Negligent Infliction of Emotional Distress: Liability to the Bystander—Recent Developments

The question of when a plaintiff may recover for mental distress which resulted from a defendant's negligent injury of a third party is far from settled. For years, the two most commonly used rules in determining liability were the impact rule[1] and the zone of danger rule.[2] But in 1968, a California Supreme Court decision[3] rekindled the smoldering controversy when it created new rules for determining liability that, in effect, rejected the impact and zone of danger rules as being too arbitrary and restrictive. The attacks upon this rule had barely ended when the Supreme Judicial Court of Massachusetts in *Dziokonski v. Babineau*[4] took the opportunity to discard that state's impact rule and adopt a position that goes beyond the California position that had sparked so much controversy years earlier.

This comment will look at the controversy, focusing briefly on the impact and zone of danger rules, but primarily on the expansion of the California position as well as the new Massachusetts rule. The *Dziokonski* case will be analyzed in terms of what seems to be a new rule of recovery on the horizon.

I. Impact and Zone of Danger

Traditionally, courts have been reluctant to recognize "peace of mind" as a legally protected interest,[5] as well as the interference with it as a separate basis for recovery in tort. Several reasons have been advanced by the courts for this position: (1) mental distress could not be financially measured for the purpose of determining damages; (2) there was no precedent for such recognition; (3) litigation would swamp the courts; and, (4) the physical consequences were too remote.[6] Only in the past eighty years have the courts begun to recognize mental distress as a separate cause of action.[7] Yet during this span of time, there has been no one rule followed by all the courts in allowing recovery. Instead, there has been a gradual development of different rules so that today the courts are far from univer-

1. *See* section I(A), *infra*, for discussion of impact.
2. *See* section I(B), *infra*, for discussion of zone of danger.
3. Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
4. ___ Mass. ___, 380 N.E.2d 1295 (1978).
5. W. Prosser, Law of Torts, §54, at 327 (4th ed. 1971) [hereinafter cited as Prosser].
6. *Id.*
7. *Id.* §12, at 49-50. *See* Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897); Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896). These cases mark the beginning of a trend toward allowing recovery to a third party bystander who suffers mental distress because of another's injury or peril.

sal agreement.[8] The rules governing recovery for mental distress have developed in an evolutionary fashion, each purporting to be better than its predecessor. Beginning with the first major rule, the impact rule, other rules have been developed until now there are at least three main theories of recovery: the impact rule,[9] the zone of danger test,[10] and, more recently, the general foreseeability, or *Dillon*, test.[11] Each imposes upon a claimant limiting factors—factors which must be present before recovery may be had for mental distress.

Although the tests are distinct from one another, and each is claimed to be better than the others, there are common threads running through all three—the concern of the courts with the problem of adequate proof of the genuineness of the mental suffering alleged and the fear of unlimited liability. These concerns are manifested in the rules by the requirements of special circumstances, or qualifying factors. The requirements place sharp limits on who may recover; and, once all of the requirements are met, the court can feel assured of the validity of the claim of mental suffering.[12]

Experience and confidence gained by the courts through the application of each of these tests spurred courts to develop other rules, or modifications of the rule then in use. While some courts would adhere to a certain rule, other jurisdictions would discard it in favor of one that was thought to be just as workable and at the same time more just. Starting with the impact rule, the search for a generally acceptable rule continued.

A. Impact Rule

Under the impact rule, damages could not be recovered when a plaintiff-bystander suffered mental distress caused by the negligent infliction of an injury to a third party by defendant unless the planitiff-bystander also suffered a direct physical injury resulting from the negligent act.[13] The courts felt that because fright or mental distress alone could not be the basis for recovery, damages from injuries resulting from fright or distress alone could not be recovered.[14] Again, the fear of fictitious claims and of an explosion of litigation led the courts to require that there be this accompanying physical injury or "impact" caused by the negligent act.[15] The courts recognized that there could be an unintentional infliction of mental

8. PROSSER, *supra* note 5, §54, at 327.

9. *See* Spade v. Lynn and Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897) and Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896), the leading cases on the impact rule.

10. Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935) is the leading case. *See also* Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

11. Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

12. PROSSER, *supra* note 5, §54 at 328. 2 F. HARPER AND F. JAMES, §18.4, at 1036 (1956).

13. 168 Mass. at ____, 47 N.E. at 89.

14. 151 N.Y. at ____, 45 N.E. at 354.

