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EMOTIONAL DISTRESS IN PRODUCTS LIABILITY: Distinguishing Users From Bystanders

INTRODUCTION

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


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

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).  

defendant seller or manufacturer—courts have allowed recovery for

1981] EMOTIONAL DISTRESS IN PRODUCTS CASES 293

defendant seller or manufacturer—courts have allowed recovery for


emotional harm.\textsuperscript{6} Recently, however, conflicting results have been reached in suits involving three parties—that is, when a user\textsuperscript{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 precedent in non-product negligence\textsuperscript{8} and inaccurately characterizing the plaintiffs as bystanders,\textsuperscript{9} has allowed recovery in such a situation.\textsuperscript{10} Another jurisdiction, lacking such precedent in negligence,\textsuperscript{11} denied recovery to this same class of plaintiffs by applying the same improper bystander characterization.\textsuperscript{12}
Such divergent results are grounded in the attachment of varying weights to the competing policies of compensating a genuine injury and limiting a manufacturer's liability. 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. A mother watched as her daughter was struck and killed by a negligently driven automobile. Although the mother had not been in danger of physical injury, she sued to recover for the severe emotional distress suffered as a result.

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.


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.\textsuperscript{19} In order to allow the mother to recover, the Dillon court adopted the "foreseeable plaintiff" test.\textsuperscript{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,\textsuperscript{21} (2) had a contemporaneous sensory perception of the accident,\textsuperscript{22} and (3) had a close relationship with the physically injured party.\textsuperscript{23}

courts have liberally interpreted "physical injury" so that according to one commentator "[a]n upset stomach was enough to show harm." Granelli, \textit{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.

22. \textit{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. \textit{Compare} Krouse v. Graham, 19 Cal. 3d 59, 75-76, 526 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 738, 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. \textit{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. \textit{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, 583 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.\textsuperscript{24} Although there has been a modest trend toward acceptance of its theory for recovery,\textsuperscript{25} several jurisdictions have limited its application by imposing additional conditions on recovery.\textsuperscript{26} Other jurisdictions, although not rejecting Dillon by name, have denied recovery in similar fact patterns.\textsuperscript{27} Finally, several jurisdictions have expressly de-


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.\textsuperscript{28}

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

\begin{quote}
[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 \textit{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.\textsuperscript{31}
\end{quote}

The Tobin court, in denying recovery to a mother in a situation similar to that in Dillon,\textsuperscript{32} stated:

\begin{quote}
\end{quote}


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.  

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. 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.

**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*, 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. The parents and brother sued the manufacturer in implied warranty and strict liability for their emotional injuries. The court extended the negligence analysis of *Dillon v. Legg* to products liability by injudiciously characterizing the family as bystanders.

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

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

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


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).

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

The Vaccaro decision clearly indicates that jurisdictions that are reluctant to permit recovery for bystander emotional distress in non-product negligence cases\textsuperscript{51} will not allow such recovery in products liability.\textsuperscript{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.\textsuperscript{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\textsuperscript{54} can be attained by limiting recovery for emotional distress to a third party who is also a user of the product.

\textsuperscript{44} Id. at 272, 422 N.Y.S.2d at 680.
\textsuperscript{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.

\textsuperscript{46} 97 Misc. 2d at 908, 412 N.Y.S.2d at 723.
\textsuperscript{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.

\textsuperscript{48} Id. at 277, 422 N.Y.S.2d at 683.
\textsuperscript{49} 52 N.Y.2d 809, 418 N.E.2d 386, 436 N.Y.S.2d 871 (1980).
\textsuperscript{50} See supra notes 57-61 and accompanying text.
\textsuperscript{51} See infra notes 57-61 and accompanying text.


