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Traumatic Mental Injury and the Bystander

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TRAUMATIC MENTAL INJURY AND THE BYSTANDER

I. INTRODUCTION

> We need only look at the world around us to observe that healthy minds linked with disabled bodies can accomplish much, while sick minds in the strongest of physical structures will contribute nothing to the welfare of the individual or society.[1]

The above statement cannot be disputed by either the medical or legal profession. Another unquestionable statement is that "all emotional disturbance has a physical aspect and all physical disturbance, an emotional aspect."[2] These two statements taken together seem to strongly indicate that damages for traumatic mental injuries caused by a tortfeasor would be as recoverable as those of pure physical injury. However, a third uncontested statement has thrown this area of damages into complete turmoil. This statement, although replete with medico-legal implications, can be stated simply as "there is no scientific proof whether emotional disturbance is caused ultimately by physical events occurring in the nervous system or by the psychological phenomena of thought, feeling or behavior."[3]

With these statements hopelessly confused for some period of time, it now seems that some courts have begun to understand and properly categorize damages recoverable for emotional distress caused by any form of traumatic event. Throughout the evolution of the mental or emotional disturbance cases, the courts have adopted many tests and theories for allowing or disallowing recovery of damages. The two most important of these tests have had significant impact on the present status of the law. Section II of this paper will discuss what has been termed the "physical injury" or impact test and Section III will deal with the second significant test, which is the "zone of danger" test.

With a basic understanding of these two most influential tests in mind, Section IV will discuss an important case law trend which has begun to emerge. The South Carolina prog-

1. Mason v. Gray, Case No. 2254 (Koontenai County Ct. Idaho, Sept. 26, 1967).

2. 1 D. SCHWARTZ, TRAUMA: NEUROSES FOLLOWING TRAUMA 32 (1959).

3. *Id.*

ress in this area will be discussed in Section V. Section VI will interpret the various suggested standards, and the problems arising therefrom, which have been proposed for a uniform and equitable view. In conclusion, Section VII will view the possible future course of the courts in regard to this complex mental and emotional recovery problem.

This broad overview of a changing and viable subject will concentrate on the developments which have occurred where the emotional distress is brought on by the plaintiff's observance of the accident. This situation has been litigated with increasing frequency and shows the emerging trends clearly.

II. PHYSICAL INJURY OR IMPACT TEST

One area in which the recovery for emotional distress has not encountered the many obstacles to be discussed later is where the negligence inflicts some physical injury. The courts reason that with a cause of action established by the physical harm, parasitic damages are awarded, and it is considered that there is sufficient assurance that the mental injury is not feigned.[4] Or, stated another way, since distress of mind is easily simulated, speculative, and difficult to disprove, the requirement of a physical injury is a guaranty of the trustworthiness of the claim.[5]

There is still some dispute in this area with regard to the immediacy of the physical injury which is required. When the emotional distress complained of results in physical illness, even though the negligence does not produce immediate physical injury, some courts allow recovery[6] while others continue to require immediate physical injury to recover.[7]

The essential "impact" which has been required by the majority of the courts has led to many absurd results and inconsistencies. "In some states the most trivial physical injury may serve as the foundation to base a claim for extraordinary consequences, and conversely the most serious physical or emotional consequences may go uncompensated because the negligence which occasioned the fright did not also produce an

4. 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 460 (1906).

5. *See* Huston v. Borough of Freemansburg, 212 Pa. 548, 61 A. 1022 (1905); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896).

6. *See* Padgett v. Colonial Wholesale Distrib. Co., 232 S.C. 593, 103 S.E.2d 265 (1958).

7. *See* Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958).

immediate physical injury."[8] A continuing problem with the impact rule was the courts' fabrication and extension to find the necessary impact. This has led many courts to find impact in minor contacts which have had no part in causing the harm sustained and have actually had no importance in themselves.[9]

The necessity of finding impact in order to allow "parasitic" damages has often caused unjustifiably harsh results when applied to the bystander situation. An example of this result is found in an Indiana case[10] which denied recovery for the fright and emotional distress sustained by a mother who watched her daughter being dragged along a railroad platform by a train. The court stated that "the most reliable and better-considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned from fright, as there was no immediate personal injury."[11] Other examples are a New York case which refused recovery to a mother who had also witnessed injury to her child;[12] an Indiana case which disallowed recovery to a wife who saw her husband being beaten;[13] and, finally, an Ohio case[14] which denied recovery in a factual situation which exemplifies the inequities of this test. In this case, the plaintiff's sister was beaten to death by the defendant and the court *held* "there can be no recovery for fright or shock, even when sustained as the result of a willful act, unless such act was directed toward the person or property of the one seeking recovery. Injuries to a third person cannot be the basis of recovery for shock or fright suffered by the complaintant."[15]

