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ILLINOIS LAW IN DISTRESS: THE "ZONE OF DANGER" AND "PHYSICAL INJURY" RULES IN EMOTIONAL DISTRESS LITIGATION

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In legal parlance, the term "emotional distress" is a catchall for all highly unpleasant mental reactions, such as fright, horror, grief, shame, embarrassment, anger, chagrin, disappointment, and worry.¹ The law has long assumed that emotional distress can constitute a serious, debilitating injury to the person.² Despite this recognition, however, American courts have continued to treat claims of negligent infliction of emotional distress very differently from other injuries to the person.³ As a result, plaintiffs claiming damages from negligently inflicted emotional distress have inevitably been confronted with rules of recovery unique to their injury.

The imposition of these rules of recovery has resulted from an historical and deep seated reluctance on the part of courts to provide a remedy for emotional injury, and a continuing tendency to view claims of emotional distress with suspicion.⁴ In recent years,

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1. *Roberts v. Saylor*, 230 Kan. 289, 637 P.2d 1175, 1180 (1981). RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965) [hereinafter cited as RESTATEMENT]; Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40, 43 (1956). See also *Braun v. Craven*, 175 Ill. 401, 420, 51 N.E. 657, 664 (1898) (fright or terror); *Wilson v. Redken Laboratories, Inc.*, 562 S.W.2d 633 (Ky. 1978) ("mortification" is simply a phase of mental anguish); *Piorkowski v. Liberty Mut. Ins. Co.*, 68 Wis. 2d 455, 228 N.W.2d 695, 701 (1975) ("humiliation" is included in a proper definition of mental or emotional suffering); The term "emotional distress," however, does not include "shock," which is a physical injury. *Rickey v. Chicago Transit Auth.*, 101 Ill. App. 3d 439, 440, 428 N.E.2d 596, 597 (1981), *aff'd*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983).

2. *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524, 528 (1975); *Paugh v. Hanks*, 6 Ohio St. 3d 72, 451 N.E.2d 759, 765 (1983). In 1897, one court noted that fright, terror, alarm or anxiety "do in fact deprive one of enjoyment and of comfort, cause real suffering, and to a greater or less[er] extent disqualify one for the time being of doing the duties of life. . . ." *Spade v. Lynn & B.R.R. Co.*, 168 Mass. 285, 288, 47 N.E. 88, 88 (1897). See *Smith & Solomon, Traumatic Neurosis in Court*, 30 VA. L. REV. 87, 96 (1943); W. PROSSER, LAW OF TORTS 50-51 (4th ed. 1971) [hereinafter cited as W. PROSSER]. G. WHITE, TORT LAW IN AMERICA, AN INTELLECTUAL HISTORY 103 (1980).

3. See *infra* notes 4-22 and accompanying text.

4. See generally W. PROSSER & W. KEETON, LAW OF TORTS 360-61 (5th ed. 1984) ("courts which are plagued with fraudulent personal injury claims may be unwilling

however, there has appeared a discernable trend among American jurisdictions towards the recognition of the negligent infliction of emotional distress as an independent tort.⁵ Unfortunately, Illinois is by no means at the forefront of this much needed development.

The purpose of this article is to examine the evolution and current status of the cause of action for negligently inflicted emotional distress. The article compares the most recent and varying formulations of this tort. Finally, the article will suggest that Illinois courts recognize the negligent infliction of *serious* emotional distress as an independent tort, and will suggest the most appropriate treatment for this cause of action.

BACKGROUND

Even as interests in physical well being,⁶ personal autonomy,⁷ and property rights⁸ were being afforded legal protection in tort,

to open the door to an even more dubious field"); M. POLELE & B. OTTLEY, ILLINOIS TORT LAW 400 (1985) (old approach under Illinois law).

5. See, e.g., Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); D'Amicol v. Alvarez Shipping Co., 31 Conn. Supp. 164, 326 A.2d 129 (1973); Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974); Barnham v. Davis, 300 N.W.2d 104 (Iowa 1981) Dziokonski v. Babinean, 375 Mass. 555, 380 N.E.2d 1295 (1978); Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433 (Me. 1982); Miller v. Cook, 87 Mich. App. 6, 273 N.W.2d 567 (1978); Corso v. Merrill, 406 A.2d 300 (N.H. 1979); Porter v. Jaffee 84 N.J. 88, 417 A.2d 521 (1980); Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979); D'Ambra v. United States, 114 R.I. 643, 338 A.2d 524 (1975); General Motors v. Grizzle, 642 S.W.2d 837 (Tex. Civ. App. 1982). Where an interest is afforded legal protection in its own right, such as an interest in freedom from physical harm, the negligent or intentional invasion of that interest gives rise to an independent cause of action. The interest in freedom from emotional disturbance was not originally given this type of protection; no remedy existed for its invasion alone. W. PROSSER, *supra* note 2, at 50. One court stated, "there can be no recovery for mere fright, nervous shock or other mental disturbance where there is no outward manifestation of their effects, upon the very logical ground that the law has never regarded these mental states standing alone as a legal injury." Orlo v. Connecticut Co., 128 Conn. 231, 235, 21 A.2d 402, 404 (1941). However, emotional distress has often accounted for the major, if not entire, measure of damages where another legal interest which is given nominal protection has been invaded, as in the infringement of personal autonomy arising from an assault. Capelouto v. Kaiser Found. Hosp. 7 Cal. 3d 889, 103 Cal. Rptr. 856, 500 P.2d 880 (1972) (mental suffering frequently constitutes the principal element of tort damages). See F. HARPER, A TREATISE ON THE LAW OF TORTS § 19, at 43 (1933); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1048-49 (1936).

6. See *Republica v. DeLongchamps*, 1 U.S. (1 Dall.) 111 (1784) (battery); *Schmitt v. Kurrus*, 234 Ill. 578, 85 N.E. 261 (1908) (assault and battery); *Callahan v. Billat*, 68 Mo. App. 435 (1897) (battery); *Burke v. Shaw*, 59 Miss. 443 (1882) (negligently inflicted personal injury).

7. See *Greathouse v. Summerfield*, 25 Ill. App. 296, 298 (1887) (false imprisonment); *Fisher v. Hamilton*, 49 Ind. 341 (1874) (malicious prosecution); *Stewart v. Maddox*, 63 Ind. 51 (1878) (false imprisonment); *Caspar v. Prosdame*, 46 La. Ann. 36, 14 So. 317 (1894) (assault) *Terrwilliger v. Wands*, 17 N.Y. 54 (1858) (defamation).

8. See *Honey v. Holcomb*, 11 Ill. 660 (1850) (fraudulent conveyance of property); *Greenleaf v. Ludington*, 15 Wis. 558 (1862) (fraudulent conveyance of stock); *Ring v. Ogden*, 45 Wis. 303 (1878) (fraudulent conveyance of land).

American courts took the position that one's interest in emotional well-being could not, in and of itself, receive similar protection. As one court stated:

The body, reputation, and property of the citizen are not to be involved without responsibility in damages to the sufferer. But outside these protected spheres, the law does not yet attempt to guard the peace of mind. . . . The law leaves feeling to be helped and vindicated by the tremendous force of sympathy.⁹

For emotional distress that is intentionally inflicted, recovery has continued to be limited to those cases where the defendant's conduct is "extreme and outrageous."¹⁰ Courts have generally posed two reasons for limiting recovery to instances of "extreme and outrageous" conduct. First, courts continue to express concern for the special potential of feigned injury where claims of emotional distress are involved.¹¹ In the case of "extreme and outrageous" intentional conduct, courts seem to have assured themselves that plaintiff's claims of emotional distress are *bona fide* because of the egregiousness of the defendant's conduct.¹² This has been so even in numer-

9. *Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 772, 15 S.E. 901 (1892) (plaintiff could not recover for emotional distress where telegraph company failed to deliver a message regarding his brother's illness prior to brother's death). *See also Note, Rickey v. Chicago Transit Authority: Consistent Limitation on Recovery for Negligent Infliction of Emotional Distress in Illinois*, 17 J. MAR. L. REV. 563, 563 n.3 (1984) (damages for "purely emotional pain and suffering have never been available in Illinois. . . .").

10. *See, e.g., Wilkinson v. Downton*, [1897] 2 Q.B.D. 57 (practical joker tells woman her husband has been in accident and is lying in a ditch with both legs broken); *Wilson v. Wilkins*, 181 Ark. 137, 25 S.W.2d 428 (1930) (defendants visit plaintiff's home at night and threaten to lynch him); *Knierim v. Izzo*, 22 Ill. 2d 73, 88, 174 N.E.2d 157, 165 (1961) (man carried out threat made to women to kill her husband); *Great A&P Tea Co. v. Roth*, 160 Md. 189, 153 A.2d 22 (1930) (grocer wraps up dead rat and has it delivered to person who is expecting a loaf of bread); *Johnson v. Woman's Hosp.*, 527 S.W.2d 133 (Tex. Ct. App.1975) (mother shown her deceased infant floating in a jar of formaldehyde).

11. *See, e.g., Knierim v. Izzo*, 22 Ill. 2d 73, 85, 174 N.E.2d 157, 164 (1961); *Gardner v. Cumberland Tel. Co.*, 207 Ky. 249, 268 S.W. 1108 (1925); *Agis v. Howard Johnson Co.*, 371 Mass. 140, 355 N.E.2d 315 (1976); *Harned v. E-Z Fin. Co.*, 151 Tex. 641, 254 S.W.2d 81 (1953). *See also* RESTATEMENT, *supra* note 1, at comment b. For a discussion of the courts' fear of fraudulent claims in the context of emotional distress actions, see Reidy, *Negligent Infliction of Emotional Distress in Illinois: Living in the Past, Suffering in the Present*, 30 DE PAUL L. REV. 295, 299 (1981). For an argument that negligent infliction of emotional distress should be limited to actions involving prolonged suffering, see Comment, *Should Short-Term Mental Distress Damages Be Compensable? The Air Crash Case*, 60 CHI. KENT L. REV. 971, 981-87 (1984).

12. *Knierim v. Izzo*, 22 Ill. 2d 73, 85, 174 N.E.2d 157, 164-65 (1961) (jurors will be able to surmise from their own experience whether conduct results in emotional distress, and symptoms of such distress are visible to the professional eye). The defendant's conduct will be carefully scrutinized by the courts "where the defendant is in a particular position to harass the plaintiff. . . ." *Harris v. Jones*, 281 Md. 560, 569, 380 A.2d 611, 615 (1977) (foreman mimicked/mockered the stuttering disability of an employee in his crew).

