Bystander Recovery in Illinois for the Negligent Infliction of Emotional Distress: *Rickey v. Chicago Transit Authority*

Hilda C. Contreras
NOTES

Bystander Recovery in Illinois for the Negligent Infliction of Emotional Distress: Rickey v. Chicago Transit Authority

INTRODUCTION

The tort of negligent infliction of emotional distress began to evolve when courts first recognized claims for relief by direct victims of tortfeasors' wrongful acts.¹ Initially, courts hesitated to acknowledge the victim's right to recover under this cause of action because of the difficulty inherent in proving emotional injuries, the fear of a flood of fraudulent litigation, and the problems in defining foreseeability and limiting liability.² These policy interests no longer bar recovery by the direct victim of a tortfeasor's negligent infliction of emotional distress.

The theories of recovery created nearly a century ago to accommodate such policy interests nonetheless remain firmly entrenched in present day tort law as applied to a bystander's right to recover under this cause of action.³ In those jurisdictions adhering to the impact rule, for example, a plaintiff must prove that the defendant's negligence produced both a physical contact and an emotional disturbance in order to recover.⁴ In other jurisdictions, the zone of physical danger test permits recovery only if the plaintiff has suffered emotional distress because he was also in

¹. The term "emotional distress" has been used to describe such diverse phenomena as fright and its physical consequences, anxiety, humiliation, grief, and rage. Brody, Negligently Inflicting Psychic Injuries: A Return to Reason, 7 VILL. L. REV. 232, 232 (1961). Traditionally, the psychic and physical components of emotional distress claims were differentiated. See, e.g., RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965). For purposes of this note, the term "emotional distress" will encompass both the psychic and physical reactions engendered by the defendant's negligent conduct. See infra notes 158-60 and accompanying text.

². As one commentator stated, duty is no more then the sum total of those policy considerations which lead the law to say that a particular plaintiff is entitled to legal protection. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 325-26 (4th ed. 1971).

³. Just as in the case of direct victim causes of action, however, most of these policy arguments no longer justify the denial of relief to bystanders. See infra notes 167-84 and accompanying text.

⁴. The impact rule originated in England in the case of Victoria Ry. Comm'r v. Coul tas, 13 App. Cas. 222 (1888). In this case, the court held that where a passenger train
imminent peril of physical injury. A majority of jurisdictions follow one of these traditional theories of recovery in evaluating claims by bystanders for negligently inflicted emotional distress.

Because of the impact rule's requirement of physical contact and the necessity of imminent peril of physical injury under the zone of physical danger rule, most jurisdictions have refused to allow bystanders to recover for negligent infliction of emotional distress. Recently, however, courts have begun to question the appropriateness of these rules with respect to plaintiffs other than direct victims who claim that their emotional distress resulted from witnessing the infliction of tortious injuries upon another.

A minority of jurisdictions have responded to the bystander's plight by recognizing a new basis for bystander recovery. This theory is founded on a standard of foreseeability, under which the plaintiff must prove that he was near enough in time and dis-

nearly hit the plaintiff due to the negligence of a train employee, recovery would not be allowed for emotional injury without any actual physical injury. Id. at 225.

5. The concept on which zone of physical danger rule is based also originated in England in Dulieu v. White, 2 K.B. 669 (1901), in which the court abandoned the impact rule in England. The court reasoned that a cause and effect relation did not necessarily exist between impact and fright, stating that the focus should be on the emotional harm rather than the physical impact. The court thus held that fright which arises from a reasonable fear of immediate personal injury to oneself should also be compensated. Id. at 675.


8. In most cases, bystander plaintiffs usually have close familial relationships with the primary victims of the defendants' negligence. See infra note 84 and accompanying text. For purposes of this note, the term "bystander" will not be used in the generic sense of the average eyewitness to a tortious occurrence, but to indicate a close family member who witnesses the tortious injury of the primary victim. The term "primary victim" will designate the initial subject of the defendant's negligence who has suffered death or serious bodily injury as a consequence of that wrongdoing.

9. In England, courts have long allowed recovery to bystanders who suffer emotional distress as a result of witnessing the tortious injury of a family member. The first English case to permit recovery under these circumstances was Hambrook v. Stokes Bros., 1 K.B. 141 (1925). In Hambrook, the defendant's servant negligently left a truck unattended at the top of a hill. The plaintiff mother had accompanied her children part of the distance on their way to school. Shortly thereafter, she saw the defendant's truck coming rapidly down the street, causing her to fear for the safety of her children. Upon discovering that one of her children had been injured, she sustained severe nervous shock and later died. The court held that there should be no distinction between shock sustained by a mother as a result of fear for her own safety, and that sustained by reason of peril to her child. Id. at 151.
tance to observe the tortious injury and that he had a close familial relationship with the primary victim.10 The foreseeability standard contemplates that a plaintiff who suffers emotional distress under these circumstances should recover for being placed in fear for the safety of another.11

The Illinois Supreme Court recently reexamined a bystander’s right to recover based on a cause of action for negligent infliction of emotional distress in Rickey v. Chicago Transit Authority.12 In Rickey, the court abandoned the impact rule, which it had followed since 1898.13 The court declined to adopt the foreseeability standard, instead it adopted the zone of physical danger rule. In its conservative expansion of the law, the Rickey decision has placed bystanders in virtually no better position to recover than under the impact rule.14

This note will briefly trace the historical development of tort law with respect to the injury of emotional distress. It will then examine the three theories of recovery for a negligent infliction of emotional distress cause of action. An analysis of the rationale and impact of the Rickey decision will follow. Finally, this note will propose that Illinois could have achieved a better balance between the bystander’s interest in recovery and the negligent tortfeasor’s interest in avoiding unduly burdensome liability by adopting the foreseeability standard.

10. These guidelines were originally set forth in Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). See infra note 74 and accompanying text.
13. The Illinois Supreme Court originally adopted the impact rule in its decision in Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898). See infra notes 33-35 and accompanying text.
14. The Rickey decision has had a more positive effect on plaintiffs who are direct victims of a defendant’s negligence. Recently, a federal district court reevaluated its previous denial of damages for emotional distress experienced by passengers just prior to the impact of an airline crash in In Re Air Crash Disaster Near Chicago, 507 F. Supp. 21 (N.D. Ill. 1980). In that case, the district court examined the line of Illinois cases beginning with Braun in which the impact rule had been followed, and concluded that Illinois courts would not allow damages for a plaintiff’s fear or apprehension of danger. In light of Rickey, however, the court determined that if a plaintiff could prove physical manifestations of the emotional distress which occurred prior to the impact of the crash, he would be entitled to recover damages for pre-impact pain and suffering. It thus gave the plaintiffs leave to amend their complaints.
HISTORICAL OVERVIEW

The Cause of Action

Tort law has long distinguished between mental and physical injury. Historically, the right to be free from physical intrusion has always received legal protection. For many years, however, courts expressed reluctance to similarly recognize an interest in emotional tranquility as an independent, legally protected right. Because they viewed mental disturbances such as fright as so evanescent and intangible as to be immeasurable by any standard then existing in the law, courts refused to award damages for the suffering of emotional injuries unless such injuries could be brought within the scope of an already recognized tort. The trier of fact could then consider the emotional injury as an additional factor when awarding damages for the host cause of action.

