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Dillon to Ochoa: The Elusive Foreseeability of Emotional Distress

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A father and his 18 year old son work for a company that removes asbestos from the ceilings of old buildings. Their company contracts with a local school district to remove and replace 30 ceilings in a grammar school. The employees work overtime because the work must be completed during a school holiday. Exhaust fans clean the air of asbestos dust. The fans are equipped with safety mechanisms that prevent the operation of fans unless specially fitted filters are attached to the blowers. The filters need constant replacement, slowing down the progress of the project. In order to install the new ceilings by the deadline, the foreman removes the safety mechanisms subjecting his employees to a hazardous environment. The father and his son work in the same unfiltered room for two weeks. The son, who removes asbestos near the blower outlet, gradually loses his health and after two weeks is too ill to work. His father rushes him to the hospital where they are met by the boy's mother. The two parents worry as their son becomes nauseous and his condition worsens. Both parents suffer from severe mental anguish as they watch the slow and progressive deterioration of their son. The mother becomes hysterical as she watches her son gasp for breath, turn blue, and die in her arms. As a result of seeing their son die, the father loses considerable weight. The mother cannot sleep and suffers a nervous breakdown, evidenced by physical nerve degeneration. Both parents must undergo psychiatric treatment.

The California Supreme Court, applying its holding in Ochoa v. Superior Court, might allow the father in this hypothetical a cause of action under the theory of negligent infliction of emotional distress, while the mother would not have such a cause of action.
This arbitrary result stems from the father's observation of the foreman's conduct. The mother has no cause of action, even though she and her husband witnessed the same agonizing death that gave rise to their severe mental distress, because she did not see the hazardous environment in which her husband and son worked. The father, on the other hand, observed the ongoing negligent activity of his company and its foreman, and thus may state a cause of action under *Ochoa*.

*Dillon v. Legg* is the seminal case that established guidelines for the current theory of emotional distress recovery in California. It involved a child who was within the "zone of danger" (her personal safety was threatened) when she witnessed the resulting death of her sister. The mother of these children was a few feet outside the zone of danger when she, too, saw the accident. The daughter could have had a cause of action because she feared for her safety, but the mother could not have had a cause of action because she was not in fear of her own personal injury. The court rejected the zone of danger rule because of the arbitrary spatial distinction of the few feet separating the mother from the surviving daughter. Instead, the court applied "[t]he general rules of tort law, including the concept of negligence, proximate cause, and foreseeability." *Dillon* was the first American case to hold that a parent who witnesses the negligent infliction of death or injury on his/her child may recover for the emotional trauma in situations where the parent does not fear imminent physical harm.

In outlining what it considered "foreseeable," the *Dillon* court included three factors to be used as guidelines. The second factor, that the plaintiff contemporaneously observe the accident, has been strictly qualified since the time of *Dillon*. Case law interpreting this second *Dillon* criterion has required the plaintiff to contemporaneously observe a *sudden* injury. But, seventeen years after *Dillon*, the California Supreme Court in *Ochoa* recently expanded the theory of emotional distress to include not only plaintiffs who observe a sudden occurrence but also those who witness an *ongoing*

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2. *Id.* at 170, 703 P.2d at 8, 216 Cal. Rptr. at 668.
3. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
4. The zone of danger rule limits recovery for negligent infliction of emotional distress to plaintiffs who suffer distress when they fear for their own physical safety. Most American jurisdictions follow this rule. *Restatement (Second) of Torts* § 436 (1966).
5. *Dillon*, 68 Cal. 2d at 746, 441 P.2d at 924, 69 Cal. Rptr. at 84.
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Ochoa involved a mother who saw the ongoing medical neglect of her son while he was in custody in juvenile hall. The court allowed the plaintiff mother to recover because she witnessed an ongoing harmful occurrence that caused her to suffer emotional distress. The Ochoa decision broadened Dillon, setting aside the narrow and arbitrary test of Dillon. Although broader, the Ochoa holding has merely replaced one arbitrary criterion with another. Just as the zone of danger rule and the sudden occurrence criterion arbitrarily limited liability between similarly situated persons, so does the broader ongoing occurrence criterion. Whether the occurrence is sudden or ongoing, under Ochoa a parent who arrives on the scene after the accident will not be permitted recovery.

Lower courts that were confused in the wake of Dillon will be similarly perplexed as they attempt to apply the Ochoa interpretation. This lack of guidance is recognized by Justice Grodin in his Ochoa concurrence which states: "there remain after today's opinion numerous questions concerning the application of the Dillon guidelines which have proved troublesome to the lower courts and which this court must, sooner or later, confront and resolve."

Justice Grodin and Chief Justice Bird questioned the viability of Ochoa and Dillon, but upheld the decisions for lack of better criteria. Both Grodin's concurrence and Bird's concurrence and dissent in Ochoa emphasize that any strict criteria established by the court will be applied in an arbitrary manner. The judicial system

8. 39 Cal. 3d at 170, 703 P.2d at 8, 216 Cal. Rptr. at 668.
9. Id. at 168, 703 P.2d at 7, 216 Cal. Rptr. at 667.
10. Id. at 190, 703 P.2d at 23, 216 Cal. Rptr. at 683 (Bird, C.J., dissenting) (Chief Justice Bird points out that the majority opinion's finding of liability hinges upon the plaintiff's observation of the defendant's wrongdoing).
11. Id. at 179, 703 P.2d at 14, Cal. Rptr. at 674 (Grodin, J., concurring).
13. 39 Cal. 3d at 179, 703 P.2d at 14, 216 Cal. Rptr. at 674 (Grodin, J., concurring). The Dillon guidelines have been strictly and mechanically applied. Id. at 182, 703 P.2d at 17,
must remove the artificial barriers to recovery and replace them with a test of foreseeability: only serious injuries to others which were reasonably foreseeable to the defendant at the time of the injuries should be recoverable by plaintiff.\textsuperscript{14}

This comment will address the problems inherent in the second \textit{Dillon} guideline which requires the bystander plaintiff to "contemporaneously observe" the negligent acts of the defendant. In part II, an overview of pertinent American law will be discussed before explaining California's approach to bystander mental distress. A synopsis and background of the \textit{Dillon} case will be presented. Part III will analyze the case of \textit{Dillon} as a foundation to \textit{Ochoa} and other cases. \textit{Dillon}’s arbitrariness, which began the confusion in this area of the law, will be illustrated. The resulting arbitrariness of the \textit{Ochoa} solution is essential to this discussion because it not only fails to clarify this confusion, but adds to it. In part IV, a return to "reasonable foreseeability" as advocated by the \textit{Dillon} court will be proposed. This proposal is not a return to \textit{Dillon}’s guidelines which have been used by courts as requirements to recovery, but rather a return to the underlying principle of foreseeability enunciated by \textit{Dillon}. This solution will effectively provide a standard by which the courts can allow deserving plaintiffs to recover. A single requirement of "serious" mental distress will be proposed to prevent a great influx of claimants from entering the courts. In this way, the arbitrary results directly attributable to the second \textit{Dillon} guideline, as interpreted by the \textit{Ochoa} case, will be replaced with a standard that minimizes inconsistent and unfair judgments.

