You Had to Have Been There - A Survey of the California Courts' Treatment of the Tort of Negligent Infliction of Emotional Distress in the Medical Malpractice Area

Aideen M. FitzGerald
YOU HAD TO HAVE BEEN THERE! A SURVEY OF THE CALIFORNIA COURTS’ TREATMENT OF THE TORT OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IN THE MEDICAL MALPRACTICE AREA

I. INTRODUCTION

The streets of east Los Angeles are filled with the ever-present sense of death. The clattering of shoes running through the alleys and the faint sound of a siren are all that is heard. You are notified by the police that your brother has been a victim of gang warfare. Rushing to the scene of the crime, you arrive just in time to see your brother being placed on a gurney. You hurry to his side, only to hear him utter that “everything will be fine.” Within a few seconds, the paramedics give your brother an injection. Suddenly, as you watch, his body goes into convulsions, the paramedics quickly place him in the back of the ambulance and rush to the nearest hospital. Two hours later, your brother is pronounced dead.

Unbeknownst to you, the paramedics accidentally administered the wrong concentration of epinephrine,¹ and as a result, your brother suffered a massive heart attack. You were completely unaware of the negligence at the time of its occurrence. Can you recover for emotional distress caused by the negligent paramedics?

In the past, such claims have received disparate treatment by the courts. Over the last several decades, the tort of negligent infliction of emotional distress (NIED) has undergone a dramatic transformation.² Because confusion and uncertainty

¹ Epinephrine is a potent stimulant—also known as adrenaline. The use of this drug causes increased heart rate. Epinephrine is generally prescribed in the treatment of bronchial asthma, acute allergic disorders and heart block. STEDMAN’S MEDICAL DICTIONARY 476 (5th unabr. law. ed. 1982).

² See generally William Winter, A Tort in Transition: Negligent Infliction of Mental Distress, 70 A.B.A. J. 62, March 1984, at 62. In the past, some courts have allowed recovery for emotional distress as a parasitic tort attached to other primary causes of action when the defendant acted intentionally or recklessly; claims for mental distress without a physical impact requirement now have wider accep-
have surrounded the courts which have confronted the issue of bystander recovery, several courts have attempted to clarify specific instances in which recovery for NIED will be allowed.

This comment traces the evolution of the tort of NIED in bystander cases in California from its birth to the present. This period encompasses the transition from an era which saw no independent cause of action for a bystander who witnessed the egregious acts of a negligent defendant to an era with the widely accepted, rapidly changing tort of NIED. Specifically, this comment emphasizes the treatment of NIED claims by California courts in the area of medical malpractice.

The analysis focuses on the application of the bystander recovery rule in the medical context. This discussion also reveals the unresolved problems and difficulties facing the application of the tort of NIED to various medical claims. The analysis confronts the problem of identifying to whom a duty is owed, determining if that duty has been breached by the defendant and finally, deciding if the breach has caused the injury to the plaintiff. The issue of public policy is also factored


4. For a survey of the evolution of the negligent infliction of emotional distress [hereinafter NIED] tort in California, see infra notes 51-98 and accompanying text.

5. See infra notes 16-98 and accompanying text.

6. See infra notes 51-98 and accompanying text.

7. The focus of this comment primarily rests on the area of bystander recovery in NIED claims. This form of recovery concerns plaintiffs who witnesses the negligent acts of the defendant through their senses. The courts have created two parallel avenues of analysis, the bystander recovery and the direct victim recovery, which can both be applied to NIED causes of actions. Under the direct victim rule of recovery, a plaintiff is not required to have witnessed the negligent acts of the defendant but, rather, suffer emotional harm as a direct result of the negligent conduct. Schwarz v. Regents of the Univ. of California, 276 Cal. Rptr. 470 (Ct. App. 1990). For a complete discussion of the distinction between the bystander and direct victim rules of recovery, see infra notes 102-15 and accompanying text.

8. See infra notes 99-179.

9. For a discussion of the problem and the application of the tort of NIED to various medical claims, see infra notes 99-179 and accompanying text.
into the equation,\textsuperscript{10} to complete the analysis of the problems facing NIED claims in the medical context.

The structure of the analysis is divided into the various elements required to prove a NIED cause of action.\textsuperscript{11} Emphasis is placed on the element of duty and the numerous analytical and proof problems which stem from its application to medical cases.

In particular, the requirement of contemporaneous and sensory observation of the injury-producing event has raised debate when applied in the medical context.\textsuperscript{12} The most obvious problem is the fact that a misdiagnosis or malpractice is often not realized by the plaintiff until after the fact.\textsuperscript{13} The difficulty derives from a problem of perception: A plaintiff may not be physically capable of observing the defendant's negligent conduct, as in the context of over-radiation. Furthermore, a plaintiff may witness the negligent act but not realize its traumatic effect.

This comment proposes a new standard of review in bystander medical malpractice cases that shifts the analysis from the element of duty to that of causation.\textsuperscript{14} The proposed change adds clarity and predictability to the analysis of a NIED claim. The application of the proposal summarizes and dictates

\begin{footnotesize}
\begin{enumerate}
\item For a discussion of policy consideration, see infra notes 177-79 and accompanying text.
\item NIED is a negligence claim, and in that respect, all the elements required to prove a claim for negligence need also be present. The essential elements of an actionable tort in negligence are the existence of a legally protected right in favor of the plaintiff, a corresponding duty on the part of the defendant, breach of that duty by the defendant and injury proximately suffered by the plaintiff. 47 CAL. JUR. 2D Torts \S 4 (1959).
\item The focus of this comment mainly concerns the problems of contemporaneous/sensory observation in medical malpractice claims. For a complete discussion of the issue of observance, regarding the injury-producing event, see infra notes 135-69 and accompanying text.
\item See James D. McGinley, Comment, California Supreme Court Survey: April 1989-June 1989: To Recover as a Bystander Under a Theory of Emotional Distress, the Plaintiff Must Suffer Severe Emotional Distress as a Result of Actual Presence and Awareness at an Event Causing Injury to a Victim Closely Related to the Plaintiff: Thing v. La Chusa, 17 PEP. L. REV. 588 (1990). This comment discusses the more difficult situation which arises when the injury-producing event lasts several minutes, or even hours. Id. at 600.
\item For a discussion of the proposed idea to shift the emphasis from the element of duty to that of causation, see infra notes 180-82 and accompanying text.
\end{enumerate}
\end{footnotesize}
the effect that such a shift in the analysis will have upon potential claims for NIED.\textsuperscript{15}

II. BACKGROUND

A. Historical Trend of Bystander Recovery For Emotional Distress in California

Over the years, the tort of NIED has undergone many changes.\textsuperscript{16} Traditionally, bystander recovery was not available. However, a plaintiff could parasitically attach a claim for mental distress to another existing tort cause of action, such as wrongful death.\textsuperscript{17} Today, independent claims for mental distress in bystander situations have gained wide acceptance.\textsuperscript{18}

1. The Impact Rule

Historically, a plaintiff could not establish an independent cause of action for emotional harm. The only way that any plaintiff could maintain an emotional distress claim was to attach the cause of action to a pre-existing claim against the negligent defendant.\textsuperscript{19} Furthermore, a plaintiff was required to prove some sort of "physical impact."\textsuperscript{20} Tangible evidence of the physical impact was required as a means of preventing fraudulent claims.\textsuperscript{21} However, this goal was never achieved, as expansive application of the concept allowed even the slightest touching to satisfy the element of bodily harm.\textsuperscript{22} Yet, in other

\textsuperscript{15.} For an examination of the applied proposal, see infra notes 186-90 and accompanying text.


