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Emotional Distress in Products Liability: Distinguishing Users from Bystanders

Linda Trummer-Napolitano

EMOTIONAL DISTRESS IN PRODUCTS LIABILITY: DISTINGUISHING USERS FROM BYSTANDERS

INTRODUCTION

The law governing recovery for emotional distress[1] in products liability[2] is at a critical stage of development. In cases involving only

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1. "Emotional distress" is used interchangeably with other terms such as "emotional trauma," "mental anguish" or "mental suffering" to connote injury to the psyche. *See* Restatement (Second) of Torts § 46 comment j (1965). In negligence, courts were traditionally unwilling to impose a duty to refrain from inflicting emotional distress. Rodrigues v. State, 52 Hawaii 156, 169-70, 472 P.2d 509, 518 (1970); Daley v. LaCroix, 384 Mich. 4, 8, 179 N.W.2d 390, 392 (1970); Johnson v. State, 37 N.Y.2d 378, 381, 334 N.E.2d 590, 591-92, 372 N.Y.S.2d 638, 641 (1975). The primary rationales for denying recovery were concerns about the possibility of spurious claims, Mitchell v. Rochester Ry., 151 N.Y. 107, 110, 45 N.E. 354, 355 (1896), *overruled*, Battalla v. State, 10 N.Y.2d 237, 239, 176 N.E.2d 729, 730, 219 N.Y.S.2d 34, 35-36 (1961), a vast increase in the amount of litigation, Knaub v. Gotwalt, 422 Pa. 267, 272, 220 A.2d 646, 647 (1966), *overruled*, Niederman v. Brodsky, 436 Pa. 401, 413, 261 A.2d 84, 89-90 (1970), and unduly burdensome liability for defendants. Tobin v. Grossman, 24 N.Y.2d 609, 617-18, 249 N.E.2d 419, 423, 301 N.Y.S.2d 554, 559-60 (1969). When a plaintiff alleged invasion of an independent legal right, however, courts were more likely to permit recovery for emotional distress. W. Prosser, Handbook of the Law of Torts 52 (4th ed. 1971). The "impact rule" permitted recovery for emotional distress when defendant's conduct resulted in physical contact with the plaintiff. *See, e.g.*, Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 581, 144 S.E. 680, 681 (1928); Boston v. Chesapeake & O. Ry., 223 Ind. 425, 430, 61 N.E.2d 326, 327-28 (1945). When courts recognized the need to redress genuine emotional injury, they construed the term "impact" broadly. Morton v. Stack, 122 Ohio St. 115, 116, 170 N.E. 869, 869 (1930) (inhalation of smoke sufficient impact); Zelinsky v. Chimics, 196 Pa. Super. 312, 318, 175 A.2d 351, 354 (1961) (jostling of passengers in automobile after collision sufficient impact). Because the impact rule proved unsatisfactory, in that it " 'bre[d] dishonest attempts to mold the facts so as to fit them within the grooves leading to recovery,' " Battalla v. State, 10 N.Y.2d 237, 241, 176 N.E.2d 729, 731, 219 N.Y.S.2d 34, 37 (1961); *accord* Daley v. LaCroix, 384 Mich. 4, 11-12, 179 N.W.2d 390, 394 (1970), it was abandoned in most jurisdictions. W. Prosser, *supra*, at 332. Instead, courts focused on the presence of physical consequences, *see* Bowman v. Williams, 164 Md. 397, 400-02, 165 A. 182, 183-84 (1933), or the particular circumstances of the case. Johnson v. State, 37 N.Y.2d 378, 383-84, 334 N.E.2d 590, 593, 372 N.Y.S.2d 638, 643 (1975); Lambert, *Tort Liability for Psychic Injuries*, 41 B.U. L. Rev. 584, 589-93 (1961); McNiece, *Psychic Injury and Tort Liability in New York*, 24 St. John's L. Rev. 1, 14-16 (1949). In bystander cases, in which the plaintiff suffers emotional distress as a result of witnessing physical injury to another, some jurisdictions have allowed recovery under the zone of danger rule. *See infra* note 17.

2. A products liability suit may be predicated on negligence, breach of warranty, or strict liability. *E.g.*, Chestnut v. Ford Motor Co., 445 F.2d 967, 968 (4th Cir. 1971); McAndrews v. Goody Co., 460 F. Supp. 104, 106 (D. Neb. 1978). Under negligence theory, a seller or manufacturer is liable for harm to the plaintiff if the

two parties—the plaintiff injured[3] by a defective product[4] and the

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product "may reasonably be expected to be capable of inflicting substantial harm if it is defective." W. Prosser, *supra* note 1, at 643 (footnote omitted); *accord* Rhoads v. Service Mach. Co., 329 F. Supp. 367, 373 (E.D. Ark. 1971); Restatement (Second) of Torts §§ 291, 395 (1965). Warranty encompasses two distinct categories, express and implied. Under an express warranty, recovery is allowed on the theory that the consumer is entitled to rely on express affirmations of fact or descriptions of a product. *See, e.g.*, Lane v. C.A. Swanson & Sons, 130 Cal. App. 2d 210, 214, 278 P.2d 723, 725 (1955); Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 12-13, 181 N.E.2d 399, 402-03, 226 N.Y.S.2d 363, 367-68 (1962); U.C.C. § 2-313 (1977). Implied warranties fall into two categories — the warranty of merchantability, U.C.C. § 2-314 (1977), and the warranty of fitness for a particular purpose. U.C.C. § 2-315 (1977). In order to recover for a breach of an implied warranty of merchantability, the "plaintiff must prove (1) that a merchant sold goods, (2) which were not 'merchantable' at the time of sale, and (3) injury and damages to the plaintiff or his property (4) caused proximately and in fact by the defective nature of the goods, and (5) notice to seller of injury." J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code 343 (1980). "Merchantable" is defined as "fit for the ordinary purposes for which such goods are used." U.C.C. § 2-314(2)(c) (1977). In order to recover for a breach of a warranty of fitness for a particular purpose, two requirements must be met: 1) the buyer must rely on the seller's judgment in furnishing the product, and 2) the seller must have reason to know of the particular purpose for which the goods are being selected. Catania v. Brown, 4 Conn. Cir. Ct. 344, 345-46, 231 A.2d 668, 670 (1967); Green Mountain Mushroom Co. v. Brown, 117 Vt. 509, 512-13, 95 A.2d 679, 681-82 (1953). The theory of strict liability in tort for defective products was first enunciated in Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), and adopted by the Second Restatement of Torts in 1965. Restatement (Second) of Torts § 402A (1965). Section 402A provides: "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller." *Id.* For a discussion of the theories of recovery, see Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 Tex. L. Rev. 1185, 1187-212 (1976); Noel, *Defective Products: Extension of Strict Liability to Bystanders*, 38 Tenn. L. Rev. 1, 1-9 (1970); Phillips, *A Synopsis of the Developing Law of Products Liability*, 28 Drake L. Rev. 317, 325-42 (1978-1979); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn. L. Rev. 791, 800-23 (1966) [hereinafter cited as Prosser I]; Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1124-48 (1960).

3. In breach of warranty and strict liability actions, a plaintiff may recover damages for personal injury and destruction of property. Restatement (Second) of Torts § 402A (1965); J. White & R. Summers, *supra* note 2, at 396; Prosser I, *supra* note 2, at 820-23; *see* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 62, 377 P.2d 897, 900-01, 27 Cal. Rptr. 697, 700-01 (1963); Hamilton Fixture Co. v. Anderson, 285 So. 2d 744, 746-47 (Miss. 1973); Barnett v. Ford Motor Co., 463 S.W.2d 33, 35 (Tex. Civ. App. 1970). Punitive damages may also be awarded in an extreme case. *See, e.g.*, Gillham v. Admiral Corp., 523 F.2d 102, 108-09 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); Sturm, Ruger & Co. v. Day, 594 P.2d 38, 46-47 (Alaska

defendant seller or manufacturer[5]—courts have allowed recovery for

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1979); Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 711, 714-15, 60 Cal. Rptr. 398, 414, 416 (1967). For a discussion of the issues involved in awarding punitive damages, see 3 L. Frumer & M. Friedman, Products Liability § 36A (1981); Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257 (1976). Pure economic loss is typically denied when the suit is predicated on strict liability. *See, e.g.*, Seely v. White Motor Co., 63 Cal. 2d 9, 16-19, 403 P.2d 145, 150-52, 45 Cal. Rptr. 17, 22-24 (1965); Henderson v. General Motors Corp., 152 Ga. App. 63, 64, 262 S.E.2d 238, 240 (1979); Alfred N. Koplin & Co. v. Chrysler Corp., 49 Ill. App. 3d 194, 203, 364 N.E.2d 100, 107 (1977); Hawkins Constr. Co. v. Matthews Co., 190 Neb. 546, 561-63, 209 N.W.2d 643, 653 (1973). *But see* Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 67, 207 A.2d 305, 313 (1965). *See generally* Speidel, *Products Liability, Economic Loss and the UCC*, 40 Tenn. L. Rev. 309, 315-18 (1973) (discussion of recovery for lost profits in warranty and strict liability).

4. A product can be rendered defective due to a design defect, a manufacturing defect, or the manufacturer's failure to warn of the product's dangerous propensities. Lancaster Silo & Block Co. v. Northern Propane Gas Co., 75 A.D.2d 55, 61-62, 427 N.Y.S.2d 1009, 1013 (1980). In a design defect case, the manufacturer's chosen design is challenged as unreasonably dangerous. Robinson v. Reed-Prentice Div. of Package Mach. Co., 49 N.Y.2d 471, 479, 403 N.E.2d 440, 443, 426 N.Y.S.2d 717, 720 (1980); Phillips v. Kimwood Mach. Co., 269 Or. 485, 487, 525 P.2d 1033, 1034 (1974). A manufacturing defect is a flaw or mistake in the product, whereby the product deviates from others in the line, or from the manufacturer's desired result. 2 L. Frumer & M. Friedman, *supra* note 3, § 16A[4][f][iii] (1981); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 Tenn. L. Rev. 363, 365-73 (1965). A product, although faultlessly manufactured, can nevertheless be defective if it is unaccompanied by warnings of the dangers attendant to its use. Failure to warn actions are predicated on negligence, *see* Drayton v. Jiffee Chem. Corp., 395 F. Supp. 1081, 1087-88 (N.D. Ohio 1975), *modified on other grounds*, 591 F.2d 352 (6th Cir. 1978), or strict liability. *See* Crane v. Sears Roebuck & Co., 218 Cal. App. 2d 855, 859, 32 Cal. Rptr. 754, 756 (1963); Restatement (Second) of Torts § 402A comment h (1965). Many courts impose a duty to warn only of foreseeable dangers, thereby blurring the distinctions between the two bases for liability. McClellan, *Strict Liability for Drug Induced Injuries: An Excursion Through the Maze of Products Liability, Negligence and Absolute Liability*, 25 Wayne L. Rev. 1, 6-9 (1978); Note, *The Liability of Pharmaceutical Manufacturers for Unforeseen Adverse Drug Reactions*, 48 Fordham L. Rev. 735, 745-48 (1980); *see, e.g.*, Oakes v. E.I. Du Pont de Nemours & Co., 272 Cal. App. 2d 645, 650-51, 77 Cal. Rptr. 709, 713 (1969); Woodill v. Parke Davis & Co., 58 Ill. App. 3d 349, 352, 374 N.E.2d 683, 686 (1978). A minority of cases have distinguished the theories of negligence and strict liability in the failure to warn context. *E.g.*, Hamilton v. Hardy, 37 Colo. App. 375, 383-84, 549 P.2d 1099, 1106-07 (1976); Little v. PPG Indus., Inc., 19 Wash. App. 812, 822, 579 P.2d 940, 947 (1978), *modified on other grounds*, 92 Wash. 2d 118, 594 P.2d 911 (1979).