\section*{II. Background}

\subsection*{A. Emotional Distress in the United States}

Various policies have been adopted regarding bystander recovery for negligent infliction of emotional distress.\textsuperscript{18} The majority of American courts do not require that physical impact accompany the mental harm in order to bring an emotional distress cause of action.\textsuperscript{18} Most states, however, have adopted requirements that limit

\begin{thebibliography}{9}

\bibitem{14} \textit{Ochoa}, 39 Cal. 3d at 181, 703 P.2d at 16, 216 Cal. Rptr. at 676 (Bird, C.J., concurring and dissenting). \textit{See} \textit{Dillon}, 68 Cal. 2d at 728, 441 P.2d at 912, 69 Cal. Rptr. at 72.

\bibitem{15} \textit{See} M. \textsc{Franklin} \& R. \textsc{Rabin}, \textsc{Cases and Materials on Tort Law and Alternatives} 197-221 (3d ed. 1983); \textsc{P. \textsc{Keeton} \& R. \textsc{Keeton}, Cases and Materials on the Law of Torts} 367-83 (2d ed. 1977).

\bibitem{16} \textsc{C. \textsc{Gregory}, H. \textsc{Kalven} \& R. \textsc{Epstein}, Cases and Materials on Torts} 957

\end{thebibliography}
recovery to some degree.\(^\text{17}\)

The "zone of danger" principle, which requires that the plaintiff bystanders fear for their own physical safety, is one such barrier.\(^\text{18}\) Originating from English courts, the "zone of danger" rule allows recovery for bystander emotional distress if: (1) the distress caused some physical harm to the plaintiff; (2) the plaintiff was in a zone of potential personal danger from the defendant; and (3) the resulting emotional distress was caused by the plaintiff's fear for his own safety, not for the safety of the third party.\(^\text{19}\) The duty owed is to exercise due care not to subject others to a foreseeable risk of physical injury.\(^\text{20}\)

Closely related is the proximity requirement that the plaintiff witness the injury. New York courts require that the bystander actually witness the accident as opposed to seeing the immediate results of the accident. *Tobin v. Grossman*\(^\text{21}\) is the seminal case of the current bystander recovery approach in New York. It involved a mother who heard the screeching of brakes, noticed her child was missing from the house, and ran outside within seconds of the impact to see her son lying in the street. Because the mother did not see the accident, she could not recover. The court of appeals feared that a finding for the mother would open the door to unlimited relatives and caretakers who were not at the scene of the accident:

> [F]oreseeability, once recognized, is not so easily limited. Relatives, other than the mother, such as fathers or grandparents, or even other caretakers, equally sensitive and as easily harmed, may be just as foreseeably affected. Hence, foreseeability would, in short order, extend logically to caretakers other than the mother, and ultimately to affected bystanders.\(^\text{22}\)

Other states require the existence of a physical manifestation directly caused by the emotional distress. Weight loss, sleeplessness,
and nerve tissue degeneration are examples of physical manifestations required by some jurisdictions. The majority view, as used in Delaware, requires the emotional distress to be manifested by tangible physical injuries such as miscarriage, nervous breakdown, or paralysis. Physical proof is necessary in these jurisdictions in order to preclude fraudulent claims.

A few states analyze the emotional distress in a traditional negligence review, rather than setting out limiting barriers. Massachusetts recently allowed the children of a man hurt in an industrial accident to recover damages, even though the children did not view the accident which resulted in their father's injuries. The court held that it was foreseeable to the employer that accidents on the job would cause emotional distress to family members who do not witness the accident.

Hawaii recognizes mental distress as a general tort in which ordinary tort principles of foreseeability apply. However, one case in Hawaii, Kokua Sales & Supply v. State, following a decision to use ordinary tort principles, has added one limitation: that the plaintiff be located within a reasonable distance from the scene of the accident. The case involved a grandfather living in California who had a fatal heart attack when he received a telephone call informing him that his daughter and granddaughter died in an automobile accident in Hawaii. Recovery was denied. Hawaii chose to apply the ordinary tort analysis of foreseeability after reviewing the California criteria formulated in Dillon.

B. Dillon v. Legg

The California Supreme Court, in deciding Dillon seventeen years ago, established the precedent for emotional distress recovery outside the "zone of danger." California became the first American jurisdiction to hold that a relative of the injured victim could recover

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26. See Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970). "[T]he question of whether the defendant is liable to the plaintiff in any particular case will be solved most justly by the application of general tort principles." Id. at 174, 472 P.2d at 520. Rodrigues is discussed more fully in part IV of this comment.
27. 56 Hawaii 204, 532 P.2d 673 (1975).
28. Id.
29. Id.
for emotional distress even though the relative witnessing the accident did not fear for her own safety.\textsuperscript{30}

\textit{Dillon} involved a child who was in the "zone of danger" when her sister was struck by a car and died. The child bystander was allowed a cause of action. The victim's mother saw the accident but was outside the "zone of danger" and was therefore, under current law, unable to recover for her mental distress. The court believed the "zone of danger" distinction, as it related to the mental anguish suffered, to be an arbitrary limit to recovery.\textsuperscript{31} The court struck down the "zone of danger" requirement and allowed the mother to bring suit for the foreseeable mental trauma that the defendant caused to her. After the \textit{Dillon} court took that first step toward foreseeability, other states have followed California's lead.\textsuperscript{32}