Liability may arise from a pattern of the defendant's conduct, where no single

ous instances where there has been no other objective evidence of emotional injury.¹³ Secondly, courts have been unwilling to compensate plaintiffs for mere insult, indignity, or annoyance, stating that such intrusions are an unavoidable aspect of modern society.¹⁴ Courts have thus used the "extreme and outrageous" requirement in order to limit recovery to cases where emotional harm is considered severe.¹⁵

For a number of reasons, courts have been even more reluctant to afford one's interest in emotional well-being protection from invasions caused by simple negligence. The courts' various rationale in this regard have been predicated, in large part, on public policy concerns. Courts have noted that the elements of moral blame and outrage associated with the intentional infliction of emotional distress, and the consequent punitive aspect of a damage award, are absent where the emotional injury is inflicted negligently.¹⁶ In a similar vein, courts have expressed the belief that liability for emotional distress imposes a burden inconsistent with the culpability of a defendant who is merely negligent.¹⁷ Also, courts have predicted that an inhibitive effect on day to day conduct would result from recog-

incident would be found sufficiently extreme and outrageous. *Boyle v. Wenk*, 378 Mass. 592, 392 N.E.2d 1053 (1979). In *Boyle*, the defendant, a private investigator, contacted the plaintiff several times while investigating whether her brother-in-law was malingering while collecting insurance. The court stated: "The flaw in Wenk's argument is that he isolates each individual incident and ignores the fact that the jury [is] entitled to draw reasonable inferences from the totality of the circumstances." *Id.* at 595, 392 N.E.2d at 1055.

13. See, e.g., *Reeves v. Melton*, 518 P.2d 57 (Okla. Ct. App. 1974) (defendant attempted to collect payment for goods that plaintiff had already paid for by pounding on plaintiff's door thereby frightening plaintiff's children); *Samms v. Eccles*, 11 Utah 2d 289, 358 P.2d 344 (1961) (defendant persistently solicited married woman to have sexual relations with him, and one such solicitation was accompanied by indecent exposure); *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974) (through deceit, defendant took picture of plaintiff for use in child molesting case against person unknown to plaintiff). For earlier cases see W. PROSSER, *supra* note 2, at 59 n.20.

14. See, e.g., *Knierim v. Izzo*, 22 Ill. 2d at 85, 174 N.E.2d at 164 (1961) ("Indiscriminate allowance of actions for mental anguish would encourage neurotic overreactions to trivial hurts, and the law should aim to toughen the psyche of the citizen rather than pamper it."); *Johnson v. Supersave Markets, Inc.*, 686 P.2d 209 (Mont. 1984); *Meyer v. 4-D Insulation Co.*, 60 Ore. App. 70, 652 P.2d 852 (1982). See also RESTATEMENT, *supra* note 1, at comment j.

15. See RESTATEMENT, *supra* note 1, at comment j.

16. *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963); *Johnson v. Supersave Markets, Inc.*, 686 P.2d 209 (Mont. 1984). See generally Millard, *Intentionally Inflicted Emotional Distress: Toward a Coherent Reconciliation*, 15 IND. L. REV. 617, 623-25 (1982) (discusses court held attitude regarding moral culpability).

17. *Cosgrove v. Beymer*, 244 F. Supp. 824 (D. Del. 1965); *Spade v. Lynn & B.R.R. Co.*, 168 Mass. 285, 47 N.E. 88 (1897); *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935). For a general discussion of the distinction drawn between intentional and negligent infliction of emotional distress, and how the element of moral culpability plays a part in the distinction, see Millard, *supra* note 16, at 623-25.

nizing a duty to avoid creating risk of emotional distress.¹⁸

In addition to these perceived exigencies of public policy, a wholly separate set of objections has centered on the courts' perceived inability to adequately administer a cause of action for negligently inflicted emotional distress. Courts have repeatedly expressed skepticism as to the ability of claimants to satisfy the element of causation, and as to the speculative nature of any damage award, where purely emotional injury is involved.¹⁹ Other courts have pointed out the difficulty in assessing proof that is largely in the plaintiff's control.²⁰ It has further been suggested that a difficult medical question of proof is presented in the negligence action, where jurors may not rely on the defendant's outrageous conduct.²¹ Additionally, courts have voiced apprehension for the potentiality of a flood-tide of litigation should emotional distress damages be found compensable to the same extent as other injuries to the person.²²

18. See, e.g., *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963) (as result of imposing liability, both actor and society as a whole feel psychological effect in the form of lessening of incentive); *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935) (imposing liability for emotional distress alone arising from negligent driving would place unreasonable burden on users of the highways).

19. As to causation, see *Elgin A. & S. Traction Co. v. Wilson*, 217 Ill. 47, 55, 75 N.E. 436, 438 (1905) (other injuries suffered by plaintiff were alleged to be cause of emotional distress suffered); *Mitchell v. Rochester R. R. Co.*, 151 N.Y. 107, 45 N.E. 354 (1896) (plaintiff's miscarriage only shows degree of fright she received from some source and the degree of injury, but does not prove that defendant's negligence was the proximate cause of plaintiff's injury). See generally Leubsdorf, *Remedies for Uncertainty*, 61 B.U.L. Rev. 132 (1981) (background discussion of damages claimed in cases where uncertainty exists as to causation); Note, *Negligently Induced Fright Causing Physical Injury to Hypersensitive Plaintiff*, 39 N.C.L. Rev. 303 (1961) (discusses causation problem in the context of hypersensitively emotional plaintiffs).

As to the speculative nature of damages, see *Knierim v. Izzo*, 22 Ill. 2d at 84, 174 N.E.2d at 163 (1961) (court observed that emotional distress cannot be measured in terms of money); *Western Union Tel. Co. v. Ferguson*, 157 Ind. 64, 66, 60 N.E. 674, 675 (1901) (in the absence of pecuniary or bodily injury, plaintiff cannot recover damages for mental anguish alone, because such damages are speculative and conjectural). For an overview of the issues presented from plaintiffs' claim for damages in cases of emotional distress caused by physical injury to another, see Liebson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. FAM. L. 163 (1976-77). See also O'Connell & Simon, *Payments for Pain and Suffering: Who Wants What, When and Why*, 1972 U. ILL. L.F. 1, 2-6 (asserts that translating emotional distress claims into dollar amounts can only be an arbitrary exercise).

20. See, e.g., *Kalen v. Terre Haute & I.R.R. Co.*, 18 Ind. App. 202, 213, 47 N.E. 694, 698 (1897) ("[t]he evidence of [emotional injury unaccompanied by bodily harm] is so much within the control of the person claiming to be so injured, and there is so little opportunity for subjecting the fact to the tests which . . . are applied in courts of justice for the ascertainment of truth, . . . that . . . there would be much danger of frequent injustice . . . in allowing such claims to be presented for trial.").

21. See, e.g., *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33, (1963); *Sinn v. Burd*, 486 Pa. 146, 158-59, 404 A.2d 672, 678-79 (1979).

22. See *Kalen v. Terre Haute & I.R.R. Co.*, 18 Ind. App. 202, 213, 47 N.E. 694, 698 (1897); *Spade v. Lynn & B.R.R. Co.*, 168 Mass. 285, 290, 47 N.E. 88, 89 (1897); *Ewing v. Pittsburgh, C. & St. L.R.R. Co.*, 147 Pa. 40, 23 A. 340 (1892) (if fright with-

The judicial response to these objections has been to condition recovery for negligently inflicted emotional distress upon the plaintiff satisfying a number of artificial rules that are otherwise unknown to the law of torts. Initially, recovery was strictly confined to two separate types of cases. In one type, a significant minority of jurisdictions deemed particular factual circumstances, on their face, to guarantee the genuineness of claims based purely upon emotional distress, that is, claims of emotional distress unaccompanied by the invasion of other legally protected interests.²³ Recovery on this basis appears to have been restricted to two specific factual patterns, namely, where a telegraph company negligently transmitted a message, such as one erroneously or belatedly announcing the imminent death of a relative,²⁴ and where a corpse was negligently mishandled.²⁵

out bodily injury recognized as a cause of action, scope of "accident cases" will be very greatly enlarged). *But cf.* *Tobin v. Grossman*, 24 N.Y.2d 609, 615, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558 (1969) (the burden on the courts of excessive litigation should not be a consideration); *Niederman v. Brodsky*, 436 Pa. 401, 411, 261 A.2d 84, 89 (1970) (observed that the feared flood tide of litigation has not materialized since courts began to recognize the emotional distress cause of action).

23. *See* *Rodrigues v. State*, 52 Hawaii 156, 472 P.2d 509, 519 (1970). *See also infra* notes 24 and 25. In such cases, the courts did not require the existence of an independent cause of action, such as one for physical injury, on which to base damages for emotional distress.

24. *See, e.g.,* *Mentzer v. Western Union Tel. Co.*, 93 Iowa 752, 62 N.W. 1 (1895) (delayed message causes son to miss mother's funeral); *C.O. So. Relle v. Western Union Tel. Co.*, 55 Tex. 308 (1881) (same). In these cases, public policy considerations militated towards allowing recovery, while emotional distress arising from other fact situations remained unredressed. One such policy consideration was that the new telegraph companies were quasi public agents that had been extended extraordinary privileges in their development, and as such owed a higher level of diligence to the public. *Reese v. Western Union Tel. Co.*, 123 Ind. 294, 24 N.E. 163 (1890); *Western Union Tel. Co. v. Newhouse*, 6 Ind. App. 422, 33 N.E. 800 (1893); *Chapman v. Western Union Tel. Co.*, 90 Ky. 265, 13 S.W. 880 (1890). Another was the recognition that a denial of recovery would tend to confer immunity on the defendants for their negligent failure to timely or correctly deliver messages. In the majority of considered cases, no pecuniary damages arose from the telegraph companies' negligence, since most of the messages sued upon related to personal matters, such as a relative's illness or death. Absent recovery for emotional distress, damages would be strictly nominal. In *Chapman*, the court stated:

Such a rule [allowing recovery for pecuniary loss but denying it for emotional distress] merits disapproval. It would sanction the company in wrongdoing. It would hold it responsible in matters of the least importance, and suffer it to violate its contracts with impunity as to the greater. It seems to us that both reason and public policy require that it should answer for all injury resulting from its negligence, whether it be to the feelings or the purse. . . .

90 Ky. at 271, 13 S.W. at 881. *See* *Reese v. Western Union Tel. Co.*, 123 Ind. 294, 24 N.E. 163 (1890); *Stewart v. Western Union Tel. Co.*, 66 Tex. 580, 18 S.W. 351 (1885).