\textsuperscript{17.} See Winter, supra note 2 and accompanying text.

\textsuperscript{18.} See infra note 37 and accompanying text.

\textsuperscript{19.} See infra note 38.


\textsuperscript{21.} Wrazel, supra note 16, at 853. See also Keeton et al., supra note 20, at 363. This text discusses the theory that the requisite "impact" was supposed to afford the desired guarantee that the mental distress is genuine. Id.

\textsuperscript{22.} See RESTATEMENT (SECOND) OF TORTS § 456 cmt. a (1965). See also Wrazel, supra note 16, at 847. This comment also suggested that one of the problems with the physical impact rule is that the slightest physical impact could be used as a "springboard to get a bystander recovery case into court." Id. See, e.g., Kenney v. Wong Len, 128 A. 343 (N.H. 1925) (plaintiff's physical impact require-
situations, a person who truly suffered emotional disturbance was denied recovery because he/she could not prove a physical impact. Courts ultimately found that this artificial requirement did not properly limit frivolous actions or support valid claims.23

2. The Zone of Danger Rule

Recognizing the problems of the physical impact requirement, the California Supreme Court in its 1963 decision of Amaya v. Home Ice, Fuel & Supply Co.24 replaced the “physical impact” criterion with a locational requirement, known as the “zone of danger rule.”25 This new rule allowed bystanders to recover in situations where they were not physically impacted, but were located close enough to the accident to fear for their own safety.26 In such situations involving a negligent defendant and a third party, a plaintiff’s proximity to the accident was a determinative factor of recovery.27

This newly-established rule did not, however, sufficiently address all the situations of bystander recovery. Harsh application of this rule arbitrarily awarded recovery to one person witnessing an accident, while it denied compensation to another who had witnessed the same accident. The only difference between the two potential plaintiffs was their physical proximity to the accident, not the emotional impact of their observation.

3. Dillon v. Legg

In 1968, the California Supreme Court dramatically transformed the NIED analysis in its landmark decision of Dillon v.
The court replaced the arbitrary criteria of the "impact rule" and the "zone of danger rule" with a new set of guidelines to assist in determining whether a plaintiff, who was not a direct victim of the inflicted negligence, could recover under a "bystander" theory.29

In Dillon,30 a young girl was killed by a negligently driven automobile. Witnessing this gruesome accident were the decedent's younger sister and her mother. The sister, because of her close proximity to the accident, was deemed to be within the "zone of danger." The mother, on the other hand, was significantly out of the area in which she would fear for her own safety. Had the supreme court applied the prevailing "zone of danger rule," the infant sister would have been allowed to recover for the mental anguish of seeing her older sister perish as a result of the driver's negligence. Yet, the mother who witnessed the same accident would not have a valid claim simply because she was located outside the "zone."31

In allowing the mother to recover for mental distress, the Dillon court emphasized that the foreseeability of injury to the plaintiff is a crucial factor in determining whether a defendant owes a duty, the breach of which is compensable.32 In an effort to limit the potentially broad interpretation of this finding, the court established criteria designed to guide future courts in a case-by-case analysis of the issue at bar.33 These factors included:

1. Whether plaintiff was located near the scene of the accident, as contrasted with one who was a distance away from it.
2. Whether the shock resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence.
3. Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the

29. For a discussion of the difference between recovery as a "direct victim" and as a "bystander," see infra notes 102-15 and accompanying text.
31. Id. at 914-15.
32. Id. at 919.
33. Id. at 920.
presence of only a distant relationship.\textsuperscript{34}

The \textit{Dillon} court explicitly stated that other courts would have to "draw lines" to elicit areas of liability dependent upon the circumstances of each case.\textsuperscript{35}

4. \textbf{Post-Dillon Application}

Since its ruling, many courts, in various jurisdictions, have adopted the \textit{Dillon} guidelines.\textsuperscript{36} California courts have seen both an expansion and a restriction of liability regarding bystander recovery.\textsuperscript{37} With great foresight, the \textit{Dillon} court predicted a future of confusion in the area of NIED.\textsuperscript{38} Twenty-two years later, courts continue to interpret and arbitrarily apply the \textit{Dillon} criteria.\textsuperscript{39} The most recent California Supreme Court decision addressing bystander recovery problems is a 1989 case, entitled \textit{Thing v. La Chusa}.\textsuperscript{40} In an effort to eliminate some of the confusion and establish more definitive guidelines, the California Supreme Court revisited \textit{Dillon} and its progeny in order to assess its validity.

The primary objective of the \textit{Thing} court was to determine whether the \textit{Dillon} guidelines were sufficient or if they should be refined to "create greater certainty in this area of the

\textsuperscript{34} \textit{Id.}


\textsuperscript{36} \textit{See, e.g.}, Toms v. McConnell, 207 N.W.2d 140 (Mich. Ct. App. 1973) (a mother saw her daughter struck and killed by a truck); Leong v. Takasaki, 520 P.2d 758 (Haw. 1974) (a boy saw his step grandmother struck and killed by an automobile); D'Ambra v. United States, 358 A.2d 524 (R.I. 1975) (a mother saw her son struck and killed by a mail truck); Dzikonski v. Babineau, 380 N.E.2d 1295 (Mass. 1978) (a father suffered a heart attack upon learning of his daughter's injury in an auto accident and his wife's death from shock upon coming to the scene of the accident).

\textsuperscript{37} \textit{See infra} notes 51-98 and accompanying text.

\textsuperscript{38} Dillon v. Legg, 441 P.2d 912, 924-25 (Cal. 1968).

\textsuperscript{39} \textit{See supra} note 37. \textit{But see, e.g.}, Tobin v. Grossman, 249 N.E.2d 419 (N.Y. 1969) (a plaintiff who heard the accident and rushed to the scene where her daughter lay seriously injured, was denied recovery); Strickland v. Hodges, 216 S.E.2d 706 (Ga. Ct. App. 1975) (plaintiffs were notified later of their daughter's injury in an auto accident and denied recovery because they were neither physically contacted themselves, nor did they have actions willfully directed at them by the defendant); Shelton v. Russell Pipe & Foundry Co., 570 S.W.2d 861 (Tenn. 1978) (a plaintiff who was notified later of his daughter's injury in an auto accident was denied recovery because he was not within the zone of danger).

\textsuperscript{40} 771 P.2d 814 (Cal. 1989).
law." The Thing court initiated a trend towards limiting the circumstances under which a plaintiff may properly state a cause of action for emotional distress and subsequently recover damages. Specifically, the court attempted to dictate a limitation of bystander recovery of damages for NIED.

In Thing, a mother whose son had been struck by a car sought recovery for emotional distress. Although the mother was close to the accident scene, she neither saw nor heard the accident, but rather, learned of it from her daughter and rushed to the scene where she observed her "bloody and unconscious child."