The \textit{Dillon} court went further, however, and developed guidelines to help courts in the determination of foreseeability. Three criteria, which were not to be used as tests or requirements, have become the source of much debate.\textsuperscript{33} The questions to be asked by each court on a case-by-case basis were:

(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 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 presence of only a distant relationship.\textsuperscript{34}

The court's purpose in developing these criteria was to clarify what was "foreseeable." As this comment will illustrate, foreseeability has been replaced with arbitrary application of rigid requirements.

\begin{itemize}
  \item \textsuperscript{30} Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
  \item \textsuperscript{31} Id. at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.
  \item \textsuperscript{32} For a discussion of other states' reactions, both accepting and rejecting the \textit{Dillon} analysis, see Note, \textit{Negligent Infliction of Emotional Distress: Reaction to Dillon v. Legg in California and Other States}, 25 \textit{Hastings L.J.} 1248 (1974).
  \item \textsuperscript{33} See Nolan & Ursin, \textit{Negligent Infliction of Emotional Distress: Coherence Emerging From Chaos}, 33 \textit{Hastings L.J.} 583, 587 (1982), where the \textit{Dillon} criteria are called an "analytically complex regime of arbitrary rules restricting recovery for foreseeable emotional distress." \textit{See also} Miller, \textit{supra} note 12.
  \item \textsuperscript{34} \textit{Dillon}, 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.
\end{itemize}
III. Analysis

A. The Arbitrary Second Guideline

This comment focuses on the second Dillon criterion of contemporaneous observation, its case law development, and the Ochoa court’s interpretation. The second criterion was meant to be a device for measuring the degree of foreseeability, not a bar to recovery. The courts were to weigh the three factors of foreseeability along with any other relevant factors and determine whether the emotional injury to the plaintiff was foreseeable to the defendant at the time of the accident. Dillon states:

The evaluation of these factors will indicate the degree of the defendant’s foreseeability: obviously . . . the degree of foreseeability of the third person’s injury is far greater in the case of his contemporaneous observance of the accident than that in which he subsequently learns of it. . . . All these elements, of course, shade into each other; the fixing of the obligation, intimately tied into the facts, depends upon each case.

The Dillon court made its intent clear. Nevertheless, most courts to date have used the second criterion as a requirement to recovery for which it was not designed. In some decisions, the second criterion has been applied strictly: if the facts meet the requirement, then a cause of action is allowed. Other decisions view the second criterion as a guideline: if the emotional distress was foreseeable and the plaintiff comes closer to seeing the accident than to learning of it from another, then a cause of action is allowed.

B. A Comparison of Case Law History

Before exploring the various strict and loose interpretations that have followed the Dillon decision, a discussion of the “sudden impact” development will be helpful. Courts applying the Dillon guidelines have relied on the necessity of the bystander perceiving a

35. For a general critique of all three guidelines, see Nolan & Ursin, supra note 33; Miller, supra note 12; and Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970).
36. Dillon, 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.
37. "What has followed in Dillon's wake is confusion rather than clarity. The Dillon guidelines have been strictly and mechanically applied. This has led to arbitrary, inconsistent and inequitable results antithetical to principles enunciated in Dillon." Ochoa, 39 Cal. 3d at 182, 703 P.2d at 17, 216 Cal. Rptr. at 676-77 (Bird, C.J., concurring and dissenting). For examples of strict, mechanical applications of the Dillon guidelines, see infra notes 45-63 and accompanying text.
38. See infra notes 45-63 and accompanying text.
39. See infra notes 45-63 and accompanying text.
sudden accident. For this reason, a summary of this pre-Ochoa requirement will aid in the analysis.

1. The Sudden Impact Rule

Prior to the Ochoa decision in 1985, the court's determination of "contemporaneous observance" was based on evidence that the plaintiff actually saw or perceived a sudden impact. In Jansen v. Children's Hospital Medical Center, a California court of appeal concluded that the second Dillon criterion of contemporaneous observance referred to the observance of a sudden accident. The court, in denying recovery to a mother who witnessed the pain-ridden deterioration and death of her daughter in the hospital, decided that Dillon "contemplates a sudden and brief event causing the child's injury." The Jansen decision was based on the fact that the medical staff's failure to diagnose the child could not have been discerned by a lay person such as the plaintiff mother. The court was attempting to curtail unlimited liability.

The California Supreme Court reaffirmed Jansen's "sudden occurrence" requirement in Justus v. Atchison. Justus involved a doctor's negligence which caused a stillborn birth while the father was in the delivery room. The court stated that a cause of action did not exist unless there was a "relatively sudden occurrence," but refused recovery because the lay person was unaware of the doctor's negligence.

Dillon never required a sudden occurrence, but these California cases have interpreted the second criterion to include such a requirement. With this interpretation in mind, a comparison of case law history regarding the second Dillon criterion will illustrate the arbitrary Dillon progeny.

2. Irreconcilable Case Law

The California courts of appeal have both strictly and loosely construed the second guideline. A review of the facts of these cases

41. Id. at 24, 106 Cal. Rptr. at 884.
42. Id.
44. Id. at 584, 565 P.2d at 135, 139 Cal. Rptr. at 110.
is helpful in demonstrating the arbitrary development of the second Dillon guideline.

In Hathaway v. Superior Court, a boy was electrocuted in his back yard when he touched an evaporative cooler. His playmate came into the house and informed the victim's mother that something was wrong. The mother and father went outside to see their son dying. The court found that the accident had ended before the parents went outside, thus, there was no recovery for mental distress. The parents had not "sensorily perceived the injury causing event."47

Nazaroff v. Superior Court took a more liberal view of a very similar injury. A boy fell into a neighbor's swimming pool. The mother arrived at the scene as her son was being pulled from the water after the drowning had already occurred. The court held that the question of whether the accident was still in progress was open to the jury.49 She was allowed a cause of action because the court found that Dillon "was not creating parameters but merely guidelines" to foreseeability.80

Justus v. Atchison and Austin v. Regents of the University of California present facts relating similar situations. However, despite the similar facts, the Justus court applied the second guideline strictly and the Austin court used a more flexible review. Plaintiff fathers in both cases were in the delivery room when their babies died during birth due to the defendant doctors' negligence. In Justus the father watched the medical staff struggle to keep the baby alive. He knew there were complications because of the commotion but was uncertain as to the severity of the situation. The doctor told the father the baby had died. The court determined that severe emotional distress did not exist until after the doctor had informed the father that the baby was dead, which followed the actual moment of death.88


47. Hathaway, 112 Cal. App. 3d at 736, 169 Cal. Rptr. at 440.
49. Id. at 566-67, 145 Cal. Rptr. at 664. (It should be noted, however, that in most instances an electrical jolt is more of a sudden occurrence than a drowning.).
50. Id. at 562, 145 Cal. Rptr. at 661.
53. Justus, 19 Cal. 3d at 585, 565 P.2d at 136, 139 Cal. Rptr. at 111.
Austin, using the contemporaneous observance guideline from Dillon, reached a different result. The court permitted recovery because the father learned of the death by his own observation. If the court in Justus had focused on the reasonable foreseeability of the emotional distress, a decision in accord with Austin may have resulted.

