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NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS: RECOVERY IS FORESEEABLE

JEFFREY HOSKINS*

I. INTRODUCTION

"Hearing about a child's accident can be almost as upsetting as actually seeing it."¹ On January 5, 2000, seven-year-old Skylar Wages was playing outside his parents' home when a car negligently driven by Phillip Pagar struck and injured him.² An ambulance rushed Skylar and his mother, who was home at the time, to the hospital.³ Skylar's father, Gerald Wages, was at work during the incident and subsequently rushed to the hospital after being informed of the accident by telephone.⁴ "Initially, Gerald got a call saying that his son had been run over by a truck [and] [a]t that time, Skylar's medical condition was uncertain."⁵ Mr. Wages filed an action against Pagar claiming negligent infliction of emotional distress resulting from his son's injuries.⁶

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1. See Carmiel Sileo, *Father Who Didn't See Son's Accident Can Sue For Emotional Distress*, 40 TRIAL 88 (2004) (stating that the Montana Supreme Court recently allowed a father to sue for emotional distress after his son was involved in an accident, even though the father did not witness the accident).

2. *Wages v. First Nat'l Ins. Co.*, 79 P.3d 1095, 1096 (Mont. 2003).

3. *Id.*

4. *Id.*

5. See Brief of Appellant at 4, *Wages v. First Nat'l Ins. Co.*, 79 P.3d 1095 (Mont. 2003) (No. 02-604) (stating that Skylar's "ability to be able to walk, to run, to actively participate in school, and to live a normal child's life were all in question.").

6. *Wages*, 79 P.3d at 1097. Skylar's injuries were extensive: [He] experienced bilateral pelvic fractures and complete urethral disruption. He has undergone at least four major, invasive and expensive surgical procedures since January 5, 2000, as well as considerable physical therapy. Due to the extensive nature of Skylar's urethra injury and the failure of surgery to correct the problem, Wages has had to catheterize his son between three and four times per day with a large catheter tube.

Id. at 1096-7.

The court goes on to state that Skylar "is behind in his education due to the accident and his ongoing medical treatment. His parents have noticed a distinct change in his personality. Moreover, the prospect of his future ability

The Supreme Court of Montana reversed and remanded the district court's denial of Wages' claim, concluding that recovery must be based on whether the injury to Wages was foreseeable.⁷ In doing so, the court followed its own precedent, in which it no longer required the plaintiff to have witnessed the accident in order to recover.⁸ The court ordered the district court to determine if Wages' injury was foreseeable, and whether "severe" or "serious" emotional distress could be found.⁹ In determining if the emotional distress was serious and severe, the court applied the standard set forth in the Restatement (Second) of Torts §46.¹⁰

Although most jurisdictions require some sort of observation of the injury-producing event, many are expanding recovery to include bystander victims.¹¹ *Wages* demonstrates that it is now possible to recover on a claim for negligent infliction of emotional distress, even if the plaintiff failed to witness the

to participate in physical activities is questionable as is his ability to have children." *Id.* at 1097.

7. *Id.* at 1100.

8. In a previous decision, the supreme court of Montana held that "[a] cause of action for negligent infliction of emotional distress will arise under circumstances where serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant's negligent act or omission." *Sacco v. High County Indep. Press, Inc.*, 896 P.2d 411, 425 (Mont. 1995). Therefore, the *Wages* court stated, "In *Sacco*, we severed the previously mandatory nexus between witnessing the accident and foreseeability, and established that a defendant can owe a duty to a NIED claimant even in circumstances where the claimant was not at the scene of the accident." *Wages*, 79 P.2d at 1100.

9. *Id.* The court held that in determining if *Wages* was a foreseeable plaintiff, "the court may consider such factors as the closeness of the relationship between the plaintiff and victim, the age of the victim, and the severity of the injury of the victim, and any other factors bearing on the question." *Id.* The court stressed that "[i]t may not, however, rely exclusively on the fact that a plaintiff was not a bystander to conclude that such a plaintiff is an unforeseeable plaintiff." *Id.*

10. RESTATEMENT (SECOND) OF TORTS §46 (1965), states:

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.

11. See James Podgers, *Witness to Tragedy: Courts Open Door to More Suits for Negligent Infliction of Emotional Distress*, 81 A.B.A. 44, (1995) (discussing two court opinions from New Jersey and Wisconsin that have made it easier for bystanders to recover).

accident.¹² The only certain thing is that this area of law is consistently inconsistent, with some jurisdictions following "archaic [laws that do] not fully address all plaintiffs who are deserving of relief."¹³ Courts, in order to maximize relief to deserving plaintiffs, should adopt the foreseeability approach when granting recovery.

Part II of this Comment will discuss the background of bystander recovery for negligent infliction of emotional distress. It will explore the three methods courts use when determining recovery: the physical impact test, the zone-of-danger test, and the foreseeability test. Part III will explain the difference between direct victims and bystander victims and explain why courts are reluctant to expand bystander recovery. It will also discuss what emotional distress encompasses and what standards the courts use to measure its extent. Part IV will propose that courts adopt the foreseeability test as the proper mode of recovery. Recent court opinions will showcase how the foreseeability test is applied and how courts use their discretion to grant deserving plaintiffs relief.

II. BACKGROUND

Courts have long been hesitant to award damages to individuals for purely mental distress absent a showing of physical injury.¹⁴ The fear was that if such claims were allowed, a "wide door" might open and a "flood of litigation" could result.¹⁵ Modern courts "continue to foster judicial caution and doctrinal limitations on recovery for emotional distress."¹⁶ With the emergence of bystander recovery, many courts remain "reluctant to allow

12. *Wages*, 79 P.2d at 1100.

13. *See Sacco*, 896 P.2d at 425 (recognizing the need for courts to utilize a better approach when determining recovery for negligent infliction of emotional distress).

14. W. PROSSER & W. KEETON, *PROSSER AND KEETON ON THE LAW OF TORTS* 55 (5th ed. 1984). *See also* *Lynch v. Knight*, 9 H.L.C. 577, 598 11 Eng. Rep. 854 (1861) (stating that the law does not place a value on mental pain or anxiety and will thus not reward damages for mental pain or anxiety when it was caused solely by the negligent act).

15. PROSSER, *supra* note 14, at 56.

16. *Id.* at 360. Keeton then cites to *Payton v. Abbott Labs*, 437 N.E2d 171, 178-81, (Mass. 1982) and *RESTATEMENT (SECOND) OF TORTS* §436A cmt. b (1965) and writes that the concerns that the courts have are three fold:

(1) the problem of permitting legal redress for harm that is often temporary and relatively trivial; (2) the danger that claims of mental harm will be falsified or imagined; and (3) the perceived unfairness of imposing heavy and disproportionate financial burdens upon a defendant, whose conduct was only negligent, for consequences which appear remote from the "wrongful act."