Eventually, a cause of action was recognized for emotional injury caused by the intentional misconduct of another. To

15. See Restatement (Second) of Torts §§ 46 comment j, 436A comment c (1965).
16. For example, the courts initially developed the tort of battery to vindicate the plaintiff's interest in freedom from intentional and unpermitted contact with the plaintiff's person. See generally W. Prosser, supra note 2, at 34-37.
17. Magruder, Mental and Emotional Disturbances in the Law of Torts, 49 Harv. L. Rev. 1033, 1035 (1935). The closest courts came to recognizing an interest in emotional tranquility at that time was their recognition of the tort of assault. The tort of assault compensates the victim for emotional injury which is intentionally inflicted. Liability only arises, however, where the defendant places the plaintiff in imminent apprehension of bodily harm. The interest which the tort protects is the right to be free from the apprehension of a harmful contact with the plaintiff's person, rather than the right to be free from emotional harm. In this respect, the tort is analogous to the zone of physical danger theory applied in negligent infliction of emotional distress actions. See generally W. Prosser, supra note 2, at 37-41.
18. W. Prosser, supra note 2, at 50.
19. The justification for awarding "parasitic damages" was that the courts could only calculate damages for emotional injury when suffered in relation to the torts of assault, battery, or false imprisonment. J. Dooley, Modern Tort Law 363-64 (1982). See also Restatement (Second) of Torts § 47(b) comment b (1965).
20. The effect of awarding parasitic damages for emotional injuries was to afford only indirect protection to the interest in emotional tranquility. See Comment, Negligently Inflicted Emotional Distress — The Case for an Independent Tort, 59 Geo. L.J. 1237, 1238 (1971). As one commentator has noted, however, this indirect recognition of the interest in emotional tranquility was nonetheless important to the development of tort law. "Treatment of any element of damages as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is today recognized as parasitic will, forsooth, tomorrow, be recognized as an independent basis of liability." 1 I. Street, Foundations of Legal Liability 470 (1906).
21. Illinois first recognized the intentional infliction of emotional distress cause of
recover for the intentional infliction of emotional distress under both traditional and modern theories of recovery, a plaintiff must prove that the defendant acted in an extreme and outrageous manner, as well as the existence of a resulting severe emotional injury. Once he has successfully proven the former, however, he has virtually assured his right to recover, because the severity of the defendant's conduct vouches for the existence of the emotional injury. As with other claims based on intentional wrongdoing, more emphasis is placed upon the conduct of the defendant than upon the harm to the plaintiff under this cause of action.

Much more stringent prerequisites to recovery, however, have evolved in the development of the negligent infliction of emotional distress cause of action. Under this new cause of action, courts could no longer rely upon the outrageousness of the defendant's conduct to verify the plaintiff's emotional injuries.

22. See Restatement (Second) of Torts § 46 (1965).
23. Pearson, supra note 7, at 486. See also Restatement (Second) of Torts § 46 comment j (1965).
24. In such intentional misconduct there is an element of outrage, which in itself, is an important guarantee that the mental disturbance which follows is serious . . . Not only is there a normal social desire to compensate the victim at the expense of the more heinous offender, but the danger of imposition is lessened to a point where it becomes reasonably safe to grant the remedy.


25. The early law of intentional wrongs was primarily concerned with preserving the peace of the realm by providing a socially acceptable, non-violent alternative to the field of honor. While the modern law of intentional wrongs may be less concerned with deterring self-help than the early law, it still falls far short of recognizing protection against emotional harm as an end unto itself. Pearson, supra note 7, at 486.
Moreover, in contrast to the intentional torts, the general laws of negligence emphasize proof of a legally compensable harm.\textsuperscript{27}

By the time the negligent infliction of emotional distress cause of action came to be recognized, the law had long since acknowledged the fear for one's own bodily safety as a legally compensable harm.\textsuperscript{28} Courts believed that this fear would engender genuine emotional distress.\textsuperscript{29} Unable to assess emotional injuries by any other standards then existing in the law, however, courts initially predicated liability for this cause of action on actual or anticipated physical intrusion to the plaintiff's person.

\textit{The Traditional Theories of Recovery}

\textbf{The Impact Rule}

Under the impact rule, a plaintiff cannot recover absent contemporaneous physical contact.\textsuperscript{30} The rule requires the plaintiff to prove that the defendant's negligence produced both an unpermitted physical impact, which resulted in physical injury, and an emotional disturbance.\textsuperscript{31} The physical intrusion defines the defendant's breach of duty. Since the plaintiff is expected to suffer fear for his own bodily safety, his emotional distress constitutes a foreseeable result of the defendant's conduct.\textsuperscript{32}

The Illinois Supreme Court adopted the impact rule in 1898 in \textit{Braun v. Craven}.\textsuperscript{33} In \textit{Braun}, the plaintiff alleged that her land-
lord had stealthily entered her room, taken her by surprise, and, in a violent manner, abused her verbally. The court stated that the defendant could not reasonably have anticipated that his language or gestures would cause the plaintiff severe nervous shock.\textsuperscript{34} It thus held that terror or fright, unaccompanied by a contemporaneous physical impact, does not create liability in the defendant.\textsuperscript{35}

Most early courts' refusals to award damages for emotional injuries alone without accompanying physical contact were based on one of several factors. Courts believed that emotional injuries were vague and intangible concepts, which might prevent a jury from accurately calculating damages.\textsuperscript{36} Further, many feared that plaintiffs could easily feign emotional injury, potentially resulting in a flood of fraudulent claims.\textsuperscript{37} Finally, emotional injuries were deemed remote and unexpected results of most defendants' negligence. A reasonably prudent person thus could not foresee that a given plaintiff would suffer emotional harm.\textsuperscript{38}

Because the plaintiff must directly incur a physical impact to recover, the rule does not accommodate one who suffers emotional distress as a result of witnessing the tortious injury of another but who experiences no accompanying physical impact.\textsuperscript{39} The impact rule has thus proven a virtually insurmountable barrier to bystander recovery.\textsuperscript{40} The harshness of the impact rule

\textsuperscript{34} Id. at 406, 51 N.E. at 659.

\textsuperscript{35} Id. at 420, 51 N.E. at 664.


\textsuperscript{37} See, e.g., Braun v. Craven, 175 Ill. 401, 51 N.E. 567 (1898); Morse v. Chesapeake & Ohio Ry., 117 Ky. 11, 77 S.W. 361 (1903); Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897).


\textsuperscript{39} Two early cases, however, did permit recovery for emotional distress absent physical impact. Spearman v. McCrory, 4 Ala. App. 672, 58 So. 927, cert. denied, 177 Ala. 672, 58 So. 1038 (1912), involved the mother of two children who were passengers in a runaway buggy. The mother suffered fear for the safety of her children and later suffered physical illness as well. The second case was Cohn v. Ansonia Realty Co., 162 A.D. 791, 148 N.Y.S. 39 (1914). In this case, the plaintiff was so overcome by fright that she fainted and fell into an elevator shaft upon seeing two of her children ascend in an unattended elevator. Neither of these cases, however, has played a significant role in the development of the law.

\textsuperscript{40} Illinois, for example, has continually denied relief to bystander plaintiffs under the impact rule. See, e.g., Carlinville Nat'l Bank v. Rhoads, 63 Ill. App. 3d 502, 380 N.E.2d
with respect to bystanders probably stems from denial of a duty to bystanders at the time the rule originated.\(^\text{41}\)

As the courts gradually recognized the harshness of the impact rule with respect to direct victims, most began to allow recovery if the direct victim suffered even the slightest impact.\(^\text{42}\) As a result, the impact rule failed to effectively screen legitimate from feigned claims of emotional injury.\(^\text{43}\) This eventually led a majority of jurisdictions to abandon the impact rule.\(^\text{44}\) In its place, the zone of physical danger test was developed. Despite widespread abandonment of the impact rule, Illinois clung to this nineteenth century theory until its recent decision in *Rickey*.

The Zone of Physical Danger Test

The concept of a zone of danger originated in the well-known case of *Palsgraf v. Long Island Railroad Co*.\(^\text{45}\) The traditional notion of a zone of danger defines a physical area within which the harmful consequences of a defendant’s negligence may fore-


\[41.\text{ Barnhill v. Davis, 300 N.W.2d 104, 106 (Iowa 1970).}\]


\[43.\text{ Comment, Duty, Foreseeability, supra note 29, at 307-08. It is questionable, in fact, whether the rule was ever effective. Physical impact bears little relation to the suffering of emotional harm. For example, a near miss may be just as frightening as a direct hit. Pearson, supra note 7, at 498. See infra notes 146-47 and accompanying text.}\]

\[44.\text{ Only a small minority of American jurisdictions retain the impact rule today. See, e.g., Harrison v. Canada Dry Corp., 245 A.2d 642 (D.C. 1968); Gilliam v. Stewart, 281 So. 2d 593 (Fla. 1974); Howard v. Bloodworth, 137 Ga. App. 478, 224 S.E.2d 122 (1976); Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980); Gambill v. White, 303 S.W.2d 41 (Mo. 1957).}\]

\[45.\text{ 248 N.Y. 339, 162 N.E. 99 (1928). In *Palsgraf*, the defendant's guard attempted to aid a passenger in boarding a train. The passenger's package, which contained explosives, fell to the ground and exploded in the process. The explosion caused a set of scales at the other end of the platform to fall, striking the plaintiff. The court denied the plaintiff's cause of action, stating that Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right . . . . The plaintiff sues in her own right for a wrong personally to her, and not as a vicarious beneficiary of a breach of duty to another . . . . The passenger far away, if the victim of a wrong at all, has a cause of action, not derivative, but original and primary. His claim to be protected against invasion of his bodily security is neither greater nor less because the act resulting in the invasion is a wrong to another far removed. *Id.* at 341-43, 162 N.E. at 99-100.}\]
If the plaintiff is within the foreseeable realm of physical injury, a duty of care arises on the part of the defendant. In an action for negligent infliction of emotional distress, the court presumes that a plaintiff within the zone of physical danger anticipates bodily harm and thus fears for his own safety. This fear authenticates the plaintiff’s emotional injuries. To further verify the plaintiff’s claim, the zone of physical danger rule requires the plaintiff to demonstrate physical manifestations of his emotional injuries. The majority of jurisdictions and the Restatement (Second) of Torts adhere to this rule.