Cortez v. Marcias and Mobaldi v. Regents of the University of California are cases with somewhat similar situations in which the appellate courts came to opposite results. In Cortez, a mother watched her child die in a hospital but thought the child had only gone to sleep. Moments later the nurse informed the mother that her child had died. The court denied recovery, holding that the emotional distress had not occurred from the contemporaneous observance but from learning of the death from the nurse.

The Mobaldi court was faced with a woman who watched her son receive an injection from the defendant doctor. The injection resulted in the boy becoming spastic and comatose. The court granted recovery because the mother was present at the scene of the accident, even though she was unaware of the causal connection between the injection and the resulting comatose condition.

The guideline term, "observation," has been interpreted by some courts, under the theory of foreseeability, to include perception. That is, the plaintiff need not actually witness or visually see the accident causing the mental distress. In the California court of appeal case of Archibald v. Braverman, a boy was severely injured in a gunpowder explosion. His mother who merely heard the explosion and arrived at the scene moments later was allowed to recover. The court stated:

[A] plaintiff claiming damages for emotional trauma as a result of injury to a third party must either be present at the time of the accident or the shock sustained by the plaintiff must be fairly contemporaneous with the accident rather than follow when the plaintiff is informed of the whole matter at a later date. Manifestly, the shock of seeing a child severely injured immediately after the tortious event may be just as profound as that experienced in witnessing the accident itself. Consequently,
the shock sustained by the mother was "contemporaneous" with
the explosion. . . . 60

The court in Parsons v. Superior Court61 did not take such a liberal
view of the second guideline. There, a family was in two cars. A
mother and father were driving in a car that was following the auto-
mobile in which their daughters were passengers. The daughters
were in an auto accident and the father came upon the wreckage. He
left his car and reached the destroyed automobile "before the dust
had settled."62 Because the parents missed seeing the actual automo-
bile collision, the court of appeal did not allow the parents to
recover.63 Had the parents been following the first car a little closer
and had they seen the injury-causing accident through their car win-
dow, the court might have granted relief for emotional distress.

These examples illustrate the arbitrary application of the sec-
ond Dillon guideline. It is difficult to reconcile such inconsistency —
however, it exists because of the malleable criterion of Dillon. Ochoa
is the latest of this long line of cases to struggle with Dillon.

C. Ochoa v. Superior Court

Ochoa involved a thirteen year old boy in Santa Clara County
juvenile hall, who became sick and needed medical attention. He was
transferred from a holding cell into the juvenile hall infirmary. His
mother visited him and was very concerned about his condition. His
pain became so great and his health so poor that his mother de-
manded that he be taken to a hospital. The juvenile hall medical
staff told her that her son, Rudy, had nothing more that a "bug."64
Rudy suffered from bilateral pneumonia with a temperature of 105
degrees. He went into convulsions, vomited blood, experienced halluci-
cinations and held his side in an attempt to relieve the excruciating
pain. For two days his mother experienced extreme emotional and
mental distress. She begged the medical staff to admit her son to a
hospital, but she was forced to leave juvenile hall. Rudy died because
the medical staff did not take him to a hospital. His mother’s mental
distress was not the result of witnessing a sudden occurrence, but
was caused by observing an ongoing occurrence. Although such a
sudden accident was required in California at that time, the court

60. Id. at 256, 79 Cal. Rptr. at 725 (citations omitted).
62. Id. at 508-09, 146 Cal. Rptr. at 496.
63. Id. at 512, 146 Cal. Rptr. at 498.
64. Ochoa, 39 Cal. 3d at 163-64, 703 P.2d at 3-4, 216 Cal. Rptr. at 663-64.
allowed recovery, concluding:

[T]he "sudden occurrence" requirement is an unwarranted restriction on the Dillon guidelines. Such a restriction arbitrarily limits liability when there is a high degree of foreseeability of shock to the plaintiff and the shock flows from an abnormal event, and, as such, unduly frustrates the goal of compensation — the very purpose which the cause of action was meant to further.68

The bystander plaintiff need not know that the ongoing occurrence is negligent conduct. The plaintiff need only perceive the action and be aware at that time that the defendant's conduct is causing harm to the victim.68 This essentially interprets the second Dillon guideline to read:

(2) Whether the shock resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of a sudden or ongoing occurrence, as contrasted with learning of the accident from others after its occurrence, and the defendant's conduct was contemporaneously understood by the plaintiff to be the cause of injury to the victim.

Although the majority warns that foreseeability is the appropriate test and that the Dillon guidelines are not to be applied mechanically,67 the majority itself applies the Dillon guidelines rigidly in its determination that Rudy Ochoa's father could not recover.68 This inconsistency demonstrates the difficulty courts experience in adopting guidelines. Courts using the Dillon analysis have continued to apply the criteria as if they were a rigid test, regardless of repeated warnings by the California Supreme Court and appellate courts that the Dillon guidelines are not to be used as strict barriers to recovery.69