PROSSER, *supra* note 14, at 360-61 (citations omitted).

recovery when physical injury is absent.”¹⁷ Today, there are three prevailing views that courts follow in determining recovery: (1) the physical impact rule, (2) the zone-of-danger rule, and (3) the foreseeability test.¹⁸

A. The Physical Impact Rule

The requirement of direct physical impact can be traced back to the English law in *Victorian Railways Commissioners v. Coultas*.¹⁹ In *Victorian Railways Commissioners*, the court dismissed the plaintiffs’ claim for emotional distress, because, although they suffered fright, that fright was not accompanied by physical injury. Since *Victorian Railways Commissioners*, American courts have also adopted the rule barring such claims.²⁰ Early courts applying the rule found that its application was grounded in public policy and the general laws of torts.²¹ Under the physical impact rule, a plaintiff may not recover unless the individual suffered a “contemporaneous traumatic physical

17. See Lucy M. Romeo, *A Case-By-Case Analysis: Connecticut Adopts the Foreseeability Test for Bystander Emotional Distress in Clohessy v. Bachelor*, 30 CONN. L. REV. 325, 325 (1997) (stating that progression of recovery for negligent infliction of emotional distress is moving more towards a foreseeability analysis).

18. See Keith J. Wenk, *Negligent Infliction of Emotional Distress: Liberalizing Recovery Beyond the Zone of Danger Rule*, 60 CHI.-KENT L. REV. 735, 735 (1984) (arguing that although the Supreme Court of Illinois abandoned the physical impact rule and adopted the zone-of-danger rule, it should have gone one step further and adopted the foreseeability test when determining recovery for negligent infliction of emotional distress).

19. 13 App. Cas. 222 (Eng. 1888). The plaintiffs suffered shock when a gatekeeper negligently allowed them to cross a railroad track with an oncoming train approaching. *Id.* Although the incident caused plaintiffs fright, the fright alone, without accompanying physical injury, would not be such that would normally flow from defendant’s act, and thus recovery is not allowed. *Id.*

20. See *Braun v. Craven*, 51 N.E. 657, 662 (Ill. 1898) (holding that without personal injury, there can be no recovery for the mere emotional distress caused by another). Another American court held that, “[w]e have not been . . . able, after the most diligent research, to find any case, holding that fright occasioned by imminent danger to one person, can be made the basis of an action for damages by another.” *Cleveland C.C. & St. L. Ry. Co. v. Stewart*, 56 N.E. 917, 922 (Ind. Ct. App. 1900). Similarly, the Supreme Judicial Court of Massachusetts held that, “[w]e remain satisfied with the rule that there can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury” *Spade v. Lynn & Boston Ry. Co.*, 47 N.E. 88, 89 (Mass. 1897).

21. See *Braun*, 51 N.E. at 664 (holding that as a matter of public policy, liability does not exist when mere fright or shock, absent physical impact, produces emotional distress). See also *Cleveland C.C. & St. L. Ry. Co.*, 56 N.E. at 919 (stating that under the laws of negligence, a party must prove proximate causation and, by requiring a direct impact, the plaintiff has established the absence of intervening acts).

injury.²² The reason behind this requirement is in part due to the fear that courts have concerning fraudulent claims.²³ In requiring a direct physical impact, courts are attempting to limit such fraudulent claims.²⁴

Although the physical impact rule has deep roots in American jurisprudence, it no longer has the support of the majority of scholars.²⁵ Because of the broader requirements that aim to increase the "fairness" of recovery,²⁶ most jurisdictions have abandoned the physical impact requirement in favor of the zone-of-danger rule or a foreseeability test.²⁷

22. See *Bass v. Nooney Co.*, 646 S.W.2d 765, 768 (Mo. 1983) (discussing the reasons for the physical impact rule and the reasons for abandoning the rule).

23. Dennis G. Bassi, *It's All Relative: A Graphical Reasoning Model For Liberalizing Recovery for Negligent Infliction of Emotional Distress Beyond the Immediate Family*, 30 VAL. U. L. REV. 913, 922 (1996). See *Bass*, 646 S.W.2d at 769 (stating further reasons for the rule include "the difficulty in proving a causal connection between the damages claimed by the plaintiff and the act of the defendant which is claimed to have induced the mental and emotional distress . . . and the probability that permitting recovery would release a flood of new litigation . . .").

24. *Id.* See *Romeo*, *supra* note 17, at 327 (stating that further policy reasons behind the rule include "trivial claims should be eliminated . . . [and] claims should not be speculative . . .").

25. *Bass*, 646 S.W.2d at 769. Indeed, not long after its acceptance in America, writers criticized the physical impact rule:

The fallacies of the arguments by which the rule . . . has been supported, the essential reason of the rule, and the grave injustice of its application have been so often exposed that it is high time our courts . . . shall no longer deny redress for . . . injury which is due to nervous shock caused by fright.

Archibald H. Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260, 278 (1921).

The following illustration further demonstrates the scholarly criticism:

When the defendant leaves a truck, unattended and insufficiently braked, at the top of a steep street, he negligently endangers the bodily safety of persons coming up the street The fact that by a lucky chance the plaintiff escaped [being] . . . run over directly by the truck . . . is not a sufficient reason for urging that [the defendant] ought not pay for . . . [the] nervous shock induced by fear for the safety of another also endangered by the approaching truck.

Calvert Magruder, *Mental Disturbance in Torts*, 49 HARV. L. REV. 1033, 1036-37 (1936) (citations omitted).

26. The impact requirement can be met by "a slight blow, a trivial jolt or jar, a forcible seating on the floor, dust in the eye, or inhalation of smoke." PROSSER, *supra* note 14, at 363-64 (citations omitted). "A Georgia circus case reduced the matter to something of an absurdity by finding 'impact' where the defendant's horse 'evacuated his bowels' into the plaintiff's lap." *Id.* at 364 (citations omitted).

27. *Bass*, 646 S.W.2d at 769. For a further analysis, see *Romeo*, *supra* note 17, at 328. *Romeo* maintains that the physical impact rule has accomplished little of what its purpose is behind the rule. *Id.*

B. The Zone-of-Danger Rule

As a result of the injustice of the physical impact test,²⁸ many states have adopted the zone-of-danger test as an alternative.²⁹ Under this rule, "a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress."³⁰ The premise behind the zone-of-danger rule is that the defendant owes a duty to the bystander, and as a result of his negligence, the defendant has breached that duty.³¹ Similarly, the zone-of-danger rule is supported by the Restatement (Second) of Torts §436.³²

Although the zone-of-danger test seems to allay courts' worries about unreasonably extending liability, its application can leave deserving plaintiffs without a remedy.³³ Therefore, courts

28. See *Bass*, 646 S.W.2d at 769-70 (discussing numerous reasons for abandoning the physical impact rule, including the "unfairness" and "inequity" of the rule, and discussing the weaknesses behind the arguments in favor of the rule).

29. Wenk, *supra* note 18, at 739. See *Towns v. Anderson*, 579 P.2d 1163, 1165 (Colo. 1978) (stating that the court is following the majority of jurisdictions and adopting the Restatement approach by no longer requiring a physical impact prior to recovery for negligent infliction of emotional distress). See also *Robb v. Pennsylvania R.R. Co.*, 210 A.2d 709, 714-715 (Del. 1965) (abandoning the physical impact rule in favor of the zone-of-danger rule in the belief that justice is better served using the latter). See also *Rickey v. CTA*, 457 N.E.2d 1, 5 (Ill. 1983) (finding that courts were applying the physical impact rule as a mere formality, and thus the better approach to recovery is the zone-of-danger test). See also *Schultz v. Barberton Glass Co.*, 447 N.E.2d 109, 112 (Ohio 1983) (stating that the arguments in favor of the physical impact requirement no longer validate the court's continued reliance on the rule when determining recovery for negligent infliction of emotional distress).