The best statement which accurately summarized the problems presented by the impact test is as follows:

> Inconsistently applied, the physical injury test has traditionally been the device of appellate courts for deciding issues of fact. Consistently applied, it is their tool for deciding questions of policy and limiting

8. Brody, *Negligently Inflicted Psychic Injuries: A Return to Reason*, 7 VILL. L. REV. 232, 235 (1962).

9. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 331 (4th ed. 1971).

10. Cleveland C. C. & St. L. Ry. v. Stewart, 24 Ind. App. 374, 56 N.E. 917 (1900).

11. *Id.* at 376, 56 N.E. at 920.

12. Blessington v. Autry, 105 N.Y.S.2d (Sup. Ct. 1951).

13. Boden v. Del-Mar Garage, Inc., 205 Ind. 59, 185 N.E. 860 (1933).

14. Koontz v. Keller, 52 Ohio App. 265, 3 N.E.2d 694 (1936).

15. *Id.* at 266, 3 N.E.2d at 695.

> questions of fact. An argument can be made that they have done neither well.[16]

This troublesome rule has recently been repudiated by the majority of the courts which have faced the issue. Prosser reports that twenty-seven states have done away with the requirement of impact and that all but four of these states have taken this position since 1900.[17]

A recent New York case[18] has revealed the many faults of the impact rule and may have, in effect, done away with it. With the problems derived from the impact test effectively abandoned, the courts then had to review the other possible alternatives. One such alternative is known as the zone of danger test.

III. ZONE OF DANGER TEST

The physical injury or impact test was replaced with a test which would allow recovery for traumatic mental injuries which were proximately caused and foreseeable by a defendant, if the plaintiff was within the "zone of danger." What this test does in effect is to allow damages for plaintiff's personal fear for his own safety and not simply his fear for another.

The leading case in this area is *Orlo v. Connecticut Co.*[19], which presented this view long before the down-fall of the impact test. The *Orlo* court stated that its

> . . . conclusion is that where it is proven that negligence proximately caused fright or shock in one who is within the range of ordinary physical danger from that negligence, and this in turn produced injuries such as would be elements of damage had a bodily injury been suffered, the injured party is entitled to recover.[20]

In this case, there was no physical injury from impact, but the court allowed recovery simply because the plaintiff was within what he actually believed to be a "zone of danger."

A second leading case, *Mahnke v. Moore*[21] decided ten years after *Orlo,* allowed plaintiff's recovery for traumatic

16. *Supra* note 8 at 238.
17. *Supra* note 9 at 332.
18. Battalla v. State, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961). This case will be discussed in more detail in Section IV of this note.
19. 128 Conn. 231, 21 A.2d 402 (1941).
20. *Id.* at 234, 21 A.2d at 405.
21. 197 Md. 61, 77 A.2d 923 (1951).

mental injuries suffered during the commission of a murder-suicide in his presence. The court in so holding stated that:

> a plaintiff can sustain an action for damages for nervous shock or injury caused without physical impact, by fright arising directly from defendant's negligent act or omission, and resulting in some clearly apparent and substantial physical injury as manifested by an external condition or by symptoms clearly indicative of a resultant pathological, physiological, or mental state.[22]

In regard to the effect of the zone of danger test on the bystander, the courts have again had difficulty in applying this standard properly. The Maryland case of *Resavage v. Davies*,[23] decided one year after *Mahnke*, held that a bystander, the mother of the injured party, could not recover because defendant's duty did not extend to a party in safety. One commentator has stated that:

> [I]f there is to be no recovery for witnessing harm to a third person, it ought to make no difference at all whether the witness is in a place of safety or within the zone of danger. In this respect, the Maryland decision in the *Resavage* case represents a misapplication of the "zone of danger" test, for there the test was used as a mechanical device which obscured the real issues of liability or nonliability.[24]

Therefore, it seems that the zone of danger test has functioned more as a rejection of the physical injury or impact test than as a solution to the bystander problem. It would seem that few cases would arise placing a bystander in such a position that he fears so greatly for his own safetly as to allow him recovery. This being true, it becomes more important that the court seek a solution which can be administered not as a mechanical test, but one that is flexible enough to fit various factual situations. Such a solution may be emerging in a new case law trend.