The zone of physical danger test places fewer restrictions on the direct victim’s ability to recover than does the impact rule. Under the zone of physical danger test, a plaintiff may prevail even where he has not experienced physical impact. The plaintiff, however, must be within the zone of physical danger created by the defendant’s negligence. Like the impact rule, the zone of physical danger test does not allow recovery for emotional distress when it arises from fear for the safety of another. Therefore, while the zone of physical danger test allows a greater likelihood of recovery for the direct victim, it still falls short of providing effective relief to bystanders.

Waube v. Warrington is the leading case which explains the policy considerations militating against bystander recovery under the zone of physical danger test. In Waube, a mother witnessed the defendant’s automobile strike and kill her child. Since she observed the accident from within her home, she was not within the zone of physical danger and did not fear for her own safety. The complaint alleged that the experience caused the mother to suffer emotional distress, which ultimately led to her untimely...

---

46. See Leibson, supra note 11, at 172; Simons, supra note 11, at 9.
47. See Leibson, supra note 11, at 172; Simons, supra note 11, at 9.
48. See Comment, Duty, Foreseeability, supra note 29, at 313; Comment, Dillon Revisited: Toward a Better Paradigm for Bystander Cases, 43 OHIO ST. L.J. 931, 932 (1982) [hereinafter cited as Comment, Dillon Revisited].
49. See Simons, supra note 11, at 12. See also Restatement (Second) of Torts § 436A (1965).
50. See generally Restatement (Second) of Torts § 313 (1965); Annot., 29 A.L.R.3d 1337 (1970).
51. See Leibson, supra note 11, at 172; Simons, supra note 11, at 9.
53. See supra note 7 and accompanying text.
54. 216 Wis. 603, 258 N.W. 497 (1935).
death only a few weeks later. The Wisconsin Supreme Court refused to sustain the cause of action because the defendant had not placed her in peril of physical injury. The court held that unless the emotional injury results from the plaintiff's fear for her own safety, it does not constitute a foreseeable result of the defendant's negligence. Moreover, a finding of liability would place an unreasonable burden upon users of the highways and encourage a proliferation of fraudulent claims.

Thirty-four years after the Waube decision, the New York Court of Appeals reevaluated the efficacy of these policy arguments under a substantially similar factual situation in Tobin v. Grossman. It rejected the fear of fraudulent claims as a ground for denying the mother's cause of action, reasoning that the courts could rely upon the sophistication of the medical profession to weed out dishonest claims. Nor did it find that the imposition of liability would lead to a proliferation of claims. A plaintiff who had suffered a cognizable harm was entitled to a remedy, despite the burdens placed on the courts. Additionally,

55. The court stated:
   The right of the mother to recover must be based, first, upon the establishment of a duty on the part of a defendant so to conduct herself with respect to the child as not to subject the mother to an unreasonable risk of shock or fright, and second, upon the recognition of a legally protected right or interest on the part of the mother to be free from shock or fright occasioned by the peril of her child.

56. Id. at 604, 258 N.W. at 497-98. Similarly, in Tobin v. Grossman, 24 N.Y.2d 609, 501 N.Y.S.2d 554 (1969), the court argued that to extend liability for injuries sustained by bystanders not within the zone of danger would represent the creation of a new duty and that no new technological, economic, or social developments existed which would warrant recognition of a new cause of action. Id. at 615, 301 N.Y.S.2d at 558. In Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979), however, the court rejected this reasoning, contending that the conduct of the defendant was of the type that had traditionally been held actionable. Bystander recovery would only constitute a broadening of the scope of damages recognized as flowing from that conduct. It further observed that developments in medical science and psychiatry provided the impetus for expanding the scope of liability to include recovery for bystander plaintiffs. Id. at 158-60, 404 A.2d at 678-79.

57. Id.

58. 216 Wis. at 613, 258 N.W. at 501.

59. Id. at 615, 249 N.E.2d at 422, 301 N.Y.S.2d at 558.

60. Id.

It is the business of the law to remedy wrongs that deserve it, even at the expense of a flood of litigation; and it is a pitiful confession of incompetence on
the Tobin court acknowledged that a negligent tortfeasor could reasonably foresee emotional harm to the mother of a child he had physically injured.\(^6\)

The Tobin case\(^6\) denied recovery, however, on two grounds.\(^6\)
First, the court held that awarding damages to a bystander plaintiff would be disproportionate to the culpability of the negligent tortfeasor.\(^6\) Second, the court found that sustaining the mother's cause of action would lead to unlimited liability.\(^6\) Ultimately, the scope of liability could encompass not only relatives, but any affected eyewitness to the occurrence.\(^6\)

**THE FORESEEABILITY STANDARD**

In relatively recent times, a minority of jurisdictions have attempted to accommodate policy considerations as well as the bystander's interest in freedom from emotional distress. In so doing, they have developed the foreseeability approach, a theory

---

the part of any court of justice to deny relief upon the grounds that it will give the court too much work to do.

61. 24 N.Y.2d at 613, 249 N.E.2d at 424, 301 N.Y.S.2d at 559.
62. New York does not apply the zone of physical danger/fear for one's own safety rule where, unlike the Tobin case, the plaintiff is not a bystander, but a direct victim. Where the plaintiff is a direct victim, the courts will apply general negligence principles. Compare Vaccaro v. Squibb Corp., 97 Misc. 2d 907, 412 N.Y.S.2d 721 (N.Y. Sup. Ct. 1978) (direct victim, plaintiff recovers) with Howard v. Lecher, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977) (bystander, no recovery).
63. The court in Tobin also noted that unduly burdensome liability would result in terms of economics. The court stated that the constantly increasing costs of insurance would eventually exceed the compulsory insurance liability limits. 24 N.Y.2d at 617, 249 N.E.2d at 423, 301 N.Y.S.2d at 559-60. The dissent attacked this view forcefully. Id. at 620, 249 N.E.2d at 429, 301 N.Y.S.2d at 562 (Keating, J., dissenting). It was also rejected in Sinn v. Burd, 486 Pa. 146, 169, 404 A.2d 672, 684 (1979) and D'Ambra v. United States, 114 R.I. 643, 654, 338 A.2d 524, 530 (1975).
64. 24 N.Y.2d at 611, 249 N.E.2d at 422, 301 N.Y.S.2d at 557. "The risks of indirect harm from loss or injury to loved ones is so 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." Id.
65. Id. But see Sinn v. Burd, 486 Pa. 146, 168-70, 404 A.2d 672, 684 (1979) (application of traditional tort concepts of liability will reasonably restrict the scope of liability).
66. 24 N.Y.2d at 611, 249 N.E.2d at 422, 301 N.Y.S.2d at 557.
of recovery which proceeds from an entirely different premise than the impact and zone of physical danger rules. Under the foreseeability standard, courts recognize that the bystander's emotional distress arises from the fear he suffers for the safety of another. Since the development of the traditional theories of recovery, the medical profession has advanced in its study of emotional trauma. These advances facilitate verification of the plaintiff's emotional injuries. Consequently, the foreseeability standard does not predicate liability on actual or anticipated physical intrusions. Nor does the plaintiff's fear for his own bodily safety have to authenticate his suffering of emotional distress.