25. *Brown Funeral Home & Ins. Co. v. Baughn*, 226 Ala. 661, 148 So. 154 (1933) (body emitting offensive odors due to improper embalming); *Casey v. Lima, Salmon and Tully Mortuary*, 168 Cal. App. 2d 42, 335 P.2d 181 (1959) (due to improper embalming, the body was malodorous and dripping fluid); *Mensing v. O'Hara*, 189 Ill. App. 48 (1914) (undertaker cut off deceased's hair without consent of the family); *Larson v. Chase*, 47 Minn. 307, 50 N.W. 238 (1891) (mutiliation). As in the telegraph

In the second type of case where recovery was initially allowed, emotional distress damages were compensable when found to be "parasitic," that is, when emotional distress damages were incident to the invasion of some independently protected interest.²⁶ For example, where the defendant's negligence caused contemporaneous physical injury, damages for attendant emotional distress were, and continue to be, recoverable under the familiar "pain and suffering" label.²⁷

A factual variation in the "parasitic" damages context give rise to the "impact" rule, which is another limitation on recovery. In some cases, courts were faced with the situation in which the defendant's negligence did not cause contemporaneous physical injury in the plaintiff, but rather caused purely psychological trauma that in turn produced emotional distress.²⁸ Oftentimes, such emotional distress subsequently matured to physical harm through the individual's internal physiological processes.²⁹ While in some cases the ultimate physical harm was relatively minor, in others the resulting physical injury was serious enough that, had it resulted contempora-

cases, only personal, non-pecuniary interests are involved in the proper handling of a corpse. *Lamm v. Shingleton*, 231 N.C. 10, 55 S.E.2d 810 (1949) (contract with mortuary was personal in nature and no pecuniary loss would arise from breach). The fact that damages would otherwise be solely nominal may have contributed to allowing recovery in this type of case.

26. In this context, emotional distress was taken into account in determining damages for the independent cause of action. *Kalen v. Terre Haute & I.R.R. Co.*, 18 Ind. App. 202, 47 N.E. 694 (1897). The "host" cause of action was generally one for personal injury. See *McDermott v. Severe*, 202 U.S. 600 (1906); *Consolidated Traction Co. v. Lambertson*, 59 N.J. 297, 36 A. 100, (1896). In at least one case, breach of contract has served as the "host" cause of action. See *Lewis v. Holmes*, 109 La. 1030, 34 So. 66 (1903). There, the court considered a bride's disappointment, humiliation, and mortification in computing damage for a milliner's breach of contract to timely provide her bridesmaids with dresses. *Id.* It has been observed that where an injury is cognizable as an element of damage parasitic to the invasion of some other right, it represents a developmental stage of a cause of action for the injury itself. *Rodrigues v. State*, 52 Hawaii 156, 472 P.2d 509, 519 (1970).

27. See *DiMere v. Cresci*, 58 Cal. 2d 292, 373 P.2d 8609, 23 Cal. Rptr. 772 (1962); *Green v. Floe*, 78 Wash. 2d 620, 183 P.2d 771 (1947). For a discussion of the Illinois courts' treatment of this issue, see *infra* notes 69-72 and accompanying text.

28. Purely mental trauma, purely physical trauma, or a combination of both may serve as the genesis for subsequent emotional disturbance. Comment, *Negligently Inflicted Emotional Distress, The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1248 (1971). See Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 U. VA. L. REV. 193 (1944) [hereinafter cited as *Relation of Emotions to Injury*].

29. Discussing common mental reactions to trauma, one commentator has noted: "It is then clear that fright as definitely affects the physical organism as does a blow with a club. . . . And what is true of fear is true in kind, though not in degree, of the lesser emotions such as worry and anxiety." Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497, 503 (1922). See *Relation of Emotions to Injury*, *supra* note 28, at 193 (the author discusses investigators' success at precipitating blisters and subcutaneous hemorrhages in subjects, then eliminating them, through hypnosis).

neously from the defendant's conduct, it would have been compensable.³⁰ Initially, the complexity of causation inherent in this type of claim evoked a great deal of skepticism from the courts.³¹ Accordingly, recovery for the ultimate physical harm and, parasitically, the attendant emotional distress, was conditioned upon plaintiff satisfying the "impact" rule.³²

Under this "impact" rule, recovery was barred unless, in lieu of the defendant's negligence having caused immediate physical injury, some noninjurious physical impact occurred to the plaintiff's person.³³ The courts viewed this rule as a "guaranty of merit to counterbalance risks of fraud."³⁴ The rule, however, came to be satisfied by extremely minor impacts, which oftentimes had little or no causal connection with the plaintiff's injury.³⁵ Consequently, the rule has been rejected in a majority of jurisdictions.³⁶

30. *Horan v. Klein's-Sheridan, Inc.*, 62 Ill. App. 2d 455, 459-60, 211 N.E.2d 116, 118 (1965) (plaintiff, who sued for injuries to her scalp and emotional distress resulting from permanent wave, could not recover for latter because it was not directly caused by physical injury). See *Colla v. Mandella*, 1 Wis. 2d 594, 85 N.W.2d 345 (1957) (excitement resulting from unattended truck running into house while plaintiff napping inside caused plaintiff's fatal heart attack). The role of emotional distress as a causal link is demonstrated in *Rasmussen v. Benson*, 135 Neb. 232, 280 N.W. 890 (1938). Here, the defendant negligently sold the plaintiff a sack of poisoned feed, which plaintiff fed to his livestock. His dairy cows died, destroying his dairy business. As a result of anxiety over the loss of his business, and fear that he had supplied poison milk to his customers, the plaintiff suffered a fatal heart attack.

31. In *Mitchell v. Rochester R.R. Co.*, 151 N.Y. 107, 45 N.E. 354 (1896), a woman alleged her miscarriage was the result of fright she received when a team of horses stopped just short of running her down. The court denied recovery, holding that an opposite result would give rise to a flood of easily feigned claims, with damages a matter of speculation and conjecture. It further held that proximate cause could not properly be shown. 151 N.Y. at 108-10, 45 N.E. at 354-55. The court in *Spade v. Lynn & B.R.R. Co.*, 168 Mass. 285, 47 N.E. 88 (1897), found it unreasonable to impose liability on defendants for physical injuries caused solely by emotional distress.

32. The rule appeared first in England, in *Victorial Railways Commissioners v. Coultas*, [1883] 13 App. & Cas. 222, and was rejected there 13 years later in *Dubieu v. White & Sons*, [1901] 2 K.B. 669. In the interim the doctrine was adopted in the United States. See *Mitchell v. Rochester R.R. Co.*, 151 N.Y. 107, 45 N.E. 354 (1896) (favorably citing *Coultas*); *Pittsburgh C. & St. L.R.R. Co.*, 147 Pa. 40, 33 A. 340 (1892).

33. J. STEIN, *DAMAGES AND RECOVERY* 82 (1972); Note, *Hunsley v. Giard; Expanded Recovery For The Negligent Infliction of Emotional Distress*, 14 WILL. L.J. 71, 73 (1977).

34. See *Relation of Emotions to Injury*, *supra* note 28, at 207.

35. *Christy Bros. Circus v. Turange*, 38 Ga. App. 581, 144 S.E. 680 (1928) (horse evacuated his bowels into plaintiff's lap); *McCardle v. George B. Peck Dry Goods Co.*, 191 Mo. App. 263, 177 S.W. 1095 (1915) (jolting from too rapid descent in elevator); *Jones v. Brooklyn Heights R.R. Co.*, 23 App. Div. 141, 48 N.Y.S. 914 (1897) (small incandescent lightbulb falls on plaintiff's head); *Morton v. Stock*, 122 Ohio 115, 170 N.E. 869 (1930) (speck of dust in plaintiff's eye).

36. W. PROSSER, *supra* note 2, at 332. The impact rule has been modified or rejected in over 40 states. For a comprehensive listing of the cases that have modified, retained or rejected the impact rule, see Reidy, *supra* note 11, at 296-97 n.4.

Currently, a majority of jurisdictions, including Illinois, condition the plaintiff's recovery of emotional distress damages on his showing that defendant's conduct placed plaintiff in fear for his own physical safety.³⁷ Another formulation of this rule requires that the defendant's conduct place plaintiff in a "zone of danger."³⁸ Generally speaking, recovery for emotional distress continues to be parasitic under the "zone of danger" rule, because most courts require that the emotional distress must ultimately mature to physical harm.³⁹

37. *Rickey v. Chicago Transit Auth.*, 98 Ill. 2d 546, 555, 457 N.E.2d 1, 5 (1983) (plaintiff had reasonable fear for his own safety); see *Battalla v. State*, 10 N.Y.2d 237, 219 N.Y.S. 2d 34, 176 N.E.2d 26 729 (1961). The rule was explained in *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935): "It is the foundation of cases holding to this liberal ruling, that the person affrighted or sustaining shock was actually put in peril of physical impact, and under these conditions it was considered immaterial that the physical impact did not materialize." *Id.* at 612-13, 258 N.W. at 501. An English case held that where one is threatened with imminent physical harm by defendants' acts, an initial breach of duty to the plaintiff is established. If the injurious accident is averted, but thereafter the plaintiff's fear of such physical harm itself matures to physical injury, see *supra* note 29, it becomes a matter of the unexpected manner in which foreseeable injury occurred, and recovery is allowed. *Hambrook v. Stokes Bros.*, [1925] 1 K.B. 141.

38. *Rickey v. Chicago Transit Auth.*, 98 Ill. 2d 546, 555, 457 N.E.2d 1, 15 (1983) (plaintiff was in negligently created zone of physical danger); see also *Owens v. Children's Memorial Hosp.*, 480 F.2d 465 (8th Cir. 1973); *H.E. Butt Grocery Co. v. Perez*, 408 S.W.2d 576 (Tex. App. 1966); *Strazza v. McKittrick*, 146 Conn. 714, 156 A.2d 149 (1959) (range of ordinary physical danger); *Robb v. Pennsylvania R.R. Co.*, 210 A.2d 709 (Del. Supp. 1965) (immediate area of physical danger). For an excellent general background discussion of the zone of danger rule, and a comparative analysis of the rationale for and against the zone of danger rule and the physical impact rule, see Note, *Rickey v. Chicago Transit Authority: Consistent Limitation on Recovery for Negligent Infliction of Emotional Distress in Illinois*, 17 J. MAR. L. REV. 563, 572-85 (1984).

It has been suggested that the two versions of the "zone of danger rule" are in fact separate tests, with the possibility of varying results. See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* 1037, note 31 (1956); Comment, *Negligently Inflicted Emotional Distress: The Case For an Independent Tort*, 59 GEO. L.J. 1237, 1241 n.22 (1971). Analytically, however, the two rules appear to be restatements of the same dual requirements: that the plaintiff actually fear for his safety, and that his fear be reasonable. It does not suffice, in a "zone of danger" jurisdiction, that the plaintiff merely be physically within that zone; he must also fear for his personal safety. For instance, in *Robb*, the court held that "where negligence proximately caused fright, in one within the immediate area of physical danger from that negligence, . . . the injured party is entitled to recover." 210 A.2d at 714-15. See also *Strazza v. McKittrick*, 146 Conn. 714, 156 A.2d 149 (1959) (recovery where negligence causes fright or shock in one in the range of physical danger); *Orlo v. Connecticut Co.*, 128 Conn. 231, 21 A.2d 402 (1941) (same); *H.E. Butt Grocery Co. v. Perez*, 408 S.W.2d 576 (Tex. App. 1966) (recovery where plaintiff in zone of danger and placed in fear of physical harm). Conversely, cases requiring that the plaintiff fear for his own safety also require that that fear be reasonable. See *Bowman v. Williams* 164 Md. 397, 165 A. 182 (1933) (plaintiff's fright based on reasonable grounds for apprehension of injury); *Savard v. Cody Chevrolet, Inc.*, 234 A.2d 656 (Vt. Supp. 1967) (recovery for reasonable fear of immediate personal injury); *O'Meara v. Russell*, 90 Wash. 557, 156 P. 550 (1916) (plaintiff clearly justified in trying to escape peril which confronted her).