IV. EMERGING CASE LAW TREND

The general rule of denying recovery for the mental disturbance suffered by the bystander is best stated in the leading case of *Waube v. Warrington*.[25] This rule can be summarized as follows:

22. *Id.* at 65, 77 A.2d at 927.
23. 199 Md. 479, 86 A.2d 879 (1952).
24. *Supra* note 8 at 239.
25. 216 Wis. 603, 258 N.W. 497 (1935).

> [N]o recovery is permitted for a mental or emotional disturbance, or for a bodily injury or illness resulting therefrom, in the absence of a contemporaneous bodily contact or independent cause of action, or an element of wilfulness, wantonness, or maliciousness, in cases in which there is no injury other than one to a third person, even though recovery would have been permitted had the wrong been directed against the plaintiff. The rule is frequently applied to mental or emotional disturbances caused by another's suffering. It has been regarded as applicable to mental or emotional disturbance resulting from an injury not only to a stranger, but also to a relative of the plaintiff, such as a child, sister, father, or spouse.[26]

Against this strong background in which the courts find no duty to the bystander, few courts have tried to view each case upon its facts. The two tests, "physical contact" and "zone of danger", have also failed to amicably handle each claim as it has arisen.

The first court which attempted to challenge the absolute no recovery doctrine was *Battalla v. State*,[27] decided in 1961. Although this case did not involve a bystander situation, it took a major step by overruling the no recovery doctrine as presented in *Mitchell v. Rochester Railway Co.*[28] The *Battalla* court stated in regard to total disallowance of damages for traumatic mental injuries, that:

> even the public policy argument is subject to challenge. Although fraud, extra litigation, and a measure of speculation are, of course, possibilities, it is no reason for a court to eschew a measure of its jurisdiction. "The argument from mere expediency cannot commend itself to a Court of Justice, resulting in the denial of a logical legal right and remedy in *all* cases because in *some* a fictitious injury may be urged as a real one.[29]

The California courts, which have been the leaders of the new trend, accepted the *Waube* rationale as late as 1963 in the case of *Amaya v. Home Ice, Fuel and Supply Co.*[30] This case was an action by a mother who suffered fright and nervous shock when she viewed her 17-month-old child being run over by the defendant's truck. Nevertheless, Justice Peter's dissent in *Amaya* presents the total argument for a more flexible de-

26. 52 AM. JUR. *Torts* §70 (1944).

27. Battalla v. State, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961).

28. 151 N.Y. 107, 45 N.E. 354 (1896).

29. 10 N.Y.2d 237, 240, 219 N.Y.S.2d 34, 37, 176 N.E.2d 729, 731 (1961).

30. 29 Cal. Rptr. 33, 379 P.2d 513 (1963).

cision. This dissent, which is highly regarded by the scholars, quotes Dean Prosser by stating:

> It is not consonant with the reactions, or the mores, of the society of today to hold that the mother who suffers emotional distress upon the sight of her child's injury should not recover if the trier of fact finds such injury was reasonably foreseeable. The knowledge of potential emotional trauma to a parent who witnesses an injury to a child is too clear to the negligent driver to permit an escape upon the ground of unforeseeability.[31]

Just six years later, the California Supreme Court was again faced with almost the identical factual situation as that presented in *Amaya*. This case, *Dillon v. Legg*,[32] overruled *Amaya* and allowed the plaintiff-mother recovery for mental injury caused by the trauma of witnessing her daughter's death in an automobile collision. The *Dillon* court, in rejecting the zone of danger test because of its total arbitrariness, simply recognized the "natural justice upon which the mother's claim rests."[33] As one commentator has stated:

> The court, feeling that duty was inherently intertwined with foreseeability, established a list of factors which should be taken into account in determining the scope of duty where the plaintiff was a witness to an act of negligence involving another. The three factors to be considered were the relation between the plaintiff and the victim, the nearness of the plaintiff to the accident, and the circumstances under which knowledge of the accident was acquired.[34]

The *Dillon* court easily did away with years of precedent and the strong *Waube* rationale by adopting a policy suggested by Prosser: "[I]t has properly been said that when a child is endangered, it is not beyond contemplation that its mother will be somewhere in the vicinity, and will suffer serious shock."[35]

There can be no doubt that *Dillon* was a major breakthrough in the entire area of bystander recovery for traumatic mental injuries. "*Dillon* substituted for an inflexible rule denying all recovery, the policy of determining case-by-case the merits of each particular action."[36] The *Dillon* decision has been rejected by name in two states which have dealt

31. *Id.* at 54, 379 P.2d at 536.