30. See *Rickey*, 457 N.E.2d at 5 (holding that "the bystander . . . must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact.").

31. *Romeo*, *supra* note 17, at 328. Additionally, the defendant breaches a duty owed to the plaintiff when he or she unreasonably places the plaintiff in danger and, as such, the plaintiff should recover damages including damages caused by seeing a family member also placed in danger because of the defendant's conduct. *Bovsun v. Sanperi*, 461 N.E.2d 843, 847 (N.Y. 1984).

32. Sections 2 and 3 of the RESTATEMENT (SECOND) OF TORTS §436 (1965) state:

(2) If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to another otherwise than by subjecting him to fright, shock, or other similar and immediate emotional disturbance, the fact that such harm results solely from the internal operation of fright or other emotional disturbance does not protect the actor from liability.

(3) The rule stated in Subsection (2) applies where the bodily harm to the other results from his shock or fright at harm or peril to a member of his immediate family occurring in his presence.

33. See *Engler v. Wehmas*, 633 N.W.2d 868 (Minn. Ct. App. 2001) (holding that although the plaintiff mother was within the zone of danger and saw her son fly ten feet in the air after being hit by a car, she was nonetheless denied

that have abandoned the zone-of-danger test as well as the physical impact test have used a form of the foreseeability test when determining bystander recovery.³⁴

C. The Foreseeability Test

Perhaps the most widely known jurisdiction to abandon the zone-of-danger test in favor of a new standard of recovery is California, in the landmark case, *Dillon v. Legg*.³⁵ In *Dillon*, the plaintiff mother filed a cause of action against the defendant for emotional trauma including "great emotional disturbance and shock and injury to her nervous system" from witnessing a car accident in which the defendant collided with the plaintiff's infant daughter.³⁶ In addition to the mother, the victim's sister also brought a claim against the driver on the ground that she "was in close proximity to the . . . collision and personally witnessed said collision . . . [and as a result] sustained great emotional disturbance and shock and injury to her nervous system . . ."³⁷ The lower court rejected the mother's claim because although she witnessed the accident, she was not within the zone of danger.³⁸ On appeal, the Supreme Court of California recognized the "fallacy" of the zone-of-danger rule and abandoned it in favor of a foreseeability test.³⁹

recovery). There was a strong dissent in this opinion arguing for recovery because "plaintiff was in the zone of danger. She reasonably feared for her own safety. She suffered severe emotional distress that was the product of fear for herself or the safety of a family member." *Id.* at 874.

34. See Patrick F. X. Santel, *Bystanders' Negligent Infliction of Emotional Distress Claims in Washington State: Must You Be Present to Win?*, 23 SEATTLE U. L. REV. 769, 772 (2000) (stating that courts began recognizing claims from plaintiffs who were neither themselves injured nor endangered by the defendant's conduct). See also Renee Birnbaum, *Negligence Law: Negligent Infliction of Emotional Distress: Under What Circumstances Can Relief Be Found?*, 83 MICH. BAR J. 18, 20 (2004) (stating that Michigan has abandoned the physical impact rule and subsequently recognized the 'hopeless artificiality' of the zone-of-danger rule).

35. See generally 441 P.2d 912, 914 (Cal. 1968) (abandoning the "zone-of-danger" test).

36. *Id.* at 914.

37. *Id.*

38. The lower court relied on two previous California decisions. First, the lower court agreed that "[n]o cause of action is stated in [the] allegation that plaintiff sustained emotional distress, fright or shock induced by apprehension of negligently caused danger . . ." *Id.* at 914-15 (quoting *Amaya v. Home Ice, Fuel & Supply Co.* 379 P.2d 513 (Cal. 1963)). Second, the court also agreed that no cause of action is stated "unless the complaint alleges that the plaintiff suffered emotional distress, fright or shock as a result of fear for his own safety." *Id.* at 915 (quoting *Reed v. Moore*, 319 P.2d 80 (Cal. 1957)).

39. The court stated:

The case thus illustrates the fallacy of the [zone-of-danger] rule that would deny recovery in the one situation and grant it in the other. In the first place, we can hardly justify relief to the sister for trauma which

In determining whether the plaintiff had a right to recover, the *Dillon* court applied the general rules of tort law.⁴⁰ First, the court noted that the plaintiff could not recover if she was found to have acted in a contributorily negligent manner.⁴¹ Second, the court turned to the concept of duty and recognized "that an action for negligence would lie only if the defendant breached a duty which he owed to plaintiff."⁴² The court further noted that when deciding if the defendant owes a duty to the plaintiff, the primary factor will be the foreseeability of risk.⁴³ While the degree of foreseeability is measured on a case-by-case basis,⁴⁴ the following factors are used to aid the court in its determination:

(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.⁴⁵

Applying these factors, the court determined that the mother had a proper cause of action and her emotional distress was foreseeable.⁴⁶

Following the *Dillon* decision, there were numerous court holdings that expanded the guidelines to allow greater recovery for bystander victims.⁴⁷ In general, the guidelines were relaxed and

she suffered upon apprehension of the child's death and yet deny it to the mother merely because of a happenstance that the sister was some few yards closer to the accident. The instant case exposes the hopeless artificiality of the zone-of-danger rule.

Dillon, 441 P.2d at 915.

40. *Id.* at 924. The court stated that it should follow its approach to other forms of injury and therefore apply negligence concepts to the present case, including the theories of proximate cause and foreseeability. *Id.*

41. *Id.* at 916.

42. *Id.* at 917.

43. *Id.* at 920. The court stated that "the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk Because it is inherently intertwined with foreseeability such duty or obligation must necessarily be adjudicated only upon a case-by-case basis." *Id.*

44. *Dillon*, 441 P.2d at 920.

45. *Id.* at 920.

46. *Id.* at 921. The court stated that "the presence of all the above factors indicates that plaintiff has alleged a sufficient prima facie case. Surely the negligent driver who causes the death of a young child may reasonably expect that the mother will not be far distant and will upon witnessing the accident suffer emotional trauma." *Id.*

47. See *Archibald v. Braverman*, 79 Cal. Rptr. 723, 725 (Cal. Ct. App. 1969) (holding that a mother could recover because she arrived on the scene shortly after the accident and witnessed the injuries to her son). See also *Krouse v.*

courts "allowed recovery more frequently."⁴⁸ Fearing that the continued application of the guidelines in *Dillon* would result in limitless liability, the California Supreme Court handed down *Thing v. LaChusa*.⁴⁹ In *Thing*, a mother was denied recovery for the emotional distress she suffered after a negligent driver struck and injured her child because she was not present at the scene of the accident.⁵⁰ The *Thing* court limited the *Dillon* guidelines and held that a bystander can recover for negligent infliction of emotional distress only if the plaintiff:

(1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress – a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances.⁵¹

D. The Problem

As these three primary standards demonstrate, "[c]ourts have been particularly concerned that some appropriate boundaries exist for negligent infliction of emotional distress to minimize

Graham, 562 P.2d 1022, 1031 (Cal. 1977) (finding that although the plaintiff did not "contemporaneously observe" his wife's accident, he was deemed a "percipient witness" by the fact that he knew where his wife was immediately before the accident and therefore must have known that the defendant's car struck her). See also *Nazaroff v. Superior Court of Santa Cruz County*, 145 Cal. Rptr. 657, 662 (Cal. Ct. App. 1978) (holding that plaintiff may have a cause of action from the "contemporaneous observation" of the immediate consequences of defendant's act).