39. In *Hanford v. Omaha & C. B. St. R.R. Co.*, 113 Neb. 423, 203 N.W. 643 (1925), the court stated that:

Beginning in 1968 with the California Supreme Court's decision in *Dillon v. Legg*,⁴⁰ a number of jurisdictions have rejected the "zone of danger" rule.⁴¹ In *Dillon*, the court granted recovery for emotional distress and resulting physical harm to a mother who, from a place of safety, witnessed her daughter being negligently struck and killed by the defendant's automobile.⁴² Acknowledging the difficulty in rationally limiting a tortfeasor's liability in the case of a "bystander" plaintiff, the court found that such liability could be adequately circumscribed by the parameters of foreseeability.⁴³

The *Dillon* court confined its holding to cases in which the plaintiff's shock resulted in physical injury.⁴⁴ The court articulated

damages may not be recovered for mere fright unaccompanied or followed by physical injuries proximately resulting therefrom is well settled. And it is also well settled that fright and mental anguish and suffering following a physical injury caused by negligence are proper elements of damage to be considered by the jury.

113 Neb. at 427, 203 N.W. at 645.

40. 68 Cal.2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

41. See, e.g., *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); *Leong v. Takasaki*, 55 Hawaii 398, 520 P.2d 758 (1974); *Barnhill v. Davis*, 300 N.W.2d 104, 107 (Iowa 1981); *Toms v. McConnell*, 45 Mich. App. 647, 207 N.W.2d 140 (1973); *Lafferty v. Manhasset Med. Center Hosp.*, 425 N.Y.S.2d 244, 103 Misc. 2d 98 (1980); *Paugh v. Hanks*, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983); *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979); *Hunsley v. Giard*, 87 Wash. 2d 424, 553 P.2d 1096 (1976).

42. *Dillon*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). The facts in *Dillon* provided fertile ground for abandonment of the "zone of danger" rule. Erin Dillon was struck and killed by defendant's car as she crossed the road. Her older sister Cheryl narrowly missed being struck and saw Erin being struck. Mrs. Dillon witnesses the entire incident from a position of safety a few yards behind Cheryl. The trial court granted defendant's motion on pleadings as to Mrs. Dillon's count, but denied it as to Cheryl's, and Mrs. Dillon appealed. *Id.* at 732, 441 P.2d at 914-15, 69 Cal. Rptr. at 74-75. The Supreme Court stated, "In the first place, we can hardly justify relief to the sister for trauma which she suffered upon apprehension of the child's death and yet deny it to the mother merely because of the happenstance that the sister was some few yards closer to the accident." *Id.* at 733, 441 P.2d at 917, 69 Cal. Rptr. at 75.

43. *Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80. Quoting from 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* 1035, 1035-36 (1956), the *Dillon* court stated:

In other cases, however, the plaintiff is outside the zone of physical risk (or there is no risk of physical impact at all), but bodily injury or sickness is brought on by emotional disturbance which in turn is caused by defendant's conduct. Under general principles recovery should be had in such a case if defendant should foresee fright or shock severe enough to cause substantial injury in a person normally constituted. Plaintiff would then be within the zone of risk in very much the same way as are plaintiffs to whom danger is extended by acts of third persons or forces of nature, or their own response (where these things are foreseeable).

Id. at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

The court found that the zone of danger could not be defined merely by the risk of physical injury, but also necessarily encompassed the area of those exposed to emotional injury. The court refused to draw the line between the plaintiff in the zone of danger of physical impact (Cheryl), and the plaintiff in the zone of emotional impact (Mrs. Dillon). *Id.* at n.5.

44. *Id.* In this manner, damages for emotional distress remained parasitic, see

three factors to be considered in determining whether the plaintiff's injury was foreseeable: 1) whether the plaintiff was near the scene of the accident, 2) whether the plaintiff's shock resulted from direct emotional impact caused by sensory and contemporaneous observation of the accident, as opposed to learning of it later from others, and 3) whether the plaintiff and the victim were closely related.⁴⁵ The court suggested that its three foreseeability guidelines were neither immutable nor all-inclusive.⁴⁶ While it found that the existence of the three factors made out a *prima facie* case, it suggested that in the future other facts might require other "lines of demarcation."⁴⁷

As courts since *Dillon* have faced claims of foreseeably injured plaintiffs in cases presenting facts not amenable to *Dillon's* guidelines, other "lines of demarcation" have indeed been drawn. In California, parent-plaintiffs arriving at the scene of an accident shortly after its occurrence, and only then seeing their injured child, have been found to have stated a cause of action notwithstanding the absence of contemporaneous sensory perception of the accident.⁴⁸ *Dillon's* requirement that the plaintiff and person whose injury the plaintiff witnessed must be closely related has also been expanded upon. The Arizona Supreme Court has interpreted this requirement to be satisfied when "a person with whom the plaintiff has a close personal relationship, either by consanguinity or otherwise," is the victim.⁴⁹ In New York, a daughter-in-law,⁵⁰ and in Hawaii, a step-grandson,⁵¹ have been allowed to recover. Similarly, the Ohio Supreme Court has held that the individual for whose safety the plaintiff-bystander is concerned need not actually be injured or receive an impact.⁵²

Of equal significance to this expansion of the scope of liability has been the trend towards recognition of emotional well-being as an interest deserving of legal protection in and of itself. As stated, the *Dillon* court expressly restricted its holding to the case where emo-

supra note 36 and accompanying text, and the interests in freedom from negligent invasions of emotional well-being continued to receive only secondary protection. See *supra* note 3.

45. *Dillon v. Legg*, 68 Cal. 2d 728, 740-41, 441 P.2d 912, 922, 69 Cal. Rptr. 72, 80 (1968).

46. 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

47. 68 Cal. 2d at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.

48. *Nazoroff v. Superior Court*, 80 Cal. App. 3d 553, 145 Cal. Rptr. 657 (1978) (mother heard cries of the rescuers of her infant son); *Archibald v. Braverman*, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969) (mother observed son's injury from explosion).

49. *Keck v. Jackson*, 122 Ariz. 114, 593 P.2d 668 (1979).

50. *Lafferty v. Manhasset Medical Center Hospital*, 103 Misc. 2d 98, 425 N.Y.S.2d 244 (1980).

51. *Leong v. Takasaki*, 55 Hawaii 398, 520 P.2d 758 (1974).

52. *Paugh v. Hanks*, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983).

tional distress resulted in physical injury.⁵³ In a number of subsequent decisions, however, this requirement has been eroded. In some cases, courts falling short of expressly rejecting the "resulting physical injury" requirement have done so *de facto*. For instance, in rejecting Maine's "impact" rule, the court in *Wallace v. Coca-Cola Bottling Plants, Inc.*,⁵⁴ stated that emotional distress would be compensable where it was "substantial and manifested by objective symptomatology."⁵⁵

Other decisions from jurisdictions purporting to retain the "resulting physical injury" requirement have found sufficient injury in one plaintiff's "gastric problems,"⁵⁶ another's sudden weight loss, inability to perform household duties, and extreme irritability,⁵⁷ and another's depression and "withdrawal from normal forms of socialization."⁵⁸ Arguably, where the original requirement that emotional distress result in physical injury evolves into the requirement that emotional distress be "manifested by objective symptomatology," the emotional distress damages are no longer parasitic,⁵⁹ and are being accorded independent legal protection. Thus, under these circumstances the negligent infliction of emotional distress can be said to have risen to independent tort status.⁶⁰

Most recently, decisions from several jurisdictions have expressly rejected the physical injury requirement, thus unequivocally recognizing the negligent infliction of emotional distress as an independent tort. The first such case was *Rodrigues v. State*.⁶¹ In *Rodrigues*, the plaintiffs suffered property damage as a result of the state's negligence, and alleged that emotional distress resulted.⁶² De-

53. 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

54. 269 A.2d 117, 121 (Me. 1970) (unpacked prophylactic touches plaintiff's lips as he drinks a bottle of Coca-Cola). Other jurisdictions have similarly rejected the "resulting physical injury" requirement, albeit somewhat ambiguously. See *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975) ("physical symptoms"); *Cavitt v. Jetton's Greenway Plaza Cafeteria*, 563 S.W.2d 319 (Tex. Civ. App. 1978) (objective symptoms or an impairment of use or control of physical structures of the body); *Hunsley v. Giard*, 87 Wash. 2d 424, 553 P.2d 1096 (1976) ("physical symptoms").

55. *Wallace*, 269 A.2d at 121.

56. *Krouse v. Graham*, 19 Cal. 3d 59, 562 P.2d 1022, 1031, 137 Cal. Rptr. 863, 872 (Cal. App. 1977).

57. *Daley v. Croix*, 384 Mich. 4, 179 N.W.2d 390 (1970).

58. *Toms v. McConnel*, 45 Mich. App. 647, 657, 207 N.W.2d 140, 145 (1973).

59. *Wallace*, 269 A.2d at 121. In the former case, the physical injury forms the basis for a cause of action, in which emotional distress relates only as a factor in determining damages. In the latter, the physical manifestations do not support the cause of action itself, but only go towards proving that an invasion of the plaintiff's emotional well being, the sole basis for the cause of action, in fact occurred.

60. See *supra* note 5 and accompanying text. See also M. POLELLE & B. OTTLEY, ILLINOIS TORT LAW 400-02 (1985); Winter, *A Tort in Transition: Negligent Infliction of Emotional Distress*, 70A. B.A.J. 62 (March 1984).

61. 52 Hawaii 156, 472 P.2d 509 (1970) (action by home owners who suffered emotional distress because of flood water damage to their house).

62. *Id.* at 159-60, 472 P.2d at 513-14.

spite the plaintiffs' failure to aver either resultant physical injury or objective manifestations of their alleged emotional distress, the court found that they had stated a cause of action.⁶³ Thereafter, the Pennsylvania Supreme Court in *Sinn v. Burd*,⁶⁴ similarly rejected the physical injury requirement, and recognized a cause of action for negligently inflicted emotional distress. The California Supreme Court followed this trend in *Molien v. Kaiser Foundation Hospitals*.⁶⁵

The Illinois Experience

Decisions from Illinois courts that have been confronted with claims of negligently inflicted emotional distress have generally mirrored the decisions of other American jurisdictions. Illinois courts have both continued to raise the various objections to the cause of action,⁶⁶ and have imposed the formalized rules of recovery.⁶⁷ While, as in other jurisdictions, there is an observable trend in Illinois decisions toward the expansion of liability for negligently inflicted emotional distress,⁶⁸ Illinois courts have been considerably more conservative in their approach than courts of a number of other populated, industrialized states.