15. 168 Mass. at ____, 47 N.E. at 89; 151 N.Y. at ____, 45 N.E. at 355; PROSSER, *supra* note 5, §54, at 327.

distress upon one who had witnessed another being injured and that logically there should be recovery. However, recovery was not allowed because the courts felt it would be not only impractical, but impossible to administer any other rule.[16] Yet, once there was immediate personal injury apart from the mental distress, the claim could safely be considered genuine.[17]

Despite the importance of "impact" as the essential element for recovery, the courts tended to liberalize the concept of what constituted sufficient impact.[18] With the passage of time, there was a gradual abandonment of the impact rule by the courts,[19] including jurisdictions that had been strong supporters of the rule in the past.[20] Many jurisdictions were now moving toward another theory of recovery—the zone of danger test—leaving the impact rule in the definite minority.[21]

B. Zone of Danger Test

The zone of danger test eliminated the requirement of an immediate physical impact. It demanded only that a plaintiff bystander have been within the zone of risk created by the negligent act.[22] The courts felt that it was reasonably foreseeable that a bystander would fear for his own safety if he were within this zone, thus adding credibility to his claim of mental anguish or suffering. This solved the problem of adequate proof of the genuineness of the claim, the problem which the impact rule had resolved by requiring an actual physical impact. Furthermore, the courts felt that because of the dilution of the impact requirement in those jurisdictions following the impact rule, the distinction between valid and invalid claims was no longer justified under an impact test.[23] The slightest touch would allow one plaintiff a cause of action, whereas another plaintiff, in an equally distressing situation, would be denied the protection of the law

16. 168 Mass. at ____, 47 N.E. at 88-89.

17. PROSSER, *supra* note 5, §54, at 328.

18. Kentucky Tractor & Terminal Co. v. Roman's Guardian, 232 Ky. 285, 23 S.W.2d 272 (1929) (trifling burn); Homans v. Boston Elevated Ry. Co., 180 Mass. 456, 62 N.E. 737 (1902) (slight blow). Prosser observes that courts have said impact may be minor contacts that have nothing to do with causing the actual harm, *e.g.*, "an electric shock, a trivial jolt or jar, a forcible seating on the floor, etc." PROSSER, *supra* note 5, §54, at 331.

19. Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970); Daley v. La Croix, 384 Mich. 4, 179 N.W.2d 390 (1970).

20. Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961), *overruling* Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896); Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).

21. 2 F. HARPER AND F. JAMES, LAW OF TORTS, §18.4, at 1034 (1956).

22. *See, e.g.*, Waube v. Warrington, 216 Wis. 603, ____, 258 N.W. 497, 500-01 (1935).

23. As one court reasoned in adopting the zone of danger test: "It appears completely inconsistent to argue that the medical profession is absolutely unable to establish a causal connection in the case where there is no impact at all, but that the slightest impact . . . suddenly bestows upon our medical colleagues the knowledge and facility to diagnose the causal connection between emotional states and physical injuries." Niederman v. Brodsky, 436 Pa. 401, ____, 261 A.2d 84, 87 (1970).

because he had suffered no impact. The zone of danger test, the courts believed, would eliminate this artificial barrier to recovery for plaintiffs with valid claims. More important to the courts, however, was that the new rule effectively "drew a line" beyond which a defendant's liability would not extend, thereby answering those who feared unlimited liability. As stated above,[24] the zone of danger test eventually became the majority position. It was also adopted in the Second Restatement of Torts.[25]

II. The Dillon Expansion

A. *California*

In 1968, the California Supreme Court in *Dillon v. Legg*[26] broke away from the zone of danger test by holding that a mother had stated a prima facie case of negligent infliction of emotional distress, which she suffered as a result of witnessing her child being killed by the negligent defendant, even though the mother was not within the zone of danger.

The court rejected the arguments of fear of fraudulent claims and fear of the impossibility of circumscribing the area of liability as grounds for denying a cause of action. The court pointed out that this was not a case in which fraud was a danger, since "we certainly cannot doubt that a mother who sees her child killed will suffer physical injury from shock."[27] More important to the court, however, was the judicial responsibility to award damages to those with meritorious claims.[28] As for infinite liability, the court found that general tort principles were sufficient to deal with the problem. A defendant is liable only for injuries to others if the injuries were reasonably foreseeable to the defendant at the time of the negligent act.[29] To determine whether the injury was reasonably foreseeable, the court set out the following guidelines: (1) whether the 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

24. 2 F. Harper and F. James, Law of Torts, §18.4, at 1034 (1956).