65. Id. at 168, 703 P.2d at 7, 216 Cal. Rptr. at 667.
66. Id. at 170, 703 P.2d at 8, 216 Cal. Rptr. at 668.
67. "It is important to remember that the factors set forth in Dillon were mere guidelines to be used in assessing whether the plaintiff was a foreseeable victim of the defendant's negligence." Id.
68. Id. at 165, 703 P.2d at 4-5, 216 Cal. Rptr. at 664-65. See also id. at 189-90, 703 P.2d at 21-23, 216 Cal. Rptr. at 681-83.
69. The Molien court, among others, expressed the same warning but following cases did not heed their message, applying Dillon strictly. See generally Diamond, supra note 12. The Hathaway court stated that it was following a "steady flow of Court of Appeal cases" in its strict application of the second Dillon criterion. 112 Cal. App. 3d at 734, 169 Cal. Rptr. at 438. For commentary on this issue, see Note, Molien v. Kaiser Foundation Hospitals: California's New Tort of Negligent Infliction of Serious Emotional Distress, 18 Cal. W.L. Rev. 101, 118 (1982); Pearson, supra note 12, at 477-516.
There is no indication that courts following the *Ochoa* view will act differently. Chief Justice Bird foresees such an inclination. When Bird criticized the *Ochoa* majority for tailoring the second guideline of *Dillon* to fit the facts in *Ochoa*, she indicated that courts will continue to misuse the *Dillon* criteria. Bird believes that the second criterion will be used in the future as a requirement to recovery. Quoting *Dillon*, Bird states: "We cannot now predetermine defendant's obligation in every situation by a fixed category; no immutable rule can establish the extent of that obligation for every circumstance of the future." The second guideline, whether based on the sudden occurrence interpretation or the ongoing occurrence interpretation, will be applied inconsistently. This inconsistency will lead to arbitrary results.

This arbitrariness will result from two differences: (1) the difference between courts which choose to apply *Ochoa* strictly from those which choose a more flexible application, and (2) with those courts choosing a strict review, a difference between those plaintiffs barely passing over the line of recovery from those who barely fall short of it. For example, under a literal view of *Ochoa*, any parent who arrives immediately after an ongoing accident to see a severely disfigured child will not be permitted recovery. Courts which apply foreseeability, using *Ochoa* as a guideline, may find for the plaintiff parents because the emotional distress was foreseeable. Turning a guideline into a line goes against the concept of foreseeability because the severe emotional distress experienced does not always depend on whether the plaintiff observes the defendant's conduct or is contemporaneously aware that such conduct is causing harm.

The emotional distress suffered when a plaintiff does not meet the requirements of recovery is often worse than that of a plaintiff

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70. 39 Cal. 3d at 190, 703 P.2d at 22, 216 Cal. Rptr. at 682 (Bird, C.J., concurring and dissenting).

71. *Id.* at 181, 703 P.2d at 16, 216 Cal. Rptr. at 676 (Bird, C.J., concurring and dissenting) (quoting *Dillon*, 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80) (emphasis original).

72. Arguably, any time a line is drawn, regardless of how fair it is, the line will probably seem arbitrary to those falling just short of the line. Lines, however, are drawn with the very purpose of allowing some to recover while excluding others.

73. It is reasonably foreseeable to a tortfeasor that serious injury, viewed by parents immediately after the incident, may cause emotional distress to those parents. In Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969), the court noted "the shock of seeing a child severely injured immediately after the tortious event may be just as profound as that experienced in witnessing the accident itself." *Id.* at 256, 79 Cal. Rptr. at 725.

74. *Ochoa*, 39 Cal. 3d at 190, 703 P.2d at 22, 216 Cal. Rptr. at 682 (Bird, C.J., concurring and dissenting).
who is allowed recovery. In some situations, a fraudulent claim can be brought simply because the plaintiff meets the requirements. In other situations, a legitimate victim of extreme emotional distress is excluded. Justice is not served by such arbitrary divisions.\textsuperscript{78}

D. \textit{The Dillon Criteria Must Be Replaced}

Lines of demarcation are necessary in limiting recovery for intangible harm, but not when they so impinge upon a foreseeability test that foreseeability no longer is a factor. \textit{Dillon}'s second criterion has been used as a "litmus test," excluding plaintiffs from recovery before the question of foreseeability is ever addressed. Guidelines have been used as dividing lines by courts because they fear fraudulent claims will increase and become unmanageable.\textsuperscript{76} The frustration and confusion of many courts is apparent in the dicta of \textit{Ochoa}.\textsuperscript{77}

The time has come for the \textit{Dillon} criteria to be replaced with a workable, fair test. Courts should analyze mental distress claims by applying ordinary tort principles of foreseeability.

IV. \textit{Proposal}

The standards for determining emotional distress recovery as set forth in \textit{Dillon} and \textit{Ochoa} are in need of revision. \textit{Ochoa} not only fails to establish a solid second guideline of "contemporaneous observance" but it also illustrates the failure of the California courts to create a workable analysis for the \textit{Dillon} guidelines. An alternative that is workable, fair and economical is that of "reasonable foreseeability." This adoption of foreseeability does not require a return to the criteria established by the \textit{Dillon} court, but rather a return to the underlying principles of foreseeability enunciated by the \textit{Dillon} court. As a safeguard against limitless liability to defendants, the reasonably foreseeable emotional distress must also be "serious" in nature. Before discussing seriousness, "reasonable foreseeability," viewed in the spirit of the \textit{Dillon} decision, should be explained.


\textsuperscript{77} See \textit{Ochoa}, 39 Cal. 3d at 167-70, 178, 182-87, 703 P.2d at 6-8, 14, 16-21, 216 Cal. Rptr. at 666-69, 674, 676-81.
A. Foreseeability

Foreseeability is at the root of bystander emotional distress issues. Foreseeability is what the *Dillon* court tried to impress upon lower courts as the only crucial test to emotional distress recovery. Foreseeability is the analysis for which the *Ochoa* court was striving. Foreseeability is also the elusive doctrine that the California courts overlook in applying arbitrary rules.

Justice Broussard in the *Ochoa* majority opinion stated, "The touchstone of our analysis in *Dillon* was foreseeability." He quotes *Dillon*:

> Since the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk, that factor will be of prime concern in every case. Because it is inherently intertwined with foreseeability such duty or obligation must necessarily be adjudicated only upon a case-by-case basis.

Courts have missed this mark by applying *strictly* the guidelines set out in *Dillon*.

As stated above, the Hawaii Supreme Court has adopted foreseeability in a regular tort analysis of emotional distress to avoid the arbitrary and confusing results of this strict application. Following *Rodrigues v. State*, the court in *Leong v. Takasaki* held that "when it is reasonably foreseeable that a reasonable plaintiff-witness to an accident would not be able to cope with the mental stress engendered," liability shall be imposed. This echoes the underlying principle that the *Dillon* court espoused. The Hawaii Supreme Court has successfully aligned itself with the *Dillon* "foreseeability" approach. To ensure that liability remains limited while returning
to *Dillon*’s foreseeability, California could adopt one requirement — that of serious emotional distress.