The California Supreme Court held that the plaintiff could not state a cause of action for negligent infliction of emotional distress as a Dillon bystander, stating:

\[\text{[T]he societal benefits of certainty in the law, as well as traditional concepts of tort law, dictate limitation of bystander recovery of damages for emotional distress. In the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff: (1) is closely related to the injured victim, (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness.}\]

In concluding that greater certainty and more reasonable limits on exposure to liability were possible by narrowing the right of recovery only to plaintiffs who personally and contemporaneously perceived the injury-producing event and its traumatic consequences, the court noted that "[n]o policy supports extension of the right to recovery for [NIED] to a larger class of plaintiffs. Emotional distress is an intangible condition experi-

41. Id. at 815. The Thing court admitted to differing opinions within their own bench but believed that they could "resolve some of the uncertainty . . . that has troubled lower courts, litigants, and, of course, insurers." Id.
42. Id. See also infra notes 45-46 and accompanying text.
43. 771 P.2d 814 (Cal. 1989).
44. Id. at 817.
45. The second factor of Thing with its emphasis on present awareness, is the primary focus of the analysis. For a discussion regarding the observation criteria required in NIED claims, see infra notes 135-69 and accompanying text.
enced by most persons, even absent negligence, at some time during their lives."\textsuperscript{47}

The newly-adopted \textit{Thing} guidelines have reversed the trend of broad interpretations of bystander recovery. A plaintiff no longer has the flexibility of claiming emotional harm from contemporary perception of the injury. A strict application of the \textit{Thing} guidelines allows plaintiffs to recover if and only if they are present at the injury-producing event.\textsuperscript{48} In effect, all claims are eliminated if the plaintiff is not physically present to witness the negligent conduct of the defendant.\textsuperscript{49}

The underlying rationale behind the limitation of bystander recovery stems from the fear of falsified claims, drastic increases in litigation and arbitrary guidelines which may deny recovery for valid claims.\textsuperscript{50} These guidelines must be tested under different factual situations in order to assess whether the courts have accomplished their goal. One area ripe for reassessment is the area of medical malpractice.

B. Survey of California Courts' Treatment of the Bystander Recovery Rules in the Area of Medical Malpractice

California courts have addressed the issue of bystander recovery in the context of medical malpractice on several occasions.\textsuperscript{51} As in other tort situations, the courts have also experienced difficulty in establishing a consistent test for recovery of mental distress in the medical context. Since the ruling in \textit{Dillon}, subsequent decisions have reflected both broad and strict interpretations of its holding.\textsuperscript{52} Presently, the modern trend is towards limiting the situations under which NIED claims will prevail. The \textit{Thing} court initiated this new position

\textsuperscript{47} Id. at 828-29.

\textsuperscript{48} See supra note 39 and accompanying text.

\textsuperscript{49} The requirement that the plaintiff be present at the scene of the injury-producing event is reminiscent of the "zone of danger" rule to the extent that the plaintiff's recovery is contingent upon his or her location at the time of the injurious event. See supra notes 24-27 and accompanying text.

\textsuperscript{50} See generally Wrazel, supra note 16. This comment addresses four fears: (1) the courts will become overwhelmed with claims; (2) the potentially crushing financial liability; (3) the problem with respect to fraudulent/trivial claims; and (4) the difficulty in finding a rule that is not arbitrary. Id.

\textsuperscript{51} See infra notes 54-98 and accompanying text.

\textsuperscript{52} See supra notes 37 & 39.
and its impact has since filtered into the area of medical malpractice. 53

Prior to Thing, the courts' determination of a NIED cause of action in medical malpractice cases hinged upon the application of Dillon. The first instance where the Dillon theory was applied to a medical malpractice case, as opposed to the standard accident scenario, was in Jansen v. Children's Hospital Medical Center. 54 In Jansen, 55 the appellate court held that the plaintiff mother was not entitled to recover after watching her daughter die a slow death as a result of a misdiagnosis. 56 The court reasoned that "what was contemplated by Dillon was a sudden event lasting a short duration." 57 The decision emphasized the fact that an injury which occurs over a long period of time allows for emotional adaptation and adjustment, as opposed to the shock experienced with an abrupt impact. 58 This decision imposed a very literal application of the Dillon factors in its analysis.

Within the past decade the California Supreme Court has often confronted the issue of NIED in the medical realm. 59 Contrary to the narrow interpretation of the Jansen court, the supreme court in its 1980 decision in Molien v. Kaiser Foundation Hospital 60 focused primarily on the foreseeability issue addressed in Dillon. 61 The court allowed a husband to recover against his wife's doctor after a misdiagnosis of syphilis and further recommendation that the husband be tested for the disease. 62 The court explained that there existed a special relationship between the tortfeasor and the first party injured. 63 The defendant hospital and doctor owed a duty directly to the

54. 106 Cal. Rptr. 883 (Ct. App. 1980).
55. Id.
56. Id.
57. Id.
58. Id.
60. 616 P.2d 813 (Cal. 1980).
62. 616 P.2d 813 (Cal. 1980).
63. Id.
husband of the patient who had been erroneously diagnosed as having syphilis. Because of the doctor's misdiagnosis, which eventually resulted in marital discord, the husband was a "direct victim" of the doctor's negligence. The court emphasized that it was "reasonably foreseeable" and "easily predictable" that such an erroneous diagnosis would produce marital discord and emotional distress to a married patient's spouse.

Following the expansive trend suggested by Molien, the California Supreme Court sought five years later to refine the guidelines under which recovery would be permitted to a bystander in medical malpractice cases. In Ochoa v. Superior Court, the court granted recovery to a mother who witnessed the negligent handling of her sick son at a juvenile hall hospital.

The Ochoa court focused on the second prong of the Dillon test, requiring "direct emotional impact" from contemporaneous and sensory perception of the accident. Replacing this prong with another concept, the Ochoa court allowed recovery when the plaintiff observes both the defendant's conduct and the victim's injury and is contemporaneously aware that the injury is caused by the defendant's conduct or lack thereof.

The court held that requiring a brief and "sudden occurrence," such as an accident, imposed an unwarranted restriction on the Dillon guidelines and unduly frustrated the goal of

64. Id.
65. Id. See also John F. Hedrich & Davidson Ream, When Can a Bystander Recover? 32 FOR THE DEFENSE (August 1990), at 2-4. For a discussion of the "direct victim" versus the "bystander rule" and its problems, see infra notes 102-15 and accompanying text.
66. 616 P.2d 813, 817 (Cal. 1980).
67. Id.
68. Id.
69. Id. The parents of the decedent sued a juvenile facility for the emotional trauma which they experienced, on seeing their son's medical needs ignored by defendants, when they visited him. Their son had been admitted to the custody of Santa Clara juvenile hall, where he apparently caught a cold. He became progressively worse and was eventually diagnosed as having bilateral pneumonia. Mrs. Ochoa's request to have her son released and seen by her own physician was denied. Her son's condition continued to worsen. Mrs. Ochoa was forced to leave the infirmary, and never again saw her son alive. Id. at 5-6.
71. Ochoa v. Superior Court, 703 P.2d 1, 7 (Cal. 1985).
compensation. Through its decision, the court allowed a mother to recover for emotional distress even though the injury-causing event occurred over a long period of time. The court's analysis focused primarily on the mother's witnessing the malpractice, seeing its effect on her son and connecting the malpractice with the injury, despite the fact that the injury was ongoing.

Four years later, the California Supreme Court considered Molien's "direct victim" concept in Marlene F. v. Affiliated Psychiatric Medical Clinic. Focusing on the element of duty, the court held that two mothers could state a claim for emotional distress against a psychotherapist for molesting their sons although neither one was a bystander witness nor a direct victim of the tortious conduct. However, damages could be recoverable only if they established that the defendant "breached a duty owed to the plaintiff[s] that is assumed by defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two."

In Marlene F., two mothers and their sons were receiving counseling from the defendant psychologist. The purpose of the treatment was to help resolve "difficulties in the relationship between mother and son." During the course of the treatment, the psychologist sexually molested the boys. The mothers sued the psychologist for negligent infliction of emotional distress, claiming that the molestation of their sons caused them serious mental and emotional suffering and further disrupted their family relationships.