25. Restatement of Torts (Second) §313(2) (1965) adopts the zone of danger test: "(2) The rule stated in subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other."

26. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

27. *Id.* at ____, 441 P.2d at 917, 69 Cal. Rptr. at 77.

28. *Id.* at ____, 441 P.2d at 918, 69 Cal. Rptr. at 78. Courts which have criticized the *Dillon* expansion have nevertheless recognized that fear of fraudulent claims cannot be a basis for denying a cause of action. *See* Tobin v. Grossman, 24 N.Y.2d 609, 615-16, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558-59 (1969).

29. 68 Cal. 2d at ____, 441 P.2d at 919, 69 Cal. Rptr. at 79.

occurrence; and, (3) whether the plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.[30]

Within a year, the Court of Appeals of New York, faced with a similar situation in *Tobin v. Grossman*,[31] rejected California's expansion of the cause of action. A mother was claiming damages for injuries which were caused by emotional distress and which were the result of witnessing defendant negligently injuring the mother's child.[32] The court listed and discussed several factors that it deemed relevant to the question of whether to allow a cause of action for negligent infliction of emotional distress.[33] The court accepted that in the situation before it, harm to the mother was reasonably foreseeable,[34] but rejected the California approach because "there appears to be no rational way to limit the scope of liability."[35] Each of the three criteria set out by the California court in *Dillon* was found to be inadequate to serve the purpose of limiting liability.[36] Indeed, the court predicted that the *Dillon* limitation (mother *witnessed* the accident) would be valid only until a case arose in which a mother was close by but did not see the accident.[37]

This predicted case did arise in California in *Archibald v. Braverman*,[38] which was decided only three months after *Tobin*. A mother came upon the scene of an accident "immediately after an explosion" and saw her son seriously injured. The court found that the mother had stated a cause of action, based on the *Dillon* criteria. The proximity factor was met in that plaintiff was in the immediate vicinity. The relationship factor was satisfied by the mother/child relationship. As for the observance factor, requiring a "sensory and contemporaneous observance of the accident," the court took the step that the New York court had predicted: "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 herein was

30. 68 Cal. 2d at ____, 441 P.2d at 920, 69 Cal. Rptr. at 80.

31. 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

32. *Id.* at 611, 249 N.E.2d at 419, 301 N.Y.S.2d at 554-55. While the allegation was that the mother was present at and viewed the accident, a pretrial examination of the mother, which was part of the record on appeal, showed that the mother was not present, and merely heard the screech of automobile tires. The court's opinion is based on consideration of both situations.

33. *Id.* at 615-17, 249 N.E.2d at 422-23, 301 N.Y.S.2d at 558-60. The factors listed by the court were: foreseeability of the injury, proliferation of claims, fraudulent claims, inconsistency of the zone of danger rule, unlimited liability, unduly burdensome liability, and the difficulty of circumscribing the area of liability.

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

35. *Id.* at 618, 249 N.E.2d at 424, 301 N.Y.S.2d at 561.

36. *Id.* at 617, 249 N.E.2d at 423, 301 N.Y.S.2d at 560.

37. *Id.*

38. 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969).

'contemporaneous' with the explosion so as to satisfy the 'observance' factor."[39]

The *Tobin* warning that the *Dillon* guidelines would lead to unlimited liability was not realized. *Archibald,* as construed by the California courts in later cases,[40] rather than being the first step toward infinite liability, marked the boundary beyond which a cause of action for negligent infliction of emotional distress could not stand.

In *Jansen v. Children's Hospital Medical Center*[41] plaintiff-mother alleged emotional distress with resulting physical injuries caused by observing her child's slow decline and death, which was the result of defendant-doctor's negligent diagnosis. Plaintiff sought to have the *Dillon* guidelines read as permitting recovery when "the result, as distinguished from . . . the tortious act itself" is visible to plaintiff.[42] The court in *Jansen,* however, refused to broaden the rule which the California Supreme Court had laid down in *Dillon. Archibald,* also, was found not to stand for the proposition for which plaintiff argued. "[I]t can be inferred [in *Archibald*] that the mother heard the explosion, thus having a 'sensory observance of it.'"[43]