48. See Stephen C. Peretz and Gayle D. Perlo, *Bystander Recovery: Ruling Within the Guidelines*, 19 W. ST. U. L. REV. 517, 519 (1992) (stating that although recovery was expanding, the lower courts began adding their own prerequisites to the *Dillon* guidelines, seemingly moving away from their original form). In their comment, Peretz and Perlo recognize that California moved back to the *Dillon* requirements when they decided *Ochoa v. Superior Court*, 703 P.2d 1 (Cal. 1985) writing, "In *Ochoa*, the court 'explicitly removed several barriers to recovery which [had] been used in conjunction with *Dillon*.'" *Id.* at 519-20 (quoting Kathleen K. Andrews, *The Next Best Thing to Being There?: Foreseeability of Media-Assisted Bystanders*, 17 SW. U. L. REV. 65, 71 (1987)).

49. 771 P.2d 814 (Cal. 1989). The *Thing* court was worried that liability based on a case-by-case analysis of foreseeability would result in "limitless liability out of all proportion to the degree of a defendant's negligence . . ." *Id.* at 826. The court also found that the *Dillon* analysis resulted in unclear and "inconsistent rulings in the lower courts." *Id.* at 825.

50. *Id.* at 830. Although the mother arrived immediately after the accident, the court further based its holding on the fact that "[s]he did not observe defendant's conduct and was not aware that her son was being injured." *Id.*

51. *Id.* at 829-30.

spurious claims and to limit the potential liability of defendants.⁵² However, as a result of the refinements in this field, there is vast uncertainty among both attorneys and their clients as to whether a successful cause of action lies.⁵³ Ultimately, many courts have abandoned both the physical impact requirement and the zone-of-danger test in favor of a foreseeability analysis.⁵⁴

III. ANALYSIS

A. Bystander Victims v. Direct Victims

With the rise of bystander recovery, courts are now required to make a distinction between claims for emotional distress brought by actual bystanders, as that term is used, and direct victims.⁵⁵ *Burgess v. Superior Court of Los Angeles County*⁵⁶ contains an example of the difference between bystander victims and direct victims. In *Burgess*, the plaintiff mother, Julia Burgess, brought a suit against defendants, Dr. Narendra Gupta and West Covina Hospital, for negligent infliction of emotional distress resulting from the negligent delivery of Burgess's child.⁵⁷ During birth, the child was deprived of oxygen for roughly forty-four

52. See Podgers, *supra* note 11 (recognizing the extreme emotional distress that results when a loved one is severely injured in an accident and acknowledging that it is the purpose of the law to draw boundaries and impose restrictions on who is able to recover and how much compensation the victim should receive).

53. See Dale Joseph Gilsinger, Annotation, *Recovery Under State Law for Negligent Infliction of Emotional Distress Under Rule of Dillon v. Legg*, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968), or *Refinements Thereof*, 96 A.L.R.5th 107 (2004) (discussing in detail the various standards used to determine recovery and how courts in separate jurisdictions apply those standards to their cases).

54. Some examples include *Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432 (Wis. 1994); *Paugh v. Hanks*, 451 N.E.2d 759 (Ohio 1983); *Barnhill v. Davis*, 300 N.W.2d 104 (Iowa 1981); *Gates v. Richardson*, 719 P.2d 193 (Wyo. 1986).

55. See, e.g., Michael Jay Gorback, *Negligent Infliction of Emotional Distress: Has the Legislative Response to Diane Whipple's Death Rendered the Hard-line Stance of Elden and Thing Obsolete?*, 54 HASTINGS L.J. 273, 288-89 (2002) (stating the courts used the physical impact test and the zone-of-danger test under the premise that recovery should be limited to direct victims; however, the emergence of bystander recovery has required courts to make a distinction between the two).

56. 831 P.2d 1197 (Cal. 1992).

57. *Id.* at 1198-99. The father of the child, Joseph Moody, also brought suit to recover for emotional distress; however, the trial court dismissed his suit when he failed to comply with discovery requests. *Id.* at 1199. In dicta, the California Supreme Court noted that an amicus brief was filed raising the question of whether a father in such a situation can recover for negligent infliction of emotional distress. *Id.* at 1199 n.4. However, since the trial court dismissed his suit, this court declined to decide that issue in the present case. *Id.* at 1199.

minutes as a result of a prolapsed umbilical cord.⁵⁸ After the child was born, "he suffered permanent brain and nervous system damage, allegedly as a result of the deprivation of oxygen."⁵⁹

At trial, defendants brought a motion for summary judgment arguing that Burgess is not entitled to recover because she did not "contemporaneously observe" the child's injuries.⁶⁰ The trial court relied upon the holding of *Thing* and granted the motion.⁶¹ On appeal the court reversed, holding that "*Thing* was not controlling under the facts presented by this case, because Burgess was a 'direct victim' rather than a 'bystander.'"⁶²

In *Burgess*, the court recognized that the physician-patient relationship creates a duty of care and further recognized that an obstetrician and an expectant mother enter into a strong physical and emotional relationship.⁶³ Therefore, "[a]ny negligence during delivery which causes injury to the fetus and resultant emotional anguish to the mother . . . breaches a duty owed directly to the mother."⁶⁴

"[T]he label 'direct victim' arose . . . as a result of a breach of duty owed the plaintiff that is 'assumed by the defendant or

58. *Id.* at 1199. The court noted that "approximately 21 minutes elapsed between the time that [Dr.] Gupta diagnosed the cord prolapse and the time Burgess was taken to emergency surgery." *Id.* at 1198. Burgess testified that during this time Dr. Gupta was "in and out" of her room and yelled at her to "[b]reathe, breathe, because your baby ain't getting enough oxygen." *Id.*

59. *Id.* at 1199. The child was eventually released from the hospital a month after birth. *Id.* The court further noted that the child died, "allegedly as the result of his injuries," while the trial was in process. *Id.*

60. *Id.* The defendants based their argument on bystander liability and the previous decision by the California Supreme Court in *Thing*, and urged the court that because there was a lack of contemporaneous observation of the injury, there was not a valid bystander claim. *Id.*

61. *Id.* As stated earlier, the *Thing* court established a bright-line rule where recovery is allowed only when the plaintiff and victim are closely related, the plaintiff is present at the scene, the plaintiff is aware the incident is causing injury, and suffers serious emotional distress. *Thing*, 771 P.2d at 829-30.

62. *Burgess*, 831 P.2d at 1199. The court relied on two primary cases: *Christensen v. Superior Court of Los Angeles County*, 820 P.2d 181 (Ca. 1991) (stating that plaintiffs seeking emotional distress were deemed direct victims of improperly performed funeral services) and *Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc.*, 770 P.2d 278 (Ca. 1989) (finding a mother a direct victim after her son was sexually assaulted by a therapist).