32. 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968).

33. *Id.* at 731, 69 Cal. Rptr. at 751, 441 P.2d at 914.

34. 3 GA. L. REV. 241, 250-51 (1968).

35. W. PROSSER, HANDBOOK OF THE LAW OF TORTS §55, at 353 (3d ed. 1964).

36. 22 S.C.L. REV. 273, 275 (1970).

with similar factual situations.[37] These rejections indicate those courts' reluctance to break with the past decisions and their continued fear of counterfeited claims. The third court to consider the situation presented in *Dillon* was important to the future of this isolated holding, the reason being the stature of the court which faced the problem. The Court of Appeals of New York in the case of *Tobin v. Grossman*[38] chose not to follow *Dillon* and stated:

> Beyond practical difficulties there is a limit to attaining essential justice in this area. While it may seem that there should be a remedy for every wrong, this is an ideal limited per force by the realities of this world. 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.[39]

This holding in *Tobin*, by the respected New York court, may retard the future growth of the trend allowing bystander recovery.

The California court upheld its decision in *Dillon* in the recent case of *Archibald v. Braverman*.[40] This was the next case which presented the opportunity to apply the factors set out in *Dillon*. The "relationship" test was not a problem since the plaintiff was the victim's mother. The "nearness" test was also disposed of, because the plaintiff arrived at the scene shortly after its occurence. The third, or "observation" test, presented the court with the greatest problem. The court determined that the "contemporaneous observance" rule did not require the plaintiff to actually be present at the scene of the accident, but only that the shock be "fairly contemporaneous" with the accident.[41] "The extension of protection for mental and emotional distress to plaintiffs who only observed

37. Guilmette v. Alexander, 259 A.2d 12 (Vt. 1969); Jelley v. La Flame, 108 N.H. 471, 238 A.2d 728 (1968).

38. 24 N.Y.2d 609, 301 N.Y.S.2d 554, 249 N.E.2d 419 (1969).

39. *Id.* at 613, 301 N.Y.S.2d at 559, 249 N.E.2d at 424.

40. 275 Cal. App. 2d 290, 79 Cal. Rptr. 723 (1969).

41. *Id.* at 292, 79 Cal. Rptr. at 725, *quoting from* W. PROSSER, HANDBOOK OF THE LAW OF TORTS §55, at 354 (3d ed. 1964).

the injuries of the victim and not the accident itself is the real significance of *Archibald.*"[42]

Since the *Archibald* decision, no court has had an opportunity to accept or reject the California rationale. It can be seen from these cases that only the slightest breakthrough has been made, but this beginning is an important one. The South Carolina court's activity in this area, although limited, may be an example of the present posture of many jurisdictions.

V. SOUTH CAROLINA VIEW

The South Carolina Supreme Court first faced the problem of whether recovery for mental suffering should be allowed in the case of *Mack v. South Bound R. R.*[43] In this case, the plaintiff was not actually struck by the defendant's train, but suffered mental injury from a near collision. The court phrased the issue as "whether in an action to recover damages for an injury sustained through the negligence of another, there can be a recovery for a bodily injury caused by mere fright and mental disturbance?"[44] The court in an exhaustive discussion of this question stated:

> The exemption from liability for mere fright, terror, alarm or anxiety does not rest on the assumption that these do not constitute an actual injury. . . . We cannot say, therefore, that such consequences may not flow proximately from unintentional neligence; and if compensation in damages may be recovered for a physical injury so caused, it is hard, on principle, to say why there should not also be a recovery for the mere mental suffering when not accompanied by any perceptible physical effects. It would seem, therefore, that the real reason for refusing damages sustained from mere fright, must be something different, and it probably rested on the ground that in practice it is impossible satisfactorily to administer any other rule.[45]

The court, however, decided for the plaintiff simply because of the seemingly intentional conduct of the defendant-railroad.