5. Parties that have been held liable in strict liability include manufacturers, *e.g.*, Kohler v. Ford Motor Co., 187 Neb. 428, 436, 191 N.W.2d 601, 606 (1971); Ulmer v. Ford Motor Co., 75 Wash. 2d 522, 531-32, 452 P.2d 729, 734-35 (1969), wholesalers, *e.g.*, Bailey v. Montgomery Ward & Co., 6 Ariz. App. 213, 219, 431 P.2d 108, 111 (1967), retailers, *e.g.*, Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 262-63, 391 P.2d 168, 171-72, 37 Cal. Rptr. 896, 899-900 (1964); Kleve v. General Motors Corp., 210 N.W.2d 568, 571 (Iowa 1973), lessors, *e.g.*, Bachner v. Pearson, 479 P.2d 319, 327-28 (Alaska 1970); Gallucio v. Hertz Corp., 1 Ill. App. 3d 272, 278-79, 274 N.E.2d 178, 182-83 (1971), bailors, *e.g.*, Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 450, 212 A.2d 769, 777-78 (1965), and a

emotional harm.[6] Recently, however, conflicting results have been reached in suits involving three parties—that is, when a user[7] of a product sues the manufacturer for emotional distress precipitated by observing physical injury to another caused by that same product. One jurisdiction, borrowing from predecent in non-product negligence[8] and inaccurately characterizing the plaintiffs as bystanders,[9] has allowed recovery in such a situation.[10] Another jurisdiction, lacking such precedent in negligence,[11] denied recovery to this same class of plaintiffs by applying the same improper bystander characterization.[12]

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builder-vendor of homes. Schipper v. Levitt & Sons, 44 N.J. 70, 95-96, 207 A.2d 314, 326-28 (1965). Several states have sought to insulate retail dealers from suit when jurisdiction can be obtained over the manufacturer. *E.g.*, Colo. Rev. Stat. § 13-21-402 (Supp. 1978); Ky. Rev. Stat. § 411.340 (Supp. 1980); N.C. Gen. Stat. § 99B-2 (1979). An action in strict liability may not be maintained against the casual, one-time seller of an article, such as an individual who sells his used family automobile. Lemley v. J & B Tire Co., 426 F. Supp. 1376, 1377 (W.D. Pa. 1977); Restatement (Second) of Torts § 402A comment f (1965). In an action for breach of an implied warranty of merchantability, the plaintiff may sue the "merchant." U.C.C. § 2-314 (1977). The Code defines a merchant as a "person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction." *Id.* § 2-104. In an action for breach of an implied warranty of fitness for a particular purpose, the plaintiff may sue the seller. *Id.* § 2-315. A seller will normally also be a merchant, although the warranty can apply to non-merchant sellers. *Id.* § 2-315 comment 4.

6. *E.g.*, Way v. Tampa Coca Cola Bottling Co., 260 So. 2d 288, 290 (Fla. Dist. Ct. App. 1972); Wallace v. Coca-Cola Bottling Plants, 269 A.2d 117, 121-22 (Me. 1970).

7. The Second Restatement of Torts explains the terms "user or consumer" as follows: " 'Consumers' include not only those who in fact consume the product, but also those who prepare it for consumption; and the housewife who contracts tularemia while cooking rabbits for her husband is included within the rule stated in this Section, as is also the husband who is opening a bottle of beer for his wife to drink. Consumption includes all ultimate uses for which the product is intended, and the customer in a beauty shop to whose hair a permanent wave solution is applied by the shop is a consumer. 'User' includes those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purposes of doing work upon it, as in the case of an employee of the ultimate buyer who is making repairs upon the automobile which he has purchased." Restatement (Second) of Torts § 402A comment *l* (1965); *see, e.g.*, Cottom v. McGuire Funeral Serv., Inc., 262 A.2d 807, 809 (D.C. 1970) (person utilizing product for the purpose for which it was made is a user of that product); Hamilton v. Motor Coach Indus., Inc., 569 S.W.2d 571, 576 (Tex. Civ. App. 1978) (person repairing a product is a user of that product).

8. Shepard v. Superior Court, 76 Cal. App. 3d 16, 19-21, 142 Cal. Rptr. 612, 614-15 (1977) (citing with approval Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968)).

9. *Id.* at 19-20, 142 Cal. Rptr. at 614-15.

10. *Id.* at 21, 142 Cal. Rptr. at 615.

11. *See* Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

12. Vaccaro v. Squibb Corp., 52 N.Y.2d 809, 418 N.E.2d 386, 436 N.Y.S.2d 871 (1980).

Such divergent results are grounded in the attachment of varying weights to the competing policies of compensating a genuine injury[13] and limiting a manufacturer's liability.[14] This Note contends that in attempting to reach a compromise between these policies, a court's primary inquiry should be whether a party claiming emotional distress is merely a bystander, or whether he is in fact a user of the defective product. When appropriate, characterization of a party as a user will allow him to recover for emotional harm under well-established products liability principles. Furthermore, if it is limited to the user of the product, recovery for emotional harm will be confined to an ascertainable group of plaintiffs. Such limitation will protect manufacturers from unduly burdensome liability.

I. Recovery for Emotional Distress in Three-Party Cases

A. *Recovery for Emotional Distress in Non-product Negligence*

The classic bystander situation was presented to the California Supreme Court in *Dillon v. Legg*.[15] A mother watched as her daughter was struck and killed by a negligently driven automobile.[16] Although the mother had not been in danger of physical injury,[17] she sued to recover for the severe emotional distress[18] suffered as a result

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13. *See* sources cited *infra* note 54. The perceived difficulties in permitting recovery for an emotional injury under the Restatement (Second) of Torts § 402A (1965) led one jurisdiction to deny recovery for third-party emotional distress. Woodill v. Parke & Davis Co., 58 Ill. App. 3d 349, 355, 374 N.E.2d 683, 688 (1978), *aff'd*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980); *accord* Mink v. University of Chicago, 460 F. Supp. 713, 719 (N.D. Ill. 1978); *see infra* notes 96-99 and accompanying text. In a non-product negligence case, one court recognized that it is perfectly appropriate to compensate emotional injury when it is adequately proven and to deny recovery when it is not. Ferrara v. Galluchio, 5 N.Y.2d 16, 21, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 999-1000 (1958); *see infra* notes 100-107 and accompanying text.

14. *See infra* notes 41-42 and accompanying text.

15. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

16. *Id.* at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74.

17. *Id.* at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75. Under the zone of danger rule, a plaintiff who has not sustained impact may nevertheless recover for emotional distress caused by witnessing injury to another if he was within the orbit of physical harm. *E.g.*, Keck v. Jackson, 122 Ariz. 114, 116, 593 P.2d 668, 670 (1979); Strazza v. McKittrick, 146 Conn. 714, 717-18, 156 A.2d 149, 151 (1959); Shanahan v. Orenstein, 52 A.D.2d 164, 167, 383 N.Y.S.2d 327, 329 (1976), *appeal dismissed*, 40 N.Y.2d 985, 359 N.E.2d 435, 390 N.Y.S.2d 927 (1977); Dave Snelling Lincoln-Mercury v. Simon, 508 S.W.2d 923, 925-26 (Tex. Civ. App. 1974). When the plaintiff witnesses the accident from a safe distance, however, the zone of danger formulation is inadequate to permit recovery. *E.g.*, Dillon v. Legg, 68 Cal. 2d 728, 733, 441 P.2d 912, 915, 69 Cal. Rptr. 72, 75 (1968); Dziokonski v. Babineau, 375 Mass. 555, 564, 380 N.E.2d 1295, 1300 (1978); Sinn v. Burd, 486 Pa. 146, 155-56, 404 A.2d 672, 677-78 (1979).

18. 68 Cal. 2d at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74. The plaintiffs also alleged injury to the nervous system. *Id.* at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74. Injury to the nervous system has been determined to be a physical injury. Espinosa v. Beverly Hosp., 114 Cal. App. 2d 232, 234, 249 P.2d 843, 844 (1952). The California

of observing the injuries to her child.[19] In order to allow the mother to recover, the *Dillon* court adopted the "foreseeable plaintiff" test.[20] The factors enunciated by the court to aid in the determination of foreseeability were whether the plaintiff (1) was in physical proximity to the scene of the accident,[21] (2) had a contemporaneous sensory perception of the accident,[22] and (3) had a close relationship with the physically injured party.[23]

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courts have liberally interpreted "physical injury" so that according to one commentator "[a]n upset stomach was enough to show harm." Granelli, *Mental Distress Tort Expanded*, Nat'l L.J., Sept. 8, 1980, at 3, col. 1. California has abrogated the need to show any physical harm in permitting recovery for emotional distress to an individual directly and foreseeably harmed by a negligent act. Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 930-31, 616 P.2d 813, 821, 167 Cal. Rptr. 831, 839 (1980).

19. 68 Cal. 2d at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74.

20. *Id.* at 739-41, 441 P.2d at 919-21, 69 Cal. Rptr. at 79-81.

21. *Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80; *see* Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690, 696-97 (Mass. 1980). One court found that the physical proximity requirement was not satisfied when the plaintiff in California sustained a heart attack upon being informed of an accident that occurred in Hawaii. Kelley v. Kokua Sales & Supply, Ltd., 56 Hawaii 204, 205-06, 209, 532 P.2d 673, 674-75, 676 (1975).

22. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80. The California courts have had difficulty consistently applying the "contemporaneous perception" requirement. *Compare* Krouse v. Graham, 19 Cal. 3d 59, 75-76, 562 P.2d 1022, 1029-31, 137 Cal. Rptr. 863, 871-72 (1977) (requirement satisfied when husband saw car approach his wife, who was in its direct path) *and* Nazaroff v. Superior Court, 80 Cal. App. 3d 553, 566, 145 Cal. Rptr. 657, 664 (1978) (triable issue of fact presented on issue of contemporaneous perception when mother arrived just as drowning son was pulled from pool) *and* Archibald v. Braverman, 275 Cal. App. 2d 253, 256, 79 Cal. Rptr. 723, 725 (1969) (requirement satisfied when mother arrived within minutes after injury to son) *with* Hathaway v. Superior Court, 112 Cal. App. 3d 728, 736, 169 Cal. Rptr. 435, 440 (1980) (requirement not met when parents arrived several minutes after injury to son) *and* Parsons v. Superior Court, 81 Cal. App. 3d 506, 512, 146 Cal. Rptr. 495, 498 (1978) (requirement not satisfied when parents arrived within seconds after accident to children) *and* Arauz v. Gerhardt, 68 Cal. App. 3d 937, 949, 137 Cal. Rptr. 619, 627 (1977) (same). Another problem presented by the contemporaneous perception requirement is that some events are, by their nature, incapable of perception. *See* Justus v. Atchison, 19 Cal. 3d 564, 584-85, 565 P.2d 122, 135-36, 139 Cal. Rptr. 97, 110-11 (1977) (recovery denied to father, present in delivery room, who could not see or sense death of fetus); Jansen v. Children's Hosp. Medical Center, 31 Cal. App. 3d 22, 24, 106 Cal. Rptr. 883, 885 (1973) (recovery denied to mother because medical misdiagnosis that led to daughter's death could not be perceived); Amodio v. Cunningham, 42 Conn. L.J. 1, 5 (Conn. Aug. 12, 1980) (court noted, but did not decide, issue of whether a negligent diagnosis is susceptible of sensory perception).

23. 68 Cal. 2d at 741, 441 P.2d at 920, 69 Cal. Rptr. at 80. In *Dillon*, both the mother and the sister of the victim were allowed to recover for their emotional distress. *Id.* at 731 n.1, 748, 441 P.2d at 914 n.1, 925, 69 Cal. Rptr. at 74 n.1, 85. Subsequently, the California court permitted a foster mother to recover for emotional distress. Mobaldi v. Board of Regents, 55 Cal. App. 3d 573, 582-83, 127 Cal. Rptr. 720, 726 (1976), *overruled on other grounds*, Baxter v. Superior Court, 19 Cal. 3d 461, 466 n.4, 563 P.2d 871, 874 n.4, 138 Cal. Rptr. 315, 318 n.4 (1977). In other

Dillon v. Legg has, however, met with mixed reception.[24] Although there has been a modest trend toward acceptance of its theory for recovery,[25] several jurisdictions have limited its application by imposing additional conditions on recovery.[26] Other jurisdictions, although not rejecting *Dillon* by name, have denied recovery in similar fact patterns.[27] Finally, several jurisdictions have expressly de-

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jurisdictions, the majority of bystander cases have involved the parent-child relationship. *See, e.g.*, Dziokonski v. Babineau, 375 Mass. 555, 557, 380 N.E.2d 1295, 1296 (1978); Corso v. Merrill, 119 N.H. 647, 649, 406 A.2d 300, 302 (1979); Sinn v. Burd, 486 Pa. 146, 150, 404 A.2d 672, 674 (1979). One court permitted a child to recover for emotional distress caused by witnessing injury to his step-grandmother. Leong v. Takasaki, 55 Hawaii 398, 400, 520 P.2d 758, 766 (1974).

24. Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute Between California and New York*, 51 St. John's L. Rev. 1, 2 (1976); Note, *Reaction to Dillon v. Legg in California and Other States*, 25 Hastings L.J. 1248, 1253-58 (1974); *see* Joseph, *Dillon's Other Leg: The Extension of the Doctrine Which Permits Bystander Recovery for Emotional Trauma and Physical Injuries to Actions Based on Strict Liability in Tort*, 18 Duq. L. Rev. 1, 22-42 (1979).

25. *See* Leong v. Takasaki, 55 Hawaii 398, 409-10, 520 P.2d 758, 765-66 (1974); Barnhill v. Davis, 300 N.W.2d 104, 106-07 (Iowa 1981); Dziokonski v. Babineau, 375 Mass. 555, 568-69, 380 N.E.2d 1295, 1302-03 (1978); Toms v. McConnell, 45 Mich. App. 647, 653-54, 207 N.W.2d 140, 144 (1973); Corso v. Merrill, 119 N.H. 647, 656, 406 A.2d 300, 306 (1979); Portee v. Jaffee, 84 N.J. 88, 97-98, 417 A.2d 521, 526 (1980); Sinn v. Burd, 486 Pa. 146, 169-73, 404 A.2d 672, 684-86 (1979); D'Ambra v. United States, 114 R.I. 643, 656-58, 338 A.2d 524, 530-31 (1975); Landreth v. Reed, 570 S.W.2d 486, 489 (Tex. Civ. App. 1978). The lower courts in Connecticut have split on the issue. *Compare* D'Amicol v. Alvarez Shipping Co., 31 Conn. Supp. 164, 169, 326 A.2d 129, 132 (Super. Ct. 1973) (accepting *Dillon*) *with* McGovern v. Piccolo, 33 Conn. Supp. 225, 228-29, 372 A.2d 989, 991 (Super. Ct. 1976) (rejecting *Dillon*).

26. One court allows a witness to recover for emotional distress only when the victim suffers serious injury or death. Portee v. Jaffee, 84 N.J. 88, 100-01, 417 A.2d 521, 527-28 (1980). Other courts require that, to be compensable, the emotional injury must be of a kind that would be suffered by a person "normally constituted." Leong v. Takasaki, 55 Hawaii 398, 408, 520 P.2d 758, 764 (1974); Sinn v. Burd, 486 Pa. 146, 168, 404 A.2d 672, 683 (1979); D'Ambra v. United States, 114 R.I. 643, 652-53 & n.4, 338 A.2d 524, 529 & n.4 (1975); *cf.* Rodrigues v. State, 52 Hawaii 156, 173, 472 P.2d 509, 520 (1970) (in non-bystander case, plaintiff must be normally constituted to recover for emotional distress); Hunsley v. Giard, 87 Wash. 2d 424, 436-37, 553 P.2d 1096, 1103 (1976) (same). Limiting damages to those that would be suffered by an individual "normally constituted" would nullify the "thin skull" rule in emotional distress cases. Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "the Punishment Fit the Crime"*, 1 U. Hawaii L. Rev. 1, 37-38 (1980). The "thin skull" rule provides that the negligent defendant must take the victim as he finds him, with any peculiar vulnerabilities. W. Prosser, *supra* note 1, at 260-63. Thus, when defendant's conduct results in impact on the plaintiff, he is liable for all consequences proximately caused by the conduct. *Id.* at 261. One writer has suggested that, while the "thin skull" rule may "produce just results in cases involving physical injury, it is not so sacrosanct that it might not be sacrificed in order to yield greater justice in mental-distress cases." Miller, *supra*, at 38 (footnote omitted).

27. Owens v. Childrens Memorial Hosp., 480 F.2d 465, 467-68 (8th Cir. 1973) (applying Nebraska law) (parents denied recovery when their son died while under

clined to follow the California lead in allowing recovery for emotional distress to bystanders who were outside the zone of danger.[28]

The principal concern articulated by the courts that have rejected *Dillon* is the difficulty of limiting liability.[29] For instance, the New York Court of Appeals, in *Tobin v. Grossman*,[30] expressed the fear that

> [i]f foreseeability be the sole test, then once liability is extended the logic of the principle would not and could not remain confined. It would extend to older children, fathers, grandparents, relatives, or others *in loco parentis*, and even to sensitive caretakers, or . . . any other affected bystanders. Moreover, in any one accident, there might well be more than one person indirectly but seriously affected by the shock of injury or death to the child.[31]

The *Tobin* court, in denying recovery to a mother in a situation similar to that in *Dillon*,[32] stated:

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the defendants' medical care); Young v. Caribbean Assocs., 358 F. Supp. 1220, 1221-22 (D.V.I. 1973) (father denied recovery after witnessing his son suffer severe burns); Woodman v. Dever, 367 So. 2d 1061, 1063 (Fla. Dist. Ct. App. 1979) (daughter denied recovery for emotional distress after witnessing assault on her mother); Strickland v. Hodges, 134 Ga. App. 909, 913, 216 S.E.2d 706, 709 (1975) (parents denied recovery for emotional distress when they learned of accident to child but did not witness it) (citing with approval Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969)); Steele v. St. Paul Fire & Marine Ins. Co., 371 So. 2d 843, 852 (La. App. 1979) (husband denied recovery for mental anguish resulting from wife having undergone unnecessary hysterectomy due to misdiagnosis). Other jurisdictions that denied recovery to a bystander before the California decision in *Dillon v. Legg* have not reversed their precedent since *Dillon*. Resavage v. Davies, 199 Md. 479, 484, 86 A.2d 879, 883 (1952) (mother denied recovery for emotional distress when she witnessed her daughter being hit by a car); Waube v. Warrington, 216 Wis. 603, 614, 258 N.W. 497, 501 (1935) (administrator not permitted to recover on behalf of mother who died several days after witnessing a fatal injury to her child).

28. Welsh v. Davis, 307 F. Supp. 416, 417 (D. Mont. 1969); Stadler v. Cross, 295 N.W.2d 552, 555 (Minn. 1980); Tobin v. Grossman, 24 N.Y.2d 609, 619, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969); Whetham v. Bismarck Hosp., 197 N.W.2d 678, 684 (N.D. 1972); Guilmette v. Alexander, 128 Vt. 116, 118-20, 259 A.2d 12, 14-15 (1969); Grimsby v. Samson, 85 Wash. 2d 52, 57, 530 P.2d 291, 294 (1975).

29. Stadler v. Cross, 295 N.W.2d 552, 555 (Minn. 1980); Tobin v. Grossman, 24 N.Y.2d 609, 618-19, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969); Grimsby v. Samson, 85 Wash. 2d 52, 57, 530 P.2d 291, 294 (1975); *see* Young v. Caribbean Assocs., 358 F. Supp. 1220, 1222 (D.V.I. 1973); Amodio v. Cunningham, 42 Conn. L.J. 1, 5 (Conn. Aug. 12, 1980); Resavage v. Davies, 199 Md. 479, 487, 86 A.2d 879, 883 (1952).