At the outset, the question of whether emotional distress was even permissible as an element of damages was the subject of some confusion. The Illinois Supreme Court initially announced that recovery for emotional distress would be allowed in a negligence action in the form of pain and suffering parasitic to contemporaneous bod-

63. *Id.* at 159, 472 P.2d at 513.

64. 486 Pa. 146, 404 A.2d 672 (1979).

65. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

66. *See, e.g., Rickey v. Chicago Transit Auth.*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983); *Knierim v. Izzo*, 22 Ill. 2d 73, 174 N.E.2d 157 (1961); *Bullard v. Barnes*, 112 Ill. App. 3d 384, 445 N.E.2d 485 (1983); *Haas v. Metz*, 78, Ill. App. 46, 52 (1898) (plaintiff claimed emotional distress resulted when the defendant allegedly spoke to various persons in a loud and angry manner within the hearing of the plaintiff). The *Haas* court found that the plaintiff's emotional distress was unforeseeable as a matter of law, and, after noting that the plaintiff had not been injured or touched by the defendant, the court stated:

If mere fright, unaccompanied with bodily injury, is a cause of action, the scope of what is known as accident cases will be very greatly enlarged; for in every case of a collision on a railroad, the passengers, although they have sustained no bodily harm, will have a cause of action against the company for the fright to which they have been subjected. This is a step beyond any decision of any legal tribunal of which we have any knowledge.

Id. at 52.

67. *See supra* note 66 and cases cited therein.

68. *Compare Neuburg v. Michael Reese Hosp.*, 60 Ill. App. 3d 679, 377 N.E.2d 215 (1978) (impact rule required because of *stare decisis*) with *Rickey v. Chicago Transit Auth.*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983) (zone of danger rule applied, and impact no longer required).

ily injury.⁶⁹ Twelve years later, however, in *Illinois Central Railroad Company v. Sutton*,⁷⁰ the court stated that mental suffering was not a cognizable element of damages, and that "the only inquiry for the jury was, the bodily injury."⁷¹ Two years thereafter, the court returned to its original rule and allowed pain and suffering damages, observing that its rule in *Sutton* had been in *dicta*, and that "the current of authority is the other way."⁷²

Illinois' adoption of the "impact" rule came in 1898, with the Supreme Court's decision in *Braun v. Craven*.⁷³ In *Braun*, the trial court found that as a result of the defendant's conduct, the plaintiff suffered emotional distress that later developed into physical injury.⁷⁴ In articulating what was already a majority view, the court held that where the plaintiff had not received either physical injury or "impact" to her person at the time of the occurrence, she could not recover for physical injury that developed subsequently as a result of emotional distress.⁷⁵ The court denied recovery "on the ground of public policy alone," echoing the concern expressed by other courts of that day that were facing similar scenarios, namely, that physical injury developing as a result of emotional distress was unforeseeable.⁷⁶

As had occurred in other jurisdictions,⁷⁷ application of the "impact" rule eventually led to irrational results in cases where the absence of "impact" was causally inconsequential, yet legally dispositive. For instance, in *Rosenberg v. Packerland Packing Co.*,⁷⁸ the plaintiffs alleged that defendant had negligently hired a truck driver who was mentally unstable, and who made repeated feints at the rear of plaintiffs' vehicle with his semi-truck.⁷⁹ The court held, *inter alia*, that the plaintiffs' allegation of negligently inflicted emotional

69. *Peoria Bridge Ass'n v. Loomis*, 20 Ill. 235 (1858).

70. 53 Ill. 397 (1870).

71. *Id.* at 399-400.

72. *Indianapolis & St. Louis R.R. Co. v. Stables*, 62 Ill. 313, 321 (1872). In formulating the rule, the court observed: "[I]n fact, we cannot readily understand how there can be pain without mental suffering." *Id.* In spite of this clear recognition that mental suffering was concomitant, but distinct from, bodily pain as a basis for recovery, the court again reversed itself several years later. In *Joch v. Dankwardt*, 85 Ill. 331 (1877), the court held a jury instruction improper "in allowing compensation for mental suffering, as a distinct element of damage in addition to bodily suffering." *Id.* at 333. Eventually, however, pain and mental suffering were recognized bases for recovery where personal injury had occurred. *City of Chicago v. McLean*, 133 Ill. 148, 24 N.E. 527 (1890) (where suffering in body and mind results from negligence, plaintiff can recover damages).

73. 175 Ill. 401, 51 N.E. 657 (1898).

74. *Id.* at 406.

75. *Id.* at 413.

76. *Id.* at 420.

77. See *supra* note 35 and accompanying text.

78. 55 Ill. App. 3d 959, 370 N.E.2d 1235 (1st Dist. 1977).

79. *Id.* at 961, 370 N.E.2d at 1237.

distress failed to state a claim because there had been no physical impact between the vehicles.⁸⁰

By 1983, Illinois courts had been applying the *Braun* "impact" rule, sometimes reluctantly,⁸¹ for over eighty years. Recognizing the inadequacies of the rule, the Illinois Supreme Court, in *Rickey v. Chicago Transit Authority*,⁸² belatedly joined the large majority of jurisdictions that had by then rejected the impact rule.⁸³ In *Rickey*, two brothers were descending a subway escalator when the scarf of one became entangled in the escalator mechanism.⁸⁴ While his brother looked on, the boy was choked and was deprived of oxygen to the point of coma.⁸⁵ The complaint alleged that as a result of witnessing his brother being so injured, the bystander brother suffered severe emotional distress.⁸⁶

Restricting its holding to the case of a bystander witnessing injury to a close relative,⁸⁷ the *Rickey* court held that the complaint stated a cause of action despite the absence of any allegation that the bystander brother had received any impact during the occurrence.⁸⁸ In so ruling, the court criticized the "impact" requirement for permitting recovery where the requisite physical contact "played trivial or no part in causing harm to the plaintiff."⁸⁹ Also, the court acknowledged that the impact rule had been largely abandoned.⁹⁰ In its place, the court adopted the "zone of danger" rule. In order to recover under the court's formulation of the rule, the bystander-plaintiff 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."⁹¹ In addition, the court held that the bystander "must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence."⁹²

80. *Id.* at 962, 370 N.E.2d at 1238. *See also* *Benza v. Shulman Air Freight*, 46 Ill. App. 3d 521, 361 N.E.2d 91 (1st Dist. 1977) (plaintiff's fear of collision was asserted as cause of harm).

81. *See, e.g.*, *Cutright v. City National Bank of Kankakee*, 88 Ill. App. 3d 742, 410 N.E.2d 1142 (1980) (plaintiff not allowed to recover damages that were based upon psychological problems that became manifest after an accident); *Benza v. Shulman Air Freight*, 46 Ill. App. 3d 521, 361 N.E.2d 91 (1st Dist. 1977).

82. *Rickey*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983).

83. *See* cases collected in 64 ALR 100 (Supp.).

84. *Rickey*, 98 Ill. 2d at 549, 457 N.E.2d at 2.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 555-56, 457 N.E.2d at 4-5.

89. *Id.* at 553, 457 N.E.2d at 4.

90. *Id.*

91. *Id.* at 555, 457 N.E.2d at 5.

92. *Id.*

Criticism of Illinois' "Zone of Danger" and "Resulting Physical Injury" Rules

Illinois' adoption of the "zone of danger" rule was significant insofar as it represents judicial recognition that mental disturbance and consequent physical harm can result from purely psychic trauma. In replacing the "impact" rule with the "zone of danger" rule, however, the Illinois Supreme Court traded one mechanistic formula of recovery for another, which, while perhaps superficially more appealing, still fails to treat emotional distress claims in a rational way. Beginning with the 1968 decision in *Dillon v. Legg*,⁹³ courts in recent years have recognized significant shortcomings in the various rationale supporting the "zone of danger" rule.⁹⁴ To a large extent, and particularly with respect to bystander-plaintiff recovery, the courts have found these rationale outdated, inherently invalid, or ill-served by the rule's application.⁹⁵

The traditional rationale for limiting recovery to persons in a zone of physical danger have, for the most part, echoed the historical objections to emotional distress claims generally. First, courts have objected to medical science's supposed difficulty in proving causation between damages and the psychic trauma of merely witnessing an accident.⁹⁶ Also, the courts have expressed fear that fraudulent claims will be asserted,⁹⁷ and that a flood of litigation may ensue.⁹⁸ Moreover, courts have expressed concern that there will be unduly burdensome liability,⁹⁹ and that there will be difficulty in rationally circumscribing liability.¹⁰⁰

Among the arguments proffered in support of the zone of danger rule, it has been most often asserted that there is difficulty in rationally circumscribing potentially limitless liability for emotional distress damages.¹⁰¹ For example, one court predicted that if the

93. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

94. See *supra* note 41 and cases cited therein.

95. See *supra* note 41 and cases cited therein.

96. See *supra* note 19. *But cf. infra* notes 106-109 and accompanying text.

97. See, e.g., *Rickey v. Chicago Transit Auth.*, 98 Ill. 2d 546, 555, 457 N.E.2d 1, 5 (1983) (apprehension about fictitious claims is a consideration in rejecting the impact rule and adopting zone of danger rule in its place); *Knierim v. Izzo*, 22 Ill. 2d 73, 85, 174 N.E.2d 157, 164 (1961) (allowing claims for emotional distress would open door to fictitious claims); *Braun v. Craven*, 175 Ill. 401, 420, 51 N.E. 657, 664 (1898) (dangerous use may be made of emotional distress claims). See also *Reidy, supra* note 11, at 299.

98. See *supra* note 22 and accompanying text.

99. See *supra* note 19. See also *infra* note 136 and cases cited therein.

100. See, e.g., *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979). See also *infra* note 101 and cases cited therein.

101. See, e.g., *Tobin v. Grossman*, 24 N.Y.2d 609, 301 N.Y.S.2d 554, 249 N.E.2d 419 (1969); *Grimmsby v. Samson*, 85 Wash. 2d 52, 530 P.2d 291 (1975); *Scarf v. Koltoff*, 242 Pa. Super. 294, 363 A.2d 1276 (1976) (unlimited liability is persuasive policy reason for not extending liability to cover bystander plaintiff).

"zone of danger" rule was replaced with the traditional foreseeability analysis in bystander cases, liability "would extend to older children, fathers, grandparents, relatives, or others *in loco parentis*, and even to sensitive caretakers, or even any other affected bystanders."¹⁰² It is in furthering the goal of limiting liability, however, that the artificiality of the "zone of danger" rule is most glaring. In the bystander context, the rule indeed circumscribes liability, but in doing so poses an absolute bar to an entire class of plaintiffs, many of whose injuries would be compensable under traditional negligence analysis because they are both foreseeable and real.¹⁰³ Based on the facts in *Rickey*, for instance, it can hardly be maintained that the emotional distress engendered in a young boy watching his brother choked into unconsciousness is any less foreseeable than that resulting from his own fear of injury.

