhart, The Shock Cases and Area of Risk, 16 Modern L. Rev. 14 (1953); Goodhart, Emotional Shock and the Unimaginative Taxicab Driver, 69 L.Q. Rev. 347 (1953); Smith & Solomon, Traumatic Neuroses in Court, 30 Va. L. Rev. 87 (1943). See also articles cited in W. Prosser at 347 n.49.

9. An element of damages is said to be "parasitic" when "the law permits elements of harm to be considered in assessing the recoverable damage, which cannot be taken into account in determining the primary question of liability." 1 T. Street, The Foundations of Legal Liability 461 (1906).

10. 118 Eng. Rep. 35, 37 (Q.B. 1852).

11. The English wrongful death statute was similar to New York's present statute, N.Y. E.P.T.L. § 5-4.3. See 118 Eng. Rep. at 37. New York cases have held that recovery can only be had for pecuniary damages, excluding from consideration such factors as mental anguish, grief, or loss of companionship. See, e.g., Fornaro v. Jill Bros., 42 Misc. 2d 1031, 249 N.Y.S.2d 833 (Sup. Ct.), rev'd on other grounds, 22 App. Div. 2d 695, 253 N.Y.S.2d 771 (2d Dep't 1964), aff'd, 15 N.Y.2d 819, 205 N.E.2d 862, 257 N.Y.S.2d 938 (1965).

12. 118 Eng. Rep. at 41-42.

13. Seger v. Town of Barkhamsted, 22 Conn. 290 (1853); Kline v. Kline, 158 Ind. 602, 64 N.E. 9 (1902); Anthony v. Norton, 60 Kan. 341, 56 P. 529 (1899); Geveke v. Grand Rapids & I.R.R., 57 Mich. 589, 24 N.W. 675 (1885); Holyoke v. Grand Trunk Ry., 48 N.H. 541 (1869); Quinn v. Long Island R.R., 105 N.Y. 643, 13 N.E. 925 (1887); Ransom v. New York & E.R.R., 15 N.Y. 415 (1857); Pennsylvania R.R. v. Allen, 53 Pa. 276 (1866);

the plaintiff, most jurisdictions have allowed compensation for plaintiff's mental distress accompanying it.[14]

The rationale of cases which required physical injury as a prerequisite for recovery of mental distress damages was apparently the belief that once a cause of action for infliction of physical harm is established, there would be sufficient assurance that the mental injury was real.[15] This fear of "vexatious suits and fictitious claims" has been an obstacle which apparently could be surmounted only by the showing of physical injury, regardless of the nature or degree.[16]

III. Mental Distress and the "Impact" Rule

The law inexorably evolved from a point where the interest in mental tranquillity was treated as an element of "parasitic" damages attached to an independent cause of action,[17] to the imposition of a duty upon those engaged in a "common calling" to avoid interference with that interest as to those dealing with them[18] and, finally, to the point where the interest is safeguarded from un-

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Goodell v. Tower, 77 Vt. 61, 58 A. 790 (1904); Draper v. Baker, 61 Wis. 450, 21 N.W. 527 (1884).

14. Recovery for mental distress as "parasitic" damages accompanying physical harm developed historically in three distinct areas: (1) Mental distress in the form of fright suffered at the time of the physical injury. Easton v. United Trade School Contracting Co., 173 Cal. 199, 159 P. 597 (1916); (2) Mental distress in the form of shame and humiliation when the physical injury caused disfigurement. Erie R.R. v. Collins, 253 U.S. 77 (1920), aff'g 259 F. 172 (2d Cir. 1919) (recovery for "mental anguish as resulting from and part of physical suffering"); (3) Mental distress in the form of plaintiff's fears as to the effect of the physical injury. Ferrara v. Galluchio, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958) (cancerophobia caused by information from subsequent treating physician).

15. W. Prosser at 350.

16. Recovery for mental distress as a "parasitic" component of damages is not limited to cases where plaintiff suffers physical injury due to another's negligence but has been extended to other causes of action. E.g., Dixon v. New York Trap Rock Corp., 293 N.Y. 509, 58 N.E.2d 517 (1944) (nuisance); Garrison v. Sun Printing & Publishing Ass'n, 207 N.Y. 1, 100 N.E. 430 (1912) (defamation); Cauverien v. DeMetz, 20 Misc. 2d 144, 188 N.Y.S.2d 627 (Sup. Ct. 1959) (conversion); Goodell v. Tower, 77 Vt. 61, 58 A. 790 (1904) (malicious prosecution and false imprisonment).

17. "The treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is to-day recognized as parasitic will . . . to-morrow be recognized as an independent basis of liability. It is merely a question of social, economic, and industrial needs as those needs are reflected in the organic law." 1 T. Street, The Foundations of Legal Liability 470 (1906).

18. 1 T. Street, The Foundations of Legal Liability 184-86 (1906). Thus, liability was imposed upon common carriers, Gillespie v. Brooklyn Heights R.R., 178 N.Y. 347, 70 N.E. 857 (1904) (see cases cited in W. Prosser at 44-45 nn.49-57), innkeepers, DeWolf v. Ford, 193 N.Y. 397, 86 N.E. 527 (1908) (see cases cited in W. Prosser at 45 n.58), and, in the minority of jurisdictions, telegraph companies, see cases cited in Amdursky at 346 n.60. The federal rule governing interstate communications and the majority of state courts are to the contrary. See cases cited in W. Prosser at 348 n.66 & 349 n.67, respectively.

reasonable encroachments by the public generally.[19] The question, then, is when will the law recognize an independent cause of action against a member of the general public for an interference with that interest?

Where some physical harm or other tangible consequences are not immediate but follow at a later date the fright or shock which allegedly induced them, there is a division in the cases. Many jurisdictions in the United States required impact, however slight, to sustain a recovery.[20] This requirement was based on the premise that the claim was thereby made more trustworthy. In *Spade v. Lynn & Boston R.R.*,[21] an action was brought to recover for bodily injuries caused by fright and mental disturbance. The jury was instructed that a person cannot recover for mere fright, fear or mental distress in the absence of bodily injury but that when the fright or shock results in bodily harm, there may be recovery for that bodily harm and whatever mental consequences the plaintiff may suffer. The Supreme Judicial Court of Massachusetts, holding that such instruction was error, stated: "[T]here can be no recovery for . . . physical injuries as may be caused solely by such mental disturbance, where there is no injury to the person from without."[22] Prior to the decision in *Battalla v. State*,[23] New York had also followed the impact rule.[24]

19. It should be noted that the intentional invasion of the interest in mental tranquillity became the basis of a separate tort at an earlier stage in time as "the law's first step in the independent recognition of an interest is to secure it against conduct purposely invading it." Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv. L. Rev. 1033, 1058 (1936) (footnote omitted). The case law in this area is in accord with Restatement (Second) of Torts § 46(1) (1965): "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." See cases cited in Amdursky at 345 nn.51-53. See also articles cited in W. Prosser at 44 n.48.

20. See cases cited (by jurisdiction, state and federal) in McNiece at 14 n.40. But it should be noted that courts in these jurisdictions find impact in minor contacts with the plaintiff, contacts which play no role in causing the injury complained of. See W. Prosser at 350-51 & nn.84-95 (cases collected therein).

21. 168 Mass. 285, 47 N.E. 88 (1897).

22. Id. at 290, 47 N.E. at 89. It was admitted that psychic injury may proximately cause bodily injury; and, to deny recovery for such injury but allow it for physical harm caused directly can hardly be logically defended. The denial of the action was clearly based on the floodgate theory and the fear of fraudulent claims.