30. 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

31. *Id.* at 616, 249 N.E.2d at 423, 301 N.Y.S.2d at 559; *accord* Grimsby v. Samson, 85 Wash. 2d 52, 57, 530 P.2d 291, 294 (1975).

32. In *Tobin*, the record revealed that the mother was not an actual eyewitness to the automobile accident in which her son was injured. Instead, she heard the screech of brakes and arrived at the scene immediately after the accident to see her

> Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree. The risks of indirect harm from the loss or injury of loved ones is pervasive and inevitably realized at one time or another. Only a very small part of that risk is brought about by the culpable acts of others. This is the risk of living and bearing children. It is enough that the law establishes liability in favor of those directly or intentionally harmed.[33]

Rejection of bystander recovery in non-product negligence also rests upon the recognition of a need for a test that can be easily and consistently applied.[34] The foreseeable plaintiff test proposed in *Dillon v. Legg* has not provided a workable solution to the problem of bystander recovery for emotional distress in negligence.[35]

B. *Recovery for Emotional Distress in Products Liability*

The precedent provided by non-product negligence has been used by a California court to permit recovery for emotional distress in products liability. In *Shepard v. Superior Court*,[36] a family was riding in its automobile, which was hit by another vehicle. The rear door opened, due to a defective locking mechanism, and the daughter fell onto the highway. She was killed when struck by an oncoming car.[37] The parents and brother sued the manufacturer in implied warranty and strict liability for their emotional injuries.[38] The court extended the negligence analysis of *Dillon v. Legg* to products liability by injudiciously characterizing the family as bystanders.[39]

By expanding liability in product cases to a new and potentially unlimited class of plaintiffs, the bystander analysis in *Shepard* is inherently unacceptable to some jurisdictions. Characterization of emotionally harmed third parties as bystanders, therefore, creates unnecessary obstacles to recovery in products liability. The specter of

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son lying injured on the ground. 24 N.Y.2d at 611, 249 N.E.2d at 419, 301 N.Y.S.2d at 554-55. The court, in rejecting *Dillon*, made it clear that the mother would have been denied recovery even if she had witnessed the accident. *Id.* at 619, 249 N.E.2d at 424, 301 N.Y.S.2d at 561-62.

33. *Id.* at 619, 249 N.E.2d at 424, 301 N.Y.S.2d at 561-62.

34. Stadler v. Cross, 295 N.W.2d 552, 554 (Minn. 1980); Grimsby v. Samson, 85 Wash. 2d 52, 56-57, 530 P.2d 291, 293-94 (1975).

35. Stadler v. Cross, 295 N.W.2d 552, 555 (Minn. 1980); Tobin v. Grossman, 24 N.Y.2d 609, 619, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969); Grimsby v. Samson, 85 Wash. 2d 52, 57, 530 P.2d 291, 294 (1975).

36. 76 Cal. App. 3d 16, 142 Cal. Rptr. 612 (1977).

37. *Id.* at 18-19, 142 Cal. Rptr. at 613-14.

38. *Id.* at 18, 142 Cal. Rptr. at 613. Plaintiffs also alleged physical injuries, without enumerating them. *Id.*

39. *Id.* at 20-21, 142 Cal. Rptr. at 614-15.

uncontrollable liability raised in non-product negligence applies with equal force in products liability.[40] Moreover, courts and commentators have expressed the fear that increased liability caused by evolving products law will adversely affect manufacturing enterprises.[41] Legislatures have responded by enacting statutes to curb the manufacturer's potentially burgeoning liability.[42] Such concern is also implicit in decisions such as *Vaccaro v. Squibb Corp.*[43]

In *Vaccaro*, a mother was administered a drug designed to prevent miscarriage. She subsequently gave birth to a child with severe physical deformities. The parents sued the drug manufacturer, alleging

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40. *See* Miller, *supra* note 26, at 35-36; Traynor, *supra* note 4, at 376.

41. Helene Curtis Indus. v. Pruitt, 385 F.2d 841, 863 (5th Cir. 1968), *cert. denied*, 391 U.S. 913 (1968); Shepard v. Superior Court, 76 Cal. App. 3d 16, 26-29, 142 Cal. Rptr. 612, 619-20 (1977) (Kane, J., dissenting); R. Epstein, Modern Products Liability Law 46-48 (1980); Birnbaum, *Legislative Reform or Retreat? A Response to the Product Liability Crisis*, 14 Forum 251, 251-53 (1978); Holford, *The Limits of Strict Liability for Product Design and Manufacture*, 52 Tex. L. Rev. 81, 87 (1973). Once on the market, a defective product reaches a vast number of potential plaintiffs. One commentator noted that one court's decision can brand thousands of products defective. Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C. L. Rev. 643, 657-58 (1978). Moreover, strict liability was adopted to relieve the plaintiff of the onerous burden of proof in negligence. Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 43-44 (Alaska 1976); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972); *see* Phipps v. General Motors Corp., 278 Md. 337, 343, 363 A.2d 955, 958 (1976); Gast v. Sears Roebuck & Co., 39 Ohio St. 2d 29, 31, 313 N.E.2d 831, 833 (1974); Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666, 677 (W. Va. 1979); Dippel v. Sciano, 37 Wis. 2d 443, 459-60, 155 N.W.2d 55, 63 (1967); Birnbaum, *supra*, at 251; Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 825-26 (1973).

42. Birnbaum, *supra* note 41, at 251-52. Statutes of repose, which establish a time limit on liability based on the age of the product rather than date of injury, are an example of such legislative attempts to confine the manufacturer's liability. *E.g.*, Or. Rev. Stat. § 30.905 (1979); Utah Code Ann. § 78-15-3(1) (1977). Other examples include statutes that create either a rebuttable presumption or a defense that the manufacturer has complied with the existing technology in the preparation of his product. *E.g.*, Colo. Rev. Stat. § 13-21-403 (Supp. 1978) ("state of the art" presumption); Ind. Code Ann. § 34-4-20-4 (Burns Supp. 1979) ("state of the art" defense). Statutes have also been enacted that apply principles of comparative fault to products liability actions, thereby reducing a manufacturer's liability by apportioning fault between the parties involved. *E.g.*, Minn. Stat. Ann. § 604.01 (West 1981); N.Y. Civ. Prac. Law § 1411 (McKinney 1976). In response to a "crisis" in the field of products liability resulting from the dramatic rise in the cost of products liability insurance, the United States Department of Commerce formed a task force to investigate the problems and propose solutions. Birnbaum, *supra* note 41, at 251 n.5; Schwartz, *The Federal Government and the Product Liability Problem: From Task-Force Investigation to Decisions by the Administration*, 47 Cin. L. Rev. 573, 574 (1978).

43. 71 A.D.2d 270, 422 N.Y.S.2d 679 (1979), *rev'd*, 52 N.Y.2d 809, 418 N.E.2d 386, 436 N.Y.S.2d 871 (1980).

that the child's deformities were caused by the drug.[44] They sought damages for their emotional injuries[45] in negligence, breach of warranty and strict liability in tort.[46] The Appellate Division recognized the mother's cause of action,[47] finding that the manufacturer breached a duty owed directly to the mother.[48] The Court of Appeals reversed[49] on the ground that New York does not permit recovery for emotional harm to a bystander.[50]

The *Vaccaro* decision clearly indicates that jurisdictions that are reluctant to permit recovery for bystander emotional distress in non-product negligence cases[51] will not allow such recovery in products liability.[52] In an attempt to circumscribe a manufacturer's liability, however, recovery may be denied to a plaintiff who is worthy of redress under established tort principles.[53] Denial of recovery for third party emotional distress need not be absolute. A proper balance between the need for adequate recovery and the desire to protect the manufacturing enterprise[54] can be attained by limiting recovery for emotional distress to a third party who is also a user of the product.

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44. *Id.* at 272, 422 N.Y.S.2d at 680.

45. *Id.* The plaintiffs commenced two actions against the drug manufacturer, the physician, and the hospital. The first action, brought by the infant's guardian, sought damages against these defendants. The second action sought recovery for emotional injury and extreme mental anguish against all defendants on ten counts. Vaccaro v. Squibb Corp., 97 Misc. 2d 907, 908-10, 412 N.Y.S.2d 722, 723-24 (Sup. Ct. 1978), *aff'd*, 71 A.D.2d 270, 422 N.Y.S.2d 679 (1979), *rev'd*, 52 N.Y.2d 809, 418 N.E.2d 386, 436 N.Y.S.2d 871 (1980). The Supreme Court denied defendants' motions to dismiss nine of the ten counts. *Id.* at 919, 412 N.Y.S.2d at 730.

46. 97 Misc. 2d at 908, 412 N.Y.S.2d at 723.

47. 71 A.D.2d at 277-78, 422 N.Y.S.2d at 683-84 (1979). The father's cause of action for emotional distress was dismissed, but his cause of action for loss of consortium was sustained. *Id.*

48. *Id.* at 277, 422 N.Y.S.2d at 683.

49. 52 N.Y.2d 809, 418 N.E.2d 386, 436 N.Y.S.2d 871 (1980).

50. *See infra* notes 57-61 and accompanying text.

51. *See supra* notes 27-28 and accompanying text.

52. *See* Woodill v. Parke Davis & Co., 58 Ill. App. 3d 349, 355, 374 N.E.2d 683, 687-88, *aff'd*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980); Vaccaro v. Squibb Corp., 52 N.Y.2d 809, 809, 418 N.E.2d 386, 386, 436 N.Y.S.2d 871, 871 (1980).

53. *See* Tobin v. Grossman, 24 N.Y.2d 609, 619, 249 N.E.2d 419, 424-26, 301 N.Y.S.2d 554, 562-63 (1969) (Keating, J., dissenting); Joseph, *supra* note 24, at 14-15.

54. Helene Curtis Indus., v. Pruitt, 385 F.2d 841, 862 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968); Singer v. Walker, 39 A.D.2d 90, 97, 331 N.Y.S.2d 823, 831 (1972), *aff'd per curiam*, 32 N.Y.2d 786, 298 N.E.2d 681, 345 N.Y.S.2d 542 (1973); Epstein, *supra* note 41, at 658-62; Green, *Should the Manufacturer of General Products be Liable Without Negligence?*, 24 Tenn. L. Rev. 928, 937 (1957); McKean, *Products Liability: Trends and Implications*, 38 U. Chi. L. Rev. 3, 61 (1970); Wilson, *Products Liability*, 43 Calif. L. Rev. 809, 809 (1955).