Bystander Recovery—A Change in the Law

The foreseeability standard originated in the case of Dillon v. Legg, in which a young girl died due to the defendant's negligent operation of his automobile. The girl's mother and sister witnessed the accident. The sister was within the zone of physical danger, but the mother was not. The California Supreme Court held that both had stated a valid cause of action, however, because a mother who sees her child killed will undoubtedly suffer emotional distress whether or not she is herself in imminent danger of bodily harm. Dillon thus refused to sanction a rule which would preclude the mother's cause of action merely because she stood a few yards distant from the accident.

The Dillon court held that the bystander recovery issue should be resolved by application of general negligence principles. To this end, foreseeability would be the primary factor in determining whether the defendant owed a duty of care to the bystander.

67. Medical science has shown that a traumatic stimulus, such as witnessing a tortious injury, can cause a two-stage mental reaction. An individual may experience a primary response that is essentially an automatic reaction which acts as a defense mechanism to shield him from the traumatic event. Depending on the psychological and physical makeup of the individual and the nature of the traumatic event, this response may range from trivial to substantial. Not every individual who suffers a primary response will suffer a secondary response. A secondary response results from the individual's inability to adjust to the traumatic event. It is generally longer in duration and more amenable to objective verification. Comment, supra note 20, at 1238-54.

68. See Leibson, supra note 11, at 164; Comment, Dillon Revisited, supra note 48, at 940.

69. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
70. Id. at 733, 441 P.2d at 914, 69 Cal. Rptr. at 74.
71. Id. at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.
72. Id. at 747, 441 P.2d at 925, 69 Cal. Rptr. at 85.
plaintiff. The court outlined three factors for determining foreseeability: proximity of the plaintiff to the scene of the accident; shock resulting from a direct emotional impact upon the plaintiff due to a sensory and contemporaneous observation of the accident; and a close relationship between the bystander and the primary victim. Dillon did not fix precise limits on the scope of liability encompassed by the foreseeability standard. Rather, it envisioned that such determinations would subsequently be made on a case-by-case basis.

Reinterpretations of the Dillon Formula

The Dillon decision was met by both warm welcome and sharp criticism from the legal community. Despite its mixed reviews, several jurisdictions have followed California's lead in recognizing emotional distress arising from fear for the safety of another as a legally compensable harm. Over the last sixteen years, the Dillon guidelines have undergone reformulation in Califor-
nia as well as in other jurisdictions. In applying the foreseeability standard, the finding of an obligation to exercise due care has largely depended upon the analysis of the facts of each particular case.\textsuperscript{79}

The Relationship Factor

\textit{Dillon} did not place more emphasis on the relationship factor than upon any other guideline.\textsuperscript{80} Yet, the strong emotional attachment between mother and child provided the impetus for sustaining the bystander mother's cause of action in \textit{Dillon}.\textsuperscript{81} Because the nature of the bystander's emotional injuries directly corresponds to the degree of psychic attachment,\textsuperscript{82} the relationship factor places practical limits on liability and effectively validates the bystander's claim for relief.

Generally, courts agree that a defendant should reasonably foresee some type of emotional injury to those with a strong and loving relationship with the primary victim.\textsuperscript{83} Therefore, the

---

\textsuperscript{79} See Dillon v. Legg, 68 Cal. 2d 728, 740, 441 P.2d 912, 921, 69 Cal. Rptr. 72, 78 (1968), in which the court envisioned such a development in the law.

\textsuperscript{80} One court, however, noted that it is the most important of the \textit{Dillon} guidelines. In D'Ambra v. United States, 114 R.I. 643, 338 A.2d 524 (1975), the court stated that personal relationships may link people together more tightly, if less tangibly, than any mere physical and chronological proximity. \textit{Id.} at 656-57, 338 A.2d at 531.

\textsuperscript{81} As Prosser has stated, where a mother suffers emotional distress due to injury to her child, all ordinary human feelings are in favor of her action against the negligent tortfeasor. W. \textit{Prosser, supra} note 2, at 334. Yet, it has also been noted that it is not enough to allow a cause of action based upon the sympathy inherent in the mother's case. From the plaintiff's perspective, the goal of tort law is to restore the plaintiff to her pre-accident condition. Yet, monetary compensation is least likely to offset the pain in the case of a mother or close relative caused by the irreplaceability of the victim. Only in a society that views money as an adequate substitute for the loss of a loved one would a bystander recovery rule find justification in the pain offset analysis. Pearson, \textit{supra} note 7, at 501-03.

\textsuperscript{82} \textit{Comment, Dillon Revisited, supra} note 48, at 942.

\textsuperscript{83} Cases subsequent to \textit{Dillon} show that the courts will look to the substance, rather
relationship factor has presented the least number of problems in cases subsequent to Dillon, because most have involved parental, spousal, or sibling relationships.\textsuperscript{84} Courts have uniformly held that these affiliations are sufficiently close to sustain a bystander's cause of action.

Observation and Location Requirements

Even if the bystander bears a close relationship to the victim, he may not recover unless he was near enough in time and distance to observe the accident.\textsuperscript{85} Under the foreseeability standard, the court does not examine whether the defendant placed the bystander in apprehension of physical injury. Rather, contemporaneous observation and location at the scene indicate that the plaintiff suffered a direct emotional impact.\textsuperscript{86}

The manner in which the bystander observes the injury to the primary victim constitutes one facet of the court's inquiry. In the Dillon case, the mother visually witnessed the accident. Subsequent decisions, however, have not always required visual perception to trigger liability.\textsuperscript{87} Courts have also permitted recovery than the legal form, of the relationship involved. For example, in Leong v. Takasaki, 55 Hawaii 398, 530 P.2d 758 (1974), the court stated that the absence of a blood relationship should not foreclose recovery. It thus upheld the claim of a young boy who had witnessed the death of his stepfather's mother. In Mobaldi v. Regents of Univ. of Calif., 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976), the plaintiff's three year old foster son died from a negligent injection of a dangerous intravenous solution. The child had lived with the plaintiff's family since the age of five months and had treated the plaintiff as his true mother. The court stated that it would look to the emotional attachments, not the legal status, of the family relationship in determining foreseeability. \textit{Id.} at 582, 127 Cal. Rptr. at 726. The court ruled that the relationship possessed all the incidents of parent and child except those flowing as a matter of law. Therefore, it upheld the foster mother's claim. \textit{Id. But see} Drew v. Drake, 110 Cal. App. 3d 555, 168 Cal. Rptr. 65 (1980) (no recovery for de facto spouse).


\textsuperscript{85} The court in D'Ambra v. United States, 114 R.I. 643, 338 A.2d 524 (1975), was of the opinion that the zone of physical danger test is merely a matrix of the observation and location factors. \textit{Id.} at 656, 338 A.2d at 531.

\textsuperscript{86} One commentator has noted that the Dillon standard proposed an emotional zone of danger test. Comment, \textit{Dillon Revisited, supra} note 48, at 937.

\textsuperscript{87} Courts have also held, however, that mere presence at the scene will not necessarily meet the sensory perception requirement. In Justus v. Atchinson, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977), the court denied recovery to an expectant father who had been in his wife's delivery room when their child died. The court stated that the event
where the bystander heard the accident.\textsuperscript{88} A bystander’s cause of action has also succeeded under a theory of constructive observation.\textsuperscript{89}

Courts also examine the subject of the bystander’s observation. As a general rule, the bystander must observe the death or serious bodily injury of the primary victim.\textsuperscript{90} Jurisdictions are split as to whether the bystander must witness the tortious act as well as its harmful consequences. In \textit{Dillon}, the court did not draw such a distinction because the mother witnessed the defendant’s car strike her daughter and the child’s resulting injuries.\textsuperscript{91}

The question of where and when the bystander makes the observation bears directly on what he perceives.\textsuperscript{92} Some jurisdic-
tions have granted relief to plaintiffs who rush to the scene of the accident to see the injured victim only moments after the occurrence. These courts reason that the emotional impact of seeing a severely injured body only moments after an accident is just as profound as if the bystander had witnessed the accident itself. These decisions have thus expanded upon the Dillon guidelines by requiring only fairly contemporaneous observation. Accordingly, in these jurisdictions, the plaintiff need not witness the defendant’s negligent act to recover.