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72. Id. at 6.
73. Id. See also Thing v. La Chusa, 771 P.2d 814 (Cal. 1989) (the decision in Thing in effect overruled the holding in Jansen). See supra note 47 and accompanying text.
74. For a complete discussion on the comparison of "direct victim" and "bystander" recovery, see supra notes 102-15 and accompanying text.
75. 770 P.2d 278 (Cal. 1989). The plaintiff mothers brought their sons to the Affiliated Psychiatric Medical Clinic to obtain counseling for family emotional problems. It was later discovered that the boys had been sexually molested by their therapist. The mothers sued the clinic for further disruption of their family relationships and the emotional harm suffered. Id.
76. Id. at 280.
77. Id. at 282.
78. Id. at 278.
79. Id. at 279.
80. Id.
The California Supreme Court found that the psychologist had in essence committed malpractice not only against the sons, but also against the mothers.\(^81\) The court stressed that the mothers were also patients and that the purpose of their treatments was to help resolve intra-family difficulties.\(^82\)

Only seventeen days later, the California Supreme Court dramatically transformed the NIED guidelines established by *Dillon v. Legg*\(^83\) with its decision in *Thing v. La Chusa*.\(^84\) This case drastically reduced the situations under which a plaintiff could recover as a bystander for emotional distress. Although the facts of *Thing*\(^85\) were not in a medical context, the decision's impact has echoed throughout the holdings of medical malpractice cases, such as the appellate court's 1990 decision in *Golstein v. Superior Court*.\(^86\)

In *Golstein*,\(^87\) an eight year old boy, Dwight Golstein II, was diagnosed with curable cancer.\(^88\) He underwent radiation treatments for his cancer at Children's Hospital of Oakland, under the care of the treating doctor.\(^89\)

Due to the negligence of the doctor, Dwight received an overdose of radiation which eventually caused his death.\(^90\) Petitioners did not observe the radiation overdose, nor were they aware that their son was being overexposed.\(^91\) However, they were "present and witnessed the results of" the negligent over-radiation.\(^92\) They observed the "'grotesque, deteriorating and worsening condition' of their son 'on a daily basis and observed [his] injuries, suffering and pain . . . up to the time of his death."\(^93\) Thereafter, petitioners sought damages for

\(^81\) Id. at 283 n.6.
\(^82\) Id. at 282.
\(^83\) Dillon v. Legg, 441 P.2d 912 (Cal. 1968).
\(^84\) Thing v. La Chusa, 771 P.2d 814 (Cal. 1989). For a discussion of the impact of *Thing* upon the tort of NIED, see supra note 13, at 588.
\(^85\) Thing v. La Chusa, 771 P.2d 814 (Cal. 1989).
\(^87\) Id.
\(^88\) Id. at 271.
\(^89\) Id.
\(^90\) Id.
\(^91\) Id.
\(^92\) Id. at 272.
\(^93\) Id.
wrongful death and for NIED based on the observation of their son's slow deterioration and eventual death.\textsuperscript{94}

Applying the newly-adopted \textit{Thing} guidelines, the \textit{Golstein} trial court sustained a demurrer without leave to amend the complaint on the issue of NIED, reasoning that petitioners did not state a cause of action because they "neither contemporaneously observed with their senses the injury-causing event which caused injury to Dwight, nor had an understanding of the consequences of that event."\textsuperscript{95}

On appeal, the court affirmed the decision of the trial court, stating that the supreme court ruling in \textit{Thing} dictates that the plaintiff must be "'present at the scene of the injury-producing event at the time it occurs and ... then aware that it is causing injury to the victim.'"\textsuperscript{96} Thereafter, petition for writ of mandate was denied.\textsuperscript{97}

III. ANALYSIS

It is evident from an examination of the above-discussed cases that an analysis of the NIED tort is a complicated task. In order to properly scrutinize this tort in the context of medical malpractice cases, it is necessary first to return to the traditional tort principles of duty, foreseeability and causation. Thereafter, public policy should be considered before completing a thorough study of this area.

A. The Application of the Bystander Recovery Rule in Medical Malpractice Cases

Generally, for a plaintiff to recover under a negligence theory, he/she must first establish that the defendant owes a duty which has been breached by defendant's negligent conduct and that this unreasonable conduct was the proximate cause of the plaintiff's injury.\textsuperscript{98} This assessment can be difficult in the area of medical malpractice because the application often becomes complex when the element of duty is extended

\begin{itemize}
  \item \textsuperscript{94} Id.
  \item \textsuperscript{95} Id.
  \item \textsuperscript{96} Id. at 278 (quoting \textit{Thing} v. La Chusa, 771 P.2d 814, 829 (Cal. 1989) (footnote omitted)).
  \item \textsuperscript{97} 273 Cal. Rptr. at 270 (Ct. App. 1990).
\end{itemize}
to third parties or, because of a special relationship between the defendant and the bystander plaintiff, is imposed as a matter of law. Only after the establishment of a duty can a proper analysis of causation be considered.

B. **The Problem of Establishing a Duty in Medical Malpractice Cases**

An analysis of the duty element begins with an examination of the relationship between the negligent defendant and the plaintiff. This process encompasses a study of the concept of foreseeability and related case law which dictates the appropriate guidelines used to determine whether a duty exists.

1. **To Whom is the Duty Owed?**

   The difficulty in assessing the element of duty in medical cases often arises from the problem of identifying to whom that duty is owed. A duty may be owed solely to a patient.\(^9^9\) In other circumstances, a duty may be imposed on a physician, as a matter of law, resulting from a special relationship between the doctor and the patient. If this special relationship exists, the doctor may, by the nature of the commitment, owe a duty to more than one person, such as other family members.\(^1^0^0\) When a doctor makes a diagnosis of a family member, it is likely to affect all other members. It is quite apparent that a duty in the medical context could become rather expansive.

   a. **Bystander v. Direct Victim Distinction**

   Case law has developed two parallel theories of recovery to describe the relationship between the plaintiff and the defendant. A plaintiff can either be characterized as a "direct victim" or a "bystander."\(^1^0^1\) The "direct victim" is a plaintiff

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99. *Restatement (Second) Of Torts* § 314A (1965) (this duty is imposed as a matter of law in the form of the physician/patient relationship).

100. *Id.* For a good discussion of the physician/patient relationship and the duties extending from that relationship, see Tarasoff v. Regents of the Univ. of California, 551 P.2d 334 (Cal. 1976) (discussing the question of whether a relationship between a doctor and a patient gave rise to a possible duty on the part of the therapist to the "victim" of the patient).

who has suffered emotional injury as a direct result of a
defendant's negligent conduct, whereas a "bystander" is one
who has witnessed the injury caused by that defendant.\(^\text{102}\)

The *Molien* court developed the line of cases known as the
"direct victim." In *Molien*,\(^\text{103}\) the supreme court held that the
defendant hospital and doctor owed a duty to the husband of
a patient who was erroneously diagnosed as having syphilis.\(^\text{104}\)
The court stated that it was "reasonably foreseeable" and "easi-
ly predictable" that the husband would be impacted by the
doctor's negligent conduct.\(^\text{105}\) Therefore, the husband could
recover as a "direct victim" of the doctor’s negligence, despite
the absence of physical injury and direct observation.\(^\text{106}\)

b. Recent Application of the "Direct Victim" Analysis

In *Ochoa*,\(^\text{107}\) the supreme court further expounded on the
notion of “direct victims.” In its 1985 decision, the court at-
ttempted to explain and limit “direct victim” recovery.\(^\text{108}\) A
mother, who witnessed her son's negligent medical treatment
while confined in a juvenile facility, was not a "direct victim" of
defendant’s negligence, such as to enable her to state a cause
of action under the "direct victim” theory.\(^\text{109}\) The defendant’s
negligence was directed at the decedent, not the plaintiff
mother.\(^\text{110}\) However, the court reasoned that the mother was
a foreseeable plaintiff, and thus, the defendant owed a duty of
care to her as a *Dillon* "percipient witness."\(^\text{111}\)

Four years later, the California Supreme Court once again
considered the concept of “direct victim” recovery in *Marlene
F.*\(^\text{112}\) Focusing on the special relationship between the psychi-
atrist and the mothers, the court reasoned that the doctor

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\(^\text{102}\) *Id.*


\(^\text{104}\) *Id.* at 820.