In a 1978 California case dealing with the problem, the court reaffirmed the necessity of some sensory perception of the injury-producing event in order to state a cause of action. In *Parsons v. Superior Court,*[44] plaintiff, rounding a curve in the road moments after an accident, came upon the wreckage of defendant's automobile in which plaintiff's children had been riding—plaintiff reached the car "before the dust had settled."[45] Finding that plaintiff had not stated a cause of action, the court said:

> Because under these uncontradicted facts there has been no showing that the real parties *saw, heard, or otherwise sensorily perceived* the injury-producing event, we conclude that real parties have not met the *Dillon* requirement of a 'direct emotional impact upon (petitioners) from the sensory and contemporaneous observance of the accident' . . . . To conclude otherwise would beyond doubt result in the limitless liability which *Dillon* proscribes.[46]

What began with *Archibald* as a "liberalization of the requirement of

39. *Id.* at ___, 79 Cal. Rptr. at 725.

40. *See* Nazaroff v. Superior Court, 80 Cal. App. 3d 553, 145 Cal. Rptr. 657 (1978); Mobaldi v. Board of Regents, 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976); Krouse v. Graham, 57 Cal. App. 3d 877, 129 Cal. Rptr. 624 (1976); Jansen v. Children's Hosp. Med. Center, 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1973); Deboe v. Horn, 16 Cal. App. 3d 221, 94 Cal. Rptr. 77 (1971).

41. 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1973).

42. *Id.* at 24, 106 Cal. Rptr. at 885.

43. *Id.*

44. 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978).

45. *Id.* at 509, 146 Cal. Rptr. at 496.

46. *Id.* at 512, 146 Cal. Rptr. at 498 (emphasis in the original).

contemporaneous observance of the accident"[47] in order to avoid "an arbitrary denial of relief"[48] has become, with the cases construing *Archibald*, a new, strict limitation on recovery, with an underlying policy of prevention of limitless liability.

B. Outside California

Even with this limitation, California has been, and may still be, the most liberal state in recognizing a right of recovery for the negligent infliction of emotional distress caused by injury to a third party. A few states have followed California's lead in extending liability, but, with the possible exception of Massachusetts,[49] none have gone as far.

In *D'Ambra v. United States*,[50] in which plaintiff witnessed her young son being struck and killed by a negligently driven mail truck, the Supreme Court of Rhode Island adopted the *Dillon* three-prong test and added a fourth factor—the presence of the plaintiff must be foreseeable. Arguably, this places greater restrictions on liability than the *Dillon* test.[51] In any event, there is no decision in Rhode Island which has extended liability beyond the situation in which the mother witnessed the accident.

Hawaii has also extended liability in a manner consistent with the *Dillon* holding. In one respect, the requirements for a cause of action are more liberal under the Hawaii rulings than under any of the California post-*Dillon* decisions. In *Leong v. Takasaki*,[52] a child witnessed his stepgrandmother being killed by a negligently operated automobile. In holding that the child had a cause of action for the negligent infliction of emotional distress, the court found that there was no necessity that plaintiff have suffered a physical injury caused by the emotional distress.[53] Hawaii, like Rhode Island, has not yet extended recovery beyond a fact situation in which the plaintiff witnessed the negligent act.

In *Toms v. McConnell*,[54] a Michigan case, plaintiff had watched as her child alighted from a school bus and started across the street, where she was struck and killed by a negligently driven truck. The court held that the allegation of physical injury produced by emotional distress caused by witnessing the death of the child was sufficient to state a cause of action.

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47. Comment, *Negligent Infliction of Emotional Distress: Liability to the Bystander*, 11 GONZ. L. REV. 203, 215 (1975).

48. *Id.* at 216.

49. *See* discussion of *Dziokonski* in section III, *infra*.

50. 114 R.I. 643, 338 A.2d 524 (1975).

51. Comment, *Negligent Infliction of Emotional Distress: Liability to the Bystander*, 11 GONZ. L. REV. 203, 213-15 (1975), suggesting that requiring an independent analysis of foreseeability of presence will result in limiting liability to cases involving a parent-child relationship.

52. 55 Haw. 398, 520 P.2d 758 (1974).

53. *Id.* at ___, 520 P.2d at 762.

54. 45 Mich. App. 647, 207 N.W.2d 140 (1973).