The artificiality of the zone of danger rule is further demonstrated in the case of a bystander-parent witnessing injury to his or her own child. In this context, courts have recognized the probability that the parent's fear for his or her own safety is eclipsed by apprehension for the safety of the child, and grief at the child's injury.¹⁰⁴ Given this indisputable reality, application of the zone of danger rule, allowing recovery by the parent for fear for his or her own safety, but denying recovery for grief or apprehension upon witnessing injury to the child, yields clearly incongruous results. As one court has observed, application of the rule under these circumstances "creates the very evil the test was designed to eliminate, i.e., arbitrariness."¹⁰⁵

With respect to the supposed inability of medical science to address issues of causation in emotional distress claims, modern courts have rejected this argument, noting the increasing sophistication of medical science in evaluating psychological trauma and its effects.¹⁰⁶ Based on these medical developments, the Illinois Supreme Court in

102. *Tobin*, 24 N.Y.2d at 616, 301 N.Y.S.2d at 554, 249 N.E.2d at 423.

103. *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975).

104. Several courts have recognized this proposition as psychological reality. See, e.g., *Dillon v. Legg*, 68 Cal. 2d at 735-36, 441 P.2d at 917, 69 Cal. Rptr. at 77 (1968); *Portee v. Jaffee*, 84 N.J. 88, 417 A.2d 521, 526 (1980); *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979).

105. *Sinn v. Burd*, 486 Pa. 146, 157, 404 A.2d 672, 678 (1979). This arbitrariness is further demonstrated by another consequence of the application of the rule, namely, the legal status it solely accords fright or fear among the several types of emotional distress long recognized to constitute injury. Without suggesting either legal or medical basis for the distinction, the rule permits recovery for fright, yet denies recovery for all other psychic injury.

106. See, e.g., *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1978); *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975) (physical and psychological injury inextricably intertwined); *Molien v. Kaiser Found. Hosp.*, 28 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (proof of causation should not rest on arbitrary distinction between physical and psychological injury).

Knierim v. Izzo,¹⁰⁷ while recognizing the tort of intentionally inflicted emotional distress, stated that the argument was "losing its effectiveness."¹⁰⁸ Furthermore, as several courts have stated, even assuming great difficulty in proving causation to a reasonable degree of medical certainty, this is an insufficient reason to deny an entire class of litigants the opportunity to attempt to prove their claims.¹⁰⁹ Moreover, simple logic suggests that since emotional distress from apprehension or grief upon perceiving injury to another is at least as foreseeable as that arising from fear for one's own safety, medical science, presumed able to determine causation in the latter context, should be recognized as able to do so in the former context.

Other arguments supporting the "zone of danger" rule have similarly failed under serious scrutiny. Apocalyptic predictions of a "flood of litigation" sure to result from abandonment of the rule have simply not materialized.¹¹⁰ Regarding the potential for fraudulent claims resulting from rejection of the rule, this argument has been dismissed as specious. As several courts have observed, the determination as to the existence and cause of emotional injury in a bystander case places no greater burden on the trier of fact than the same determination made in the context of "parasitic" pain and suffering damages.¹¹¹ Moreover, elemental logic again suggests the invalidity of this argument as a basis for retention of the "zone of danger" rule. Under the rule, the stalwart, emotionally unaffected by a near brush with serious injury, can take his or her case to the jury, while the mother, incapacitated with grief at witnessing the killing of her child, is turned away upon her complaint.¹¹²

As indicated, the *Rickey* court also stated that in order to recover the plaintiff "must show physical injury or illness as a result of the emotional distress caused by the defendant's negligence."¹¹³ The court found that the appellate court had treated the plaintiff's complaint as one seeking recovery solely for emotional distress. In this regard, the court observed that the appellate court had adopted a standard "that is too vaguely defined to serve as a yardstick for the

107. 22 Ill. 2d 73, 174 N.E.2d 157 (1961).

108. *Knierim*, 22 Ill. 2d at 85, 174 N.E.2d at 164.

109. *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524, 530 (1975); *Niederman v. Brodsky*, 436 Pa. 401, 408, 261 A.2d 84, 87 (1970); *Leong v. Takasaki*, 55 Hawaii 398, 408, 520 P.2d 758, 764 (1974).

110. *See, e.g., Ramirez v. Armstrong*, 100 N.M. 538, 542, 673 P.2d 822, 826 (1983); *Sinn v. Burd*, 486 Pa. 146, 162-63, 404 A.2d 672, 680-681 (1979). *See also supra* note 22.

111. *See, e.g., Dillon v. Legg*, 68 Cal. 2d 728, 737, 441 P.2d 912, 919, 69 Cal. Rptr. 72, 77 (1968); *Rodrigues v. State*, 52 Hawaii 156, 170, 472 P.2d 509, 519 (1970).

112. Indeed, one court has suggested that a plaintiff standing within the zone of danger was, under the rule, *presumed* to have suffered emotional distress. *Leong v. Takasaki*, 55 Hawaii 398, 404, 520 P.2d 758, 762 (1974).

113. *Rickey*, 98 Ill. 2d at 555, 457 N.E.2d at 5.

courts to apply, and one that is excessively broad in that it would permit recovery for emotional disturbance alone."¹¹⁴ Thus under Illinois law, recovery for negligently inflicted emotional distress remains "parasitic" in nature. In embracing this view, however, the *Rickey* court failed to acknowledge the recent trend towards rejection of the physical injury requirement, and the cogent arguments supporting the trend.¹¹⁵

Without even discussing their validity, the *Rickey* court cited, in rote fashion, the familiar litany of reasons that courts have traditionally given for maintaining the physical injury requirement. It referred to the arguments that fraudulent claims would otherwise be presented, that damages would otherwise be difficult to ascertain and measure, that emotional injuries are unforeseeable, and that frivolous litigation would be encouraged.¹¹⁶ As with the similar arguments that have been marshalled in favor of the "zone of danger" rule, the arguments supporting the physical injury requirement have been cast in serious doubt in recent years.

The primary justification given for requiring physical injury is its value in screening out feigned claims of emotional harm.¹¹⁷ Yet, even the most well-justified rule loses much of its appeal when applied as unevenly as the physical injury requirement has been. Exceptions to the requirement have long been recognized in the negligent mishandling of corpse cases and the negligent telegraph message cases.¹¹⁸ In the "parasitic damages" context, the quantum of evidence that courts have required to be shown in order to demonstrate that emotional distress actually accompanies the "host" physical injury has often been minimal.¹¹⁹

Similarly, in some jurisdictions, physical injury sufficient to support the parasitic emotional distress claim has been found in some extremely questionable circumstances.¹²⁰ As one judge has noted, "in no other area are the vagaries of our law more apparent

114. *Id.* at 554, 457 N.E.2d at 4.

115. *See infra* notes 117-135 and accompanying text.

116. *Rickey*, 98 Ill. 2d at 555, 457 N.E.2d at 5.

117. *Molien v. Kaiser Found. Hosp.*, 28 Cal. 3d 916, 925, 616 P.2d 813, 818, 167 Cal. Rptr. 831, 836 (1980).

118. *See supra* notes 24-25 and accompanying text.

119. *Brown v. Sullivan*, 71 Tex. 470, 10 S.W. 288 (1888) (where physical injury occurs, recovery may be had for mental suffering without direct proof that mental suffering ensued); *Scolavino v. State*, 187 Misc. 253, 62 N.Y.S.2d 17 (Ct. Claims 1946), *modified*, 271 App. Div. 618, 67 N.Y.S.2d 202, *aff'd*, 297 N.Y. 460, 74 N.E.2d 174 (mental suffering is a presumed consequence of physical injury); *Reiss v. Howard Johnson's, Inc.*, 121 Ga. App. 119, 173 S.E.2d 95 (1970) (the law infers bodily pain and suffering from personal injuries); *Cook v. Missouri Pac. R. Co.*, 19 Mo. App. 329 (1885) (jury may infer mental pain from the physical pain which inevitably accompanies personal injury).

120. *See infra* notes 35-36 and accompanying text.

than in the distinction between mental and emotional distress accompanied by physical manifestation and such discomfort unaccompanied by physical manifestation."¹²¹ Given this history, the argument that emotional distress is too often not genuine and hence requires physical injury as corroboration, appears incongruous.¹²²

Another reason given for barring recovery for emotional distress absent physical injury is the speculation inherent in determining and awarding emotional distress damages.¹²³ Yet this objection does not appear to have deterred courts from awarding damages in cases alleging other torts, such as defamation or false imprisonment, where remedies are equally subject to speculation. Likewise, the assertion that the difficulty in proving causation in emotional distress cases justified requiring physical injury¹²⁴ is equally suspect. Logically, it is apparent that proving the existence of physical injury sheds little light on the question of causation of the contemporaneous emotional distress. Further, it is clear that a cause of action should not be denied solely because of the difficulty in proving its elements in a given case.

Most importantly, the requirement of physical injury can no longer be justified in light of the current availability of medical expertise to detect and evaluate emotional harm. Increasingly, contemporary medicine is able to provide the trier of fact with intelligent bases for evaluating claims of purely psychic injury.¹²⁵ Mental distress is medically characterized as a reaction to traumatic stimulus.¹²⁶ The various specific psychic reactions have been generally categorized, and behavioral and physical manifestations normally accompanying the given reactions have been identified.¹²⁷ While

121. *Allen v. Jones*, 104 Cal. App. 3d 207, 216, 163 Cal. Rptr. 445, 451 (1980) (concurring opinion).

122. See *Goodrich*, *supra* note 29, at 510. The author finds that, under such circumstances, "pious incantations" about recovery being too uncertain "lose their charm." *Id.* at 509.

123. See *supra* note 19 and cases cited therein.

124. *Id.*

125. *Towns v. Anderson*, 195 Colo. 517, 579 P.2d 1163 (1978). See *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979) (psychic injury capable of being proven by medical science despite absence of physical manifestation). For a comprehensive discussion of recent medical advances that are useful in the context of proving emotional distress claims, see *Reidy supra* note 11, at 300-03. Cf. *Peck, Compensation for Pain: A Reappraisal in Light of New Medical Evidence*, 72 MICH. L. REV. 1355 (1974) (author traces the adequacy of medical advancements in the context of pain and suffering injury claims).

126. See Comment, *Negligently Inflicted Emotional Distress: The Case For an Independent Tort*, 59 GEO. L.J. 1237, 1248 (1971).