23. 10 N.Y.2d 237, 176 N.E. 729, 219 N.Y.S.2d 34 (1961), overruling Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896).

24. The only consistent departure from the earlier New York rule denying recovery for mental distress absent impact was in those cases dealing with corpses. See, e.g., Gostkowski v. Roman Catholic Church, 262 N.Y. 320, 186 N.E. 798 (1933) (unauthorized disinterment of the deceased's body); Finley v. Atlantic Transp. Co., 220 N.Y. 249, 115 N.E. 715 (1917) (negligent misdelivery of deceased's body); Darcy v. Presbyterian Hosp., 202 N.Y. 259, 95 N.E. 695 (1911) (defendant performed an unauthorized autopsy upon the deceased); Klumbach v. Silver Mount Cemetery Ass'n, 242 App. Div. 843, 275 N.Y.S. 180 (2d Dep't 1934), aff'd mem., 268 N.Y. 525, 198 N.E. 386 (1935) (cemetery mislaid the body of the deceased). The rationale for recovery in such cases cannot be grounded in logic or reason for if one

The majority view in the United States allows recovery for psychic injury absent impact.[25] In the *Battalla* case, the infant plaintiff was at a ski slope owned and operated by New York State. The infant was placed in a chair lift by an employee who failed to secure the protective belt properly. During the descent of the chair the infant became hysterical due to fear, thereby suffering mental distress. Defendant moved to dismiss for failure to state a cause of action. The Court of Claims denied the motion[26] but the appellate division reversed on the strength of *Mitchell*.[27] In reversing the appellate division, the New York Court of Appeals said: "It is our opinion that *Mitchell* should be overruled. It is undisputed that a rigorous application of its rule would be unjust, as well as opposed to experience and logic."[28]

Dulieu v. White & Sons[29] presented the English courts with an opportunity to re-evaluate the impact rule, which had prevailed in that country for the same policy reasons that had supported its application in the United States. Plaintiff suffered severe emotional shock when a van, negligently driven by defendant's employee, went out of control and crashed into a tavern where she was tending bar. The fright which she suffered at this occurrence resulted in the premature birth of her child and caused the child to be born an idiot. The court, by Kennedy, J., rejected the defendant's argument that lack of impact precluded recovery for mental distress and, upon re-examination of the impact rule generally, concluded that it was no longer consistent with the policy considerations of modern jurisprudence.[30] Having rejected the impact rule, the court placed England in accord with the majority view in the United States.

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can recover for the negligent treatment of the dead body of a relative, why should recovery be denied for the negligent treatment of a living relative? Perhaps the distinction is that in the "corpse" cases, there is an "especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious." W. Prosser at 349. Whatever the soundness of this contention, the "special circumstances," e.g., the reverence one feels upon the death of a loved one which focuses upon that person's earthly remains, are, in effect, a substitute for the usual requirement of impact.

25. See cases cited (by jurisdiction) in McNiece at 16 n.43.

26. 17 Misc. 2d 548, 184 N.Y.S.2d 1016 (Ct. Cl. 1959).

27. 11 App. Div. 2d 613, 200 N.Y.S.2d 852 (3d Dep't 1960).

28. 10 N.Y.2d at 239, 176 N.E.2d at 730, 219 N.Y.S.2d at 35.

29. [1901] 2 K.B. 669, rejecting Victorian Rys. Comm'rs v. Coultas, [1888] 13 App. Cas. 222 (P. C.) (Austl.).

30. The court made the following points: (1) The argument that such injury is too remote is neither medically nor legally sound. [1901] 2 K.B. at 677. (2) Once physical injury is said to be caused by fright or shock, it remains for the jury to determine if the damages alleged ought to be held proximately caused. Id. at 678-79. (3) If such damages are held to be a proximate cause of the physical injury, it cannot be said "[t]hat fright—where physical injury is directly produced by it—cannot be a ground of action merely because of the absence of any accompanying impact . . . ." Id. at 673. (4) The rationale that such actions are to be discouraged on the ground of public policy alone cannot be accepted. The court stated: "[I]f, as is admitted, and I think justly admitted, by [Spade v. Lynn & B.R.R., 168 Mass. 285, 47 N.E. 88 (1897)], a claim for damages for physical injuries naturally and directly resulting from nervous shock which is due to the negligence of another in causing fear of

IV. Mental Distress and Bystander Recovery—England

A further aspect of the *Dulieu* decision, which may well have been of equal importance to the law of mental distress recovery as was its rejection of the impact rule, was the statement in the opinion of Judge Kennedy that: "The shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself."[31] Although the issue of bystander recovery was not before the court in *Dulieu*, the dictum contained therein would appear to preclude recovery by one other than the person threatened with "immediate personal injury."

Some twenty years later, however, the issue of bystander recovery was directly before the court in *Hambrook v. Stokes Brothers*,[32] thereby necessitating an evaluation of Judge Kennedy's statement. Defendant's employee parked a truck at the top of a steep road without properly engaging the emergency brake. Plaintiff's wife, pregnant at the time, had just left her children after walking them part of the way to their school when she saw the unattended truck coming in her direction from around a bend in the road. She realized immediately that the truck had passed the place where she left her children and that the narrowness of the road created a distinct possibility that they had been injured by the truck. Upon returning around the bend in the road, she saw a crowd gathered and was informed that a child answering the description of her daughter had been severely injured. Plaintiff alleged that the mental distress suffered by his wife as a result of this event caused her to miscarry, occasioned other severe physical injuries and, ultimately, brought about her death. The evidence was unclear as to whether the wife's nervous shock was caused primarily by fear for her children or what was told her at the scene of the accident. It is significant that the defendant admitted negligence choosing, instead, to defend on the issue of proximate cause.

The trial court instructed the jury according to the dictum in *Dulieu* and verdict was for the defendant. In reversing the judgment below, the appellate court could not agree on the grounds therefor. Bankes, L.J., based his opinion on the ground that if defendant's vehicle runs out of control in a populated street, it is reasonably foreseeable that a person would be frightened of immediate physical injury so as to sustain nervous shock resulting in an adverse physical condition. He drew no distinction between that case and one in which the person fears for her child and not for herself.[33] However, he would limit recovery to

immediate bodily hurt is in principle not too remote to be recoverable in law, I should be sorry to adopt a rule which would bar all such claims on grounds of policy alone, and in order to prevent the possible success of unrighteous or groundless actions." Id. at 681.

31. [1901] 2 K.B. at 675.

32. [1925] 1 K.B. 141 (C.A. 1924).

33. Id. at 151. Hence, so long as plaintiff is within that class which may be injured by defendant's act, it is sufficient that the fright was suffered due to fear of injury for the child. This argument is weakened by the fact that the evidence is questionable concerning the danger of bodily injury to the mother. The truck was proceeding in her direction and did strike a building close to where she was standing. However, she appeared to have ample time to avoid a threatened impact, if indeed such a threat existed.

those instances where the shock was due to fear of immediate physical harm to one's self or children and such fear is apprehended by one's unaided senses, not by information received from others.[34] Atkin, L.J., argued that once there is a breach of duty, the wrongdoer is liable for the consequences, even though the type of damage may be unexpected—namely, shock.[35] He found a breach of duty to the plaintiff's wife on the ground that the owner or operator of a vehicle has "a duty to use reasonable care to avoid injuring [all wayfarers] using the highway."[36] Sargant, L.J., dissented on primarily two grounds: (1) There can be no recovery unless the wife apprehended physical harm to herself. On this point, the apprehension of harm was not shown.[37] (2) Liability should not be extended to third parties as the defendant could not be expected to reasonably foresee harm to such persons. The defendant's duty does not extend to all users of the highway in such cases.[38]