Conversely, other jurisdictions do require a bystander to witness the injury-producing event itself. In order to recover, the plaintiff must be at the scene when the accident occurs. This more restrictive approach stems from a desire to keep bystander recovery within strict limits.

Under this approach, the tortious act must be capable of actual


93. For example, in Landreth v. Reed, 520 S.W.2d 486 (Tex. Civ. App. 1978), the court allowed recovery where a girl witnessed attempts to resuscitate her younger sister as well as her sister’s death. The court stated that she had been brought so close to the reality of the accident as to render her experience an integral part of it. Id. at 490. In Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978), the court allowed a plaintiff to recover based on the fact that he had arrived on the scene while the injured victim was still there. In Ferriter v. Daniel O’Connell Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (1980), the court extended recovery to plaintiffs who first witnessed the injured victim at the hospital some time after the accident. The court stated that a plaintiff who rushes onto the accident scene has no greater right to recover than one who rushes instead to the hospital. Id. at 518, 413 N.E.2d at 697.


95. Fairly contemporaneous observation does not mean that a bystander who is nowhere near the scene or who only learns of the accident several hours later from a third party can recover. E.g., Gustafson v. Paris, 67 Mich. App. 363, 241 N.W.2d 208 (1976) (no recovery for mother who arrives at scene shortly after son dies from wounds inflicted by negligent motorist); Yandrich v. Radic, 495 Pa. 243, 433 A.2d 459 (1981) (no recovery for father who goes to scene of accident only to learn his son has already been taken to the hospital).


97. See Parsons v. Superior Court, 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978) (court denied recovery where plaintiffs arrive at scene of accident as dust was settling); Arauz v. Gerhardt, 68 Cal. App. 3d 937, 137 Cal. Rptr. 619 (1977) (court denied recovery where mother arrived at scene five minutes later).

98. Comment, Dillon Revisited, supra note 48, at 945.
observation. For example, in *Dillon*, a bystander prevailed where she observed the auto collision which injured her child.99 Yet, courts have denied damages where a defendant doctor has made an erroneous medical diagnosis.100 Furthermore, the event must be brief and sudden,101 presumably because where the primary victim's health gradually deteriorates over a long period of time, the bystander can better prepare himself emotionally.102

The Requirement of Physical Manifestations

Jurisdictions have differed in their determinations regarding the contemporaneous observation and location guidelines. The cases, however, generally evidence a commitment by the courts to avoiding unduly burdening the defendant while affording the bystander redress for his injuries. As one additional safeguard against unlimited liability, the *Dillon* court confined its ruling to cases where the plaintiff displays physical manifestations of his emotional distress.103 Historically, courts have looked to a plaintiff's resultant physical manifestations as a means of verifying his emotional injuries.104 The majority of jurisdictions which fol-

99. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72.
100. *E.g.*, *Jansen v. Children's Hosp. Medical Center*, 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1973). In this case the plaintiff alleged that the defendants had negligently diagnosed and treated her daughter. The court denied recovery because a layman could not have perceived an event such as an erroneous diagnosis. Further, the *Dillon* decision contemplated a sudden and brief event which the plaintiff must actually witness. Thus, the mother could not recover for witnessing her daughter's progressive decline in health and ultimate death. *Id.* at 24, 106 Cal. Rptr. at 883.
101. *Id.* at 24, 106 Cal. Rptr. at 883.
103. 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 77.
104. *See* *Restatement (Second) of Torts* §§ 313(1)(b), 436A comment b (1965); Comment, *supra* note 20, at 1244. There are two historical exceptions to the physical manifestations requirement. The rule does not apply in cases involving negligently handled corpses or graves, nor to the negligent forwarding of telegraphic messages. *See generally*, Comment, *Duty, Foreseeability, supra* note 29, at 310-11 (discussion and collection of cases involving these two exceptions). The Court of Appeals of New York, which had refused in *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969), to expand liability by adopting the foreseeability standard, nevertheless allowed a plaintiff to recover for mental suffering incurred when the defendant's hospital erroneously informed her by telegram that her mother had died. *Johnson v. State*, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975). One commentator has noted that although the court of appeals distinguished *Tobin* on the ground that the bystander had suffered only indirectly while the recipient of the telegram in *Johnson* was directly injured, it is likely that the more important difference was that the potential number of plaintiffs was limited in *Johnson*, but not in *Tobin*. *Miller, supra* note 75, at 9.
Because the medical profession now possesses a better understanding of emotional trauma, the importance of authentication in this matter has diminished. Having acknowledged that other methods of verification exist, a minority of jurisdictions have abrogated the physical manifestations requirement as an essential element of the bystander's cause of action. To minimize the possibility of fraudulent claims, they have shifted their focus to the quality of the bystander's injuries, only permitting recovery for serious emotional distress. To this end, some courts have raised the standard of proof and will only award damages where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of that case.

---

105. Even these jurisdictions, however, are now beginning to focus upon the severity and quality of the plaintiff's emotional injuries, rather than concentrating solely on their physical effects. See, e.g., Portee v. Jaffee, 84 N.J. 88, 417 A.2d 521 (1980); D'Ambra v. United States, 114 R.I. 643, 338 A.2d 524 (1975). In Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981), the court developed an objective standard against which to assess the plaintiff's emotional injuries. The court stated that it would only permit recovery if, in addition to exhibiting resultant physical manifestations, the plaintiff actually believed that the victim would be seriously injured or killed and that a reasonable man, similarly situated, would reasonably have believed that the victim would be seriously injured or killed.

106. See supra notes 67-68 and accompanying text.


108. E.g., Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). The court noted that the requirement of physical manifestations only encourages extravagant pleadings and distorted testimony. Id. at 929, 616 P.2d at 820, 167 Cal. Rptr. at 838. Further, many courts which impose this requirement will permit recovery even where the plaintiff alleges trivial physical injuries. Id. The court concluded that the plaintiff should only be required to prove the severity of his emotional distress. In so doing, the jurors could determine from their own experiences whether the plaintiff had suffered compensable emotional injury. In addition, the plaintiff's claim could be verified through expert medical testimony. Id. at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

109. The forerunner in this area is Hawaii. In Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970), the court developed the "ability to cope" test, shifting to the trier of fact the responsibility for determining whether liability should be limited. Miller, supra note 75, at 7. Rodrigues had involved a claim of emotional distress caused by the negligent damage to their property. Subsequently, in Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974), the court reaffirmed the principles set forth in Rodrigues in a bystander's case. The court made it clear that the factors set forth in Dillon v. Legg to determine foreseeability and duty would not be used by the trial court to bar recovery, but would only be relevant in determining whether the amount of stress engendered was beyond that with which a reasonable person could be expected to cope. Miller, supra note 75, at 8. In Kelley v. Kokua Sales & Supply, 56 Hawaii 204, 532 P.2d 673 (1975), however, the court denied
Under the foreseeability standard, a growing number of jurisdictions have recognized a bystander's interest in emotional tranquility as a legally protected right. They have also employed more flexible and realistic guidelines to assess a bystander's cause of action than jurisdictions which follow the traditional theories of recovery. Against the backdrop of these significant developments in the law of torts, the Illinois Supreme Court was called upon in Rickey to reevaluate the viability of its precedent governing negligent infliction of emotional distress causes of action.

**RICKEY V. CHICAGO TRANSIT AUTHORITY**

**The Facts**

On February 12, 1972, Robert Rickey, age eight, witnessed the near death by strangulation of his younger brother Richard, age five. The brothers had just descended a subway escalator owned and operated by the Chicago Transit Authority. Richard’s clothing became entangled in a mechanism at the escalator’s base, trapping him in the mechanism and choking him. Richard’s inability to breathe for a substantial period of time rendered him comatose. His comatose condition now requires his permanent confinement in a nursing care facility.