II. Proper Characterization of Plaintiffs

A. *Allaying Fears of Unlimited Liability*

The New York Court of Appeals has asserted that "the law must establish, circumscribe and limit the rules ascribing liability in a manner which accords with reason and practicality."[55] In a well-reasoned opinion, the intermediate court in *Vaccaro* recognized that

> [r]estricting liability to the mother [who used the drug] will hold a strict rein on liability and provide a reasonably objective test . . . . There is no danger that a larger class might become involved . . . . [Therefore,] [t]he imagined difficulty of circumscribing . . . liability is overcome . . . . [and] "the rationale underlying the *Tobin* case, namely, the real dangers of extending recovery for harm to others than those directly involved, is inapplicable to the instant case."[56]

The New York Court of Appeals was apparently unpersuaded by this rationale.[57] In citing *Howard v. Lecher*,[58] the majority,[59] over a strong dissent,[60] summarily placed Mrs. Vaccaro in the bystander category and refused to acknowledge that the defendant owed her any duty whatsoever.[61]

Howard has, however, been strongly criticized.[62] Its reliance on *Tobin v. Grossman*[63] was misplaced because in *Howard* there existed

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55. Howard v. Lecher, 42 N.Y.2d 109, 112, 366 N.E.2d 64, 66, 397 N.Y.S.2d 363, 365 (1977).

56. Vaccaro v. Squibb Corp., 71 A.D.2d 270, 277-78, 422 N.Y.S.2d 679, 683-84 (1979) (citations omitted) (quoting Johnson v. State, 37 N.Y.2d 378, 383, 372 N.Y.S.2d 638, 643, 334 N.E.2d 590, 593 (1975)), *rev'd*, 52 N.Y.2d 809, 418 N.E.2d 386, 436 N.Y.S.2d 871 (1980).

57. Vaccaro v. Squibb Corp., 52 N.Y.2d 809, 810, 418 N.E.2d 386, 386, 436 N.Y.S.2d 871, 871 (1980).

58. 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977). In *Howard*, the parents of a child born with Tay-Sachs disease sued their doctor in negligence for failing to inform them of the high risk that their child would be born with this disease. *Id.* at 110, 366 N.E.2d at 64-65, 397 N.Y.S.2d at 364. The majority, citing Tobin v. Grossman, 24 N.Y.2d 609, 301 N.Y.S.2d 554, 249 N.E.2d 419 (1969), denied the parents recovery for the emotional distress they experienced at seeing their child suffer. 42 N.Y.2d at 113, 366 N.E.2d at 66, 397 N.Y.S.2d at 365-66.

59. Vaccaro v. Squibb Corp., 52 N.Y.2d 809, 810, 418 N.E.2d 386, 386, 436 N.Y.S.2d 871, 871 (1980).

60. *Id.* at 811-12, 418 N.E.2d at 386-87, 436 N.Y.S.2d at 871-72 (Fuchsberg, J., dissenting).

61. *See id.* at 811, 418 N.E.2d at 386-87, 436 N.Y.S.2d at 872.

62. Birnbaum & Rheingold, *Torts, 1977 Survey of New York Law*, 29 Syracuse L. Rev. 593, 605-09 (1978); Capron, *Tort Liability in Genetic Counseling*, 79 Colum. L. Rev. 618, 639-42 (1979); Note, *Wrongful Birth and Emotional Distress Damages: A Suggested Approach*, 38 U. Pitt. L. Rev. 550, 553-55 (1977); 24 N.Y.L. Sch. L. Rev. 502, 510-12 (1978).

63. 24 N.Y.2d 609, 301 N.Y.S.2d 554, 249 N.E.2d 419 (1969).

a duty to the plaintiff mother that would have adequately circumscribed liability.[64] In any event, the reasoning of the *Howard* majority is inapplicable to the situation presented in *Vaccaro*. The *Howard* facts apparently did not warrant the imposition of a duty that would result in compensation of one plaintiff and not the other.[65] In *Vaccaro*, however, the duty owed by the manufacturer was more readily cognizable.[66] Only the mother consumed the drug[67] and liability was with certainty limited by the duty owed only to her.[68] All others harmed were mere bystanders, as was correctly deduced with respect to the father by the lower court [69] and the dissenter in the Court of Appeals.[70]

The failure of the Court of Appeals to adequately consider this matter is a retreat to the inviolate sanctuary of *Tobin v. Grossman*.[71] It was equally improper for the California court to extend the *Dillon* bystander analysis to the facts presented in *Shepard*.[72] It is crucial that a court correctly determine whether the plaintiff is only a bystander or whether he is a user. While at first blush all three-party cases may appear to be bystander situations, the spuriousness of this characterization quickly becomes apparent.[73] A bystander is a pas-

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64. 42 N.Y.2d at 116, 366 N.E.2d at 68, 397 N.Y.S.2d at 368 (Cooke, J., dissenting).

65. *See id.* at 113, 366 N.E.2d at 66, 397 N.Y.S.2d at 365-66. The *Howard* court concluded that it could not distinguish between the injuries suffered by the mother and the father. *Id.* In addition, the doctor's nonfeasance in failing to take both parents' genealogical history and evaluate it properly was not the direct cause of the child's illness. *Id.* at 110-11, 366 N.E.2d at 65, 397 N.Y.S.2d at 364. In dictum, the majority posited a hypothetical in which the doctor committed an act of misfeasance by causing injuries to the child during delivery, and stated that in such a case, the parents still could not recover for their emotional distress. *Id.* at 112-13, 366 N.E.2d at 66, 397 N.Y.S.2d at 365. The Appellate Division in *Vaccaro*, however, distinguished this dictum on the grounds that the duty breached would be one owed to the child. Vaccaro v. Squibb Corp., 71 A.D.2d 270, 275, 422 N.Y.S.2d 679, 682 (1979), *rev'd*, 52 N.Y.2d 809, 418 N.E.2d 386, 436 N.Y.S.2d 871 (1980). In *Vaccaro*, however, the mother's injury was the result of a breach of a duty owed directly to her. *Id.* In addition, whether administration of the drug to Mrs. Vaccaro throughout her pregnancy was the direct cause of the injuries to her child was a genuine question of fact. *Id.*

66. 71 A.D.2d at 274, 422 N.Y.S.2d at 682.

67. 52 N.Y.2d at 811-12, 418 N.E.2d at 387, 436 N.Y.S.2d at 872 (Fuchsberg, J., dissenting).

68. *See id.*

69. *See* 71 A.D.2d at 278, 422 N.Y.S.2d at 684.

70. 52 N.Y.2d at 811-12, 418 N.E.2d at 386-87, 436 N.Y.S.2d at 872 (Fuchsberg, J., dissenting).

71. *Id.* at 811 & n.*, 418 N.E.2d at 387 & n.*, 436 N.Y.S.2d at 872 & n.*.

72. *See supra* notes 36-39 and accompanying text.

73. *See* Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 921-23, 616 P.2d 813, 815-17, 167 Cal. Rptr. 831, 833-35 (1980); Howard v. Lecher, 42 N.Y.2d 109, 116-17, 366 N.E.2d 64, 68-69, 397 N.Y.S.2d 363, 367-68 (1977) (Cooke, J., dissenting); Note, *supra* note 62, at 555.

sive onlooker,[74] while users may be defined as that class of persons using a product[75] for the purposes for which it was intended.[76] Circumscribed by the clearly recognizable duty owed by a manufacturer to the user of its product, liability to the user is eminently reasonable and practical.

B. *Basis for User Recovery in Products Liability*

1. Duty and Causation

Manufacturers clearly owe a duty to all users to ensure that the product will not be unreasonably dangerous.[77] The manufacturer advertises the product,[78] creates a demand for it,[79] and expects the

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74. Singer v. Walker, 39 A.D.2d 90, 95, 331 N.Y.S.2d 823, 828 (1972), *aff'd per curiam*, 32 N.Y.2d 786, 298 N.E.2d 681, 345 N.Y.S.2d 542 (1973).

75. *See* Vaccaro v. Squibb Corp., 52 N.Y.2d 809, 811-12, 418 N.E.2d 386, 387, 436 N.Y.S.2d 871, 872 (1980) (Fuchsberg, J., dissenting); *supra* note 7; *cf.* Howard v. Lecher, 42 N.Y.2d 109, 116-17, 366 N.E.2d 64, 68, 397 N.Y.S.2d 363, 367-68 (1977) (Cooke, J., dissenting) (in non-product negligence, patient to whom physician owed a direct duty was not a bystander); Johnson v. State, 37 N.Y.2d 378, 382-83, 334 N.E.2d 590, 593, 372 N.Y.S.2d 638, 642 (1975) (in non-product negligence, patient's daughter, to whom hospital owed a direct duty, was not a bystander); Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 921-23, 616 P.2d 813, 815-17, 167 Cal. Rptr. 831, 833-35 (1980) (in non-product negligence, *Dillon* held inapplicable because plaintiff was direct victim of the negligent act).

76. Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963); Singer v. Walker, 39 A.D.2d 90, 93-94, 331 N.Y.S.2d 823, 827 (1972).

77. The Second Restatement of Torts refers to a "product in a defective condition unreasonaby dangerous." Restatement (Second) of Torts § 402A(1) (1965). Controversy exists as to whether a plaintiff must prove that a product is both defective and unreasonably dangerous. Most courts require proof of both. *E.g.*, Serpiello v. Yoder Co., 418 F. Supp. 70, 71-72 (E.D. Pa. 1976), *aff'd mem.*, 556 F.2d 568 (3d Cir. 1977); Rogers v. Unimac Co., 115 Ariz. 304, 306-07, 565 P.2d 181, 183-84 (1977); Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d 830, 835 (Iowa 1978); Phipps v. General Motors Corp., 278 Md. 337, 344, 363 A.2d 955, 958-59 (1976); Dippel v. Sciano, 37 Wis. 2d 443, 460, 155 N.W.2d 55, 63 (1967). Other courts, however, require proof of the existence of a defect only. *E.g.*, Butaud v. Suburban Marine & Sporting Goods, Inc., 543 P.2d 209, 213-14 (Alaska 1975); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 132-33, 501 P.2d 1153, 1161-62, 104 Cal. Rptr. 433, 441-42 (1972); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 176, 406 A.2d 140, 153 (1979).

78. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 467, 150 P.2d 436, 443 (1944) (Traynor, J., concurring); First Nat'l Bank v. Nor-Am Agricultural Prods., Inc., 88 N.M. 74, 87, 537 P.2d 682, 695 (1975); Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 12-13, 181 N.E.2d 399, 402, 226 N.Y.S.2d 363, 367-68 (1962); Tedder v. Pepsi-Cola Bottling Co., 270 N.C. 301, 305-06, 154 S.E.2d 337, 340 (1967); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 248-49, 147 N.E.2d 612, 615 (1958); General Motors Corp. v. Dodson, 47 Tenn. App. 438, 460, 338 S.W.2d 655, 665 (1960); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 619, 164 S.W.2d 828, 832-33 (1942).

79. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 385, 161 A.2d 69, 84 (1960); Tedder v. Pepsi-Cola Bottling Co., 270 N.C. 301, 305-06, 154 S.E.2d 337,

consumer to purchase it.[80] By this conduct, and by the mere presence of the product on the marketplace,[81] the manufacturer assumes a duty to the user of that product.[82] Such a duty was owed by the drug company in *Vaccaro*.[83] As the intermediate court recognized, the duty of the drug company was manifest: "It manufactured, sold and distributed the drug designed to prevent miscarriage."[84] The duty was owed directly to the mother because "[i]t was she who was injected with the drug, which was prescribed and administered to her" throughout her pregnancy.[85] Similarly, in *Shepard*, it was recognized that the automobile manufacturer owed a duty to the family riding in the automobile.[86]

Once a duty is breached, the manufacturer should be liable to the user for all injuries caused by the defective product.[87] In products

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340 (1967); Baxter v. Ford Motor Co., 168 Wash. 456, 462-63, 12 P.2d 409, 412 (1932).

80. Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 248-49, 147 N.E.2d 612, 615-16 (1958); Klages v. General Ordnance Equip. Corp., 240 Pa. Super. Ct. 356, 364-65, 367 A.2d 304, 308-09 (1976); Baxter v. Ford Motor Co., 168 Wash. 456, 462-63, 12 P.2d 409, 412 (1932).

81. Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963); Conder v. Hull Lift Truck, Inc., 405 N.E.2d 538, 544 (Ind. Ct. App. 1980); Phipps v. General Motors Corp., 278 Md. 337, 352, 363 A.2d 955, 963 (1976); H. Melick, The Sale of Food and Drink 154 (1936); Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 Va. L. Rev. 1109, 1129-31, 1243-46 (1974).

82. Hertzler v. Manshum, 228 Mich. 416, 422, 200 N.W. 155, 156 (1924); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 384, 161 A.2d 69, 84 (1960); Race v. Krum, 222 N.Y. 410, 415, 118 N.E. 853, 853-54 (1918); Parish v. Great Atl. & Pac. Tea Co., 13 Misc. 2d 33, 62-63, 177 N.Y.S.2d 7, 36-37 (Mun. Ct. N.Y. 1958); Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 230, 235-36, 218 N.E.2d 185, 188, 191-92 (1966); Markle v. Mulholland's, Inc., 265 Or. 259, 266-67, 509 P.2d 529, 532 (1973); Hamilton v. Motor Coach Indus., 569 S.W.2d 571, 575 (Tex. Civ. App. 1978). The Second Restatement of Torts provides that "the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it." Restatement (Second) of Torts § 402A comment c (1965). In discussing the liability of a manufacturer of adulterated foodstuffs, one commentator noted that "[t]he manufacturer who places food or drink upon the market in sealed containers has, by such means (and especially by his advertising or printed labels), intentionally brought himself into direct relationship with the ultimate purchaser. . . . [The manufacturer's] representations announce the assumption . . . of a duty to make reparation directly to . . . the public purchasing the product . . . ." H. Melick, *supra* note 81, at 154-55 (footnote omitted).

83. 71 A.D.2d 270, 422 N.Y.S.2d 679 (1979), *rev'd*, 52 N.Y.2d 809, 418 N.E.2d 386, 436 N.Y.S.2d 871 (1980).

84. *Id.* at 274, 422 N.Y.S.2d at 682.

85. *Id.* at 276, 422 N.Y.S.2d at 682.

86. Shepard v. Superior Court, 76 Cal. App. 3d 16, 20, 142 Cal. Rptr. 612, 614 (1977).

87. 2 L. Frumer & M. Friedman, *supra* note 3, at 3B-88 to -88.1. In order for a plaintiff to recover in a products liability action, he must prove causation in fact,

liability it is not necessary that, for a defective product to be the legal cause of an injury, either the particular injury[88] or the manner in which it occurred[89] be foreseeable. Rather, the focus is on whether the use of the product was reasonably foreseeable.[90]

In *Vaccaro*, the mother clearly was utilizing the drug for the precise purpose for which it was intended.[91] Similarly, in *Shepard*, transportation of people was the foreseeable use of the family automobile.[92] Additionally, there was no misuse of the product in either case.[93] When the use of the product is foreseeable, the fact that the injury sustained was emotional, rather than physical, should not be determinative in assessing liability.

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i.e., that the injury complained of was the result of a defective product, and that the defect can be traced to the manufacturer. *Id.* Additionally, the plaintiff must prove proximate, or "legal," cause. Rogers v. Unimac Co., 115 Ariz. 304, 309, 565 P.2d 181, 185 (1977); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 127, 501 P.2d 1153, 1157, 104 Cal. Rptr. 433, 437 (1972); Bradford v. Bendix-Westinghouse Automotive Air Brake Co., 33 Colo. App. 99, 111, 517 P.2d 406, 413 (1973); Kirkland v. General Motors Corp., 521 P.2d 1353, 1363 (Okla. 1974). In non-product negligence, the general rule that a tortfeasor is responsible for all the natural and proximate causes of his negligent act has been applied to permit recovery for emotional harm. *E.g.*, Johnson v. State, 37 N.Y.2d 378, 383-84, 334 N.E.2d 590, 593, 372 N.Y.S.2d 638, 642 (1975); Barnette v. Dickens, 205 Va. 12, 16, 135 S.E.2d 109, 113 (1964). When the plaintiff's conduct breaks the chain of causation and becomes the primary cause of the injury, however, proximate cause is not present. For example, the failure to repair a product, or misuse of the product, can constitute an intervening and superceding cause of the injury. *E.g.*, Greiner v. Volkswagenwerk Aktiengesellschaft, 429 F. Supp. 495, 497 (E.D. Pa. 1977); Rogers v. Unimac, 115 Ariz. 304, 309, 565 P.2d 181, 186 (1977). *See generally* Twerski, *The Many Faces of Misuse: An Inquiry Into the Emerging Doctrine of Comparative Causation*, 29 Mercer L. Rev. 403, 420-26 (1978).

88. Eshbach v. W.T. Grant's & Co., 481 F.2d 940, 942-43 (3d Cir. 1973); Newman v. Utility Trailer & Equip. Co., 278 Or. 395, 397-400, 564 P.2d 674, 675-76 (1977); *cf.* Roberts v. United States, 316 F.2d 489, 495 (3d Cir. 1963) (in non-product negligence, defendant not required to foresee the precise injury that occurred in order to be liable); Barnette v. Dickens, 205 Va. 12, 16, 135 S.E.2d 109, 112-13 (1964) (same).

89. Eshbach v. W.T. Grant's & Co., 481 F.2d 940, 943 (3d Cir. 1973); Dorsey v. Yoder Co., 331 F. Supp. 753, 768 (E.D. Pa. 1971), *aff'd*, 474 F.2d 1339 (3d Cir. 1973); Comstock v. General Motors Corp., 358 Mich. 163, 180, 99 N.W.2d 627, 636 (1959); Tucci v. Bossert, 53 A.D.2d 291, 293, 385 N.Y.S.2d 328, 330-31 (1976); Smith v. J.C. Penney Co., 269 Or. 643, 659, 525 P.2d 1299, 1306-07 (1974).

90. LeBouef v. Goodyear Tire & Rubber Co., 623 F.2d 985, 989 (5th Cir. 1980); Eshbach v. W.T. Grant's & Co., 481 F.2d 940, 943 (3d Cir. 1973); DeRosa v. Remington Arms Co., 509 F. Supp. 762, 768-69 (E.D.N.Y. 1981); Derrick v. Yoder Co., 88 Ill. App. 3d 864, 873, 410 N.E.2d 1030, 1036 (1980); Newman v. Utility Trailer & Equip. Co., 278 Or. 395, 399, 564 P.2d 674, 676 (1977).

91. Vaccaro v. Squibb Corp., 71 A.D.2d 270, 274, 422 N.Y.S.2d 679, 682 (1979), *rev'd*, 52 N.Y.2d 809, 418 N.E.2d 386, 436 N.Y.S.2d 871 (1980).

92. *See* Shepard v. Superior Court, 76 Cal. App. 3d 16, 20, 142 Cal. Rptr. 612, 614-15 (1977).

93. *See id.*; Vaccaro v. Squibb Corp., 71 A.D.2d 270, 274, 422 N.Y.S.2d 679, 682 (1979), *rev'd*, 52 N.Y.2d 809, 418 N.E.2d 386, 436 N.Y.S.2d 871 (1980). A

2. Nature of the Injury

It is a futile exercise to attempt to categorize an injury as discretely emotional or physical.[94] The Court of Appeals in *Vaccaro*, however, denied recovery to the mother on the additional ground that she did not allege independent physical injuries.[95] Similarly, in *Woodill v. Parke Davis & Co.*,[96] an Illinois appellate court denied recovery in a situation similar to *Vaccaro* by relying on section 402A of the Second Restatement of Torts.[97] That section provides: "One who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . is subject to liability for physical harm thereby caused to the ultimate user or consumer . . . ."[98] After quoting section 402A, the *Woodill* court summarily concluded that "the Restatement did not intend a strict liability action for mental anguish or emotional distress."[99]

The *Woodill* court's construction of the term "physical harm" is erroneous. The comments to section 402A are silent on the proper interpretation of "physical harm." To ascertain the scope of its meaning, reference to section 436A,[100] concerning emotional distress in

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plaintiff's misuse of a product, such as failure to read and follow instructions, will relieve the manufacturer from liability. *See* Poches v. J.J. Newberry Co., 549 F.2d 1166, 1168 (8th Cir. 1977); McDevitt v. Standard Oil Co., 391 F.2d 364, 369 (5th Cir. 1968); Hawkeye Sec. Ins. Co. v. Ford Motor Co., 199 N.W.2d 373, 381 (Iowa 1972). Conduct regarded as foreseeable use in one jurisdiction may be misuse in another. *Compare* LeBouef v. Goodyear Tire & Rubber Co., 451 F. Supp. 253, 257 (W.D. La. 1978) (driving at excessive speed foreseeable use), *aff'd*, 623 F.2d 985 (5th Cir. 1980) *with* Hoelter v. Mohawk Serv., Inc., 170 Conn. 495, 497-98, 506, 365 A.2d 1064, 1066, 1069 (1976) (excessive speed was such misuse as to preclude recovery).