127. Two distinct types of responses to traumatic stimulus have been identified. One is a primary response, designed to protect the individual from harm, such as the classic "fight-flight" response. See *Goodrich, supra* note 29, at 499. Other primary responses include anger, grief, shock, or embarrassment. Comment, *Negligently Inflicted Emotional Distress: The Case for an Independent Tort*, 59 GEO. L. REV. 1237,

only one of the several traumatic neuroses, the conversation reaction or "hysteria," typically results in any actual physical impairment,¹²⁸ most other reactions are manifested by observable symptoms.¹²⁹ Finally, physicians have developed a number of tests to detect malingering in the context of emotional injury.¹³⁰

At the same time, developments in the rules of evidence in Illinois and other jurisdictions have facilitated the presentation of medical testimony to the jury regarding the existence and cause of emotional distress. Physicians have been held competent to testify regarding their conclusions as to the existence and causation of emotional injury when such conclusions are based on the observation of these symptoms.¹³¹ Where physical manifestations have subsided prior to observation by medical experts, exceptions to the hearsay rule have allowed such experts to draw conclusions based on information obtained second-hand.¹³² Additionally, testimony as to the plaintiff's subjective symptoms and feelings has been found admissible, both from the plaintiff and from other lay persons who have observed the plaintiff's demeanor.¹³³ Such evidence has been af-

1249 (1971). One commentator has suggested, however, that due to the transient nature of the response, emotional distress should not be compensable. Smith & Solomon, *Traumatic Neuroses in Courts*, 30 VA. L. REV. 87, 123 (1943).

Secondary reactions are distinguishable from primary reactions, being longer lasting, and result from the individual's continuing inability to cope with the traumatic event. Such reactions have been designated "psychoneuroses," and generally are categorized as hysteria, neuasthenia, anxiety states, and the compulsive, obsessive states. Smith & Solomon, *supra* at 92-95.

128. Smith & Solomon, *supra* note 127, at 92-95. The patient suffering from the hysteria reaction may present symptoms of paralysis, convulsions, anasthenia, memory loss, etc. No structural pathology accompanies these symptoms, yet they are similar to those resulting from actual physiological damage. *Id.*

129. *Id.* at 93-95.

130. See Goodrich, *supra* note 29, at 499.

131. See *Olin Industries, Inc. v. Industrial Comm.*, 394 Ill. 202, 68 N.E.2d 259 (1946); *Miller v. Michigan Central R.R. Co.*, 167 Mich. 21, 132 N.W. 483 (1911) (physician's testimony that plaintiff's symptoms caused neurasthenia admissible); *Johnson v. State*, 37 N.Y. 2d 378, 372 N.Y.S. 2d 638 (1975) (plaintiff's expert testified that plaintiff suffered anxiety neurosis, based on objective manifestations of that condition); *Hess v. Philadelphia Transp. Co.*, 358 Pa. 144, 56 A.2d 89 (1948) (plaintiff had no organic injuries but suffered from blind spots, headaches, fear of loud noises; physician and specialist found plaintiff suffering from neurosis). *Zelinsky v. Chimics*, 196 Pa. Super. 312, 175 A.2d 351 (1961) (plaintiff, who suffered no physical injuries, could not keep mind on work and had to quit job; expert witness testified suffering from neurosis).

132. See *Beecher v. Best*, 74 Ill. App. 2d 174, 219 N.E.2d 371 (5th Dist. 1966). See also *Kaufman v. Kaufman*, 164 F.2d 519 (D.C. Cir. 1947) (in annulment proceeding by wife, physician should be permitted to testify as to husband's impotence where basis of testimony was husband's statements to physician); *United States v. Roberts*, 62 F.2d 594 (10th Cir. 1932) (physician may testify as to irrational statements made to him by patient since he did not testify to prove truth of facts stated but to prove mental state of patient); *United States v. Nickle*, 60 F.2d 372 (8th Cir. 1932) (if patient goes to physician for treatment with no expectation of using him as a witness, the physician may testify to statements made to him by patient).

133. Rheingold, *The Basis of Medical Testimony*, 15 VAND. L. REV. 473, 519

forded greater credibility through the practice, in Illinois and in other jurisdictions, of allowing experts to draw conclusions as to the plaintiff's subjective symptoms based on observing the plaintiff's and others' testimony at trial.¹³⁴ In short, there is simply no longer sufficient reason for allowing serious emotional injury to go unredressed solely because it does not mature to physical harm. As one recent court has noted, the goal of identifying feigned claims will be better effectuated if questions as to the existence and the extent of emotional harm are submitted to the trier of fact.¹³⁵

In the face of this compelling logic against the "zone of danger" and "resulting physical injury" rules, and considering the fact that rationale supporting the rules grow increasingly chimerical, Illinois' recent adoption of these rules is truly unfortunate. Because other approaches for addressing claims of negligently inflicted emotional distress currently exist, and are analytically more sound, the imposition of the "zone of danger" and "resulting physical injury" rules at this juncture works a disservice to Illinois litigants. The following sections examine and compare these more recent approaches, and provide suggestions for Illinois courts considering emotional distress claims in the future.

ALTERNATIVE APPROACHES

With the gradual erosion of many of those "administrative" concerns believed to necessitate the denial of recovery, courts, beginning with the *Dillon* decision, have extended the compass delimiting liability for negligently inflicted emotional distress. Yet even in this period of increasing confidence in the law's ability to "administer" emotional distress claims, courts continue to acknowledge that the cause of action does present unique problems. Primary among the courts' concerns remains the question of how to most rationally circumscribe liability.¹³⁶ Courts allowing bystander recovery have continued to acknowledge that, in reality, the number of persons foreseeably injured to at least some degree can be unduly large.¹³⁷ At the same time, courts continue to raise other issues of public policy relevant to recovery. As the court in *Rodrigues v. State* observed:

(1962).

134. See, e.g., *Wilson v. Clark*, 84 Ill. 2d 186, 417 N.E.2d 1322 (1981) (adopting Federal Rule of Evidence 703 in Illinois). See also *Rheingold*, *supra* note 133, at 519.

135. *Molien v. Kaiser Foun. Hosp.*, 27 Cal. 3d 916, 930, 167 Cal. Rptr. 831, 839, 616 P.2d 813, 821 (1980).

136. See, e.g., *Kelly v. Kokua Sales and Supply Ltd.*, 56 Hawaii 204, 532 P.2d 673, 676 (1975); *Barnhill v. Davis*, 300 N.W.2d 104, 106-07 (Iowa 1981); *Dziokonski v. Babineau*, 380 N.E.2d 1295, 1302 (Mass. 1978). See also *supra* notes 99-100 and accompanying text.

137. See, e.g., *Molien*, 27 Cal. 3d at 928, 616 P.2d at 820, 167 Cal. Rptr. at 828. See also *supra* note 136 and cases cited therein.

It is universally agreed that there are compelling reasons for limiting the recovery of the plaintiff to claims of *serious* mental distress. The reasons offered to limit recovery are that mental distress of a trivial and transient nature is part and parcel of everyday life in a community, that under certain circumstances social controls may deal more effectively with mental distress, that some kinds of mental distress may have a beneficial therapeutic effect, that the law should not penalize the "prime mover" in society nor curry to neurotic patterns in the population.¹³⁸

Recent decisions have attempted to address these continuing concerns through two separate approaches. In one, courts have applied the *Dillon* foreseeability guidelines,¹³⁹ or variations thereon, in order to determine the appropriate extent of a tortfeasor's liability to plaintiff bystanders. The second approach hinges on a foreseeability analysis without the application of express guidelines. This latter approach was first applied by the Hawaii Supreme Court in *Rodrigues v. State*,¹⁴⁰ and later more fully developed by the California Supreme Court in *Molien v. Kaiser Foundation Hospitals*.¹⁴¹ In the balance of this article, this second approach will be referred to as the *Rodrigues-Molien* analysis.

The Dillon Guidelines.

In the bystander case, the *Dillon* guidelines have generally proven to be workable and have, for the most part, produced rational results. This is particularly true where courts have viewed the factors as the *Dillon* court intended, that is, as flexible indicia of the scope of liability, and not as iron-clad rules of recovery.¹⁴² This flexible approach is demonstrated in *Bliss v. Allentown Public Library*,¹⁴³ where a mother heard a crash and turned to see her child lying on the floor with a library sculpture positioned across the child's badly injured arm. Noting that the mother had not observed the accident, the court nevertheless held that the mother had stated

138. *Rodrigues*, 52 Hawaii 156, 172-73, 472 P.2d 509, 520 (1970).

139. See *supra* text accompanying notes 44-47.

140. 52 Hawaii 156, 472 P.2d 509 (1970).

141. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

142. See *supra* note 43 and accompanying text. See also *Paugh v. Hanks*, 6 Ohio St. 3d 72, 79, 451 N.E.2d 759, 764 (1983) ("the term 'factors' should be understood to alleviate any misconception that such facts are requirements"). In formulating its guidelines, the *Dillon* court stated:

Because it is inherently intertwined with foreseeability such duty or obligation must necessarily be adjudicated only upon a case-by-case basis. We cannot now predetermine defendant's obligation in every situation by a fixed category; no immutable rule can establish the extent of that obligation for every circumstance of the future.

Dillon, 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

143. 497 F. Supp. 487, 488 (E.D. Pa. 1980).

a cause of action for negligently inflicted emotional distress.¹⁴⁴ Rejecting the defendant's argument that such observance was a necessary prerequisite for recovery, the court stated that:

denying the mother's claim because of the position of her eyes at the split second that the accident occurred ignores the reality that the entire incident produced the emotional injury for which she seeks redress. The mother's injury, if any, was clearly foreseeable under the circumstances, and it would not be an unreasonable extension of the defendant's duty of care to impose liability if plaintiffs prove negligence at trial.¹⁴⁵

Similarly, in *Archibald v. Braverman*,¹⁴⁶ a mother arrived at the scene of an explosion after its occurrence, but in time to witness severe injuries to her thirteen-year-old son. In holding that the mother had stated a cause of action, the court observed: "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."¹⁴⁷

A number of decisions have, on the other hand, tended to apply the *Dillon* criteria as "bright line" rules of recovery. For example, in *Ramirez v. Armstrong*,¹⁴⁸ a man was killed when an automobile struck him while he was crossing the street. Three children, who had been close by, witnessed the accident. Two of the children were his son and daughter, and the third was a young girl who had been living with the family. A third child of the victim learned of her father's death and viewed his body after the accident.¹⁴⁹ Adopting the *Dillon* criteria, the court held that in order for a plaintiff to recover for negligently inflicted emotional distress, there must be a familial relationship between the plaintiff and victim, and the emotional distress must result from contemporaneous sensory perception of the accident.¹⁵⁰ Thus, the court granted recovery to the two children of the victim who had witnessed his death, but denied recovery to the other child-witness, and also to the daughter who had only witnessed the aftermath of the accident but not the accident itself.¹⁵¹

The Rodrigues-Molien Analysis.