There is dictum in a later Michigan case, *Gustafson v. Faris,*[55] which suggests that Michigan may, in the future, go beyond the post-*Archibald* California cases in extending the cause of action. In *Gustafson,* plaintiffs' child had been killed by a negligently operated automobile. The court sustained a summary judgment against plaintiffs as to their claim of emotional distress because plaintiffs' injuries were not alleged to have occurred "fairly contemporaneously with the injury to the deceased."[56] In determining the meaning of "fairly contemporaneous," the court cited *Archibald* as holding that a cause of action is stated when plaintiff "viewed her son's injuries . . . within moments after the allegedly negligent accident occurred . . . in spite of the fact that she did not witness the actual accident."[57] To date, however, the Michigan courts have not been faced with a situation in which they could decide to make the extension.

In a 1973 case, *D'Amicol v. Alvarez Shipping Co.,*[58] a Connecticut court allowed a cause of action when plaintiffs saw their child killed in an automobile accident. It is questionable at present whether Connecticut is still to be counted among those jurisdictions following the *Dillon* rule. In 1976, in *McGovern v. Piccolo,*[59] the court held that plaintiff failed to state a cause of action for emotional distress when the allegation was that plaintiff observed, immediately after the accident, the injuries to and death of her son. The court stated that Connecticut did not follow the *Dillon* rule, despite the *D'Amicol* decision.[60] The court said, however, that in the alternative, even if *Dillon* and *D'Amicol* were followed, plaintiff's claim would fail because there was no allegation that plaintiff "actually witnessed" the accident. The *Archibald* extension was rejected as illogical.[61] The question thus remains unsettled in Connecticut.

It appears from the cases considered that what began with *Dillon* in 1968 as an expansion of the right of recovery in the emotional distress-third party situation has run its course. None of the aforementioned jurisdictions following California's lead have expanded the right of recovery beyond that permitted by California. Recovery is limited by the requirement that the plaintiff have witnessed the accident. California has gone further by requiring that the plaintiff have merely some sensory perception of the injury-producing event. Despite the warnings that unlimited liability would follow, the courts have had little difficulty in applying these rules, with fairly foreseeable results in any given case. The argument that these

55. 67 Mich. App. 363, 241 N.W.2d 208 (1976).
56. *Id.* at ____, 241 N.W.2d at 211.
57. *Id.*
58. 31 Conn. Supp. 164, 326 A.2d 129 (1973).
59. 33 Conn. Supp. 225, 372 A.2d 989 (1976).
60. *Id.* at ____, 372 A.2d at 991. The court feared unlimited liability and cited *Archibald* as an illogical extension of *Dillon.*
61. *Id.*

rules set arbitrary limits may be true,[62] but they are limits that work in practice to allow recovery in meritorious cases in which both the impact rule and the zone of danger rule (with their own arbitrary limits) would deny recovery.

With *Tobin*'s unlimited-liability bogeyman effectively dealt with by these pro-*Dillon* jurisdictions, it is expected that the *Dillon* rule will one day be followed in the majority of jurisdictions. However, the *Dillon* rule may no longer be the most liberal in allowing recovery.

III. The Massachusetts Rule

In 1978, the Supreme Judicial Court of Massachusetts, in *Dziokonski v. Babineau*,[63] in overruling *Spade v. Lynn & Boston Railroad*,[64] one of the nation's leading cases on the impact rule, held that plaintiff had stated a cause of action in alleging that a parent had "sustain[ed] substantial physical harm as [a] result of severe mental distress over some peril or harm to his minor child caused by defendant's negligence . . . where the parent either witness[ed] the accident or soon [came] on the scene while the child [was] still there."[65]

It was alleged that the child was struck by an automobile as she was crossing a street. The mother "lived in the immediate vicinity of the accident, went to the scene of the accident and witnessed her daughter lying injured on the ground."[66] The mother suffered emotional shock as a result of the child's injury and died while riding in the ambulance that was taking her daughter to the hospital.[67] The allegation also stated that the father suffered emotional distress as a result of the injury to his daughter and the death of his wife, and his death was caused thereby.[68]

In overturning the impact rule, the court said that the zone of danger rule was better in that it tends to produce more reasonable results while still providing a means of limiting the scope of a defendant's liability; but, it was an inadequate rule in that it does not measure the reasonable foreseeability of an injury to a parent caused by anxiety over harm to his child.[69] Application of the rule would serve to deny recovery in cases in which it should not be denied.