The *Hambrook* decision is generally cited for the proposition that where the defendant owes a duty to the bystander, recovery is allowed even though the plaintiff apprehended harm not to himself but to a third party.[39] Thus, in *Owens v. Liverpool Corp.*,[40] the relatives of a deceased were allowed to recover for mental distress when the hearse carrying the deceased was struck by a vehicle negligently operated by the defendant. The plaintiffs were in the car to the rear of the hearse and only one of them saw the actual impact, the other three merely seeing its effects (the coffin overturned and was nearly ejected onto the road). The court cited *Hambrook* for the rule that the shock need not arise from fear of immediate personal injury to oneself[41] and went on to state that "the right to recover damages for mental shock caused by the negligence of a defendant is not limited to cases in which apprehension as to human safety is involved."[42] It can be argued that *Owens* follows, and perhaps extends, *Hambrook*. But it is interesting that *Owens* involved shock suffered as the result of negligence affecting a corpse.[43]

The difficulty with *Hambrook* is its broad basis of liability. In *Bourhill v. Young*,[44] the court, seizing the opportunity to limit *Hambrook*, denied recovery

34. [1925] 1 K.B. at 152.

35. Id. at 156.

36. Id.

37. Id. at 165.

38. Id. at 162-64. In deference to the majority, he suggested that, upon retrial, the judge instruct the jury to find whether plaintiff's wife suffered shock due solely to "her own unaided realization of what had happened, or was due wholly or partly to what she heard from bystanders." Id. at 165. He assumed the latter alternative would be found as fact and liability would thereby be denied.

39. At least where the bystander is the parent of the third party, if the opinion of Bankes, L.J., is to be strictly applied.

40. [1939] 1 K.B. 394 (C.A. 1938).

41. Id. at 399.

42. Id. at 400.

43. See note 24 supra.

44. [1943] A.C. 92 (Scot. 1942).

to a bystander who did not witness a collision between a motorcyclist and an automobile and, being behind another vehicle from which she had just alighted, was never in fear, or danger, of immediate physical harm but thereafter suffered emotional harm upon viewing the accident scene. The court stated that a duty is owed to " 'persons so placed that they may reasonably be expected to be injured by the omission to take such [proper] care.' "[45] Hence, the orbit of duty is defined in terms of the "zone of physical risk" test, *e.g.*, the bystander must be within the zone of physical harm, as reasonably foreseen by an ordinary man, in order to recover for mental distress. Each of the five judges reserved opinion on the soundness of the holding in *Hambrook*, mererly distinguishing it on the ground that the defendant had admitted liability in that case.[46]

King v. Phillips[47] interpreted *Bourhill* as meaning that emotional harm is the injury which must be foreseeable[48] and, therefore, plaintiff need not be within the area of physical danger. Foreseeability, then, is not restricted to damage causing physical injury.[49] Applying the "foreseeability of emotional harm" rationale, recovery in the instant case was denied when a mother, hearing a scream, looked out an upstairs window seventy yards away from the point at which defendant's taxicab had struck her child. Of great importance in this case was the fact that the driver could not anticipate that the mother would see the accident.[50]

45. Id. at 102 (citation omitted).

46. The court argued that there is a different standard of foreseeability to be applied where the issue is liability rather than the remoteness of injury. For instance, a person of particularly sensitive susceptibilities may not be within the defendant's reasonable foresight. Hence, there is no duty to this person. However, once it is established that the defendant has breached a duty toward that person, the defendant must take the victim as he finds him. On the issue of damages, therefore, the plaintiff's particular susceptibility may be a factor. [1943] A.C. at 109-10. The court's distinction of Hambrook is not altogether valid, however, because the defendant's pleading in that case did not limit that court's deliberation on the issue of liability. The legal duty owed to wayfarers, in general, and plaintiff, in particular, was clearly stated in Hambrook.

47. [1953] 1 Q.B. 429.

48. "It seems to me that each member of the House of Lords [in Bourhill] based his decision on the ground that the motor-cyclist could not reasonably have been expected to have foreseen that the [plaintiff] would suffer injury by emotional shock. The test applied was not foreseeability of physical injury, but foreseeability of emotional shock." Id. at 438.

49. Singleton, L.J. stated: "I find it difficult to draw a distinction between damage from physical injury and damage from shock; prima facie, one would think that, if a driver should reasonably have foreseen either, and damage resulted from the one or from the other, the plaintiff would be entitled to succeed." Id. at 437.

50. "The driver owed a duty to the boy, but he knew nothing of the mother; she was not on the highway; he could not know that she was at the window, nor was there any reason why he should anticipate that she would see his cab at all . . . ." Id. at 436. But see Goodhart, Emotional Shock and the Unimaginative Taxicab Driver, 69 L.Q. Rev. 347, 350-51 (1953), wherein the author compares the foresight of the cab driver in King with a case in which the driver of a horse and van left it unattended in the street. A boy threw a stone at the horses; they bolted and, a quarter of a mile away, injured the plaintiff who ran into

Since neither *Hambrook* nor *Bourhill* have been overruled, the law in England is presently in a state of uncertainty. There are two distinct tests of liability,[51] with *King* providing a broader base for recovery than *Bourhill*. Thus, in *Boardman v. Sanderson*,[52] recovery for mental distress was awarded to a plaintiff who was clearly outside the zone of physical danger but who, because of defendant's knowledge that he was in the vicinity, was within the zone of foreseeable emotional harm.[53]

V. Mental Distress and Bystander Recovery—United States

A. *Majority View—"Zone of Physical Risk" Doctrine*

The overwhelming weight of authority in the United States denies recovery for mental distress in bystander cases, and does so primarily on two grounds: (1) the "zone of physical risk" test, and (2) the "impact" test.[54]

In the leading case of *Waube v. Warrington*,[55] it was held that recovery would be denied a plaintiff who is not placed in danger of immediate physical harm by the defendant's act. A mother was looking out the window of her home

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the street to stop them when he apprehended a woman and child in danger. Defendant was held liable.

51. In the course of his opinion in King, Denning, L.J. decided that the facts of the case were substantially similar to Hambrook but concluded that the shock complained of was too remote to allow recovery. His rationale was that the descent of the runaway truck in Hambrook presented a case different from the slow backing of a taxicab. [1953] 1 Q.B. at 442. This position has been justly criticized: "[I]t may be suggested that it is not immediately obvious why a mother should receive less of a shock when she sees her child being slowly run over than when it is done rapidly. The length of time consumed would seem at first sight to increase rather than to lessen the effect of such a shock." Goodhart, Emotional Shock and the Unimaginative Taxicab Driver, 69 L.Q. Rev. 347, 352-53 (1953). In any event, it may be suggested that in holding plaintiff's mental distress too remote, the "foreseeability of emotional harm" test is no more than the "zone of physical risk" concept cast in different language.

52. [1964] 1 W.L.R. 1317 (C.A.).

53. Plaintiff, his eight year old boy and defendant went to a garage to collect defendant's car. While plaintiff was in the garage office paying the repair bill for defendant, the defendant backed his vehicle in a negligent manner causing injury to plaintiff's child. Recovery was allowed on the theory that defendant knew plaintiff was within earshot and, upon hearing a scream and coming to his child's assistance, it was reasonably foreseeable that plaintiff would suffer nervous shock.