\(^\text{105}\) *Id.*

\(^\text{106}\) *Id.* at 819. For a good discussion of the “direct victim” concept, see
Stephan P. Bedell et al., *Negligent Infliction of Emotional Distress in Illinois: A “Fore-


\(^\text{108}\) *Id.* at 9-10.

\(^\text{109}\) *Id.*

\(^\text{110}\) *Id.*

\(^\text{111}\) *Id.* at 10.

\(^\text{112}\) *Marlene F. v. Affiliated Psychiatric Medical Clinic*, 770 P.2d 278 (Cal.
1989).
would be liable to the mothers, as "direct victims," for the emotional distress he caused her by molesting their sons.\textsuperscript{113} The court rationalized that since the purpose of the medical attention was to resolve intra-family difficulties, it would be reasonably foreseeable that the mothers would be affected by this behavior.\textsuperscript{114}

2. The Foreseeability Factor as a Component of Duty

The foreseeability element is not restricted to a "direct victim" analysis. In bystander situations, as addressed in \textit{Dillon}, the courts have also found it necessary to factor foreseeability into the duty equation. In the area of medical malpractice, it is reasonably foreseeable that a close family member will be significantly impacted by a misdiagnosis. For example, if a doctor erroneously diagnosed a spouse as having AIDS, the immediate emotional distress arising out of this misinformation is readily apparent.\textsuperscript{115} In this situation, the physician could possibly be faced with a NIED claim.

The \textit{Dillon} decision emphasized that the "foreseeability of risk [is] of . . . primary importance in establishing the element of duty."\textsuperscript{116} The court believed that the duty owed to a plaintiff in NIED cases could be determined by applying the three proposed guidelines\textsuperscript{117} and deciding if "the accident and harm [were] reasonably foreseeable."\textsuperscript{118}

Post-\textit{Dillon} decisions have expanded this concept so that the foreseeability factor has become the sole ground upon which duty is determined.\textsuperscript{119} In an attempt to limit this ex-

\begin{itemize}
  \item \textsuperscript{113} \textit{Id.} at 282-83.
  \item \textsuperscript{114} \textit{Id.}
  \item \textsuperscript{115} The spouse in this example may be potentially distinguishable from the plaintiff-husband in \textit{Molien} since the latter was recommended to be tested; see supra note 62 and accompanying text.
  \item \textsuperscript{116} \textit{Dillon v. Legg}, 441 P.2d 912, 923 (Cal. 1968) (quoting \textit{Grafton v. Mollica}, 42 Cal. Rptr. 306, 310 (Cl. App. 1965)). The court commented that: "[s]ince the chief element in determining whether a defendant owes a duty or an obligation to [a] plaintiff is the foreseeability of the risk, this factor will be of prime concern in every case." \textit{Id.} at 919.
  \item \textsuperscript{117} \textit{Id.} at 920.
  \item \textsuperscript{118} \textit{Id.} at 921.
  \item \textsuperscript{119} The \textit{Thing} court commented that:
    Post-\textit{Dillon} decisions have now permitted plaintiffs who suffered emotional distress, but not resultant physical injury and who were not at the scene of and thus did not witness the event that injured another,
pansive application of the foreseeability concept, the Thing court recognized that "foreseeability of injury, alone, does not justify imposition of liability." Considering other policy factors, the Thing court established its own new test for bystander recovery. The potentially broad spectrum of plaintiffs and the role of foreseeability have suggested that there is a need to establish certain limits to this NIED cause of action. It is clear that there must be some point at which to restrict liability. However, it is difficult to determine at which point to place this limitation. The Dillon court attempted to define this point by establishing guidelines which would limit the situations in which a defendant had a duty to a plaintiff.

3. The Impact of the Dillon Guidelines as an Aid in the Determination of the Duty in Medical Malpractice Cases

Coupled with the traditional limitations set forth by the foreseeability concept, the Dillon court established guidelines to assess the duty owed to a plaintiff. These factors were to be used in a case-by-case analysis.

However, the application of the Dillon guidelines has led to many arbitrary and ad hoc decisions. Courts have both expanded and restricted their interpretation of Dillon, leaving no clear lines by which one could reasonably predict the outcome of a NIED case. The intent of the Dillon court was to establish guidelines which would assist in the determination of a duty. Unfortunately, these guidelines have proven to be unworkable when applied to various situations, particularly in the medical context.

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122. Id. at 919-20.
123. The flexibility of the Dillon guidelines has allowed for broad interpretations. See supra notes 37 & 39 and accompanying text. See, e.g., Krouse v. Graham 562 P.2d 1022, 1029 (Cal. 1977); but see, e.g., Hoyem v. Manhattan Beach City Sch. Dist., 585 P.2d 851, 859 (Cal. 1978).
124. See supra notes 37 & 39 and accompanying text.
a. Physical Manifestation Requirement

_Dillon_ originally required a physical manifestation of emotional distress.\(^{127}\) The plaintiff would have to allege some sort of physical harm in the complaint.\(^{128}\) However, early interpretations of _Dillon_ paid little attention to this requirement. Ultimately, the court in _Molien_ rejected this criterion arguing that there was no valid connection between the psychological effect and physical manifestation of the injury.\(^{129}\) Furthermore, with advances in science, some agree it may be easier to prove emotional harm without requiring actual physical injury.\(^{130}\) The _Molien_ court replaced this requirement with a severity test by which a plaintiff must prove the degree of emotional harm.\(^{131}\) Later, the _Thing_ court echoed the need to prove the severity of emotional distress. As one of its newly-adopted guidelines, the _Thing_ court required the type of emotional harm beyond that which "would be anticipated in a disinterested witness," but required no physical manifestation of emotional harm.\(^{132}\)

b. Close Relationship to Victim

The only _Dillon_ limitation which has survived harsh criticism is the element of a close relationship between the victim and the bystander.\(^{133}\) This element is relevant to both the foreseeability concept and to limit the number of potential plaintiffs who seek recovery for emotional distress. The general feeling is that one will not be as severely distressed by witnessing a stranger's injury. Admittedly, it may be a tragic sight, but the impact is not the same as witnessing the pain of a loved one.

\(^{127}\) Id.
\(^{128}\) Id.
\(^{131}\) _Thing_ v. La Chusa, 771 P.2d 814, 822 (Cal. 1989).
\(^{132}\) Id. at 829.
\(^{133}\) _Dillon_ v. Legg, 441 P.2d 912, 920 (Cal. 1968).
c. Observing the Injury

The most problematic element of Dillon, the requirement of contemporaneous and sensory observation of the accident, is set forth in the second prong of the guidelines.\textsuperscript{134} This element has undergone extensive interpretation. As seen in Thing,\textsuperscript{135} the supreme court replaced the second factor of Dillon\textsuperscript{136} with a more clear-cut element. Under these new guidelines\textsuperscript{137} plaintiffs may recover, if and only if he/she is present at the injury-producing event.\textsuperscript{138}

Admittedly, the factual patterns in both of these cases are distinguishable from those of a medical malpractice suit. However, these criteria have been adopted and applied to medical cases to assist in the determination of a duty.