63. *Burgess*, 831 P.2d at 1203. The court discussed the realities of childbirth. It mentioned that the obstetrician is aware of the physical and emotional connection between a mother and her fetus. *Id.* It further mentioned how mothers often forgo all anesthesia out of concern for the well-being of the future child and that the obstetrician is aware that, regardless of any pain, childbirth is the most joyous experience for mothers. *Id.*

64. *Id.* Finally, the court stated that once it is understood that there is a breach of physician-patient duty, this case becomes a mere professional malpractice claim for which recovery is warranted. *Id.*

imposed on the defendant as a matter of law, or that arises out of a relationship between the two."⁶⁵ The essential analysis that courts look at in determining if one is a direct victim versus a bystander is the "source of the duty owed by the defendant to the plaintiff."⁶⁶ Ultimately, in direct victim cases, successful recoveries for negligently inflicted emotional distress result when a defendant breaches a preexisting duty owed to the plaintiff, regardless of whether the plaintiff is labeled a bystander.⁶⁷

B. The Serious and Severe Emotional Distress Requirement

As discussed earlier, although courts may employ different methods to establish valid claims for emotional distress,⁶⁸ the similarity between them is that in order to recover, the emotional distress must be serious and severe.⁶⁹ When the Supreme Court of Connecticut adopted the foreseeability test in *Clohessy v. Bachelor*,⁷⁰ the court held that a bystander's "emotional injury must be serious, beyond that which would be anticipated in a disinterested witness and which is not the result of an abnormal response."⁷¹ In *Clohessy*, the plaintiff mother brought a suit to recover for the emotional distress she suffered after witnessing defendant's automobile negligently strike and kill her son.⁷² The

65. *Id.* at 1201 (quoting *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* 770 P.2d 278, 282 (Cal. 1989)).

66. *Id.* at 1200. The court recognized that the concept of duty in direct victim cases arises from a preexisting relationship between the plaintiff and the defendant, whereas in bystander cases, there lacks that preexisting relationship, and the defendant assumes no "duty of care beyond that owed to the public in general." *Id.* at 1200-01.

67. *Id.* at 1201.

68. *See supra* notes 19-51 and accompanying text (discussing the three main standards courts use to establish claims for negligent infliction of emotional distress).

69. *See Thing*, 771 P.2d at 829-30 (holding that the distress must be greater than that suffered by a disinterested witness). *See also Wages*, 79 P.3d at 1098 (stating that the RESTATEMENT (SECOND) OF TORTS §46 should be used as the standard to determine the seriousness of the distress).

70. 675 A.2d 852 (Conn. 1996).

71. *Id.* at 865. In reaching its opinion, the court relied on precedent from other courts adopting the same standard. *See Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 435 S.E.2d 320, 322 (N.C. 1993)(quoting *Johnson v. Ruark Obstetrics*, 395 S.E.2d 85, 97 (N.C. 1990))(holding that "plaintiff must show an 'emotional or mental disorder, such as . . . neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals' . . ."). *See also Paugh v. Hanks*, 451 N.E.2d 759, 765 (Ohio 1983) (holding that "serious emotional distress may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case.").

72. *See Clohessy*, 675 A.2d at 854, n.2 (stating that the decedent's minor brother, Liam Clohessy, through his father, John Patrick Clohessy, also brought suit for his resulting emotional distress from witnessing the accident).

court found that it was reasonable to foresee that a mother would suffer serious emotional distress in such a situation and held that a valid bystander claim existed.⁷³

Conversely, in *Fitch v. Milford Power Co.*,⁷⁴ the court found that plaintiffs, Michael Fitch and Robert Fitch III, failed to state a valid bystander claim for negligent infliction of emotional distress.⁷⁵ The plaintiffs brought the claim after witnessing their father trapped in a crane for several hours.⁷⁶ As a result of witnessing the accident, the brothers complained of suffering from nightmares, resulting in sleeping difficulty.⁷⁷ However, after the accident, the plaintiffs missed no work, were not diagnosed with emotional disorders, and continued to live normal, everyday lives.⁷⁸ The court held that "[d]espite the indisputably traumatic effect their father's injury has had on their lives . . . [the] accident would have been traumatic to even a disinterested person and having nightmares about such an event would be a normal response to these circumstances."⁷⁹ Ultimately, the court held that plaintiffs' emotional distress was not serious and severe and therefore denied recovery.⁸⁰

1. *Measuring Emotional Distress*

Before courts can measure a plaintiff's emotional distress, the evidence must demonstrate that the defendant's negligence was the proximate cause of the plaintiff's injury.⁸¹ Often, this inquiry comes down to the question of whether defendant owed plaintiff a duty.⁸² Once proximate cause is established, emotional distress is

73. See *id.* at 865 (determining that all requirements of the claim are met, including relation to the victim, contemporaneous sensory perception, and substantial injury to the victim).

74. 36 Conn. L. Rptr. 601 (Conn. Super. Ct. 2004).

75. See *id.* (requiring a foreseeability analysis similar to that in *Dillon*, including close relation to the victim, contemporaneous sensory perception, substantial injury to the victim, and serious emotional distress).

76. See *id.* (recognizing that the plaintiffs stated in their claim that the Heat Recovery Steam Generator fell on their father as he worked at the Milford Power Company).

77. See *id.* (arguing that their emotional distress is serious and severe, Michael and Robert also claimed that they suffered anger and frustration as well as weight gain).

78. See *id.* (recognizing that bystander claims exist when the emotional distress is serious, the court determined that neither plaintiff suffered a "debilitating emotional reaction" that rises to the necessary level of a valid claim).

79. *Id.*

80. *Id.*

81. See PROSSER, *supra* note 14, at 272-73 (explaining the difficulty that courts and juries have over the term proximate cause, but suggesting that "legal cause" or "responsible cause" are close synonyms).

82. *Id.* at 273.

often described in terms of terror, anxiety, depression, worry, as well as personality changes.⁸³

The actual measure of the extent of the emotional distress is often difficult to determine because no clear standard exists.⁸⁴ In his treatise on remedies, Dobbs states, "[b]ecause the award for pain does not reflect economic loss, it is difficult to establish standards of measurement. [Therefore] . . . courts have rejected the 'Golden Rule' measurement under which the jury would be told to award an amount they would personally take to undergo the plaintiff's injuries."⁸⁵ Dobbs concludes that courts are content to simply allow the jury to decide on a measurement that results in "fair compensation" or a "reasonable amount."⁸⁶

C. Arguments Against Expansion

As noted earlier, courts are consistently worried about expanding bystander recovery because of the perceived effects on the legal system.⁸⁷ Although most jurisdictions have completely abolished the physical impact requirement,⁸⁸ many are reluctant to abandon the zone-of-danger rule in favor of a foreseeability test.⁸⁹ The following sections will explain some of those fears and how courts react to them.

1. Fear of Limitless Liability

Opponents of expanding the method of recovery for bystanders in negligent infliction of emotional distress cases argue that doing so will result in limitless liability.⁹⁰ In *Tobin v.*

83. See DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION, 652-54, (2d ed. 1993) (stating that any emotional reaction to a tort, as long as the plaintiff can prove proximate causation, is a basis for which the courts may award compensation to the victim).