94. D'Ambra v. United States, 396 F. Supp. 1180, 1184 (D.R.I. 1973); Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 929, 616 P.2d 813, 820-21, 167 Cal. Rptr. 831, 838-39 (1980); Sloane v. Southern Cal. Ry., 111 Cal. 668, 680, 44 P. 320, 322 (1896); Gay v. A & P Food Stores, 39 Misc. 2d 360, 364, 240 N.Y.S.2d 809, 813 (Civ. Ct. N.Y. 1963); Brickner, *The Psychology of Disability*, in Traumatic Medicine and Surgery for the Attorney 65 (P. Cantor ed. Supp. 1964); Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 Geo. L.J. 1237, 1259 n.128 (1971) [hereinafter cited as *Independent Tort*].

95. Vaccaro v. Squibb Corp., 52 N.Y.2d 809, 810, 418 N.E.2d 386, 386, 436 N.Y.S.2d 871, 871 (1980). The dissent argued that the plaintiff did in fact rely on physical injuries, in that the record described injuries to her nervous system, vomiting, and nausea. *Id.* at 811, 418 N.E.2d at 387, 436 N.Y.S.2d at 872.

96. 58 Ill. App. 3d 349, 374 N.E.2d 683 (1978), *aff'd*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980).

97. *Id.* at 355, 374 N.E.2d at 688.

98. Restatement (Second) of Torts § 402A(1) (1965).

99. 58 Ill. App. 3d at 355, 374 N.E.2d at 688; *accord* Mink v. University of Chicago, 460 F. Supp. 713, 719 (N.D. Ill. 1978); Shepard v. Superior Court, 76 Cal. App. 3d 16, 23, 142 Cal. Rptr. 612, 616 (1977) (Kane, J., dissenting).

100. Restatement (Second) of Torts § 436A (1965).

negligence, is instructive. Comment c to that section defines bodily harm to include recurring symptoms such as nausea and long-term mental disturbances, "notwithstanding their mental character."[101] In accordance with the Restatement, courts in non-product negligence cases have liberally construed physical harm as including emotional disturbances.[102]

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101. Restatement (Second) of Torts § 436A comment c (1965). One commentator has suggested that because the Restatement requires proof of causation, but not contact with the plaintiff, emotional distress manifested by objective symptoms is compensable under § 402A. Davis, *Product Liability Under Section 402A of the Restatement (Second) of Torts and the Model Uniform Product Liability Act*, 16 Wake Forest L. Rev. 513, 531 n.99 (1980). Medical research has identified two discrete responses to trauma, a primary and a secondary response. Leong v. Takasaki, 55 Hawaii 398, 411-12, 520 P.2d 758, 766-67 (1974); *Independent Tort, supra* note 100, at 1248-50. The initial response, such as fear, grief or embarrassment, is an attempt by the individual to dissipate the stress precipitated by the event, *id.* at 1249 & nn.67-68, and is transient in nature. Smith & Solomon, *Traumatic Neuroses in Court*, 30 Va. L. Rev. 87, 123 (1943). The secondary reaction is typically exemplified by a traumatic neurosis, and is more debilitating. Smith & Solomon, *supra*, at 92-99; *Independent Tort, supra* note 94, at 1249-51. The term "traumatic neurosis" describes a primarily psychic injury precipitated by either physical or emotional trauma. Keiser, *Traumatic Neurosis: A Common Problem*, 2 Law. Med. J. 173, 173 (2d ed. 1974). Four kinds of traumatic neuroses appear frequently in personal injury cases. They are (1) anxiety reactions, which are characterized by a state of nervousness and tension, Blinder, *Psychiatric Aspects of Traumatic Injuries*, 1 Law. Med. J. 313, 315 (2d ed. 1973); Smith & Solomon, *supra*, at 94; (2) phobic reactions, Blinder, *supra*, at 316; *see* Ferrara v. Galluchio, 5 N.Y.2d 16, 19-20, 152 N.E.2d 249, 251, 176 N.Y.S.2d 996, 998 (1958); Shanahan v. Orenstein, 52 A.D.2d 164, 168, 383 N.Y.S.2d 327, 330 (1976), *appeal dismissed*, 40 N.Y.2d 985, 359 N.E.2d 435, 390 N.Y.S.2d 927 (1977); (3) hysterical neurosis, which results in a bodily impairment that has no physical basis, such as paralysis, Blinder, *supra*, at 316; Modlin, *Psychiatry and the Law*, in Modern Legal Medicine, Psychiatry and Forensic Science 721, 724 (W. Curran, A. McGarry, C. Petty eds. 1980); *Independent Tort, supra* note 94, at 1250-51; *see* Williamson v. Bennett, 251 N.C. 498, 501, 112 S.E.2d 48, 50 (1960); and (4) depressive reactions. Blinder, *supra*, at 318-21; *see* D'Ambra v. United States, 396 F. Supp. 1180, 1182 (D.R.I. 1973); Mobaldi v. Board of Regents, 55 Cal. App. 3d 573, 578, 127 Cal. Rptr. 720, 723 (1976), *overruled on other grounds*, Baxter v. Superior Court, 19 Cal. 3d 461, 466 n.4, 563 P.2d 871, 874 n.4, 138 Cal. Rptr. 315, 318 n.4 (1977). A traumatic neurosis, by preventing an individual from functioning normally, can be a debilitating as a physical injury. Laughlin, *Neuroses Following Trauma*, in 6 Traumatic Medicine for the Attorney 122 (P. Cantor ed. 1962); Keiser, *supra*, at 175; *Independent Tort, supra* note 94, at 1251-52.

102. *See, e.g.*, Mobaldi v. Board of Regents, 55 Cal. App. 3d 573, 578, 127 Cal. Rptr. 720, 723 (1976) (depression and weight loss), *overruled on other grounds*, Baxter v. Superior Court, 19 Cal. 3d 461, 466 n.4, 563 P.2d 871, 874 n.4, 138 Cal. Rptr. 315, 318 n.4 (1977); Daley v. LaCroix, 384 Mich. 4, 15-16, 179 N.W.2d 390, 396 (1970) (weight loss and nervousness); Toms v. McConnell, 45 Mich. App. 647, 657, 207 N.W.2d 140, 145 (1973) (depression); Corso v. Merrill, 119 N.H. 647, 658, 406 A.2d 300, 307 (1979) (same); Hughes v. Moore, 214 Va. 27, 29, 35, 197 S.E.2d 214, 216, 220 (1973) (anxiety reaction, phobia and hysteria); *cf.* Wolfe v. Sibley, Lindsay & Curr Co., 36 N.Y.2d 505, 508, 510, 330 N.E.2d 603, 604, 608, 369 N.Y.S.2d 637, 639, 641 (1975) (acute depressive reaction and resultant weight loss compensable psychological injury in workman's compensation case).

The essential issue is the adequacy of proof of the injury.[103] As one court noted, "[t]he term 'physical' is not used in its ordinary sense for purposes of applying the 'physical consequences' rule. Rather, the word is used to indicate that the condition . . . for which recovery is sought must be one susceptible of objective determination."[104] Emotional distress is frequently manifested in demonstrable physical reactions, such as vomiting, nausea, or injury to the nervous system.[105] In such cases, the harm is clearly capable of proof.[106] Furthermore, courts and commentators have recognized that recovery for emotional distress may be proper even in the absence of physical symptoms, when the circumstances of the case provide a "guarantee of [the] genuineness" of the injury.[107]

Moreover, strict adherence to a physical harm requirement in three-party cases is unwarranted because such a requirement is not rigorously imposed even in existing products liability law. Courts have allowed recovery for an essentially emotional injury[108] in cases involv-

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103. Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 929-30, 616 P.2d 813, 821, 167 Cal. Rptr. 831, 839 (1980); Rodrigues v. State, 52 Hawaii 156, 170-71, 472 P.2d 509, 519 (1970); Daley v. LaCroix, 384 Mich. 4, 13-15, 179 N.W.2d 390, 395-96 (1970); Ferrara v. Galluchio, 5 N.Y.2d 16, 21, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 1000 (1958); *Independent Tort*, *supra* note 94, at 1258-62.

104. *In re* United States, 418 F.2d 264, 269 (1st Cir. 1969); *accord* Vance v. Vance, 286 Md. 490, 500, 408 A.2d 728, 733-34 (1979).

105. *In re* United States, 418 F.2d 264, 269 (1st Cir. 1969); Strazza v. McKittrick, 146 Conn. 714, 717, 156 A.2d 149, 151 (1959); Ferrara v. Galluchio, 5 N.Y.2d 16, 21, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 999 (1958); Savard v. Cody Chevrolet, Inc., 126 Vt. 405, 406-07, 234 A.2d 656, 657 (1967). The most frequently occurring reactions to trauma are catalogued in Blinder, *supra* note 101, at 315-18; Keiser, *supra* note 101, at 175-77; Modlin, *supra* note 101, at 722-25; *Independent Tort*, *supra* note 94, at 1250-51.

106. Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 930-31, 616 P.2d 813, 821, 167 Cal. Rptr. 831, 839 (1980); W. Prosser, *supra* note 1, at 328; *Independent Tort*, *supra* note 94, at 1250.

107. Leong v. Takasaki, 55 Hawaii 398, 412-13, 520 P.2d 758, 766-67 (1974); Johnson v. State, 37 N.Y.2d 378, 383-84, 334 N.E.2d 590, 593, 372 N.Y.S.2d 638, 643 (1975); Ferrara v. Galluchio, 5 N.Y.2d 16, 21, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 999 (1958); W. Prosser, *supra* note 1, at 330.