Focusing primarily upon the requirement of contemporaneous and sensory perception, much of the difficulty arises from an examination of a plaintiff witnessing a physician's negligent medical treatment of a third party. Often, there is a problem with witnessing/observing the negligence, since many events are humanly unobservable, like radiation therapy. Moreover, observers are not commonly present (or allowed to be present) for many observable procedures.\textsuperscript{139}

The problem stems from the fact that observation is difficult to define when the result of the negligence does not occur instantaneously, as it would in an auto accident. In the latter situation, the plaintiff can immediately see the bloody victim lying helplessly on the tarred pavement. In the former, a patient may not be affected by the negligent conduct of a doctor until several hours or days after the negligence has

\textsuperscript{134} The second prong of Dillon relates to contemporaneous and sensory perception; see supra note 34 and accompanying text. This requirement has undergone the most severe scrutiny. Courts have applied both broad and narrow interpretations of this element. As a result, a closer look at this guideline must be taken.

\textsuperscript{135} Thing v. La Chusa, 771 P.2d 814 (Cal. 1989).

\textsuperscript{136} Dillon v. Legg, 441 P.2d 912 (Cal. 1968).

\textsuperscript{137} Thing v. La Chusa, 771 P.2d 814 (Cal. 1989).

\textsuperscript{138} Id. at 829.

\textsuperscript{139} There are certain medical procedures where persons, other than the patient, are not allowed to be present. These procedures range from major surgery to simple x-rays.
occurred. Thus, it is necessary to take a closer look at the observation criterion.

1) How Was the Injury Observed?

A general requirement for potential plaintiffs seeking to recover emotional distress is that they be a "percipient witness." The term encompasses those plaintiffs who perceive the injury through their senses. The Dillon court required close, sensory observation, which is a direct perception of the event, as contrasted to learning about the accident from a third person.

The problem pertaining to direct perception is even more complicated in the medical context. Unfortunately, many injuries incurred in that context are invisible, such as those resulting from radiation. Some take a long time to have an effect, like failing to diagnose an illness. This makes observation difficult or humanly impossible.

It is evident that there are problems regarding the requirement of perception of the injury. A number of factors must be considered to determine whether the plaintiff perceived the tortious act. For example, was the plaintiff present when the resulting injury occurred? Did the plaintiff ob-

140. See Michael P. Goughan, Comment, Frame v. Kothari: May Plaintiffs Recover in New Jersey for the Emotional Distress Suffered Due to the Negligent Misdiagnosis of Third Persons, 35 VILL. L. REV. 477 (1990). This comment discussed the difficulty in allowing third party recovery for medical misdiagnosis cases. "The nature of a misdiagnosis is such that its results may neither manifest themselves immediately nor be shocking. Hours, days, or months may separate a diagnosis, the manifestation of the injury to the patient, and the family member's observation of the injury." Id. at 484 (quoting Frame v. Kothari, 560 A.2d 675, 678 (N.J. 1989)).

141. The theory derived from the Dillon case has come to be known as the "percipient witness" theory. Under this revolutionary theory, bystanders who were once denied recovery for emotional distress were now eligible to receive damages if they satisfied the necessary requirements. Hedrich & Ream, supra note 65, at 2.

142. Hedrich & Ream, supra note 65, at 2.


144. This problem was raised by the petitioner in Golstein and was questioned during oral arguments. However, the petitioner was unable to present a distinction between the case at bar and a situation where the injury is witnessed by the plaintiff but the plaintiff does not see or meaningfully comprehend the actual injury-causing event. Golstein v. Superior Court, 273 Cal. Rptr. 270, 278 n.3 (Ct. App. 1990).

145. The court in Mobaldi addressed this issue holding: "[i]t is observation of the consequences of the negligent act and not observation of the act itself that is likely to cause [severe] emotional trauma." Mobaldi v. Regents of the Univ. of
serve the negligent act itself? Was it humanly possible to observe the injury? These are all important questions to ask when addressing the manner of observation.

Considering all of these variables, it is easy to understand why there has been confusion in the courts over the requirement of contemporaneous observation. However, most courts do allow recovery only when the plaintiff has observed an injury-producing event. It is not essential that visual observation be found as long as the plaintiff realizes how the harm has come to the third person.

The Thing court established clearer guidelines by replacing the requirement of contemporaneous perception with the presence of the plaintiff at the injury-causing event. This rigid requirement eliminates any potential plaintiff who was not at the site of the injury. Unfortunately, the court did not specifically address the case of invisible injury-causing events, which often occur in instances of medical malpractice.

The Golstein decision was the first application of the new Thing criterion to the medical field. The case concerned the very issue of invisible injury. The court's decision emphasized the Dillon component of perception regarding the injury-causing event, by denying compensation in cases where an event cannot be perceived. The court held that a plaintiff must "experience a contemporary or sensory awareness of the causal connection between the negligent conduct and the resulting injury." Furthermore, applying Thing, a plaintiff must be "present at the scene of the injury-producing event at

146. The Golstein court considered the issue when an injury could not be perceived or could not be perceived with meaningful understanding. Golstein v. Superior Court, 273 Cal. Rptr. 270 (Ct. App. 1990).
147. See, e.g., Jansen v. Children's Hosp. Medical Ctr., 106 Cal. Rptr. 883 (Ct. App. 1980); see supra notes 54-58 and accompanying text.
148. See, e.g., Krouse v. Graham, 562 P.2d 1022 (Cal. 1977) (The plaintiff saw a car approaching at a high speed and knew that his wife was at the rear of his door. The court concluded that the husband was a percipient witness because, even though he did not actually see his wife killed, he realized how the harm had come to his wife.) Id.
151. Id. at 271.
152. Id. at 278.
the time it occurs and... then aware that it is causing injury to the victim."\textsuperscript{153}

As a result of this outcome, the Golstein court has set forth a strict requirement of knowledgeable observation in the area of medical malpractice. According to the Golstein court, a plaintiff must observe and understand the defendant's malpractice in order to recover for emotional distress, something that may not be humanly observable.\textsuperscript{154}

2) \textbf{What Was the Subject of the Observation?}

Another problem which arises from the Dillon application stems from the subject matter of the plaintiff's observation. The Dillon court did not distinguish whether the witness must observe the negligent act, the result, or both.\textsuperscript{155} The court simply required "observation of the accident."\textsuperscript{156}

The Thing court attempted to clarify this question by placing a definite emphasis on the presence of plaintiffs at the injury-producing event and requiring that they also be aware of its traumatic consequences.\textsuperscript{157} All plaintiffs who were not at the injury-causing site will be denied recovery.

Golstein appears to have adopted and applied this rigid requirement in the medical context.\textsuperscript{158} The appellate court denied recovery to the parents of a decedent minor who died as a result of the negligent administration of an overdose of radiation. The court reasoned that since the plaintiffs did not observe the radiation overdose and further admitted that during the radiation therapy they were unaware that their son was being overexposed, they should be denied recovery.\textsuperscript{159} The

\textsuperscript{153} Id.

\textsuperscript{154} Id. at 272.


\textsuperscript{156} Dillon v. Legg, 441 P.2d 912, 920 (Cal. 1968).

\textsuperscript{157} Thing v. La Chusa, 771 P.2d 814, 829 (Cal. 1989).