54. A third theory having less application has been proximate cause, i.e., plaintiff's injury is deemed too remote. Even where the plaintiff was in the zone of danger, courts have denied recovery thereby suggesting that it is the nature of the injury which is the real obstacle. W. Prosser at 353. Thus, in Edwards v. Miranne, 11 So. 2d 271 (La. Ct. App. 1942), a husband sought to recover for mental distress occasioned by bodily injury to his wife when he and his wife were involved in an automobile collision. Held, the wife's injury was superficial and, therefore, "wholly insufficient to arouse any mental anxiety from which a defendant could be held answerable." 11 So. 2d at 272; accord, Carey v. Pure Distrib. Corp., 124 S.W.2d 847 (Tex. Sup. Ct. 1939).

55. 216 Wis. 603, 258 N.W. 497 (1935).

watching her child cross a highway. She witnessed the killing of the child due to the defendant's negligent operation of an automobile. As a result, the mother suffered severe nervous shock which caused physical illness and, ultimately, her death. This action was brought by the husband as special administrator of the estate of his deceased wife. The issue was "whether the mother of a child who, although not put in peril or fear of physical impact, sustains the shock of witnessing the negligent killing of her child, may recover for physical injuries caused by such fright or shock."[56] The court cited *Palsgraf v. Long Island R.R.*[57] for the proposition that the "plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another."[58] No duty was found owing to the mother in *Waube* as she was not within the zone of physical danger.[59]

Those jurisdictions which base recovery on the fact that plaintiff was within the "zone of physical risk" are, in effect, using that doctrine to determine when the defendant owes a legal duty to the plaintiff. It has been stated that "'[i]n every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury.'"[60] That duty has been found where the plaintiff is threatened with immediate physical harm. Thus, if the plaintiff is within the zone of danger, an initial breach to that plaintiff is established. The fact that plaintiff suffers physical harm through fright at the peril or injury to a third party,[61] rather than through impact, is irrelevant. Recovery will be allowed as "it becomes merely a matter of the unexpected manner in which the foreseeable harm has occurred . . . ."[62]

B. *Majority View—"Impact" Rule*

Those jurisdictions which require an impact upon the plaintiff to justify recovery for his own mental distress, of course, deny recovery to one who

56. Id. at 605, 258 N.W. at 497.

57. 248 N.Y. 339, 162 N.E. 99 (1928).

58. Id. at 342, 162 N.E. at 100.

59. "It is our conclusion that [defendant's duty and plaintiff's right] can neither justly nor expediently be extended to any recovery for physical injuries sustained by one out of the range of ordinary physical peril as a result of the shock of witnessing another's danger." 216 Wis. at 613, 258 N.W. at 501. See also Angst v. Great N. Ry., 131 F. Supp. 156 (D. Minn. 1955); Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933); Barber v. Pollock, 104 N.H. 379, 187 A.2d 788 (1963); Cote v. Litawa, 96 N.H. 174, 71 A.2d 792 (1950); All v. John Gerber Co., 36 Tenn. App. 134, 252 S.W.2d 138 (1952); Nuckles v. Tennessee Elec. Power Co., 155 Tenn. 611, 299 S.W. 775 (1927); Frazee v. Western Dairy Prods., 182 Wash. 578, 47 P.2d 1037 (1935); Klassa v. Milwaukee Gas Light Co., 273 Wis. 176, 77 N.W.2d 397 (1956).

60. 248 N.Y. 339, 342, 162 N.E. 99, 99-100 (1928) (citations omitted).

61. It has been stated that the status of the bystander is a factor and that where plaintiff is unrelated to the injured party, recovery is denied. 14 Buffalo L. Rev. 332, 333 n.12 (1964). While this is true as to the weight of the decided cases, it cannot be said to be a universal rule. See Webb v. Francis J. Lewald Coal Co., 214 Cal. 182, 4 P.2d 532 (1931) (discussed in note 104 infra).

62. W. Prosser at 353.

suffers mental injury by witnessing injury to a third person.[63] Thus, in *Knaub v. Gotwalt*,[64] the Supreme Court of Pennsylvania denied recovery for mental distress suffered by the parents and sister of a child in witnessing that child's death. It is significant that the sister was crossing the street with the decedent and was only three feet away at the time of impact to the decedent. The court stated that: "[The impact] rule applies even where the complaining party seeking relief was not merely a nearby witness but the actual victim of the alleged negligent or frightening conduct."[65]

This rule is carried to an illogical extreme in *Beaty v. Buckeye Fabric Finishing Co.*,[66] a diversity action decided under Arkansas law. Plaintiff was a citizen of Arkansas. The defendant Buckeye was an Ohio corporation and the individual defendant, McCurdy, was a citizen of that state. Plaintiff was proceeding on a highway and her father was a passenger in her vehicle. An oncoming car signalled for a left turn and plaintiff slowed down to allow that car to cross her lane of travel whereupon a tractor-trailer, owned by defendant Buckeye and driven by defendant McCurdy, struck the rear of plaintiff's car. The impact was not severe, although plaintiff did suffer some bodily injury. Plaintiff pulled onto the right shoulder of the roadway and the driver of the trailer pulled in behind her. Both drivers exited to inspect the damage to their respective vehicles. McCurdy set the emergency brake but left the trailer's motor running. Meanwhile, plaintiff's father exited plaintiff's car from the right side and walked to a point between the rear of plaintiff's car and the front of the truck. Some three minutes later, the truck's brake failed and the truck lurched forward, momentarily pinning the father to the rear of the car. As the car rolled forward from this second impact, the father fell to the ground and was crushed by the wheels of the tractor-trailer. He cried out, lost consciousness as the wheels went over him and subsequently died. The entire scene was within the sight and hearing of the plaintiff. Plaintiff's cause of action for mental distress, caused by the father's death in her presence, was denied. After proclaiming Arkansas an "impact state"[67] the court stated: "[S]he is confronted with the difficulty that she was injured in one accident and her father was killed as a result of another which, although following the first very closely, was, nevertheless, entirely separate and distinct from it. The physical impact upon the plaintiff was caused by the negligence of McCurdy in the operation of the truck upon the highway, whereas the injuries to and death of [plaintiff's father] were caused

63. Beaty v. Buckeye Fabric Finishing Co., 179 F. Supp. 688 (E.D. Ark. 1959); Southern Ry. v. Jackson, 146 Ga. 243, 91 S.E. 28 (1916); Cleveland, C.C. & St. L. Ry. v. Stewart, 24 Ind. App. 374, 56 N.E. 917 (1900); Mahoney v. Dankwart, 108 Iowa 321, 79 N.W. 134 (1899); Duet v. Cheramie, 176 So. 2d 667 (La. Ct. App. 1965); Holland v. Good Bros., 318 Mass. 300, 61 N.E.2d 544 (1945); Keyes v. Minneapolis & St. L. Ry., 36 Minn. 290, 30 N.W. 888 (1886); Knaub v. Gotwalt, 422 Pa. 267, 220 A.2d 646 (1966); Davis v. Tacoma Ry. & Power Co., 35 Wash. 203, 77 P. 209 (1904).

64. 422 Pa. 267, 220 A.2d 646 (1966).

65. Id. at 270, 220 A.2d at 647.

66. 179 F. Supp. 688 (E.D. Ark. 1959).