84. See *id.* at 383 (recognizing the difficulty in establishing a common standard because of the bias that certain juries may have and the lack of a "market value" on suffering).

85. *Id.* (citations omitted).

86. See *id.* (stating that because there is no real standard of measurement, review of the jury's award is often difficult).

87. PROSSER, *supra* note 14, at 56.

88. See *supra* notes 25-27 (explaining the arguments against the physical impact rule).

89. See Wenk, *supra* note 18 (explaining the reasons that Illinois opted to follow the zone-of-danger rule as opposed to applying a foreseeability test).

90. See Engler, 633 N.W.2d at 872 (discussing that Minnesota applies the zone-of-danger test as the method of recovery because a negligent defendant must not be subject to unlimited liability). See also Bassi, *supra* note 23, at 945-46 (recognizing that the arguments against expanding bystander recovery include the idea that liability must be limited). See also Thing, 771 P.2d at 821 (stating that a pure foreseeability test would result in "limitless exposure").

Grossman,⁹¹ the Court of Appeals of New York stated that “[e]very injury has ramifying consequences, like the ripples of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree.”⁹² In *Tobin*, the court denied recovery to a mother after her child was injured when the defendant negligently struck the child with an automobile.⁹³ Although New York eventually adopted the zone-of-danger test,⁹⁴ the *Tobin* court clearly made its point, stating that “[t]his is the risk of living and bearing children.”⁹⁵

Another fear is that such limitless liability will result in disastrous consequences to defendants.⁹⁶ Imposing limits on liability is one way courts hope to avoid such grave consequences to defendants.⁹⁷ In *Migliori v. Airborne Freight Corp.*,⁹⁸ the Supreme Judicial Court of Massachusetts feared that expanding bystander recovery to non-relative victims would result in “excessive liability.”⁹⁹ The court denied the plaintiff’s claim for emotional distress after the plaintiff came upon and attempted to help an individual who had been negligently struck by defendant’s van.¹⁰⁰ Regarding the rationale behind denying the claim and thus limiting liability, the court quoted Chief Justice Cardozo, stating

91. 249 N.E.2d 419 (N.Y. 1969).

92. *Id.* at 424.

93. *See id.* (denying recovery because at the time of this case, New York did not allow recovery for mere emotional distress absent a showing of direct physical injury to the plaintiff—the physical impact rule).

94. *See* *Bovsun v. Sanperi*, 461 N.E.2d 843, 850 (N.Y. 1984) (holding that a mother and daughter have valid claims of emotional distress after witnessing their husband/father in a car accident. In the same appeal the court held that a mother and father had a valid claim of emotional trauma after witnessing their daughter in a car accident. Both cases presented situations where the plaintiffs were in the zone of danger).

95. *Tobin*, 249 N.E. 2d at 424.

96. *See* Santel, *supra* note 34, at 770 (arguing that expansion will require defendants to compensate for indirect losses and the compensation will be open-ended). *See also* Richard L. Abel, *What We Know and Do Not Know About the Impact of Civil Justice on the American Economy and Policy: Judges Write the Darndest Things: Judicial Mystification of Limitations on Tort Liability*, 80 TEX. L. REV. 1547, 1560 (2002) (recognizing that courts place limits on recovery because of the effect that liability would have on the defendant).

97. *See* *Migliori v. Airborne Freight Corp.* 690 N.E.2d 413, 414 (Mass. 1998) (recognizing that courts must place limits in terms of the class of plaintiffs that can recover as well as the type of injuries for which plaintiffs may obtain compensation).

98. *Id.*

99. *Id.* at 415. The court recognizes that limits on recovery are utilized more to place limits on potential liability than on “grounds of fairness or other imperatives of corrective justice.” *Id.* at 416.

100. *Id.* at 414. The court discussed both liability under a bystander theory and liability under a rescuer doctrine because the evidence is unclear on whether the plaintiff saw the accident or arrived shortly thereafter. *Id.*

that if recovery were allowed, the defendant would be exposed to "a liability in an indeterminate amount for an indeterminate time to an indeterminate class."¹⁰¹

2. *Fear Over a Floodgate of Litigation*

Another concern courts have over expansion of bystander recovery is that doing so will open a floodgate of litigation.¹⁰² Courts are concerned that plaintiffs will bring suits based on every imaginable mental harm they may suffer.¹⁰³ The fear of a flood of litigation is not new and can be traced back to the English case of *Winterbottom v. Wright*.¹⁰⁴ In *Winterbottom*, the court held that only parties to a contract may bring suit; otherwise there would be "no limit to such actions."¹⁰⁵ The court further stated that if it were to allow recovery "one step beyond that, there is no reason why we should not go fifty."¹⁰⁶

Similarly, prior to abandoning the impact rule, Pennsylvania courts feared that allowing recovery to bystander victims would inundate their courts with claims that previously lacked justiciability.¹⁰⁷ In *Knaub v. Gotwalt*,¹⁰⁸ the Supreme Court of Pennsylvania held that a mother, father, and sister could not recover on a claim of mental shock and anguish after witnessing a driver hit a family member, because doing so would result in a "virtual avalanche of cases" and cause "chaos" in the area of negligence law.¹⁰⁹ The court reasoned that allowing such claims

101. *Id.* at 418 (quoting *Ultramares Corp. v. Touche, Niven & Co.*, 174 N.E. 441, 444 (N.Y. 1931)).

102. See Francis X. Clinch and Jodie L. Johnson, *Compensation of Emotional Distress in Montana: Distinctions Between Bystanders and Direct Victims*, 47 MONT. L. REV. 479, 482 (1986) (explaining that the fear of a floodgate of litigation was a strong argument for the physical impact rule; however, courts that have abandoned that rule have not seen a flood of litigation).

103. See Jon L. Gillum, *Fear of Disease in Another Person: Assessing the Merits of an Emerging Tort Claim*, 79 TEX. L. REV. 227, 233-34 (2000) (stating that the fear of a floodgate of litigation argument is analogous to a "slippery-slope" argument and thus courts have employed bright-line rules in attempts to alleviate that fear).

104. 152 Eng. Rep. 402 (E.P. 1842). See also Robert L. Rabin, *The Duty Concept in Negligence Law: A Comment*, 54 VAND. L. REV. 787, 799-800 (2001) (discussing the historical nexus between liability and the concerns courts have in preventing a flood of litigation).

105. See *Winterbottom*, 152 Eng. Rep. at 403 (finding that if parties outside of contracts were allowed to sue, it would result in alarming consequences for which the court can find no precedent).

106. *Id.* at 405.

107. See *Bosley v. Andrews*, 142 A.2d 263, 266 (Pa. 1958) (stating that courts would open a "Pandora's box" if recovery were allowed for mental injury absent physical harm).

108. 220 A.2d 646 (Pa. 1966).