Robert Rickey, through his mother Janet, brought suit against the Chicago Transit Authority under a cause of action sounding in negligence. The complaint alleged that as a result of witnessing his brother nearly strangling to death, Robert had suffered severe emotional distress which became manifest in physical injuries. The complaint did not allege that Robert had suf-

---

recovery to a bystander plaintiff because the plaintiff had not been located within a reasonable distance of the scene of the accident. The plaintiff had suffered a heart attack and died shortly after being informed of the deaths of his daughter and granddaughter in Hawaii. He had learned of the accident, however, over the telephone in his home in California.

111. Id. at 549, 457 N.E.2d at 1. Otis Elevator Co. had designed, manufactured, and sold the escalator to the Chicago Transit Authority ("CTA"). Midland Elevator Co. had contracted with the CTA to inspect its escalators. In 1971, Midland merged with the U.S. Elevator Co.
112. Id. at 549, 457 N.E.2d at 2.
113. Id.
114. Id. at 548, 457 N.E.2d at 1. Rickey sought recovery from Midland and U.S. Elevator. He also brought a products liability claim against Otis Elevator Co.
115. Id. at 550, 457 N.E.2d at 2. The complaint alleged that the emotional distress had
ferred a physical impact at the time of the occurrence, nor did it allege that Robert had been in danger of physical harm.116

The Lower Courts

At trial, the circuit court dismissed the complaint with prejudice, stating that no cause of action existed for the negligent infliction of emotional distress absent a contemporaneous physical impact.117 The Illinois Appellate Court, however, abandoned Illinois precedent requiring physical impact.118 In so doing, the appellate court held that Robert Rickey had stated a valid cause of action for the negligent infliction of emotional distress under the foreseeability standard.119 The court noted that ordinarily it is improper for an appellate court to deviate from prior state supreme court decisions.120 The court felt, however, that the history of the impact rule and the development of alternatives to that rule necessitated a reevaluation of Illinois law.121

The Illinois Supreme Court

The Illinois Supreme Court found the appellate court’s implementation of the foreseeability standard improper.122 The court held that the zone of physical danger test constituted the appropriate alternative to the impact rule.123 It then remanded the

become manifest in physical injury, including “definite functional, emotional, psychiatric, and behavioral disorders, extreme depression, prolonged and continuing mental disturbances, inability to attend school and engage in gainful employment and to engage in his usual and customary affairs.” Id.

117. 98 Ill. 2d at 548-49, 457 N.E.2d at 1-2.
119. Id. at 442-43, 428 N.E.2d at 599. The appellate court affirmed the dismissal of the complaint as to Otis Elevator Co. on Rickey’s strict liability claim, but reversed and remanded the case with respect to the other defendants.
120. Id. at 441, 428 N.E.2d at 598.
121. Id.
122. The appellate court had denied applications by the CTA and U.S. Elevator Co. for a certificate of importance to the Illinois Supreme Court. The supreme court granted and consolidated the petitions for leave to appeal of the CTA and U.S. Elevator Co. 98 Ill. 2d at 549, 457 N.E.2d at 2. The supreme court noted in its opinion that had petitions for leave to appeal not been filed, the appellate court’s decision would have stood without challenge, in contradiction to Illinois’ consistent application of the supreme court’s upholding the impact rule decision in Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898). 98 Ill. 2d at 552, 457 N.E.2d at 3.
123. 98 Ill. 2d at 555, 457 N.E.2d at 5.
case to allow Rickey to plead consistently with the zone of physical danger test.\textsuperscript{124}

The court initially examined Illinois precedent requiring a contemporaneous physical impact in order for a bystander to recover for the negligent infliction of emotional distress. Justice Ward, writing for the court, noted that Illinois had consistently denied bystander recovery under the impact rule.\textsuperscript{125} He further observed that most jurisdictions no longer require a contemporaneous physical impact in order to sustain a cause of action,\textsuperscript{126} because such a requirement can be satisfied by trivial physical contacts which bear little relation to the harm suffered by the plaintiff.\textsuperscript{127} For example, a plaintiff can satisfy the requirement with even the slightest impact, such as dust in the eye.\textsuperscript{128} The court thus concluded that abandonment of the impact rule in Illinois would be the appropriate course of action.\textsuperscript{129}

In determining which theory of recovery would replace the impact rule, the supreme court turned to the appellate court's decision. The appellate court had adopted a standard similar to that enunciated in \textit{Dillon v. Legg}.\textsuperscript{130} The lower court's theory differed from \textit{Dillon}, however, because the latter had pertained to a case in which the plaintiff suffered shock resulting in physical injuries,\textsuperscript{131} while the appellate court's opinion permitted recovery for emotional distress alone.\textsuperscript{132} Courts have expressed reluctance

\begin{itemize}
\item \textsuperscript{124} \textit{Id.} at 556, 457 N.E.2d at 5.
\item \textsuperscript{125} \textit{Id.} at 550, 457 N.E.2d at 2. \textit{See also} Kaiserman v. Bright, 61 Ill. App. 3d 67, 377 N.E.2d 261 (1978). In \textit{Kaiserman}, the defendant taxicab driver struck a young boy who had just alighted from a school bus. The force of the impact caused the boy's body to be thrown across the street and into his own front yard. The boy's family rushed out into the yard upon hearing the screeching of brakes. There, the family discovered the boy, who was severely injured. The boy died in his father's arms only moments later. The court refused to sustain the plaintiff's causes of action. Relying on \textit{Braun}, the court stated that no action would lie for the negligent infliction of emotional distress absent a contemporaneous physical impact. \textit{Id.} at 71, 377 N.E. 2d at 264. \textit{See supra} note 40 and accompanying text.
\item \textsuperscript{126} 98 Ill. 2d at 533, 457 N.E.2d at 4. \textit{See supra} notes 43, 44, and accompanying text.
\item \textsuperscript{127} 98 Ill. 2d at 533, 457 N.E.2d at 4.
\item \textsuperscript{128} \textit{Id.} \textit{See supra} note 42 and accompanying text.
\item \textsuperscript{129} 98 Ill. 2d at 554, 457 N.E.2d at 4.
\item \textsuperscript{130} \textit{Id.} \textit{See also supra} note 69 and accompanying text.
\item \textsuperscript{131} 98 Ill. 2d at 554, 457 N.E.2d at 4.
\item \textsuperscript{132} \textit{Id.} It is not clear that the appellate court abrogated the resultant physical manifestations requirement. The court stated, "We believe that the plaintiff's allegations regarding the consequences of his distress are sufficient to establish a real, compensable injury as opposed to a mere temporary fright." 101 Ill. App. 3d at 443, 428 N.E.2d at 599.
to award damages for purely emotional distress based on policy considerations such as the fear of fraudulent claims, the difficulty in ascertaining damages, and the potential for encouraging frivolous litigation.\(^\text{133}\) The supreme court thus declined to adopt the lower court's theory because of the difficulty inherent in authenticating the plaintiff's emotional injuries without resultant physical manifestations.\(^\text{134}\) Instead, the court announced that Illinois would join the majority of jurisdictions which follow the zone of physical danger test,\(^\text{135}\) in which a bystander within the zone of physical danger who fears for his own safety because of the defendant's negligence states a valid cause of action for physical injuries resulting from emotional distress.\(^\text{136}\)

Under the facts alleged, however, the court found no clear indication of whether Rickey could recover under the zone of physical danger test. The complaint did not allege that the defendant's negligence had endangered Rickey so that he feared for his own safety.\(^\text{137}\) Nor did it reveal Rickey's position at the time of the accident.\(^\text{138}\) The facts did demonstrate, however, that Rickey had manifested physical symptoms of his emotional distress.\(^\text{139}\) Therefore, the supreme court remanded the case so that Rickey could plead under the zone of physical danger test.\(^\text{140}\)

The complaint did allege resultant physical manifestations. See supra note 116 and accompanying text. The supreme court, however, based much of its rejection of the foreseeability standard on this assumption. See infra notes 154-55 and accompanying text.

\(^{133}\) 98 Ill. 2d at 555, 457 N.E.2d at 5. Courts have also advanced these policy considerations to bar direct victims' causes of action and those of bystander plaintiffs. See supra notes 2, 55-66, and accompanying text.

\(^{134}\) 98 Ill. 2d at 554, 457 N.E.2d at 4.

\(^{135}\) Id. at 555, 457 N.E.2d at 5. The court cited Pennsylvania, as illustrated in the case of Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970), as one of the jurisdictions which follows the zone of physical danger rule. Niederman was overruled nearly five years ago, however, in Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979). Pennsylvania now follows the foreseeability standard.