67. Id. at 697.

by subsequent negligence of McCurdy in the parking and securing of the vehicle."[68]

Although the case was decided on other grounds, the court in *Beaty* assumed, without deciding, that if the plaintiff's father had been killed and plaintiff had been injured in the same accident, Arkansas law would permit a recovery for plaintiff's attendant mental distress.[69] Some jurisdictions have allowed recovery in such cases. In *Greenberg v. Stanley*,[70] plaintiff suffered severe psychological disturbances arising out of an accident in which her infant child was fatally injured. The accident occurred when two cars collided, one mounting the curb after the collision and striking both the plaintiff and her child. New Jersey is an "impact state" and, therefore, a cause of action for mental distress is denied where there has been no impact upon the plaintiff. That rule is extended to onlookers who suffer anguish due to the infliction of injury upon third parties.[71] The court allowed recovery on the ground that "the entire, inseparable, resulting psychiatric complex, induced partly by the emotionally shocking and unexpected trauma to the plaintiff herself and partly by her simultaneous concern for her injured child, [interacted] to produce the whole resulting psychoneurosis and its sequelae."[72]

Other jurisdictions, however, have held that the mere fact that plaintiff suffers personal injury does not warrant recovery for mental anguish from the simultaneous injury or endangerment to third parties in the same accident episode.[73] Thus, in *Lessard v. Tarca*,[74] plaintiff was denied recovery for mental distress sustained as a result of watching one of her children burn to death in the wreckage of an automobile accident. Plaintiff, her husband and her other three children suffered concurrent physical injury in that accident. The court held that each of the injured parties could recover damages for emotional distress, pain, suffering and shock but such damages could not include that which arose from witnessing injury to another.[75]

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68. Id. at 698.

69. Id.

70. 51 N.J. Super. 90, 143 A.2d 588 (App. Div. 1958).

71. Id. at 106-07, 143 A.2d at 597.

72. Id. at 107, 143 A.2d at 598. The fact that plaintiff suffered some personal injury, regardless of how slight, justified recovery for mental distress. See Chesapeake & O. Ry. v. Robinett, 151 Ky. 778, 152 S.W. 976 (1913) where plaintiff and her father were passengers on defendant's railroad. The conductor assaulted the father causing him to fall against plaintiff which, in turn, caused plaintiff to fall against the arm of a seat. Plaintiff brought this action to recover for bodily injury caused by her own fall and mental distress caused by the assault upon the father. Held, the rule that plaintiff cannot recover for mere fright is inapplicable in this case as there was "impact" upon the plaintiff when her father was caused to fall against her. Id. at 784, 152 S.W. at 979. Hence, plaintiff may be compensated for "the physical and mental suffering . . . that may have been directly caused her by the physical impact and fright, if any, resulting from the wrongful assault and battery committed upon her father . . . ." Id.

73. Sherwood v. Ticheli, 10 La. App. 280, 120 So. 107 (1929); Fleming v. Lobel, 59 A. 28 (N.J. Sup. Ct. 1904); Taylor v. Spokane, P. & S. Ry., 72 Wash. 378, 130 P. 506 (1913).

74. 20 Conn. Supp. 295, 133 A.2d 625 (Super. Ct. 1957).

75. Id. at 298-99, 133 A.2d at 628.

C. *The New York Rule*

As noted earlier, New York had been an "impact state" prior to *Battalla*. The question today is what effect has the *Battalla* decision had upon bystander recovery in New York. In 1961, the *Kalina*[76] case concerned an action against a hospital (and the attending doctor) for mental distress suffered by the parents of a boy who had been circumcised by the defendant hospital after the hospital had been given notice that the boy was to be circumcised in accordance with the tenets of the Orthodox Jewish faith. Defendant's motion to dismiss for failure to state a cause of action was granted.[77] The court stated that: "We deem it the intention of the *Battalla* case to realistically enlarge the damage claim of one acted against. It did not intend to provide a cause of action for interested bystanders hitherto excluded."[78]

Kalina, then, would appear to preclude recovery in an onlooker action for mental distress. But two factors are of special importance: (1) This was not a true bystander case on its facts, and (2) The decision could have rested upon the well-settled rule in New York that "[t]he parent's rights in an action for injuries to the child are restricted to an action for the loss of the child's services and for medical attendance and expenses."[79] Should *Kalina* be conclusive on the question of bystander recovery where the plaintiff is bringing the action *in his own right?* In his excellent dissent in the Appellate Division,[80] Justice Halpern stated:

> This case does not involve the question of the right of a plaintiff to recover for emotional distress caused by the witnessing of the infliction of an injury upon a third person or caused by hearing an account of such an injury. The impact of the *Battalla* decision upon that type of case is still to be determined. Here the claim is for the infliction of emotional distress by the defendants directly upon the plaintiffs themselves by an act violating their religious beliefs. The cause of action is not for the injury to the child but for the direct injury to the plaintiffs.[81]

Approximately one year after the *Kalina* case, *Berg v. Baum*[82] and *Lahann v. Cravotta*[83] were decided. In both cases, a parent sought to recover for mental distress occasioned by witnessing his child injured due to the negligence of defendant. In *Lahann*, the child's injuries resulted in death. Recovery was denied in both on the ground that *Battalla* did not overturn the "impact" rule in favor of bystanders in whose presence the accident occurs. The basis for the

76. Kalina v. General Hosp., 31 Misc. 2d 18, 220 N.Y.S.2d 733 (Sup. Ct. 1961), aff'd mem., 18 App. Div. 2d 757, 235 N.Y.S.2d 808 (4th Dep't 1962), aff'd, 13 N.Y.2d 1023, 195 N.E.2d 309, 245 N.Y.S.2d 599 (1963).

77. 31 Misc. 2d 18, 220 N.Y.S.2d 733 (Sup. Ct. 1961).

78. Id. at 20, 220 N.Y.S.2d at 736.

79. Fiorello v. New York Prot. Epis. City Miss. Soc'y, 217 App. Div. 510, 514, 217 N.Y.S. 401, 406 (1st Dep't 1926). See also Roher v. State, 279 App. Div. 1116, 112 N.Y.S. 2d 603 (3d Dep't 1952); Blessington v. Autry, 105 N.Y.S.2d 953 (Sup. Ct. 1951).

80. 18 App. Div. 2d 757, 235 N.Y.S.2d 808 (4th Dep't 1962).

81. Id. at 760, 235 N.Y.S.2d at 814.

82. 224 N.Y.S.2d 974 (Sup. Ct. 1962).

83. 228 N.Y.S.2d 371 (Sup. Ct. 1962).

decision in *Lahann* was that there was no duty owed to the bystander;[84] *Berg* merely quoted from the holding in *Kalina* that *Battalla* does not "provide a cause of action for interested bystanders."[85]

Then, in 1964, *Haight v. McEwen*[86] departed from the trend of the other recent New York cases. In *Haight*, plaintiff sought to recover for mental distress caused by witnessing her son killed by the defendant's negligent operation of an automobile. Plaintiff was present and watching her son crossing a highway at the time of the occurrence. The defendant moved to dismiss the complaint on the ground that it failed to state a cause of action. The motion was denied. In reaching its decision, the court relied on a recent California decision, *Amaya v. Home Ice, Fuel & Supply Co.*[87] and on the English case of *Hambrook v. Stokes Brothers*.[88] These two decisions are based on the theory that a parent who witnesses the exposure of his child to danger or actual injury is within the class of persons to whom the defendant owes a duty of care. The court disposed of *Kalina's* interpretation of *Battalla* as dicta. The case was remanded, however, to determine at trial if the defendant should have anticipated the mother's presence and, therefore, whether or not the fright suffered was a foreseeable consequence of defendant's negligence.[89]

Bond v. Smith[90] was decided in 1966 and added nothing but confusion to an already confused body of law. Plaintiff and her husband were walking on the shoulder of a road when the vehicle operated by defendant crossed the centerline and struck plaintiff's husband. He was killed instantly, and his body was thrown so that it struck the plaintiff. The defendant contended that plaintiff could not recover damages for emotional and mental shock caused by witnessing the injuries to, and death of, her husband. The court granted defendant's motion to dismiss, concluding that the New York cases which denied bystander recovery did so on the ground that the negligence of the defendant has not had sufficient causal relation to the injuries of the plaintiff.[91] However, implicit in the *Bond* holding is the idea that proximate cause could be found where the plaintiff was within the zone of danger.[92] The troublesome aspect of such a

84. Id. at 373; see Lula v. Sivaco Wire & Nail Co., 265 F. Supp. 222 (S.D.N.Y. 1967).

85. 224 N.Y.S.2d at 976.