**B. Seriousness**

It is well recognized that ordinary tort foreseeability, if applied to emotional distress claims, may open the door to unlimited liability. A simple accident can create a chain reaction, bringing on hundreds of plaintiffs, all injured in differing degrees. As a matter of economy, the line must be drawn somewhere. By drawing the line at “serious” emotional distress the courts can decide cases consistently, thus preventing arbitrary results.

Everybody suffering from recognizable serious distress, if defined by the California Supreme Court, would recover. Everybody not suffering from serious mental distress would be barred from recovery. The seriousness requirement might be viewed by some to be just another test replacing the former *Dillon* requirements, both being arbitrary. However, injury from serious mental distress is what the courts are trying to remedy, therefore, serious mental distress itself should be the focus of the courts. With seriousness as a requirement, victims will be allowed recovery for their actual injury. Plaintiffs will not be granted a windfall merely because they were “at the right place at the right time.” Seriousness, of course, must be defined.

Mental anguish is a normal and inevitable part of life. In the New York case of *Tobin v. Grossman*, a mother saw her son being struck by an automobile. The boy was badly hurt and the mother suffered from emotional distress. The court pointed out:

> 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 act of others. This is the risk of living and bearing children.


86. See W. PROSSER, *Palsgraf Revisited*, supra note 86, at 216-17, 218 n.10.


88. Id. at 630, 249 N.E.2d at 424, 301 N.Y.S.2d at 561-62 (concluding paragraph of majority opinion). It should be noted that although the plaintiff had physical manifestations
A legal wrong should only exist when there is an unusual or severe mental harm, otherwise every disturbing episode in life would be cause for a lawsuit. But determining the severity of the emotional damage is difficult to pinpoint in many situations. When physical manifestations of the mental trauma are lacking, it is difficult to measure severity. Psychological evidence can be subjective and expert testimony can be found to support either side of a claim. A court that uses "seriousness" as a test must have a standard.

*Molien v. Kaiser Foundation Hospitals,* a recent California Supreme Court case, dealt with the issue of seriousness. It involved a woman who was misdiagnosed to have syphilis. She was told to inform her husband of her illness so that he could be examined and medically treated. The wife became suspicious that he had engaged in extramarital affairs. This tension led to the dissolution of their marriage. The husband was diagnosed and the hospital found he did not have syphilis. It was later learned that the initial diagnosis of the wife having syphilis was incorrect. The husband sued the hospital for extreme mental distress. The court allowed recovery despite the fact that the husband suffered from no immediate physical injury (e.g. broken bones) as a result of his diagnosis. The court asserted that serious mental distress manifests itself in physical symptoms (e.g. nerve fiber degeneration, weight loss). It was emphasized that "mental injur[ies] are marked by definite physical symptoms, which are capable of clear medical proof. . . . [T]he problem is one of proof, and it will not be necessary to deny a remedy in all cases resulting from her mental distress, the New York court of appeals still refused to grant recovery. One commentator addressing the issue of serious emotional distress suggests "limiting recovery to cases of emotional distress that most people do not face with sufficient frequency or sufficient certainty to anticipate, to prepare for, and thus to absorb without suffering severe or permanent emotional damage." Note, *Limiting Liability for the Negligent Infliction of Emotional Distress: The "Bystander Recovery" Cases*, 54 S. CAL. L. REV. 847, 868 (1981). A discussion of this "threshold of 'seriousness'" requirement can be found in *Ochoa*, 39 Cal. 3d at 179-80, 703 P.2d at 15, 216 Cal. Rptr. at 675 (Grodin, J., concurring).


91. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). This is a direct victim case and not a bystander recovery case. Nonetheless, it contains dicta regarding the question of seriousness and foreseeability.

92. The Dillon guidelines were never used in this case because the husband was found to be a direct victim, not a bystander. The general principles of foreseeability were applied to the facts. *Id.* at 923, 616 P.2d at 816, 167 Cal. Rptr. at 834.

93. *Id.* at 916, 616 P.2d at 813, 167 Cal. Rptr. at 831.

94. *Id.* at 926, 616 P.2d at 818, 167 Cal. Rptr. at 836.

95. See infra notes 101-02 and accompanying text.
because some claims may be false."\textsuperscript{96}

The \textit{Molien} court’s requirement of serious mental distress is similar to that of the Hawaii case of \textit{Rodrigues}.\textsuperscript{97} The \textit{Rodrigues} court determined that serious mental distress occurs “where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.”\textsuperscript{98} There is, of course, a problem in identifying legitimate mental distress. Advances in medicine and science, however, have enabled courts to recognize serious mental distress with some accuracy.\textsuperscript{99} The \textit{Molien} court believed that medical science would probably guarantee detection of legitimate or false claims.\textsuperscript{100} Detection would be possible because serious mental distress results in physical symptoms of injury.\textsuperscript{101} Thus, plaintiffs suffering from nerve fiber degeneration, sleeplessness, great weight loss, intense nervousness, personality changes, or other medically recognized symptoms of mental distress, will be allowed a cause of action.

The Restatement Second of Torts provides guidance in determining serious mental distress from that which is not serious. Temporary fright, nervous shock, nausea, grief, rage and humiliation are not considered serious.\textsuperscript{102} Medical records, either from a hospital or the office of a psychiatrist whose help the plaintiff has sought, can establish whether the mental distress was serious under the Restatement Second definition. Juries would determine the validity of such reports because to have the court decide would be to usurp the powers of the juries. The

\textsuperscript{96} Molien, 27 Cal. 3d at 926, 616 P.2d at 818, 167 Cal. Rptr. at 836 (quoting W. PROSSER, \textit{TORTS} 328 (4th ed. 1971)).

\textsuperscript{97} 27 Cal. 3d at 926, 616 P.2d at 819-20, 167 Cal. Rptr. at 837-38.

\textsuperscript{98} 52 Hawaii at 173, 472 P.2d at 520.


\textsuperscript{100} See generally \textit{Molien}, 27 Cal. 3d at 924-25, 616 P.2d at 817-18, 167 Cal. Rptr. at 835-36.