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."\textsuperscript{55} In a well-reasoned opinion, the intermediate court in\textit{Vaccaro} recognized that restricting 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,] the imagined difficulty of circumscribing liability is overcome . . . . [and] "the rationale underlying the\textit{Tobin} case, namely, the real dangers of extending recovery for harm to others than those directly involved, is inapplicable to the instant case."\textsuperscript{56}

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

\textit{Howard} has, however, been strongly criticized.\textsuperscript{62} Its reliance on\textit{Tobin v. Grossman}\textsuperscript{63} was misplaced because in\textit{Howard} there existed

\begin{itemize}
  \item \textsuperscript{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).
  \item \textsuperscript{60} \textit{Id.} at 811-12, 418 N.E.2d at 386-87, 436 N.Y.S.2d at 871-72 (Fuchsberg, J., dissenting).
  \item \textsuperscript{61} See \textit{id.} at 811, 418 N.E.2d at 386-87, 436 N.Y.S.2d at 872.
  \item \textsuperscript{63} 24 N.Y.2d 609, 301 N.Y.S.2d 554, 249 N.E.2d 419 (1969).
\end{itemize}
a duty to the plaintiff mother that would have adequately circum-scribed liability. 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. In Vaccaro, however, the duty owed by the manufacturer was more readily cognizable. Only the mother consumed the drug and liability was with certainty limited by the duty owed only to her. All others harmed were mere bystanders, as was correctly deduced with respect to the father by the lower court and the dissenter in the Court of Appeals.

The failure of the Court of Appeals to adequately consider this matter is a retreat to the inviolate sanctuary of Tobin v. Grossman. It was equally improper for the California court to extend the Dillon bystander analysis to the facts presented in Shepard. 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. A bystander is a pas-

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.
sive onlooker, while users may be defined as that class of persons using a product for the purposes for which it was intended. 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. The manufacturer advertises the product, creates a demand for it, and expects the


consumer to purchase it. By this conduct, and by the mere presence of the product on the marketplace, the manufacturer assumes a duty to the user of that product. Such a duty was owed by the drug company in Vaccaro. As the intermediate court recognized, the duty of the drug company was manifest: “It manufactured, sold and distributed the drug designed to prevent miscarriage.” 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. Similarly, in Shepard, it was recognized that the automobile manufacturer owed a duty to the family riding in the automobile.

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


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. 553, 553-54 (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. Mulchollan'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. . . . [T]he 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).


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

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


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 or the manner in which it occurred be foreseeable. Rather, the focus is on whether the use of the product was reasonably foreseeable.

In Vaccaro, the mother clearly was utilizing the drug for the precise purpose for which it was intended. Similarly, in Shepard, transportation of people was the foreseeable use of the family automobile. Additionally, there was no misuse of the product in either case. 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.

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 superseding 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).


2. Nature of the Injury

It is a futile exercise to attempt to categorize an injury as discretely emotional or physical. The Court of Appeals in Vaccaro, however, denied recovery to the mother on the additional ground that she did not allege independent physical injuries. Similarly, in Woodill v. Parke Davis & Co., an Illinois appellate court denied recovery in a situation similar to Vaccaro by relying on section 402A of the Second Restatement of Torts. 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 . . . ." 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."

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, concerning emotional distress in 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).


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 877, 436 N.Y.S.2d at 872.


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

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


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." In accordance with the Restatement, courts in non-product negligence cases have liberally construed physical harm as including emotional disturbances.

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. Takeda, 55 Hawa.i 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.

The essential issue is the adequacy of proof of the injury. 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." Emotional distress is frequently manifested in demonstrable physical reactions, such as vomiting, nausea, or injury to the nervous system. In such cases, the harm is clearly capable of proof. 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.

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 in cases involv-


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


Coke, discovered something that "resembled a rat with the hair sucked off." This unfortunate encounter resulted in vomiting and nausea. A number of courts regard these symptoms as sufficient physical illness to permit recovery. Other courts, mindful that the trend is toward greater protection of the consumer, have permitted recovery without strictly adhering to the physical injury requirement. 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.

In addition, in one products liability case, 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. 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." The outrageousness of the situation guaranteed the genuineness of the injury.

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, while the user of a 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").

113. Id.
118. Id. at 634.
119. Id. at 636.
120. Id. at 635-37.
prescription drug, taken while pregnant, cannot recover for severe emotional trauma caused by the birth of a physically deformed child. If more certainty is needed in ascertaining the genuineness of the emotional harm, a requirement similar to one of the Dillon factors, that the user have a close relationship with the other injured party, 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.

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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).