86. 43 Misc. 2d 582, 251 N.Y.S.2d 839 (Sup. Ct. 1964).

87. 23 Cal. Rptr. 131 (Dist. Ct. App. 1962), rev'd, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963), overruled by Dillon v. Legg, 68 Cal. 2d 766, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

88. [1925] 1 K.B. 141 (discussed in text accompanying note 32 supra).

89. The court appears to be constructing a test of "foreseeability of emotional harm" as in King v. Phillips, [1953] 1 Q.B. 429 (discussed in text accompanying note 47 supra).

90. 52 Misc. 2d 186, 274 N.Y.S.2d 534 (Sup. Ct. 1966).

91. Thus, "it could be said that it was held as a matter of law that the negligence of the defendant was not the proximate cause of the injuries (mental and emotional distress) to the plaintiff." Id. at 188-89, 274 N.Y.S.2d at 536.

92. "In the present case the question of the proximate cause of the plaintiff's mental and emotional distress should be submitted to a jury for them to determine whether or not these injuries were caused by the fact of her witnessing the injuries to her husband or her nearness to the defendant's automobile." Id. at 189, 274 N.Y.S.2d at 536.

finding is that the zone of danger concept has traditionally been the test for finding a duty owing to the plaintiff on *grounds other than proximate cause.*

The argument from proximate cause in *Bond* is also questionable on the facts of that case. First, there is the tendency of the courts to allow recovery for mental distress as a result of physical injury caused by an "impact" which, by its nature, could play no role in causing the injury.[93] Once physical injury is established through impact, mental distress as an element of "parasitic" damages would certainly be in accordance with precedent.[94] In this respect, it is significant that the defendant did not "object to [plaintiff] seeking damages for [fright, mental and emotional shock, and injury to her nervous system caused by the fact of her witnessing the injuries to and the death of her husband] if she sustained the same as a result of her being struck down in the same accident."[95] The second, albeit less compelling, factor is the line of cases which allows recovery for mental distress where there is simultaneous injury or endangerment to third parties in the same accident.[96]

The recent decision in *Tobin v. Grossman*[97] is in line with what appears to be the weight of authority in New York. Plaintiff's child was injured due to the defendant's negligent operation of an automobile. The plaintiff allegedly witnessed the accident but at a pre-trial examination she stated that she was actually inside the house at the time, heard the squeal of brakes and came out to see her child lying on the lawn. The court accepted the facts most favorable to plaintiff.[98] In dismissing the plaintiff's cause of action for mental distress, the court relied on the following:[99] (1) The dicta in *Kalina* that *Battalla* did not extend a cause of action to interested bystanders; (2) The *Knaub* line of cases which deny recovery in the absence of impact; and (3) The *Amaya* decision which, on appeal, denied recovery to a parent for mental distress caused by witnessing injury to her child.

While the majority of recent decisions appear to deny recovery to a bystander for his mental distress suffered upon witnessing injury to a third party, the law in New York is not settled. *Kalina* has generally been followed but, as in *Haight*, it could be considered mere dicta. New York courts have also placed emphasis upon the *Amaya* decision at various stages of its judicial history.[100] Therefore, it appears that the issue of bystander recovery must await an authoritative determination by the New York Court of Appeals.[101]

93. See W. Prosser at 350-51 & nn.84-95 (cases collected therein). See also Chesapeake & O. Ry. v. Robinett, 151 Ky. 778, 152 S.W. 976 (1913) (discussed in note 72 supra).

94. See Section II supra.

95. 52 Misc. 2d at 187, 274 N.Y.S.2d at 535.

96. See text accompanying notes 69-72 supra.

97. 30 App. Div. 2d 229, 291 N.Y.S.2d 227 (3d Dep't 1968), rev'g 55 Misc. 2d 304, 284 N.Y.S.2d 997 (Sup. Ct. 1967).

98. 30 App. Div. 2d at 231, 291 N.Y.S.2d at 229.

99. Id. at 231-32, 291 N.Y.S.2d at 229.

100. The Supreme Court of California held against recovery for the parent-bystander, but it is interesting to note that since the decision in Tobin v. Grossman, Amaya has been overruled. See note 87 supra.

101. See Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, 239 N.E.2d 897, 293

D. *Minority View*

Although the "impact rule" has long been rejected by the courts of California in cases where the negligent act was directed at the plaintiff personally,[102] the decisions in that jurisdiction generally denied recovery for mental distress in bystander actions except where there was some element of physical injury,[103] or a reasonable fear of such injury,[104] to the plaintiff. Thus, where a bystander suffered mental distress merely as a result of witnessing an accident,[105] or its aftermath,[106] or as a result of fearing for the safety of another,[107]

N.Y.S.2d 305 (1968), overruling Kronenbitter v. Washburn Wire Co., 4 N.Y.2d 524, 151 N.E.2d 898, 176 N.Y.S.2d 354 (1958). In allowing a wife to recover for loss of consortium, the court stated that there is a "growing recognition that the law of torts must recognize the interest of persons in the protection of essentially emotional interests . . . . The policy of modern tort law has been to expand tort liability 'in the just effort to afford decent compensatory measure to those injured by the wrongful conduct of others.'" 22 N.Y.2d at 507, 239 N.E.2d at 902, 293 N.Y.S. 2d at 311-12 (citation omitted). This broad language could well signify the inclination of the Court of Appeals to allow recovery for mental distress in an action by one witnessing danger or injury to a third party.

102. Sloane v. Southern Cal. Ry., 111 Cal. 668, 44 P. 320 (1896). This was at a time when other jurisdictions clung to its arbitrary application. See cases collected in Cook v. Maier, 33 Cal. App. 2d 581, 584-85, 92 P.2d 434, 435-36 (Dist. Ct. App. 1939).

103. In Lindley v. Knowlton, 179 Cal. 298, 176 P. 440 (1918), a chimpanzee owned by defendant was kept in so negligent a manner that it escaped its enclosure and entered the home of the plaintiff. It attacked plaintiff's two children successively, choking one of them severely, before plaintiff fought the animal off. Because of this ordeal, plaintiff was granted recovery for severe shock and hysteria in addition to the damages for physical injuries incurred in her fight with the animal.

104. Liability could be predicated upon fright induced by the plaintiff's reasonable fear for the safety of another so long as plaintiff simultaneously feared for his own safety. Kelly v. Fretz, 19 Cal. App. 2d 356, 65 P.2d 914 (Dist. Ct. App. 1937). In Webb v. Francis J. Lewald Coal Co., 214 Cal. 182, 4 P.2d 532 (1931), plaintiff was allowed to recover for emotional distress when defendant's employee negligently drove a truck into the front of a shop operated by plaintiff. This case is quite interesting in that plaintiff feared not only for her own safety, but also for the safety of a stranger—the driver of the truck.

105. Reed v. Moore, 156 Cal. App. 2d 43, 319 P.2d 80 (Dist. Ct. App. 1958) (plaintiff was denied recovery for shock and a resultant miscarriage caused when she witnessed, from the front of her home about 130 feet from the point of impact, an automobile accident involving her husband).

106. Clough v. Steen, 3 Cal. App. 2d 392, 39 P.2d 889 (Dist. Ct. App. 1934) (plaintiff could not recover for "profound shock" which caused mental and physical disorders ensuing from the sight of her dead child who was killed in an automobile accident).