Reasonable foreseeability, said the court, is the proper starting point in deciding whether a negligent act leads to liability. When a defendant negligently injures a person, it is reasonably foreseeable that there will be some-

62. Prosser, *supra* note 5, §54, at 335.
63. ___ Mass. ___, 380 N.E.2d 1295 (1978).
64. 168 Mass. 285, 47 N.E. 88 (1897).
65. ___ Mass. at ___, 380 N.E.2d at 1302.
66. 380 N.E.2d at 1296.
67. *Id.*
68. *Id.*
69. *Id.* at 1300.

one with sufficient emotional attachment to that person so that he will be emotionally affected.[70]

In determining a defendant's liability, the court laid out several criteria to be used. The court required: (1) that there be a substantial physical injury as well as proof of a causal connection between that injury and the defendant's negligent act; (2) that factors such as "where, when and how" the claimant came to know of the injury to the third party be considered; and (3) that the degree of familial or other relationship between the claimant and the third person be taken into account.[71]

Dziokonski goes beyond the limits of recovery marked by *Dillon* and *Archibald* in that it allows a cause of action to be stated without having to allege a "sensory perception of the injury producing event." Under *Dziokonski,* it is not necessary that the plaintiff have seen, heard, or felt the accident in any way at the time of its occurrence (as is required under *Dillon* and *Archibald*), but the court does require that the plaintiff have come upon the scene of the accident soon after its occurrence while the injured party is still there.

In place of the sensory perception requirement, the Massachusetts court seems to place greater weight on the type and degree of relationship that existed between plaintiff and the injured third party (note that the *father* has a cause of action based simply on his allegation that he suffered emotional distress because of the deaths of his *wife* and *child*). The court is also concerned with how the knowledge of the event came to the plaintiff. These two factors are apparently intended to limit the class of claimants.

Although the *Dziokonski* guidelines are arguably arbitrary, in reality they are not. The guidelines appease the old fear of fraudulent claims and limit the scope of liability of the defendant.

The factors of the degree of relationship between the plaintiff and the victim and of the manner in which the plaintiff acquired knowledge of the accident are flexible, allowing a court on a case by case basis to determine the claims that are meritorious. This flexibility is in sharp contrast to the rough, unrealistic (in terms of actual emotional harm) and truly arbitrary limits which in the past have denied recovery to admittedly meritorious claims.

The Massachusetts court looks to the factors that one would naturally expect to be considered in determining whether mental distress was reasonably foreseeable. The court is trying to avoid placing arbitrary limits on recovery. It cannot be seriously argued that the degree of relationship between a plaintiff and a victim is an arbitrary factor. The same is true of where, when, and how the plaintiff came to know of the accident. Perhaps the only arbitrary limitation is the physical injury requirement. Here again, the court is concerned with the proof of genuineness of the emotional

70. *Id.* at 1302.
71. *Id.*

distress. Whatever the court's reason for the requirement, it is distinguishing emotional distress manifested by physical injury and emotional distress with no physical manifestations. Future cases will reveal whether this distinction will prevent recovery of valid claims.[72]

How far the *Dziokonski* rule will be carried is not clear. Time and the cases will tell whether the new rule will work, but there appears to be no reason that it should not. The arguments of fraud and unlimited liability have been met and found unconvincing. Although the principles laid down in *Dziokonski* are limiting (as are all rules of law), they are rational, practical, and do not limit recovery by relying on factors that may have little connection to actual mental suffering.

It is not expected that the *Dziokonski* case will be followed by any great number of jurisdictions—at least not in the near future. The *Dillon* rule, which had been the most liberal until *Dziokonski,* was laid down only ten years ago. Despite its proven practicality, *Dillon* has been followed in only a handful of other states. The zone of danger rule is still the prevailing position. Courts which still question the *Dillon* extension, as well as those which are still refining it, will look long and hard at Massachusetts' experience in applying *Dziokonski* before following Massachusetts' lead.

The strength of the holding lies in the fact that it is the product of a study of all the alternatives and problems in this area. The Massachusetts court made a great leap from the impact rule to the most liberal rule in the country. The reasons for the leap seem to be an acceptance of the duty of the court to hear and redress meritorious claims, and the belief that more general principles of liability best serve to reach this end.

DAVID H. CONNOLLY, JR.
WM. GREGORY MCCALL

72. Judge Keating, dissenting in *Tobin,* said: "The only real requirement . . . which policy and justice dictate, is stringent evidence of causation and of actual injury to deter those who would use a sound and just rule as a cover for spurious claims." 24 N.Y.2d at 620-21, 249 N.E.2d at 425, 301 N.Y.S.2d at 563 (dissenting opinion).