\(^{136}\) 98 Ill. 2d at 556, 457 N.E.2d at 5.

\(^{137}\) Id. at 556, 457 N.E.2d at 5.

\(^{138}\) Id.

\(^{139}\) Id.

\(^{140}\) Id.
ANALYSIS

The Zone of Danger Rule: An Extension of the Impact Rule

The Rickey decision marks Illinois' justified abandonment of the long-suffered impact rule. Where the plaintiff receives a slight jolt or a speck of dust in the eye, no guarantee exists that he has suffered more than a fleeting instance of fright or other emotional disturbance. The law cannot be expected to compensate for every minor upset incurred in daily living. The Illinois Supreme Court found this sufficient justification to abandon the impact rule. Additional reasons exist, however, which make the abrogation of the requirement of a contemporaneous physical impact both desirable and necessary.

Under the impact rule, courts have diminished the value of society's interest in emotional tranquility. By predicing liability on physical impact, only indirect protection is afforded to the gravamen of the plaintiff's complaint, that his right to be free from emotional distress has been violated. A plaintiff might just as well bring a conventional negligence action for personal injuries, since he may recover parasitic damages, characterized as pain and suffering, under that cause of action.

Furthermore, the impact rule virtually bars recovery to a plaintiff who suffers emotional distress when viewing the tortious injury of another. In a bystander's cause of action, however, physical impact bears little relation to the suffering of emotional distress. Moreover, the impact rule fails to recognize fear for the safety of another as a legally compensable harm.

The significance of Illinois' departure from the impact rule is diminished when viewed in light of its adoption of the zone of

---

142. See Comment, Dillon Revisited, supra note 48, at 933.
143. See Pearson, supra note 7, at 486-88.
145. See Culbert v. Sampson's Supermarkets, 444 A.2d 433 (Me. 1982) (mother fears for the safety of her child who choked on a foreign substance negligently left in a jar of baby food); Landreth v. Reed, 570 S.W.2d 486 (Tex. Civ. App. 1978) (young girl fears for the safety of her infant sister who has fallen into a swimming pool).
146. See supra note 8 and accompanying text. Where the plaintiff can prove that there was some impact, however, some courts will allow recovery for emotional distress due in
physical danger test. The zone of physical danger test is no more than an extension of the impact rule. By similarly emphasizing the physical inviolability of the plaintiff, the rule fails to afford direct protection to the plaintiff’s interest in emotional tranquility.\(^{147}\)

In addition, like the impact rule, the zone of physical danger test is illogical when applied in a bystander’s cause of action.\(^{148}\) A bystander suffers emotional harm because of perception of the tortious injury of the primary victim. The functioning of the bystander’s audiovisual senses, the conduits through which he perceives the occurrence, do not depend upon his imminent proximity to the defendant’s act.\(^{149}\) The bystander may be located outside of the zone of immediate physical danger and yet witness very vividly the primary victim’s injury, thereby suffering emotional distress.\(^{150}\) Moreover, even proponents of the zone of physical danger test recognize that observation of the death or serious injury of a close family member may foreseeably engender genuine and severe emotional injuries.\(^{151}\) Courts nonetheless continue to preclude recovery under this theory.\(^{152}\)

---

147. Under the zone of physical danger rule, a negligent infliction of emotional distress action is analogous to the tort of assault. In each action, the plaintiff suffers emotional injury. Yet, to recover, the defendant must have placed the plaintiff in apprehension of an imminent harmful physical contact. See supra note 17 and accompanying text.


149. Simons, supra note 11, at 10.

150. Id.


152. In two cases, courts have allowed recovery under the zone of physical danger rule where the plaintiff’s emotional injuries were due in part to fear for his own bodily safety. In Dave Snelling Lincoln-Mercury v. Simon, 508 S.W.2d 923 (Tex. Civ. App. 1974), a mother brought a claim for negligent infliction of emotional distress after witnessing her son fall out of a moving automobile as a result of a defective lock in the back door. The court stated that the mother had also been imperiled by the defective lock and thus must have feared for her own safety. In Bowman v. Williams, 164 Md. 397, 165 A. 182 (1953), the plaintiff was looking out of his front window when the defendant negligently drove his truck into the plaintiff’s home. The plaintiff alleged that he feared not only for his safety, but for the safety of his wife and children, and had thus suffered emotional distress. The court stated that the defendant had placed the plaintiff in imminent danger which resulted in fear for both himself and his family and that it would grant recovery because the shock sustained by the plaintiff was the same whether it arose from fear for himself or another.
The Requirement of Physical Manifestations: Clouding the Issue of Proof

In adopting the zone of physical danger rule, the Illinois Supreme Court did not discuss the rule's substantive merits or faults. Nor did it analyze the foreseeability standard, which it rejected. The only explicit reason the court gave for adopting the zone of physical danger test was that it could not accept the appellate court's interpretation of the foreseeability standard.153

The supreme court perceived that the lower court's theory would permit recovery absent resultant physical manifestations of the plaintiff's emotional injuries,154 in spite of the fact that the complaint alleged such physical injuries.155 If the basis of the Rickey court's decision is solely its desire to retain the physical manifestation requirement, it is difficult to comprehend why the court refused to adopt the foreseeability standard.

The majority of jurisdictions which follow the foreseeability standard retain this element as a prerequisite to bystander recovery.156 The court did not acknowledge this fact in its opinion. Even though the appellate court's interpretation of the foreseeability standard apparently did not include the physical manifestations requirement, the supreme court could nonetheless have adopted the foreseeability standard and yet retained that element.

Moreover, rejection of the physical manifestations requirement would not, as the supreme court feared,157 have prompted recovery for purely emotional distress or exacerbated the difficulties in proving plaintiffs' claims. The medical profession has proven that purely emotional distress, without accompanying physical manifestations, does not exist.158 Scientific studies have shown that the physical and psychic components of emotional distress

153. See supra notes 130-34 and accompanying text.
154. See supra notes 130-31 and accompanying text. See also supra note 152.
155. See supra note 132 and accompanying text.
157. See supra notes 131-34 and accompanying text.
158. See Leibson, supra note 11, at 164; Comment, supra note 20, at 1249.
are inextricably intertwined.\textsuperscript{159} Courts have clung to the historic distinction between the physical and the psychic, however, thus requiring the plaintiff to prove resultant physical manifestations.\textsuperscript{160}

Rather than providing a means of weeding out false claims, the law’s distinction between the physical and psychic components of emotional distress clouds the issue of proof.\textsuperscript{161} Under the foreseeability standard, a minority of jurisdictions have recognized the artificiality of this distinction, and thus abrogated the requirement of physical manifestations as an essential element of the negligent infliction of emotional distress cause of action.\textsuperscript{162} These courts do continue to view such physical symptoms as admissible evidence of the plaintiff’s claim.\textsuperscript{163} They have placed greater reliance on expert medical testimony and the experience of the jury, however, in assessing the authenticity of a plaintiff’s injuries.\textsuperscript{164} By refusing to allow recovery except in cases of serious emotional injury, these jurisdictions more effectively circumscribe liability and assure meritorious claims without resort to artificial legal distinctions. To the extent that these jurisdictions have created alternatives to the resultant physical manifestations requirement,\textsuperscript{165} it appears that the Illinois Supreme Court need not have foundered on the difficulties inherent in the efficient administration of bystander claims when choosing an alternative to the impact rule. The Rickey court could have adopted the foreseeability standard without the requirement of resultant physical manifestations, and implemented other feasible mechanisms to ensure the validity of the bystander’s emotional distress.