\textsuperscript{158} See supra notes 151-55 and accompanying text. In dictum, the Golstein court commented on the Mobaldi holding which analyzed the subject of the plaintiff's observation. In Mobaldi, the court proclaimed that "observation of the consequence of the negligent act itself is 'likely to cause trauma so severe' as to allow recovery." Golstein v. Superior Court, 273 Cal. Rptr. at 274 (quoting Mobaldi v. Regents of the Univ. of California, 127 Cal. Rptr. 720 (Ct. App. 1976), disapproved in part on unrelated grounds, Ochoa v. Superior Court, 703 P.2d 1 (Cal. 1985)).

\textsuperscript{159} Golstein v. Superior Court, 273 Cal. Rptr. 270 (Ct. App. 1990).
Golstein court reasoned that the "true basis for recovery appears to be the presence of the plaintiff witnessing the immediate, and egregious, [sic] results of the defendant's unseen negligence."\(^{160}\)

3) When Was the Injury Observed?

The Dillon court required contemporaneous observation of the tortious event.\(^{161}\) However, several courts have both accepted and modified that requirement.\(^{162}\)

In Jansen,\(^{163}\) the court denied recovery for a plaintiff who observed the "injury" of a child's slow and painful death, due to malpractice but did not "observe" the "accident."\(^{164}\) The Jansen court ruled that the injury-producing event itself must be observed and the event must be of a "sudden" and brief nature capable of sensory perception.\(^{165}\)

Overruling Jansen and replacing the second prong of Dillon, the Ochoa court reasoned that requiring a "sudden occurrence" such as an accident imposed an unwarranted restriction on the Dillon guidelines and unduly frustrated the goal of compensation.\(^{166}\) The court replaced the old Dillon requirement with a new test providing that a plaintiff must observe both the plaintiff's misconduct and the victim's injury and be contemporaneously aware that the injury is caused by defendant's conduct or lack thereof.\(^{167}\)

The Thing court accepted the rigid suggestion of the Ochoa decision concerning contemporaneous awareness.\(^{168}\) In effect, this guideline limits recovery by the timeliness of the observation. Golstein has subsequently adopted this contemporaneity criterion.

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160. Id. at 271.
162. See infra notes 164-69 and accompanying text.
164. Id. at 24. See also Golstein v. Superior Court, 273 Cal. Rptr. 270 (Ct. App. 1990).
166. Ochoa v. Superior Court, 703 P.2d 1, 7 (Cal. 1985).
167. Id.
d. Proximity Requirement

The third *Dillon* guideline focuses on proximity. The location of a plaintiff to the accident was a determinative factor in the duty analysis. However, the nearness of a plaintiff to the injured victim often does not accurately reflect the emotional trauma suffered. A mechanical application of this requirement would deny recovery to those familial relations who are not within a certain spatial distance.

In the situation of a car accident, this factor may have some merit. It is more shocking to be located close to the scene as opposed to some distance away. By comparison, the same rationale can be applied to the medical context. The impact of being in the same room as the victim when the injury is inflicted may be more severe than sitting in the waiting room.

However, this concern was again addressed by the second factor of *Thing*. The court in *Thing* adopted a similar requirement that the plaintiff be present at the injury-causing event and then aware that it is in fact causing the injury. This locational requirement will limit recovery to those according to proximity. In addition, this case emphasized the causal connection between the injury and the effect of the injury.

C. A Causation Problem: Awareness of the Injury-Producing Event

Having discussed the duty requirement, we must now turn to the issue of causation, another necessary element in a negligence cause of action. If the defendant breaches a duty of due care owed to the plaintiff, the next factor which must to be proven is that the injuries suffered were caused by that defendant’s breach.


170. The second factor of *Thing* allows recovery if and only if the plaintiff is “present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim.” *Thing v. La Chusa*, 771 P.2d 814, 817 (Cal. 1989).

171. *Id.*

172. In effect, this requirement will eliminate all potential plaintiffs who are not present when the negligent act occurs.
The flexibility allowed by Dillon and subsequent courts regarding the element of duty has both positive and negative attributes. Generally, a broad interpretation of the Dillon guidelines could afford recovery in many situations. Plaintiffs who were neither "bystanders" at the scene of the injury causing event nor "perceptual witnesses" who observed the defendant's negligent conduct have been allowed to recover under NIED. However, arbitrary attempts to limit the duty owed by a defendant have proven unsuccessful. Therefore, the element of causation may prove to be a more effective limitation on potential plaintiffs.\footnote{173}

The Golstein court, adopting the newly acquired Thing guidelines, decided that the plaintiff must be "present at the scene of the injury producing event at the time it occurs and . . . then aware that it is causing injury to the victim."\footnote{174} This case illustrates one of the first instances where the plaintiff was required to appreciate the injury at the time of its occurrence. The Golstein court emphasized the "causal connection" between the accident and the injury.\footnote{175} This connection forces a plaintiff to observe the malpractice and realize at the time that the act is actually causing the injury to the third party. This last requirement eliminates many potential claims.

Not only must plaintiffs be present, but they must also understand the impact of the injury. This is a critical factor in the analysis of a NIED claim. Previously, courts have placed their primary focus on the duty owed to plaintiffs, and have attempted to limit liability by curtailing the duty that a negligent defendant owed to potential plaintiffs. Perhaps shifting the focal point from duty to causation will close the valves to the floodgates of emotional harm litigation and eliminate the problem of fraudulent claims in NIED cases.

As in all tort cases, causation is a prima facie element of recovery. If a plaintiff is unable to prove the direct connection between the injury to the victim and the resulting emotional harm, recovery should be denied.

\footnote{173. For a discussion on the effect of shifting the focal point from the element of duty to that of causation, see infra notes 180-82 and accompanying text.}
\footnote{175. Id. at 271.}
The emphasis is not on how the negligent act affected the victim but rather its effect on the plaintiff-bystander. If the plaintiff-bystander was unaware of the negligent act at the time of its occurrence, compensation should be denied.

D. Policy Considerations

After establishing all the necessary tort elements, public policy must also be considered. Public policy plays an important role in our legal system and can greatly impact a court’s decision. In NIED situations, there has been a constant battle over the desire to compensate deserving plaintiffs and the logistical need to reduce the scope of claims, many of which are tenuous.\textsuperscript{176} Several factors must be taken into consideration: the cost of increased litigation, the increased effect on insurance expenses, the overburdening of the judicial system and the genuine claim of an injured plaintiff.\textsuperscript{177} All of these considerations are critical to an analysis of a NIED claim.

The impact of \textit{Thing} will be a “dramatic[] cut back on emotional distress claims” by narrowing the number of potential plaintiffs.\textsuperscript{178} As a result, the claims of some deserving plaintiffs may also be eliminated because they cannot meet one of the established requirements. These policy considerations must be taken into account when facing a NIED cause of action.

IV. PROPOSAL

There has been significant judicial interpretation regarding the element of duty and several attempts to impose limitations thereon. Unfortunately, these efforts have produced inconsistent results. There is consequently a need to shift the focal point from the area of duty to that of causation.

\textsuperscript{176} For a good discussion on the underlying policy reasons, see Wrazel, supra note 16 and accompanying text.

\textsuperscript{177} See Wrazel, supra note 16 and accompanying text.

\textsuperscript{178} Thing v. La Chusa, 771 P.2d 814 (Cal. 1989).
A. Causal Connection

The emphasis on causation should replace the prior attention given to duty. As seen in one of the most famous tort cases, *Palsgraf v. Long Island Railroad Company*, a major area of conflict is whether to analyze an issue as one of “duty” or one of “proximate cause.” As Chief Justice Cardozo suggested, the proper emphasis is on the legal cause, while Justice Andrews approached the issue as a question of duty.