109. *Id.* at 647-48.

would promote both “normal” and “nervous” people to believe they suffered emotional shock from any unexpected event.¹¹⁰

3. *Fear of Fraudulent Claims*

Finally, because emotional distress is often difficult to determine,¹¹¹ courts are reluctant to expand recovery due to a fear that plaintiffs will falsify their injuries.¹¹² Also, critics suggest that the difficulty in determining valid negligent infliction of emotional distress claims arises from the fact that such claims are often difficult to prove or measure.¹¹³ As stated earlier, the requirement of a physical impact prior to recovery for negligent infliction of emotional distress was a direct attempt to limit fraudulent claims.¹¹⁴

For example, in *Elden v. Sheldon*,¹¹⁵ the Supreme Court of California denied relief to a bystander who witnessed the injury and death of the individual with whom he was living, but was not his wife.¹¹⁶ The court recognized the increase in non-married couples living together and establishing emotional bonds that are as strong as those shared by married couples, and yet was reluctant to expand recovery.¹¹⁷ The court stated that the reasons for dismissal of plaintiff's suit included the state's strong interest in marriage, the need to limit recovery, and the fear of fraudulent claims.¹¹⁸ The burden imposed on the court system by allowing

110. See *id.* at 647 (recognizing that the court also feared that medical science would be unable to prove that the emotional trauma the individual plaintiffs believed they suffered was actually caused by defendant's negligence).

111. See Santel, *supra* note 34, at 792 (stating that courts fear that juries will be unable to distinguish valid claims of emotional distress from fraudulent claims).

112. *Id.*

113. See Douglas A. Terry, *Don't Forget About Reciprocal Altruism: Critical Review of the Evolutionary Jurisprudence Movement*, 34 CONN. L. REV. 477, 495 (2002) (stating that courts recognize that mental claims are more difficult to prove and measure than pure physical injuries, and because of that they have used varying approaches when awarding recovery).

114. Wenk, *supra* note 18, at 737. See also Thomas T. Uhl, *Bystander Emotional Distress: Missing an Opportunity to Strengthen the Ties That Bind*, 61 BROOK. L. REV. 1399, 1419 (1995) (recognizing that New York employed the physical impact requirement until 1961 in an attempt to limit fraudulent claims).

115. 758 P.2d 582 (Cal. 1988).

116. *Id.*

117. See *id.* at 585-86 (stating that there is no doubt that non-married, cohabitating couples live lives similar to that of married couples, including sharing expenses, resources, and emotions and that injury to one will result in emotional trauma to the other).

118. See *id.* at 586-88 (stating that allowing a claim would also require the court to delve deep into every relationship which would result in a “massive intrusion” into the private lives of these individuals).

recovery in situations such as this, the court reasoned, was too great.¹¹⁹ Ultimately, allowing recovery in this instance, the court feared, would invite "mischief" and "difficult problems of proof" in determining if a relationship was the equivalent of a marriage.¹²⁰

IV. PROPOSAL

Courts should adopt only the foreseeability test when determining recovery for negligent infliction of emotional distress for bystander victims. There is no question in today's legal system that bystanders have a right to recover, and the majority of courts already utilize a foreseeability analysis in granting recovery.¹²¹ Courts must no longer deny relief to deserving plaintiffs because of fear that the legal system will be unduly burdened.¹²² In addition, with the advancement of medical science, courts are able to adequately differentiate between valid claims and fraudulent claims.¹²³ The remainder of this Comment will analyze why the foreseeability approach should be followed and the limits that must be placed on it in order to have effective adjudication.

A. *The Fear of Unduly Burdening the Legal System Is Without Merit*

When California first applied the foreseeability test, it emphasized that the hardships on the judicial system must not prevent compensation for wrongs committed.¹²⁴ Also, as Dean Prosser once stated, "it is the business of the law to remedy wrongs that deserve it... and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the court too much work to do."¹²⁵

119. *Id.*

120. *See id.* at 587 (stating that plaintiff argued that the nature and seriousness of the relationship could be shown through circumstantial evidence; however, the court dismisses those suggestions).

121. *See* Romeo, *supra* note 17, at 346 (recognizing the viability of bystander recovery and stating that Connecticut follows the majority of jurisdictions in applying a foreseeability analysis to determine if victims have a successful action).

122. *See supra* notes 89-118 and accompanying text (discussing the main arguments that jurisdictions have against using a foreseeability approach, including the fear of limitless liability, the fear of a floodgate of litigation, and the fear of fraudulent claims).

123. When the California Supreme Court first recognized bystander recovery for negligent infliction of emotional distress in *Dillon*, they stated, in dicta, that with medical knowledge there is "no distinction... between physical injury and emotional injury flowing from the physical injury..." *Dillon*, 441 P. 2d at 920 n.5.

124. "Yet we cannot let the difficulties of adjudication frustrate the principle that there be a remedy for every substantial wrong." *Dillon*, 441 P.2d at 919.

125. Romeo, *supra* note 17, at 344 (quoting William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 877 (1939)).

The judicial system has not been excessively burdened in the jurisdictions that have adopted the foreseeability approach.¹²⁶ For example, Montana applies the foreseeability approach and has not experienced an increase in fraudulent claims, a flood of litigation, or unlimited liability.¹²⁷ Similarly, Connecticut has successfully adopted the foreseeability test without incurring such burdens.¹²⁸ In fact, the fears that courts have expressed regarding the foreseeability approach have largely not occurred.¹²⁹

B. Medical Science and Emotional Distress

The use of medical science will aid courts in their determination of recovery for negligent infliction of emotional distress.¹³⁰ By using advancements in scientific technology, courts are able to better distinguish between fraudulent claims and valid claims, thus alleviating that major fear.¹³¹ Further, requiring a physical impact in order to recover because of a fear of fraudulent claims has all but been deemed unnecessary in light of modern medical science.¹³²

An example of a court trumpeting the value of medical science in the field of bystander liability is *Sinn v. Burd*.¹³³ In *Sinn*, the mother was on her porch when she witnessed a car negligently collide with her daughter, causing her daughter's death.¹³⁴ The

126. See *Sacco*, 896 P.2d at 418-19 (arguing that the courts' fears over fraudulent claims, floodgates of litigation, and unlimited liability have not been experienced, and by imposing narrow rules on recovery, deserving plaintiffs get nothing).

127. *Id.*

128. See *Clohesy*, 675 A.2d at 860-61 (stating that for public policy reasons the court is adopting the foreseeability test over the zone-of-danger test).

129. See *Romeo*, *supra* note 17, at 344 (stating that while the fears may remain, they have not been realized).

130. See Meredith A. Moore, *South Dakota's Interpretation of Negligent Infliction of Emotional Distress and The "Zone of Danger" Rule in Nielson v. AT&T Corporation: A Dangerous Hybrid*, 45 S.D. L. REV. 379, 394-95 (recognizing that courts are concerned with the difficulty of determining the extent of the emotional distress suffered, but the advancement of medical science has enhanced the ability of courts to rule on these claims).

131. See *id.* at 395 (stating that although medical science will not eliminate fraudulent claims entirely, and thus some fear will inevitably remain, technology decreases the potential for fraud and allows courts a better opportunity to deal with these cases).

132. See Anthony Fernandez, *Bystander Liability - Unmarried Cohabitants May Satisfy the "Intimate Familial Relationship" Element of Negligent Infliction of Emotional Distress Where They Have a Stable, Enduring, Substantial Relationship with Strong Emotional Bonds and Deep Emotional Security*, 26 SETON HALL L. REV. 371, n.10 (stating that authorities no longer see the purpose of the physical impact rule due to the fact that medical science has firmly established that mental distress is an injury in itself).