\textsuperscript{159} Leibson, supra note 11, at 164; Comment, supra note 20, at 1249.
\textsuperscript{160} E.g., Leong v. Takasaki, 55 Hawaii 398, 404, 520 P.2d 758, 762-63 (1974).
\textsuperscript{162} See supra notes 107-09 and accompanying text.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Id. In adopting the “ability to cope” test, some courts employ a standard similar to that applied in actions for the intentional infliction of emotional distress. See RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965). Generally, plaintiffs are not required to exhibit resultant physical manifestations as an essential element of their causes of action under that tort. See Comment, supra note 24, at 626-29. This can be attributed to a large extent to the fact that the severity of the defendant’s conduct vouches for the existence of the plaintiff’s emotional injuries. Id. See supra notes 23-24 and accompanying text. In its decision in Rickey, the appellate court noted that because Illinois courts have
The *Rickey* decision recognizes a bystander's right to recover for the negligent infliction of emotional distress. By adopting the zone of physical danger rule, however, the Illinois Supreme Court has so limited the scope of liability that it has actually placed bystanders in no better position to recover than under the impact rule. When announcing that Illinois would follow the zone of physical danger test, the court cited case precedent from various jurisdictions which follow the rule; in each case cited, the bystander had not prevailed.\(^{166}\)

**Weighing the Policy Considerations**

When addressing the bystander recovery issue, most courts have focused on the various policy considerations underlying the extension of a common law tort duty to bystanders. The majority of the policy considerations traditionally advanced no longer justify denial of bystander recovery.

Both advocates and opponents of bystander recovery agree that the fear that courts will be exposed to a flood of fraudulent claims is unfounded.\(^{167}\) A potential increase in the courts’ case-loads should not justify rejection of an entire class of claims.\(^{168}\) Moreover, advances in medical science now minimize the ability to recover for trivial or feigned instances of emotional injury.\(^{169}\) Reliance on expert medical testimony and the integrity of the judicial system provide better solutions for verifying plaintiffs’ claims than adherence to theories of recovery created nearly a century ago to cope with then existing difficulties in proof.\(^{170}\)


\(^{167}\) See supra notes 59-60 and accompanying text.


\(^{169}\) See supra notes 67-68 and accompanying text.

\(^{170}\) See, e.g., Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961), where, in abandoning the impact rule, the court stated that it would prefer to rely upon
Today, both medical science and changing societal values require expanded legal recognition of the consequences of defendants' negligent acts.171 The increasing density of the American population and the modern trend of urbanization have made serious invasions of an individual's psychological well-being more likely.172 In addition, there is now recognition of the debilitating effects mental distress may have on an individual's ability to carry on the functions of life.173 Both critics and advocates of bystander recovery no longer deem emotional distress which arises from witnessing the tortious injury of another a remote or unforeseeable result of a defendant's wrongdoing.174 Some courts continue to argue, however, that to impose liability upon the negligent tortfeasor is wholly disproportionate to his moral culpability.175 One commentator has even contended that in our increasingly complex society, a toughening of the mental hide will provide better protection than the law ever can.176 Although the law should not compensate for every minor shock incurred in daily living, there must be some point at which an injured party can vindicate his right to be free from emotional distress. The more interwoven societal relations become, the

173. In our increasingly complex society, the orderly and normal functioning of a man's mind is as critical to his well-being as physical health. Indeed, a sound mind within a disabled body can accomplish much, while a disabled mind in the soundest of bodies is rarely capable of making any substantial contribution to society.
174. See supra note 61 and accompanying text.
176. Magruder, supra note 17, at 1035. Under this view, it might seem extravagant and unnecessary to compensate victims of mental suffering.

It should also be noted that the effect of litigation itself may possibly contribute to and intensify the plaintiff's mental reaction. See Comment, supra note 20, at 1261. But see Leibson, supra note 11, at 194, where the author notes that the burden on the negligent defendant is minimal because only those who suffer abnormal reactions or severe emotional distress over the death or serious injury of a loved one are the plaintiffs about whom litigation in this area has centered. Most others would probably not consider the time and expense of a lawsuit or the reawakening of sad memories worth the cost. Id. See
greater the responsibility one must accept for his conduct.\textsuperscript{177}

The most crucial point about which courts differ lies in where to limit liability, if indeed bystander recovery is to be recognized. In \textit{Rickey}, the Illinois Supreme Court chose to remain within traditionally recognized areas of tort responsibility. By adopting the zone of physical danger rule, the court has reflected its desire to maintain predictable determinations of liability in a field of tort law clouded by numerous gray areas. Had the \textit{Rickey} court gone one step further and adopted the foreseeability standard, however, Illinois would have had more flexible, realistic guidelines with which to make case-by-case determinations of liability.\textsuperscript{178}

The foreseeability standard validly limits the scope of compensable plaintiffs to close family members.\textsuperscript{179} A bystander who has no relation to the primary victim is not likely to suffer compensable emotional injury.\textsuperscript{180} An unrelated eyewitness will most often suffer a fleeting instance of sorrow or pity for the primary victim.\textsuperscript{181} On the other hand, a close family member may reasonably be anticipated to suffer feelings of severe shock or grief.\textsuperscript{182} Such emotional reactions are not only more objectively verifiable,\textsuperscript{183} but also much more deserving of redress in a court of law. Furthermore, the foreseeability standard reflects the fact that the law cannot compensate every family member who suffers the

\textsuperscript{generally} Miller, \textit{supra note} 76 (regarding the need for proportionality in the awarding of damages for emotional distress in a negligence action).

\textsuperscript{177} Sinn v. Burd, 486 Pa. 146, 164, 404 A.2d 672, 681 (1979).

\textsuperscript{178} In Robert Rickey's case, to recover under the zone of physical danger rule, he would have had to amend his complaint to allege that he feared for his own safety as a result of his location within the zone of physical danger. To do so would seem rather contrived. It would be difficult to believe that Rickey feared that his clothing would likewise become entangled in the escalator or that he in any other way apprehended immediate physical harm. Given the tender ages of the two boys, and their close familial relationship, it is entirely conceivable that Rickey experienced genuine emotional distress as a result of fear for his brother's safety. While Robert Rickey may go uncompensated for his emotional injury under the zone of physical danger test, he would have had a better opportunity to recover under the foreseeability standard. Rickey was closely related to the primary victim, located at the scene as it occurred, and manifested physical symptoms of his emotional distress. \textit{See also} Liebson, \textit{supra note} 11, at 174 (discussing the increased potential of fraudulent pleading under the zone of danger test).

\textsuperscript{179} \textit{See supra note} 75 and accompanying text.

\textsuperscript{180} Leibson, \textit{supra note} 11, at 197-98.

\textsuperscript{181} \textit{Id}.

\textsuperscript{182} \textit{Id} at 195-209, describing the grief reaction and its capability of being measured in a court of law.

\textsuperscript{183} \textit{Id}.
loss or injury of a loved one due to a tortfeasor’s negligence.\textsuperscript{184} In effect, it limits recovery to family members who witness the tortious occurrence. The foreseeability standard originated only sixteen years ago.\textsuperscript{185} The standard reflects the courts’ increasing receptivity to twentieth century advances in medicine, and also evidences an increased respect for the interest in emotional well-being. Had Illinois adopted the foreseeability standard,\textsuperscript{186} the benefits would not only have accrued to Robert Rickey. An entire class of plaintiffs would have benefitted, most of whom will now, under the zone of physical danger test, bear the total burden of a negligent tortfeasor’s wrongdoing.

**CONCLUSION**

By adopting the zone of physical danger rule, the Illinois Supreme Court has provided for predictable determinations of liability in a field of tort law abounding with gray areas. However, in its conservative expansion of the law governing the negligent infliction of emotional distress cause of action, the *Rickey* decision has placed bystanders in no better a position to recover than under the impact rule. *Rickey* avoided coming to terms with the practical effects of the imposition of the zone of physical danger rule, as well as the substantive issues surrounding the problem of bystander recovery. Perhaps if it had confronted these issues, Illinois would have instead adopted the foreseeability standard, under which Illinois courts would have had flexible, realistic guidelines with which to make case-by-case determinations of liability. More importantly, adoption of the foreseeability standard would have enabled the innocent bystander to more effectively vindicate his right to be free from emotional distress.

\textbf{HILDA C. CONTRERAS}


\textsuperscript{185} See supra note 69 and accompanying text.

\textsuperscript{186} Illinois could have abandoned the impact rule in favor of the foreseeability standard with the physical manifestations requirement, as did Massachusetts in Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978). Illinois could also have abandoned the impact rule in favor of the foreseeability standard without the physical manifestations requirement, as did the court in Culbert v. Sampson’s Supermarkets, 444 A.2d 433 (Me. 1982). See supra notes 154-65 and accompanying text.