Causation is the most important factor in determining if recovery should be granted for emotional distress claims. The plaintiff not only must be present or directly affected by the defendant’s negligent act, but must also be aware and appreciate that the negligent act caused the injury. This causal connection should be the determinative factor in all NIED cases. Absent a showing of causation, recovery should be denied.

The rationale for shifting the emphasis of the analysis to causation is to limit the vast number of potential plaintiffs in a more defined and fair way. The courts have struggled for over twenty years to achieve an equitable solution to this problem. Reinterpretation of this area of the law has been inconclusive. Thus, an attempt to refocus the judicial attention to causation may help in solving some of the problems of NIED claims.

The Golstein court has set the stage by applying the new criterion established in *Thing* which calls for awareness of the injury in connection with the negligent act of the defendant. This shift in analysis appears to indicate a new trend toward a focus on causation.

Based on this analysis, the immediacy of the causal connection is of utmost importance. A plaintiff must not only be aware of the negligent conduct but also that such actions are concurrently causing the injury. This connection is necessary to satisfy the severity of shock required to prove a prima facie case of NIED.

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179. 162 N.E. 99 (N.Y. 1928).
180. Id.
B. **Duty**

Simply the fact that a plaintiff establishes a causal connection does not eliminate the need to prove the other elements of a NIED cause of action. With respect to duty, one must consider whether there is a relationship between the victim and the plaintiff. This common bond is either in the form of familial ties or other special relationships. The importance of establishing a duty is to determine if the defendant has breached that duty. In the case of NIED the duty is usually owed to a bystander. Therefore, the foundation of the duty must be stated through any of the above-stated relationships, or imposed as a matter of law.

C. **Foreseeability**

Factoring into this element of duty is the concept of foreseeability. As the *Thing* court suggested, foreseeability of injury, standing alone, is not the sole guideline for establishing a NIED action. This flexible concept of foreseeability has opened Pandora's box, as to the ease with which one may prove a cause of action under NIED.

For example, the foreseeability aspect of the duty analysis will allow both a mother, who is holding her baby while the reaction to an overdose of drugs takes affect, and a wife, who has just heard the misdiagnosed information that her husband has AIDS, to recover. In the first instance, the mother's presence alerts the doctor to his responsibility of care toward her through her baby. In the latter, it is reasonably foreseeable that the spouse will be affected by his negligent act. This flexibility allows plaintiffs who are not present to recover.

D. **Breach**

Next, it must be decided whether the defendant's conduct has breached the duty owed to that bystander plaintiff. Damages are recoverable in a negligence action when they result from the breach of duty owed to the plaintiff that is assumed

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182. 771 P.2d at 833 (Cal. 1989). The *Thing* court stated that: "It is clear that foreseeability of injury alone is not a useful "guideline" or a meaningful restriction on the scope of a NIED of emotional distress action." *Id.*
by defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two. For example, a nurse owes a patient a duty of reasonable care in the administration of drugs, and if the nurse overdoses the patient, that nurse has breached a duty to that patient.

E. Severity of Distress

Having established all of the tort criteria, a plaintiff must further demonstrate the seriousness of emotional distress suffered. The shock or fright of witnessing or being a victim of medical malpractice must be accompanied by a serious degree of emotional distress. The original purpose of NIED was to compensate for the shock of witnessing a brutal accident. When one learns of the negligent act after the fact or discovers it over a long period of time, there is more time to adjust or adapt to the news. It is the brutal, abrupt discovery causing severe emotional distress which should allow for recovery under a NIED claim.

The type of distress which requires legal intervention should be “so severe that no reasonable person could be expected to endure it.” This application of the reasonable person standard will help courts interpret NIED cases consistently. Furthermore, it will aid the fact-finder in making a determination of the culpability of the defendant. By applying this objective standard to each case, a jury will have some guidance as to the degree of severity of emotional distress required to satisfy a claim for NIED. This legal test will restrict recovery for the overly-sensitive plaintiffs if they do not fulfill the objective requirement.

V. PROPOSAL APPLIED

Referring back to the original hypothetical at the beginning of this comment, the proposed factors can be applied to determine if the sister could recover. Considering the familial connection between the brother and the sister, the sister’s presence at the scene of the injury-producing event and

184. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965).
185. See supra paragraph 1 of this comment.
the act of improperly administering the epinephrine injection, it appears that the sister may have a viable claim for emotional distress against the negligent paramedics.

Unfortunately, the answer is not quite that clear. Admittedly, the sister is a reasonably foreseeable plaintiff based on her sibling relationship. Any injury to her brother would have a foreseeable impact on her emotional well-being. However, the facts suggest that the sister was not then aware of the negligence of the paramedics, nor did she appreciate that their actions directly caused her brother's death. Thus, since the causal connection is not met, she most likely would be denied recovery under a NIED claim.\footnote{186. For an examination of a case with a similar fact pattern and result, see Wright v. City of Los Angeles, 268 Cal. Rptr. 309 (Ct. App. 1990).}

If this outcome appears harsh, remember that the sister did not actually understand the harm being caused to her brother. She thought that he was suffering from the wounds received during the gang warfare exchange. Therefore, would it seem fair to burden the defendants with this liability? Admittedly, the paramedics were negligent, but their actions cannot conclusively be determined to have caused emotional harm to the sister.

In a different factual scenario, the sister may have had a valid negligent infliction claim. For example, assume that while one paramedic was administering the injection, the other paramedic exclaimed, “Stop, you have the wrong amount of medication.” Shortly thereafter, the sister witnessed her brother go into convulsions and die. According to these facts, the sister could recover for NIED if she had made the causal connection between the injury and the paramedics actions.

What makes these two situations different? It is the effect on the plaintiff that creates the emotional distress. In the first instance, the sister was not harmed by the paramedics because she was oblivious to the cause of the problem. In the second setting, she had knowledge and was directly affected by their actions, and therefore should recover.

A parallel analogy may be drawn. Consider the tort of assault.\footnote{187. A necessary element of the tort of assault is the victim’s apprehension. BLACK’S LAW DICTIONARY 114 (6th ed. 1990).} If a man comes into a woman’s room and kisses her on the head while she is asleep, and thus unaware, she
does not have a claim for assault. However, if she were awake, she would likely have a valid claim, absent consent. The difference is in the awareness of the action. While awake and aware, she may find his actions offensive; while asleep, she is unaware of his intentions. Therefore, it is clear that the causal connection is of utmost importance in a NIED claim. The only way to make a proper determination of the severity of emotional harm suffered is to ensure that actual harm has been inflicted. If there is no appreciation that the negligent defendant caused the injury, the plaintiff has not met the burden of proof.

VI. CONCLUSION

This comment traced the evolution of bystander recovery for NIED claims from its early stages of development to the present state of the law in California. The analysis showed that the development of this tort has been unpredictable and ad hoc. The application of the NIED cause of action is particularly problematic in the area of medical malpractice. The proposed suggestion to shift the focus of the courts' emphasis, from the area of duty to the area of causation, may prove to alleviate some of the problems confronting today's courts in their determination of compensable NIED claims.

Under the current state of the law, as established in Thing and applied in Golstein, a bystander plaintiff's recovery for emotional distress in a medical malpractice cause of action is limited. The requirements needed to successfully plead this cause of action are narrow and rigid.

The tort of NIED is a difficult subject to address because it often concerns harm inflicted upon a loved one. The observance of a loved one suffering pain, often causes pain itself. However, we all suffer pain throughout our lives, most of which is not compensable. It would be a great injustice to allow recovery where no compensable harm has been inflicted.

Aideen M. FitzGerald