\textsuperscript{102} The fact that these are accompanied by transitory, non-recurring physical phenomena, harmless in themselves, such as dizziness, vomiting and the like, does not make the actor liable where such phenomena are in themselves inconsequential and do not amount to any substantial bodily harm. On the other hand, long continued nausea or headaches may amount to physical illness, which is bodily harm; and even long continued mental disturbance . . . may be classified by the courts as illness, notwithstanding [its] mental character.

\textit{RESTATEMENT (SECOND) OF \textit{TORTS} § 436A, comment c (1966).}
Molien court dissent questioned whether the jury would be capable of evaluating medical testimony, but there is ample support for the belief that jurors are capable of recognizing fraudulent claims.103

This standard of seriousness would prevent frivolous claims from flooding the courts. Mental distress that does not reach the required level of seriousness would be considered part of the ordinary emotional distress that accompanies a normal life, and thus no recovery would be granted.

It should be stressed that seriousness is a factor that is vital to the underlying principles of Dillon's foreseeability guidelines. Seriousness is a measure of degree, and that is what the Dillon court intended by labeling its criteria as measuring "guidelines" instead of using the term "rules." The Hawaii Supreme Court, in Leong v. Takasaki, emphasized that the Dillon criteria "should not be employed by a trial court to bar recovery but should at most be indicative of the degree of mental distress suffered."104

The arbitrariness inherent in the Ochoa guideline would be replaced by a test that goes directly to the heart of the claim — the reasonable foreseeability of serious mental distress. With this as a basis and a requirement of "seriousness" to limit unwarranted claims, California could have a workable and practical standard for granting recovery to bystanders who are emotionally distressed as a result of a defendant's misconduct.

C. The Proposal Applied

Although the standard of reasonably foreseeable and serious emotional distress is workable, it may be subject to arbitrariness if different courts apply the guideline with substantial variance. The California Supreme Court or the Legislature will have to create basic guidelines because "foreseeability" is an elusive concept. An adherence to general concepts of tort negligence would result in judgments that would be fair. For instance, generally, the closer the relationship between the emotionally distressed plaintiff and the physically injured victim, the greater the chance of finding that the defendant owed a duty of care.108

103. See Dillon, 68 Cal. 2d at 737, 441 P.2d at 918, 69 Cal. Rptr. at 78; Tobin, 24 N.Y.2d at 615-16, 249 N.E.2d at 422, 301 N.Y.S.2d at 558-59; Sinn, 486 Pa. at 160, 404 A.2d at 679.

104. 55 Hawaii at 410, 520 P.2d at 766 (emphasis added). For a development of common law relating to this case, see Annot., 94 A.L.R.3d 471 (1979).

105. California currently requires that the plaintiff bystander be a family member of the victim. In Drew v. Drake, 110 Cal. App. 3d 555, 168 Cal. Rptr. 65 (1980), the court deter-
Other examples of tort law will help to clarify the result of applying the proposed standard. The factors of each case should be weighed by the court. Factors such as seeing an accident or the immediate aftermath of the accident should not be requirements for recovery. However, these factors do indicate the extent of foreseeable harm. For example, a defendant who injures a child by negligently operating his/her automobile can reasonably foresee that the child’s mother is at least within seeing or hearing distance. It also seems foreseeable that close family members of an injured person may be called to the scene and will witness the immediate results of a horrible accident, thus causing serious emotional distress.

Determining how much time must pass before liability is limited is a difficult task. The plaintiffs should have to view the result of the accident within moments or perhaps hours of the injury. Moments seems more reasonable because the serious impact of the shock is the cause of the emotional distress. But, it must be stressed that each case should be decided on its own merits, and the circumstances of the case should not be subject to arbitrary time limits. For example, bystander plaintiffs returning to their home after a vacation can witness a horrible sight if they arrive to see their dead son's body a day after he has been murdered.

It seems acceptable to exclude most telephone conversations, especially long distance conversations (because the receiver of the call cannot readily view the result of the accident) from the area of reasonableness. The impact of seeing the victim severely injured is generally more emotionally distressing than hearing that the victim is severely injured. Again, it will depend on the circumstances. If the Dillon requirement of "close relationship," as found in the third criterion, means a relationship analogous to parent and child or husband and wife. Id. at 557, 168 Cal. Rptr. at 65-66. In this case, unmarried "live in spouses" lived as husband and wife for three years. Even though one spouse visually witnessed an accident in which the other was killed, the court denied recovery. Id. For a discussion of the related area of spousal consortium, see Hendrix v. General Motors, 146 Cal. App. 3d 296, 193 Cal. Rptr. 922 (1983), in which the court stated "[n]o state court has ever allowed an unmarried plaintiff to state a claim for loss of consortium." Id. at 927. The Supreme Court of New Jersey, in Portee v. Jaffee, 84 N.J. 88, 417 A.2d 521 (1980), decided that "the existence of a marital or intimate familial relationship is . . . an essential element of a cause of action for negligent infliction of emotional distress." Id. at 98, 417 A.2d at 527.

See Tobin, 24 N.Y.2d at 615, 249 N.E.2d at 422, 301 N.Y.S.2d at 558. See supra note 22 and accompanying text; W. Prosser, supra note 22.

106. See supra text accompanying notes 26-28. For the result the Hawaii Supreme Court rendered when faced with the same issue see infra notes 110, 116, and text accompanying notes 114-16.
California Supreme Court decides that telephone conversations should be included in the realm of emotional distress recovery, the court can tailor its “weighing instructions” regarding seriousness of emotional impact to conform to its standard of seriousness. In this way, the court can define the penumbra of “seriousness” and foreseeability. Lower courts can follow such a standard, not as requirements to recovery, but as guidelines.108

Some bystanders are more likely to become emotionally distressed than others. This is the reason for the “serious” emotional distress requirement. But, even “thin skulled” plaintiffs can incur serious mental distress upon seeing an accident that would not normally create serious mental distress in an average bystander. Although general tort theory allows such a plaintiff to recover, the standard of reasonable foreseeability of emotional distress adopted in Hawaii does not grant such relief.110

There will be problems with every system established to grant relief. The courts will have to face these problems and resolve them in a manner that is the least arbitrary. Having a flexible standard may at first appear arbitrary, but being able to judge every situation on a case by case basis is more fair to both plaintiffs and defendants of emotional distress cases. This comment would not be complete without investigating the theories that support the status quo of California emotional distress recovery.