133. 404 A.2d 672 (Pa. 1979).

134. *Id.* at 674.

mother filed an action for emotional distress resulting from witnessing the collision.¹³⁵ The court held that the mother had a valid claim and that her injury was reasonably foreseeable.¹³⁶

The *Sinn* court relied on the advancement of medical science as a way to prove the “causal link between the psychic damage suffered by the bystander and the shock or fright attendant to having witnessed the accident.”¹³⁷ The court noted that the use of medical science lessens the chance of a negligent infliction of emotional distress claim being “intangible, untrustworthy, illusory, and speculative.”¹³⁸

C. The Foreseeability Test Used in Conjunction with the Court's Discretion

While the zone-of-danger test or the physical impact test may place a strict standard on recovery and give courts a sense of certainty, the foreseeability test also places limits on recovery, yet gives courts discretion to make sound decisions.¹³⁹ While the foreseeability approach should be modeled around the three standards adopted in *Dillon* – (1) plaintiff located near the scene of the accident, (2) contemporaneous observation, and (3) close relation to the victim¹⁴⁰ – courts must use their discretion to allow just recovery.¹⁴¹ In *Marzolf v. Stone*,¹⁴² the Supreme Court of Washington followed a foreseeability approach in granting recovery to bystander victims, yet applied the guidelines to fit the facts of the case at hand.¹⁴³ The court stated that limiting recovery to a bright-line rule “is attractive in its simplicity. However, it

135. *Id.* In addition to the claim for emotional distress, the mother also brought claims under the Wrongful Death and Survival Acts. *Id.* The deceased sister also brought a separate claim for emotional distress from watching her sister die. *Id.*

136. *Id.* at 686. The court applied the foreseeability test enacted in *Dillon*: plaintiff located at the scene, contemporaneous observation of accident, and close relation of plaintiff and victim. *Id.* at 685.

137. *See id.* at 678 (stating that cases dealing with negligent infliction of emotional distress have not kept up with the medical field and concerns over causal proof should no longer deny claims).

138. *Id.* (citing *Huston v. Fremansburg*, 61 A. 1022 (1905)).

139. *Id.* at 683-84 (arguing that because the foreseeability test places limits on recovery, the fear of unlimited liability is displaced).

140. *Dillon*, 441 P.2d at 920.

141. *See Marzolf v. Stone*, 960 P.2d 424 (1998) (holding that plaintiff can recover for emotional distress suffered after arriving at the scene of the accident shortly after the injury causing event occurred and yet before a substantial change in the victim's condition).

142. *Id.*

143. *See id.* at 426 (stating that the victim's father arrived at the accident scene roughly ten minutes after the injury-causing event and before paramedics arrived to see his son, who died shortly thereafter, in severely critical condition).

draws an arbitrary line that serves to exclude plaintiffs without meaningful distinction."¹⁴⁴

With the increase in non-married cohabitants as well as the general debate surrounding marriage in today's society, the foreseeability approach will allow courts to use their discretion when deserving plaintiffs are injured. For example, in *Graves v. Estabrook*,¹⁴⁵ the Supreme Court of New Hampshire extended bystander liability to a woman who witnessed the collision and death of her fiancé and as a result suffered severe emotional distress.¹⁴⁶ While not yet related by blood or marriage, the relationship between the couple satisfied the other factors of the foreseeability approach.¹⁴⁷ The court recognized that the outcome of following a bright-line rule of recovery would not justify the facts of this case.¹⁴⁸ In granting recovery, the court noted that betrothed individuals have a bond similar to that of marriage.¹⁴⁹ Finally, in working within the boundaries established in *Dillon*, but applying its discretion, the court stated: "[t]he appropriate analysis is not to resort to a dictionary definition but rather to use our traditional analysis of foreseeability."¹⁵⁰

While courts in their discretion are able to grant recovery to deserving plaintiffs, boundaries must be drawn.¹⁵¹ For example, there must be a relation between the victim and the plaintiff that rivals that of blood. In *Graves*, the court described such factors as "the duration of the relationship, the degree of mutual dependence, the extent of common contributions to a life together, the extent and quality of shared experience, whether the plaintiff and the [victim] were members of the same household, [and] their emotional reliance on each other"¹⁵² This prevents the

144. See *id.* at 428-29 (arguing that emotional distress flows from both witnessing a relative's accident as well as seeing the relative severely injured at the scene).

145. 818 A.2d 1255 (N.H. 2003).

146. See *id.* at 1257 (stating that the plaintiff saw her fiancé get hit by a car while she was traveling directly behind him whereupon he suffered trauma to his head resulting in his ultimate death).

147. *Id.*

148. The court noted the *Elden* opinion from California, *supra* notes 115-20, but rejected the reasoning. *Id.* at 1261. The court stated: "it fails to consider that there is also no logical distinction between denying recovery to a fiancée who has lived with her betrothed for seven years and allowing recovery to a wife who met and married her husband a week before the accident." *Id.*

149. *Id.* at 1262.

150. See *id.* at 1259 (stating that the defendant's argument that "closely related" should be construed to a dictionary definition would result in a "dry classification") (citing *Ouellette v. Blanchard*, 364 A.2d 631, 634 (N.H. 1976)).

151. See Santel, *supra* note 34 (arguing that without boundaries and requirements imposed on negligent infliction of emotional distress, the liability stemming from bystander recovery will be too great).

152. *Graves*, 818 A.2d at 1262.

defendant from being liable to all individuals who merely see such an event.

In addition, as stated earlier, the injury to the plaintiff must be serious and severe.¹⁵³ The factors considered in this analysis include “the intensity and duration of the distress, circumstances under which the infliction occurred, and the party relationships involved.”¹⁵⁴ The determination of this may require the use of medical technology, or may be “ascertain[ed] by expert medical testimony”¹⁵⁵ in order to prevent unwarranted relief.

V. CONCLUSION

It is time for courts to abandon archaic laws and standards that are no longer justified in today’s society.¹⁵⁶ Given advancements in medical science and technology, courts are able to weed out the fraudulent claims from the truly justified claims. Negligent infliction of emotional distress is a viable tort, and bystanders who suffer its effects deserve compensation. By applying their discretion within the foreseeability test, courts will reach results that are reasonable and just.

153. See RESTATEMENT (SECOND) OF TORTS §46 (1965) (requiring severe emotional distress in order to recover). See also *Thing*, 771 P.2d at 829-30 (holding that the distress must be greater than that suffered by a disinterested witness).

154. *Renville v. Fredrickson*, 323 Mont. 503, 507 (Mont. 2004) (citing *Sacco v. High County Indep. Press*, 896 P.2d 411, 426 (1995)). In *Renville*, the mother suffered negligent infliction of emotional distress after her son was involved in a car accident. *Id.* However, the court denied relief because the negligent infliction of emotional distress was not serious and severe enough to warrant recovery. *Id.* at 507-08.

155. See *Sacco*, 896 P.2d at 425 (stating that jurors are also able to determine the extent of emotional distress by relating the defendant’s conduct to their own experiences) (citations omitted).

156. *Id.*