107. Maury v. United States, 139 F. Supp. 532 (N.D. Cal. 1956) (parents were barred from recovering for emotional distress when a fire caused by defendant's negligence destroyed their home and burned their child to death even though they were present at the scene and had full knowledge that their child was inside the house, unable to escape or be rescued); Minkus v. Coca Cola Bottling Co., 44 F. Supp. 10 (N.D. Cal. 1942) (recovery was denied in an action for breach of warranty brought by parents alleging nervous shock occasioned by their child suffering bodily injury as a result of partially consuming a soft drink containing a decomposed mouse); Reed v. Moore, 156 Cal. App. 2d 43, 319 P.2d 80 (Dist. Ct. App. 1958).

a successful action could not be maintained. California had not adopted the "zone of physical risk" doctrine as such, but it is obvious that if the plaintiff must reasonably fear for his own safety in order to recover, *a fortiori*, he must be within the zone of physical peril. The decided cases were not inconsistent with that doctrine. However, its first appearance was not until *Reed v. Moore*,[108] wherein it was stipulated that plaintiff was fearful solely for her husband's safety and *could not be considered within the zone of danger*.[109]

Then, in 1963, the landmark decision in *Amaya v. Home Ice, Fuel & Supply Co.*[110] was rendered. At the time of the accident, plaintiff was pregnant and the mother of a seventeen-month-old infant. She alleged that she was standing near[111] the infant when defendant's truck, negligently operated, approached the child. Plaintiff having shouted a warning to no avail, witnessed the child run over by defendant's truck, thereby sustaining extreme emotional distress. Plaintiff declined the court's offer to allow her to amend her complaint to read "that the fright and shock suffered by the plaintiff was for the fear of her own safety."[112] Instead, plaintiff asserted that her distress was due to fear for the safety of her child. The trial court entered judgment for defendant but was reversed on appeal.[113] The Supreme Court of California reversed and reinstated the judgment of the trial court, holding that the complaint failed to state facts sufficient to constitute a cause of action.

The court's decision was based on two broad grounds: (1) the administrative factor, and (2) the socio-economic and moral factors. The administrative factor is premised upon the concept that "[j]ustice . . . exists only when it can be effectively administered."[114] The problem of proof is one aspect of this factor;[115] another is limiting liability for mental distress caused by the apprehension of peril or injury to a third person.[116] The limitation of defendant's

108. 156 Cal. App. 2d 43, 319 P.2d 80 (Dist. Ct. App. 1958).

109. Id. at 44, 319 P.2d at 81.

110. 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

111. There is no indication that plaintiff was in the immediate vicinity of the child. Apparently, she was not, as in the course of an opinion denying recovery, the court stated: "[I]n cases where the defendant's conduct involved negligent driving of a motor vehicle the courts conclude that to extend liability to spectators who were not themselves in danger 'would, in our opinion, place an unreasonable burden upon users of highways.'" Id. at 314, 379 P.2d at 524-25, 29 Cal. Rptr. at 44-45 (citation omitted).

112. Id. at 298, 379 P.2d at 514, 29 Cal. Rptr. at 34.

113. Amaya v. Home Ice, Fuel & Supply Co., 23 Cal. Rptr. 131 (Dist. Ct. App. 1962).

114. 59 Cal. 2d at 310, 379 P.2d at 522, 29 Cal. Rptr. at 42.

115. The court said: "[W]e are left with the question of whether in this area of inquiry where emotions play so large a role the law has now become sufficiently responsive to scientific reality to redress the 'net balance of justice.' The question is a disturbing one, and cannot be answered merely by invoking the rule that a conflict of expert testimony is for the jury." Id. at 312, 379 P.2d at 523, 29 Cal. Rptr. at 43.

116. The court does discuss limitations of liability, e.g., the injury threatened or inflicted must be serious, causing severe shock which results in actual physical harm; the action should be confined to members of the immediate family; the plaintiff must be present at the accident, suffering contemporaneous shock. The court rejected these limitations as arbitrary.

liability in such cases is closely related to the second ground, the socio-economic and moral factors. The inevitability of accidents in an increasingly complex industrial society is such that the interest of potential plaintiffs in bystander cases must be subordinated so that that society can function without an impossible financial burden.[117] Accordingly, "the social utility of such activities [industry, commerce, transportation and the like] outweighs the somewhat speculative interest of individuals to be free from the risk of the type of injury here alleged."[118] Secondly, the defendant's culpability must be considered. Compensation in our legal system is based on the concept of fault. Hence, where defendant's act is merely negligent, rather than intentional, a lesser degree of liability should attach. This court is in full agreement with the *Waube* decision in which that court stated: "[T]he liability imposed by such a doctrine [recovery for physical injuries sustained by one out of the range of ordinary physical peril as a result of witnessing another's danger] is wholly out of proportion to the culpability of the negligent tort-feasor . . . ."[119]

Approximately five years after *Amaya*, in *Dillon v. Legg*,[120] the Supreme Court of California sustained a cause of action for mental distress suffered by a plaintiff who was *not within the zone of physical danger* and another who *may* have been within that zone. The cause of action arose when a child was killed by defendant's negligently operated car as the child attempted to cross a roadway. The child's mother and sister witnessed the accident. The opinion is unclear as to where the mother was positioned at the time, but it was determined that the sister was at the curb. The mother sued for mental distress inflicted upon the infant sister as well as for her own mental distress at having witnessed

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Id. at 312-13, 379 P.2d at 523-24, 29 Cal. Rptr. at 43-44. See also W. Prosser at 353-54. The limitations considered, and ultimately rejected, by the court are substantially those proposed by the Restatement for the area of intentional infliction of damage. See Restatement (Second) of Torts § 46(2) (1965). See also Restatement (Second) of Torts §§ 306, 312-13, 436, 436A (1965).

117. The court did recognize insurance as a means of compensation thereby placing the risk of loss upon the many rather than the few. Thus, the cost of that compensation would be spread over those who are not, as well as those who are, liable for plaintiff's injury. The court concluded, however, that the present system of insurance could not "adequately and fairly" absorb the consequences of extending liability in the instant case. Further, the "activities of everyday life" which may give rise to a cause of action should such extension be permitted, are all too often "either uninsurable or customarily uninsured." 59 Cal. 2d at 314, 379 P.2d at 525, 29 Cal. Rptr. at 45.

118. Id.

119. Waube v. Warrington, 216 Wis. 603, 613, 258 N.W. 497, 501 (1935).

120. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). There is an interesting sidelight to the Amaya-Dillon decisions. Justice Tobriner wrote the Amaya opinion allowing recovery in the District Court of Appeal. He was reversed in the Supreme Court of California by Justices Schauer, Traynor, McComb and White (the last sitting pro tem). Justices Peters, Gibson and Peek dissented. When Dillon was decided by the Supreme Court of California, Tobriner was on the bench of that court and, not surprisingly, wrote the majority opinion. Justices Peters, Mosk and Sullivan concurred; Justices Traynor, Burke and McComb dissented.

the tragedy. The decision permitting recovery (and, in the process, overruling *Amaya*) represents a radical departure from the prior law of California and a total divergence from the vast body of case law in the United States generally.