D. The Opposition

The argument for strict application of Dillon criteria is enticing

108. Even if the California Supreme Court insists upon rigid parameters of seriousness, listing what cannot be considered “serious” mental distress, it would present a more workable system than the current arbitrary approach. Under rigid requirements of “seriousness,” every plaintiff would be treated fairly. Claimants who suffer from emotional distress arising from similar situations would not be treated arbitrarily. For example, if two persons witness the aftermath of an accident and both suffer the same amount of emotional distress, but only one witness happens to observe the negligence of the tortfeasor, the rigid “seriousness” requirement would either enable both witnesses to recover, or neither witness to recover. The court would merely focus on whether the resulting emotional distress was 1) foreseeable and 2) serious.


110. The Hawaii Supreme Court in Leong held that plaintiffs would have to prove that it was “reasonably foreseeable that a reasonable plaintiff-witness to an accident would not be able to cope” in order to recover on a claim of emotional distress. 55 Hawaii at 410-11, 520 P.2d at 765. One commentator states, “If ‘serious’ is deemed too vague, it would not seem objectionable to require foreseeability of a degree of distress beyond that with which the average person should be expected to cope.” Miller, supra note 12, at 36-37 n.196.
but unfair in its arbitrariness. It can be argued that limiting liability
in this area necessarily means having arbitrary guidelines. Those
who support a strict Dillon enforcement can advance two major
benefits of having strict limits to recovery. First, liability will be ef-
fectively limited. Second, such rigid rules help jurors and guide lower
courts.111 But the exclusion of wronged plaintiffs from the courtroom
is too high a price to pay for attempting to guide jurors and courts.
The Dillon court itself quoted from two cases when it stated:

[We] should be sorry to adopt a rule which would bar all such
claims on grounds of policy alone, and in order to prevent the
possible success of unrighteous or groundless actions. Such a
course involves the denial of redress in meritorious cases, and it
necessarily implies a certain degree of distrust, which [we] do
not share, in the capacity of legal tribunals to get at the truth in
this class of claim.112

Some states have found ordinary tort analysis to be a viable al-
ternative to the Dillon criteria. Hawaii, upon rejecting the three
guidelines of Dillon, did not experience the influx of fraudulent
claims feared by the California courts.113 Rodrigues v. State114 was
the seminal Hawaii case which determined that negligent infliction
of emotional distress issues should be decided by the application of
general tort principles.115 Eleven years later, the Hawaii Supreme
Court declared, “[s]ince our holding in Rodrigues, there has been no
'plethora of similar cases'; the fears of unlimited liability have not
proved true.”116 This is important because limitless liability is one of
the strongest arguments for those who advocate the strict application
of the Dillon guidelines.117 Hawaii courts have indicated that this
result does not necessarily follow from a return to reasonable
foreseeability.

111. For an interesting discussion of barriers used to guide lower courts, see Note, Tort
Law — Negligent Infliction of Emotional Distress in Accident Cases — The Expanding
112. Dillon, 68 Cal. 2d at 744, 441 P.2d at 923, 69 Cal. Rptr. at 83 (quoting Ham-
brook v. Stokes Bros., [1925] 1 K.B. 141) (quoting the origin of the quotation, Dulieu v. White
113. See supra note 111.
115. Id.
116. Campbell, 63 Hawaii at 565, 632 P.2d at 1071. This case allowed recovery for
mental distress suffered when the plaintiff's dog died. This is probably a broader interpreta-
tion of foreseeability than most jurisdictions would accept. Also, Hawaii has since imposed one
requirement, that of reasonable distance. Kokua Sales & Supply, 56 Hawaii 204, 532 P.2d
673 (1975); see supra text accompanying notes 27-29.
117. See supra notes 45-63 and accompanying text.
But even if the floodgates of litigation were open to fraudulent claims, it is the duty of the court to decide which are fraudulent and which are legitimate. The purpose of allowing negligent infliction of emotional distress as a cause of action in California is to remedy wrongs negligently inflicted on bystanders of the accident. The dilemma the courts face is the problem of allowing deserving claimants relief while reducing or eliminating frivolous claims. To protect the court, insurance companies, and the public from unlimited costs, there are safeguards other than the arbitrary second criterion that will enable the court to separate the fraudulent from the sincere.\textsuperscript{118} The proposed reasonable foreseeability of serious mental distress does provide a more equitable approach to negligent infliction of emotional distress, allowing sincere plaintiffs recovery.

V. Conclusion

Returning to the original asbestos hypothetical, the mother of the 18 year old boy who died would be allowed recovery if (1) the mental distress she suffered was the result of the defendant’s negligence, (2) the emotional distress was foreseeable to the defendant, and (3) the mental distress was serious in nature. The psychiatric care that the parents needed, after the mother’s nervous breakdown and sleeplessness and the father’s severe weight loss, indicates that their case should go before a jury. The jury would have to be instructed as to what degree of seriousness the court deems appropriate. This level of seriousness would have to be established by the California Supreme Court or the California Legislature so that arbitrariness would not result between different courts. Again, this delineation of seriousness would be used as a guide, not a test, and the jury would have to decide upon the facts of each case.

Under this proposed standard of ordinary tort foreseeability, bystander mental distress claims will be simplified and decided without arbitrary results. Those who prove they have suffered from serious, foreseeable mental distress will be allowed a cause of action. The increase in fraudulent claims, if any, should be accepted because the courts have a duty to determine legitimacy of claims on a case by case basis.

\textsuperscript{118} For a theory of compensating emotional distress victims only for their economic loss, see Diamond, \textit{supra} note 12. General principles of tort law as they apply to emotional recovery are discussed in Peck, \textit{The Role of the Courts and Legislatures in the Reform of Tort Law}, 48 MINN. L. REV. 265, 308 (1963). For an overview of many alternative approaches, see Miller, \textit{supra} note 12.
In demonstrating the difficulty of applying the *Dillon* guidelines, the *Ochoa* court has done much to develop the area of bystander emotional distress. However, the court failed to produce a guideline that is not subject to arbitrary results. By replacing "reasonable foreseeability" to mental distress, the proposed standard will allow recovery to those seriously harmed while excluding those who merely experience the suffering that is part of being alive.

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