The supreme court, in a later opinion, clearly adopted the "physical injury" requirement for recovery for mental injury. This case, *Norris v. Southern Ry.*,[46] plainly stated that "the law in this State does not allow recovery of damages for mental suffering in the absence of bodily injury, except under

42. 22 S.C.L. REV. 273, 276, (1969).
43. 52 S.C. 323, 29 S.E. 905 (1898).
44. *Id.* at 332, 29 S.E. at 908.
45. *Id.* at 333, 29 S.E. at 909.
46. 84 S.C. 15, 65 S.E. 956 (1909).

the mental anguish statutes with reference to telegraph companies."[47]

Almost fifty years after the *Norris* decision, the court did away with the "physical injury" or "impact" test in the case of *Padgett v. Colonial Wholesale Distributing Co.*[48] The court quoted at length from the California decision of *Sloane v. Southern California Ry.*:[49]

> The interdependence of the mind and body is in many respects so close that it is impossible to distinguish their respective influence upon each other. . . . The mental condition, which superinduced the bodily harm in the foregoing cases was fright, but the character of the mental excitation by which the injury to the body is produced is immaterial. If it can be established that the bodily harm was the direct result of the condition, without any intervening cause, it must be held that the act which caused the condition set in motion the agencies by which the injury was produced, and is the proximate cause of such injury.[50]

The court firmly stated the new rule by holding that "if the respondent's bodily injury was proximately caused by the shock, fright, and emotional upset as a result of the negligence and willfulness of the appellant, he was entitled to recover such damages as would compensate him for the injuries so sustained."[51]

The next case in this area comes close to presenting the third party concept, but does not adequately dispose of the issues. This case, *Roscoe v. Grubb*,[52] distinguished the court's holding in *Padgett* in regard to direct causation. The court stated that in *Padgett* the plaintiff's fright was a natural, immediate, and foreseeable result of the negligent operation of the defendant's truck; whereas, in this case the injury was no more than a trivial bruise which caused no shock, fright, or emotional upset. The emotional upset was caused not by defendant's negligence, but by plaintiff's concern, at first over his wife's condition, and then from his fretting over the delay in settlement of his claims.

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47. *Id.* at 21, 65 S.E. at 959.

48. 232 S.C. 593, 103 S.E.2d 265 (1958).

49. 111 Cal. 668, 44 P. 320 (1896).

50. 232 S.C. 593, 605, 103 S.E.2d 265, 271, *quoting from* Sloane v. Southern California Ry., 111 Cal. 668, 44 P. 320 (1896).

51. *Id.* at 594, 103 S.E.2d at 265.

52. 237 S.C. 590, 118 S.E.2d 337 (1961).

The court, in the 1968 decision of *Turner v. A B C Jalousie Co.*,[53] again spoke in terms of foreseeability and proximate causation. In this case the respondent claimed danger from shock, fright, and emotional upset caused by the conduct of appellant. The court, in overruling a demurrer to this cause of action, stated that:

> [S]ince it is alleged in the complaint that the tortious conduct of the appellant brought about the physical or bodily injury to the respondent, such states a cause of action and is good against a demurrer. The question of whether the respondent can prove her case against the appellant will be determined from the evidence produced upon a trial of the cause.[54]

There are unquestionably many states which have progressed no further on this issue than has South Carolina. The factual situation has not arisen often, and there has been a failure on the part of attorneys to plead mental damages due to old rulings on this subject. The South Carolina courts have begun to look at traumatic mental injuries as a proper element of damages, but, as seen in the *Turner* and *Roscoe* cases, full proof of foreseeability and causation is required.

VI. SUGGESTED SOLUTIONS AND STANDARDS

The prior sections have endeavored to show the progress of the courts in the area of damages for traumatic mental injuries and the problems which have been encountered. These problems will eventually have to be worked out before every case of mental injury can be fairly and equitably decided. What solutions and alternatives have been offered to adequately handle this emerging, complex area of damages?

One commentator suggests a solution which can be summarized in the following statement:

> The objective standard of the reasonable man has been successfully used to detect the existence of a breach of duty once a duty has been established. The same objective standard could be used to determine the existence of a duty to a third party observer. Like the reasonable man, a fictitious person could be created to presuppose an observer's uniform standard of susceptibility to witnessing injury to a person and to simplify the identification of the prospective standard. The fictitious person could be named the reasonable observer.[55]

53. 251 S.C. 92, 160 S.E.2d 528 (1968).

54. *Id.* at 97, 160 S.E.2d at 530.

55. Note, *Negligently Caused Mental Distress: Should Recovery Be Allowed?*, 13 S.D.L. REV. 402, 408 (1968).

This author, therefore, would apply traditional negligence concepts to our problem. This approach would require medical proof of the mental injuries suffered. After the duty and breach are established, the plaintiff must proceed to prove that defendant's action was the proximate cause of his damage. This test would reveal any fictitious claim, but in many cases might pose an unrealistic burden of proof for the plaintiff.