108. Slonsky v. Phoenix Coca-Cola Bottling Co., 18 Ariz. App. 10, 11-12, 499 P.2d 741, 742-43 (1972); Coca-Cola Bottling Co. v. Langston, 198 Ark. 59, 62-63, 127 S.W.2d 263, 263-64 (1939); Medeiros v. Coca-Cola Bottling Co., 57 Cal. App. 2d 707, 709, 135 P.2d 676, 680 (1943); Way v. Tampa Coca-Cola Bottling Co., 260 So. 2d 288, 290 (Fla. Dist. Ct. App. 1972); Kroger Co. v. Beck, 375 N.E.2d 640, 645-46 (Ind. Ct. App. 1978); Connell v. Norton Coca-Cola Bottling Co., 187 Kan. 393, 395, 357 P.2d 804, 807-08 (1960); Deris v. Finest Foods, Inc., 198 So. 2d 412, 417 (La. Ct. App. 1967); Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117, 121 (Me. 1970); Hattiesburg Coca Cola Bottling Co. v. Cawley, 2 So. 2d 143, 143 (Miss. 1941); Kenney v. Wong Len, 81 N.H. 427, 432-34, 128 A. 343, 346-47 (1925); Gay v. A & P Food Stores, 39 Misc. 2d 360, 364, 240 N.Y.S.2d 809, 813 (Civ. Ct. 1963).

ing adulterated food and beverages,[109] provided that there was sufficient proof of causation and of the genuineness of the injury.[110] In a typical case, the plaintiff finds a harmful substance in a food product and experiences emotional distress with resultant physical consequences.[111] In one case, the plaintiff, while drinking a bottle of

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109. The use of the phrase "adulterated food and beverage cases" in this Note refers to those cases where either food or beverages contain a foreign substance. *See generally* 3 R. Hursch & H. Bailey, American Law of Products Liability 125-532 (2d ed. 1975). Recovery may be sought in negligence, where liability is predicated on the manufacturer's breach of a duty to exercise a high degree of care in the preparation of his product. *See, e.g.*, Medeiros v. Coca-Cola Bottling Co., 57 Cal. App. 2d 707, 715, 135 P.2d 676, 680 (1943); Hertzler v. Manshum, 228 Mich. 416, 423, 200 N.W. 155, 157 (1924); Rozumailski v. Philadelphia Coca-Cola Bottling Co., 296 Pa. 114, 116, 145 A. 700, 700 (1929). Other courts have based the manufacturer's liability on a breach of warranty. *E.g.*, Connell v. Norton Coca-Cola Bottling Co., 187 Kan. 393, 394, 357 P.2d 804, 805 (1960); Le Blanc v. Louisiana Coca Cola Bottling Co., 221 La. 919, 926, 60 So. 2d 873, 875 (1952); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 612, 164 S.W.2d 828, 829 (1942). As one court noted, "[i]t seems to be the rule that where food products sold for human consumption are unfit for that purpose, there is such an utter failure of the purpose for which the food is sold, and the consequences of eating unsound food are so disastrous to human health and life, that the law imposes a warranty of purity in favor of the ultimate consumer as a matter of public policy." *Id.; accord* Cernes v. Pittsburg Coca Cola Bottling Co., 183 Kan. 758, 761, 332 P.2d 258, 261 (1958). Recovery may also be sought under strict liability in tort. *See, e.g.*, Slonsky v. Phoenix Coca-Cola Bottling Co., 18 Ariz. App. 10, 12, 499 P.2d 741, 743 (1972); Shoshone Coca-Cola Bottling Co. v. Dolinski, 82 Nev. 439, 443, 420 P.2d 855, 857-58 (1966).

110. Medeiros v. Coca-Cola Bottling Co., 57 Cal. App. 2d 707, 713-14, 135 P.2d 676, 678-80 (1943); Kroger Co. v. Beck, 375 N.E.2d 640, 645-46 (Ind. Ct. App. 1978); Connell v. Norton Coca-Cola Bottling Co., 187 Kan. 393, 396-97, 357 P.2d 804, 807-08 (1960); Deris v. Finest Foods, Inc., 198 So. 2d 412, 416-17 (La. Ct. App. 1967); Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117, 121-22 (Me. 1970); Gay v. A & P Food Stores, 39 Misc. 2d 360, 363-64, 240 N.Y.S.2d 809, 812-13 (Civ. Ct. 1963).

111. *E.g.*, Slonsky v. Phoenix Coca-Cola Bottling Co., 18 Ariz. App. 10, 11, 499 P.2d 741, 742 (1972) (metal filings in bottle resulted in vomiting and nausea); Coca-Cola Bottling Co. v. Langston, 198 Ark. 59, 60, 127 S.W.2d 263, 263 (1939) (swallowed ground glass in bottled beverage resulted in vomiting and nausea); Medeiros v. Coca-Cola Bottling Co., 57 Cal. App. 2d 707, 709, 135 P.2d 676, 677 (1943) (bottle brush in coke bottle resulted in illness); Way v. Tampa Coca Cola Bottling Co., 260 So. 2d 288, 288 (Fla. Dist. Ct. App. 1972) (rat in bottle resulted in nausea and vomiting); Kroger Co. v. Beck, 375 N.E.2d 640, 642 (Ind. Ct. App. 1978) (needle in piece of meat pricked throat, resulted in aversion to meats); Connell v. Norton Coca-Cola Bottling Co., 187 Kan. 393, 394, 357 P.2d 804, 806 (1960) (centipede in bottle resulted in vomiting and nausea); Deris v. Finest Foods, Inc., 198 So. 2d 412, 416-17 (La. Ct. App. 1967) (glass particles in banana split resulted in mental and emotional anxiety); Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117, 118 (Me. 1970) (prophylactic in bottle resulted in vomiting); Hattiesburg Coca Cola Bottling Co. v. Cawley, 2 So. 2d 143, 143 (Miss. 1941) (roach in coke bottle resulted in vomiting and nausea); Kenney v. Wong Len, 81 N.H. 427, 430-32, 128 A. 343, 344-46 (1925) (mouse hidden in food served in restaurant resulted in nervous

Coke, discovered something that "resembled a rat with the hair sucked off."[112] This unfortunate encounter resulted in vomiting and nausea.[113] A number of courts regard these symptoms as sufficient physical illness to permit recovery.[114] Other courts, mindful that the trend is toward greater protection of the consumer, have permitted recovery without strictly adhering to the physical injury requirement.[115] In these cases, the vomiting and nausea experienced by the plaintiffs were regarded by the courts solely as objective manifestations of the emotional harm, indicative of the legitimacy of the complaint.[116]

In addition, in one products liability case,[117] a court upheld a jury verdict awarding plaintiff $30,000 for the mental anguish and suffering she experienced when a defective hair conditioner caused her hair to fall out.[118] In reversing a decision setting aside the jury verdict as excessive, the court noted that "[i]t is obvious the [lower court] determined that in order to recover damages . . . there should have been physical pain and suffering. That is a false premise."[119] The outrageousness of the situation guaranteed the genuineness of the injury.[120]

Reliance on such precedent permitting recovery for an emotional injury in two-party products liability cases is entirely appropriate in three-party cases. It would be clearly anomalous to permit recovery for shock at viewing a worm in a can of corn,[121] while the user of a

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shock); Gay v. A & P Food Stores, 39 Misc. 2d 360, 361, 240 N.Y.S.2d 809, 810 (Civ. Ct. 1963) (worm in can of corn resulted in nausea and stomach pains). More serious consequences can result from the ingestion of a harmful food product. Obieli v. Campbell Soup Co., 623 F.2d 668, 668-69 (10th Cir. 1980) (roach in soup caused emotional distress which in turn caused "venous thrombosis, pulmonary emboli, and esophageal hiatus hernia").

112. Way v. Tampa Coca Cola Bottling Co., 260 So. 2d 288, 288 (Fla. Dist. Ct. App. 1972).

113. *Id.*

114. *See, e.g.*, Crystal Coca-Cola Bottling Co. v. Cathey, 83 Ariz. 163, 172-73, 317 P.2d 1094, 1100 (1957); Moss v. Coca Cola Bottling Co., 103 Cal. App. 2d 380, 383-84, 229 P.2d 802, 805 (1951); Harris v. Coca-Cola Bottling Co., 35 Ill. App. 2d 406, 419, 183 N.E.2d 56, 62-63 (1962); Gay v. A & P Food Stores, 39 Misc. 2d 360, 363, 240 N.Y.S.2d 809, 812 (Civ. Ct. 1963).

115. Way v. Tampa Coca Cola Bottling Co., 260 So. 2d 288, 290 (Fla. Dist. Ct. App. 1972); Wallace v. Coca-Cola Bottling Plants, 269 A.2d 117, 121 (Me. 1970); *cf.* Hunsley v. Giard, 87 Wash. 2d 424, 436, 553 P.2d 1096, 1103 (1976) (emotional suffering compensable if manifested by objective symptoms).

116. Way v. Tampa Coca Cola Bottling Co., 260 So. 2d 288, 290 (Fla. Dist. Ct. App. 1972); Wallace v. Coca-Cola Bottling Plants, 269 A.2d 117, 120-21 (Me. 1970).

117. Wilson v. Redken Laboratories, 562 S.W.2d 632 (Ky. 1978).

118. *Id.* at 634.

119. *Id.* at 636.

120. *Id.* at 635-37.

121. Gay v. A & P Food Stores, 39 Misc. 2d 360, 361, 365, 240 N.Y.S.2d 809, 810, 814 (Civ. Ct. 1963).

prescription drug, taken while pregnant, cannot recover for severe emotional trauma caused by the birth of a physically deformed child.[122] If more certainty is needed in ascertaining the genuineness of the emotional harm, a requirement similar to one of the *Dillon* factors,[123] that the user have a close relationship with the other injured party,[124] may be imposed.

Conclusion

When confronted with third-party emotional distress in products liability, courts should not adopt the bystander analysis used in non-product negligence. Inherent in products law is an identifiable and limited class of plaintiffs—users. Indeed, the adulterated food and beverage cases provide adequate precedent for recovery for a user's emotional distress. When a person uses a defective product and that defect causes physical injury to a loved one, the user is clearly more than a mere onlooker. Permitting user recovery for genuine emotional harms cannot be said to be either an uncontrolled or unwarranted burden on manufacturers.

Linda Trummer-Napolitano

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122. Mink v. University of Chicago, 460 F. Supp. 713, 719 (N.D. Ill. 1978); Woodill v. Parke Davis & Co., 58 Ill. App. 3d 349, 354-55, 374 N.E.2d 683, 687-88 (1978), *aff'd*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980); Vaccaro v. Squibb Corp., 52 N.Y.2d 809, 810, 418 N.E.2d 386, 386, 436 N.Y.S.2d 871, 871 (1980).

123. *See supra* note 23 and accompanying text.

124. As one court observed, "[i]t is the presence of deep, intimate, familial ties between the plaintiff and the physically injured person that makes the harm to emotional tranquility so serious and compelling." Portee v. Jaffee, 84 N.J. 88, 98, 417 A.2d 521, 526-27 (1980).