The very contentions which compelled the *Amaya* court to deny recovery were re-examined and ultimately rejected in *Dillon*.[121] Of greater significance, however, is the fact that *Dillon* discards the "zone of physical risk" doctrine. The court artfully exposed the weakness of that doctrine:

> [T]he complaint here presents the claim of the emotionally traumatized mother, who admittedly was *not* within the zone of danger, as contrasted with that of the sister, who *may have been* within it. The case thus illustrates the fallacy of the rule that would deny recovery in the one situation and grant it in the other. In the first place, we can hardly justify relief to the sister for trauma which she suffered upon apprehension of the child's death and yet deny it to the mother merely because of a happenstance that the sister was some few yards closer to the accident. The instant case exposes the hopeless artificiality of the zone-of-danger rule. In the second place, to rest upon the zone-of-danger rule when we have rejected the impact rule becomes even less defensible . . . . The zone-of-danger concept must, then, inevitably collapse because the only reason for the requirement of presence in that zone lies in the fact that one within it will fear the danger of *impact*.[122]

While the *Dillon* case does attempt to fix some guidelines in determining the scope of defendant's liability, courts will, in effect, consider each set of facts on a case-by-case basis, applying to each the general principles of negligence.[123] It will be interesting to observe the effect, if any, that *Dillon* will have upon future case law in this country.[124]

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121. The argument that recovery upon a valid claim should be denied to prevent fraudulent claims was rejected because the argument proceeds from a doubtful factual assumption and the existence of potential fraud does not justify foreclosing the many legitimate claims. Id. at 736-39, 441 P.2d at 917-18, 69 Cal. Rptr. at 77-78. The problem of proof is no greater in such cases than where the mental distress is alleged as an aggravation of, or "parasitic" to, an established tort, or where, if inflicted intentionally, constitutes an independent tort. Id. at 738, 441 P.2d at 918-19, 69 Cal. Rptr. at 78-79. The inability to fix limits of liability on the different facts of future cases is not justification for denying recovery where the facts of the specific case before the court clearly dictate liability. As a general rule, the court will determine liability in terms of reasonable foreseeability, that is, was the accident and harm reasonably foreseeable by defendant as a reasonably prudent man. Id. at 739-46, 441 P.2d at 919-921, 69 Cal. Rptr. at 79-81. That administrative effectiveness is essential to justice cannot be debated. However, the floodgate theory was rejected without ill effects in other areas of the law, e.g., product liability, and can afford no rational basis for denying recovery where a bystander alleges mental distress caused by witnessing danger or injury to a third person. Id. at 746-47, 441 P.2d at 922-24, 69 Cal. Rptr. at 82-84.

122. Id. at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.

123. These guidelines are not exact and rigid formulas for allowing or denying recovery, but will aid the court in ascertaining the degree of defendant's foreseeability. Id. at 740-41, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81. The presence of certain factors will constitute a prima facie case. Id. at 740, 441 P.2d at 921, 69 Cal. Rptr. at 81.

124. As noted above, the Amaya case played an important role in certain New York decisions. See text accompanying notes 87 & 99 supra.

VI. Conclusion

It would seem natural that a person witnessing injury to another would suffer shock or fright to some degree; and, where the onlooker is a parent witnessing danger or harm to his or her child, the proposition that such fright would result in mental distress of a serious nature is especially persuasive. Still, the vast majority of American courts deny recovery to the interested bystander. The sounder decisions are based upon a concept of duty rather than proximate cause; that is, the defendant's act must be a breach of duty owed to the plaintiff and not to someone else. But when a child is injured or placed in peril of injury, "it is not beyond contemplation that its [parent] will be somewhere in the vicinity, and will suffer serious shock."[125] The situation is even more incomprehensible when one considers that a bystander who is injured by a flying piece of debris caused by a collision has a right of action whereas one who suffers injury merely through his senses is denied recovery. The relationship of the defendant to the plaintiff is the same in both cases.[126]

Perhaps, the true rationale of the cases is to be found in practical expediency.[127] The danger of "vexatious suits and fictitious claims" is real, but not impossible to avoid. The effects of fear upon the total structure of the human body serve to "show that judicial language formulated, at a time when no one knew so much about the human organism as we do now, was inaccurate."[128] Fear is more than a purely emotional and subjective response. There are marked physical reactions which, in certain cases, have deep and significant effects upon the entire human organism.[129] Mental distress induced by fear is, therefore, capable of clear and convincing proof.

Granted that there is adequate proof to show the existence of mental injury, there is yet another troublesome problem—that of the "idiosyncratic plaintiff."[130] This issue attains its importance due to the general rule of damages that the tortfeasor takes his victim as he finds him and is liable even for unforeseeable consequences.[131] The problem has been stated in these terms: "Assume for the moment that study of the claimant's pre-traumatic personality shows a neurotic constitution or condition sufficient to make the subject an extreme reactor to stimuli which would only mildly affect the average person, if at all. In his case a $5.00 touch may become a $10,000 disability. Shall the law protect

125. W. Prosser at 353.

126. Annot., 18 A.L.R.2d 220, 240 (1951).

127. "It is now more or less generally conceded that the only vaild objection against recovery for mental injury is the danger of vexatious suits and fictitious claims, which has loomed very large in the opinions as an obstacle." W. Prosser at 347.

128. Goodrich, Emotional Disturbance as Legal Damage, 20 Mich. L. Rev. 497, 501 (1922).

129. See id. at 499-501 where it is demonstrated that fear is a physical response with specific physical effects upon the human body.

130. "An injury seems to be considered idiosyncratic when the psychic stimulus is patently inadequate to arouse excessive physiological manifestations in an average person." McNiece at 65.

131. See cases cited in Amdursky at 352-53 n.96.

this fragile fellow to the full, or where shall legal and social policy draw the lines limiting the compensation he may obtain?"[132]

The rationale for imposing such liability on the defendant is that "as between the tortfeasor who started the chain of circumstances resulting in the injury and the entirely innocent plaintiff, the tortfeasor should suffer the consequences."[133] On the other hand, it has been suggested that ordinary principles of tort law should be applied to such a plaintiff,[134] creating, in effect, the "ordinary plaintiff" much in the same fashion that courts construct the "reasonably prudent man" when determining a defendant's liability.[135] Thus, a plaintiff's pre-existing mental disorder may be considered on the question of whether or not his mental injury was proximately caused by defendant's act.[136]

"Duty" is not absolute. Rather, it is a relative concept shifting its limits as social needs and policy dictate. That which is a legally unprotected interest today may come within the realm of the protected tomorrow. But a sound public policy does not operate to protect the interest of the plaintiff to the exclusion of the defendant's interest. It seeks, instead, to balance these conflicting interests. Where should the courts draw the line? Concrete limitations have been proposed[137] but these are subject to the criticism that, in time, they may become overly mechanical and serve no better purpose than prior arbitrary tests (*e.g.*, the "impact" rule).

The issue of bystander recovery is not susceptible to solution by the statement of a general rule. Perhaps, all that can be done is to allow the courts, on the facts of each case, to determine if defendant's act created a risk of emotional harm to the plaintiff, if such risk was reasonably foreseeable and if the act did, in fact, proximately cause the plaintiff's injury. "[T]hese questions will be solved most justly by applying general principles of . . . negligence, and . . . mechanical rules of thumb which are at variance with these principles do more harm than good."[138]

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132. Smith & Solomon, Traumatic Neuroses in Court, 30 Va. L. Rev. 87, 99 (1943). See also McNiece at 67-79.

133. McNiece at 77.

134. Amdursky at 352.

135. See Comment, Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases, 35 U. Chi. L. Rev. 512, 516 (1968).

136. The presence or absence of a pre-existing condition should not, however, be a factor in determining defendant's liability. It goes merely to the extent of damages. Thus, "expert testimony should be introduced in order to show what the average reaction would be to such a stimulus [defendant's act], and, if the plaintiff's reaction has not been that of the average individual, he should not recover at all, or at least his damages should be reduced to a small amount." McNiece at 76-77.

137. See note 116 supra.

138. 2 F. Harper & F. James, Torts 1039 (1956).