This pure negligence approach was first suggested by Dr. Hubert Smith in his article which discusses the relation of injury and disease to emotional upset.[56] In this celebrated work, Dr. Smith advocated that liability should be predicated on a finding that the defendant's conduct caused a substantial and unreasonable risk of emotional harm to a normal person in the plaintiff's position.[57] An important truth about the possible negligence standard is that "the jury reaches the question of the breadth of the zone of emotional risk in the particular case as a factual determination, and since the standards with which it must work are vague, it retains a greater degree of discretion than under the artificial limitations of the traditional approaches."[58]

A similiar approach to this problem has been suggested by The American Law Institute's Restatement of Torts section 436, which reads:

> (1) If the actor's conduct is negligent as violating a duty of care designed to protect another from a fright or other emotional disturbance which the actor should recognize as involving an unreasonable risk of bodily harm, the fact that the harm results solely through the "internal operation" of the fright or other emotional disturbance does not protect the actor from liability.
>
> (2) If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to another otherwise than by subjecting him to fright, shock, or other similar and immediate emotional disturbance, the fact that such harm results solely from the internal operation of fright or other emotional disturbance does protect the actor from liability.
>
> (3) The rule stated in Subsection (2) applies where the bodily harm to the other results from his shock or fright at harm or peril to a member of his immediate family occurring in his presence.[59]

56. Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944).

57. *Id.*

58. Note, *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases*, 35 U. CHI. L. REV. 512, 528 (1968).

59. RESTATEMENT (SECOND) OF TORTS §436 (1965).

The drafters of the restatement, by use of a caveat leave open the question of whether subsection (3) applies to one not a member of the plaintiff's immediate family.[60] Also the drafters have left open the question dealing with the necessity for actually witnessing the injury, but state that if the plaintiff is a stranger or does not witness the accident, liability may be denied because of "administrative policy" and "uncertainty as to genuiness."[61]

Prosser states that regardless of what standard is adopted for deciding whether the plaintiff is to recover or not, there must be some limitations.[62] "It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one man were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as his friends."[63] Thereafter, Prosser suggests his limitations which have been adopted by most commentators and the *Dillon* and *Archibald* courts.

These limitations are basically (1) that the injury must be a serious one; (2) that the action may be confined to members of the immediate family; and (3) that the plaintiff be present or learn of the accident fairly contemporaneously.[64] Such limitations are unquestionably arbitrary. However, as stated in *Dillon,* the hypothetical situations possible are endless, and, therefore, each case must be decided as it arises on its own separate facts.[65]

VII. CONCLUSION

The complex fields of mental anguish and recovery for traumatic mental injury by the bystander are fairly new areas of the law. The usual objections based upon a fear of fraudulent claims and the difficulty of proof have been raised throughout these areas. Many courts have slowly begun to realize that mechanical tests, such as the physical injury and zone

60. RESTATEMENT (SECOND) OF TORTS, Comment on Caveat to §436, comment *h* at 460.

61. *Id.* at 461.

62. *Supra* note 9 at 334.

63. *Id.*

64. *Id.*

65. Dillon v. Legg, 69 Cal. Rptr. 82, 441 P.2d 922 (1968).

of danger tests, cannot prevent the incidence of fraudulent claims. On the contrary, this writer suggests that a pure negligence standard will protect against these fraudulent claims. These courts are beginning to realize that the proof problems are "neither insurmountable nor unique to mental distress cases, and should not prevent a plaintiff from presenting his case in court."[66]

There is a small minority of decisions which has attempted to allow the mentally injured plaintiff-bystander a forum in which to prove his damages. However, the majority of the courts continue to disallow such mental injury claims. The minority decisions have had a positive effect in that they show that such cases can be proved and that the feared "flood" of fraudulent claims has not materialized. The major question which each court must face is whether its present position provides the best recompense the law can allow. "Our common law cannot hope to survive by stubborn adherence to decisions written for a different world. We cannot and should not apply seventeenth and eighteenth century rules to twentieth century conditions."[67]

It is this writer's belief that the aforementioned problems can be solved when the courts begin to look at the factual situations of each case and realize that only in those cases in which traumatic injury can be properly proved should recovery be allowed. However, as it has been in the past, most courts continue to throw out the valid injuries along with the fraudulent ones. The choice of direction is now squarely before the courts. They can no longer hide behind false tests and procedures. The evolution, although slow and awkward, has now progressed too far to retreat and hopefully will continue forward with improvement.

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66. Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1263 (1971).

67. Henderson v. Henderson, 11 Misc.2d 449, 456-57, 169 N.Y.S.2d 106, 115 (Kings County Sup. Ct. 1957).