In *Rodrigues v. State*,¹⁵² the plaintiffs alleged that their emo-

144. *Id.* at 489.

145. *Id.*

146. 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1978).

147. *Id.* at 256, 79 Cal. Rptr. at 725.

148. 100 N.M. 538, 673 P.2d 822 (1983).

149. *Ramirez*, 100 N.M. at 539-40, 673 P.2d at 823-824.

150. *Id.* at 541-42, 673 P.2d at 825-826.

151. *Id.* at 543, 673 P.2d at 827.

152. 52 Hawaii 156, 472 P.2d 509 (1970).

tional distress resulted from damage to their house. Their lot was situated in an area that was drained by a highway culvert and that the state highway department had the duty to keep clear and open. In a night of heavy rains the state delayed in clearing the culvert, and the plaintiffs' home was extensively damaged because the blocked culvert caused flooding. The plaintiffs sued for the property damage and mental suffering.¹⁵³

The *Rodrigues* court reviewed, at some length, the history of limitations on claims of negligently inflicted emotional distress. It identified two "primary considerations" in the scheme, namely, the fear of fraudulent claims, and the potential for limitless liability.¹⁵⁴ With respect to the first concern, the court noted the "contemporary sophistication" of medical science, and the traditional ability of courts and juries to recognize fraud.¹⁵⁵ The court therefore rejected the physical injury requirement. In its stead, the court held that "[i]n cases other than where proof of mental distress is of a medically significant nature, . . . the general standard of proof required to support a claim of mental distress is some guarantee of genuineness in the circumstances of the case."¹⁵⁶

Regarding the continuing potential for endless liability, the *Rodrigues* court found that any difficulty in limiting liability was not a sufficient reason to automatically deny the plaintiffs' claim. It instead adopted a new standard for recovery on claims of emotional distress, namely, that recovery would be limited to serious emotional injury.¹⁵⁷ It held that courts and juries were to apply this standard "based upon the reaction of 'the reasonable man'".¹⁵⁸ The court stated: "We hold that serious mental distress may be found where a reasonable man, normally constituted, would be unable to cope with the mental stress engendered by the circumstances of the case."¹⁵⁹

The *Rodrigues* analysis was adopted in its entirety ten years later when the California Supreme Court decided *Molien v. Kaiser Foundation Hospitals*.¹⁶⁰ In *Molien*, a staff physician at the defendant hospital gave the plaintiff's wife a routine physical examination. The physician, who was also a defendant, advised her that she had contracted infectious syphilis. She underwent treatment, which included massive doses of penicillin. The doctor advised her to tell her husband of the diagnosis, which she did.

153. *Rodrigues*, 52 Hawaii at 157-60, 472 P.2d at 512-14.

154. *Id.* at 172, 472 P.2d at 519.

155. *Id.* at 172, 472 P.2d at 519-20.

156. *Id.*

157. *Id.* at 173, 472 P.2d at 520.

158. *Id.*

159. *Id.*

160. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

As a result of the diagnosis, the plaintiff's wife became upset and suspicious, believing that the plaintiff had engaged in extramarital sex. "Tension and hostility" arose between the two, and dissolution proceedings followed. The diagnosis was subsequently discovered to have been erroneous.¹⁶¹ The plaintiff sued, alleging that he had suffered extreme emotional distress as a result of the negligent misdiagnosis.

The plaintiff's complaint was dismissed at trial, and the appellate court affirmed.¹⁶² The appellate court found that the doctor's act of informing the plaintiff's wife of the diagnosis had been the event of actionable negligence. Since the plaintiff had not witnessed his wife being informed of the diagnosis the court found that the second *Dillon* requirement of "sensory and contemporaneous observance of the accident" had not been met.¹⁶³

The California Supreme Court reversed, finding the argument that the plaintiff had failed to satisfy the *Dillon* criteria a "rote application of the guidelines to a case factually dissimilar to the bystander scenario."¹⁶⁴ The court observed that the *Dillon* guidelines served as a limitation on liability where one witnessed injury to a third person, but distinguished the plaintiff as being "himself a direct victim of the assertedly negligent act."¹⁶⁵ The court found *Dillon* significant, not for its delineation of guidelines that had been fashioned for the precise issue then at hand, but rather for its general principal of foreseeability. The court stated that in contending that the plaintiff had not satisfied the *Dillon* criteria, the defendants had overlooked the *Dillon* court's admonition that "an obligation hinging on foreseeability 'must necessarily be adjudicated only upon a case-by-case basis.'"¹⁶⁶ The court noted in conclusion: "Because the risk of harm to him was reasonably foreseeable we hold, in negligence parlance, that under these circumstances defendants owed plaintiff a duty to exercise due care in diagnosing the physical condition of his wife."¹⁶⁷

Like the court in *Rodrigues*, the *Molien* court discussed the historical bases for requiring that emotional distress be either accompanied by, or result in, physical injury.¹⁶⁸ The court found modern medical science, along with the traditional role of the trier of fact, to be fully capable of discerning the genuineness of emotional distress

161. *Id.* at 919-20, 616 P.2d at 814-815, 167 Cal. Rptr. at 832-33.

162. *Molien*, 96 Cal. App. 3d 468, 158 Cal. Rptr. 107 (1979).

163. *Id.*

164. *Molien*, 27 Cal. 3d at 924, 616 P.2d at 816, 167 Cal. Rptr. at 834.

165. *Id.*

166. *Id.*

167. *Id.* at 924, 616 P.2d at 817, 167 Cal. Rptr. at 835.

168. *Id.* at 925-26, 616 P.2d at 817-18, 167 Cal. Rptr. at 835-36.

claims.¹⁶⁹ The court expressly adopted the *Rodrigues* standard of proof allowing either proof of a "medically significant nature" or a finding of some "guarantee of genuineness in the circumstances of the case."¹⁷⁰ The court held that a cause of action could be stated for "the negligent infliction of serious emotional distress."¹⁷¹

A COMPARISON OF THE APPROACHES

The *Dillon* and the *Rodrigues-Molien* analyses both mark a fundamental change in the law of negligently inflicted emotional distress. At the same time, each furthers the important policy and administrative interests in circumscribing liability and in barring recovery for trivial emotional injury. Each approach presents a more workable alternative than Illinois' "zone of danger" rule. For the reasons that follow, however, it is suggested that the *Rodrigues-Molien* analysis is the better reasoned of the two approaches, and that it therefore provides the best model for Illinois courts facing emotional distress claims in the future.

While *Dillon* did not contain the *Rodrigues* and *Molien* decisions' explicit standard that recovery be limited to serious emotional injury, application of the *Dillon* guidelines has yielded this result. Despite the expansive language of the *Dillon* court as to the importance of foreseeability,¹⁷² it is clear from decisions like *Ramirez* that, in practice, the three *Dillon* factors have oftentimes not been applied as "guidelines" for a determination of foreseeability. Rather, they represent limitations on foreseeability as a determinant of liability, denying recovery for emotional injury that is in fact foreseeable.

It cannot be seriously disputed, for instance, that in *Ramirez* the tortfeasor could reasonably foresee at least some degree of emotional injury to the non-related child-witness, and to the non-witness daughter of the man killed. What is implicit from this application of the three *Dillon* factors, and from the nature of the factors themselves, is that they serve as guides to the determination of whether serious emotional injury to the plaintiff is foreseeable. The factors, therefore, serve a function similar to the *Rodrigues-Molien* objective severity standard. Unfortunately, the denial of recovery because the three *Dillon* "rules" have not been satisfied can, as in *Ramirez*, smack of the same artificiality that results from applica-

169. *Id.* at 929-31, 616 P.2d at 818-20, 167 Cal. Rptr. at 838-39.

170. *Id.* at 931, 616 P.2d at 821, 167 Cal. Rptr. at 839.

171. *Id.*

172. The court stated: "Since the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk, that factor will be of prime concern in every case." *Dillon*, 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

tion of the "zone of danger" rule.

By expressly defining the tort as the negligent infliction of serious emotional distress, the *Rodrigues-Molien* analysis similarly imposes a necessary limitation on the tortfeasor's liability. However, the two courts so limited recovery not through the "bright-line," and sometimes arbitrary *Dillon* rules, but through a case by case analysis using the familiar "reasonable man" standard. As the *Rodrigues* court noted "[c]ourts and juries which have applied the standard of conduct of 'the reasonable man of ordinary prudence' are competent to apply a standard of serious mental distress based upon the reaction of 'the reasonable man.'" ¹⁷³ Thus this approach represents an effort to more closely follow traditional negligence principles in administering emotional distress claims.

Moreover, the *Rodrigues-Molien* analysis is more broadly applicable to a variety of factual situations than is the *Dillon* approach. As the *Molien* court recognized, in cases other than where liability to a bystander is at issue, the *Dillon* guidelines are obviously irrelevant to a determination of whether serious injury to the plaintiff is foreseeable. ¹⁷⁴

Even in the bystander context, the *Rodrigues-Molien* analysis provides a more logical alternative to the *Dillon* criteria in limiting a tortfeasor's liability. The determination as to the foreseeability of serious emotional injury based on a case by case, objective analysis, appears more consistent with the nature of human reaction to psychic trauma than does the determination based on *Dillon*'s guidelines. As a number of courts have pointed out, one's physical presence at the site of injury to another, and one's contemporaneous perception of the injury, are not the only psychologically relevant determinants of whether emotional distress will occur. ¹⁷⁵ One court noted in this regard that ". . . the instant advice that one's child has been killed or injured, by telephone, word of mouth, or whatever means, even if delayed, will have in most cases the same impact. The sight of gore and exposed bones is not necessary to provide special impact on a parent." ¹⁷⁶ Further, while one's relationship with the injured person has psychological relevance, it is the personal bond that one has with the person, and not blood kinship, that is the most relevant determinant. ¹⁷⁷

173. *Rodrigues v. State*, 52 Hawaii 156, 173, 472 P.2d 509, 520 (1970).

174. See *supra* text accompanying notes 164-167.

175. See, e.g., *Amaya v. Home Fuel, Ice & Supply Co.*, 59 Cal.2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1962); *Tobin v. Grossman*, 24 N.Y.2d 609, 301 N.Y.S.2d 554, 249 N.E.2d 419 (1969).

176. *Tobin v. Grossman*, 24 N.Y.2d 609, 617, 301 N.Y.S.2d 554, 558, 249 N.E.2d 419, 423 (1969).

177. Comment, *Fear For Another: Psychological Theory and the Right to Recovery*, 1969 ARIZ. L.J. 420, 428.

Nor is it likely that application of the *Rodrigues-Molien* analysis in the bystander context will result in liability to a significantly greater number of persons than would an application of *Dillon's* guidelines. It is probable that the absence of one of the *Dillon* factors will be a prime consideration in the jury's conclusion as to whether a reasonable man would "cope" with the emotional injury "engendered by the circumstances of the case." The particular value of the *Rodrigues-Molien* objective severity standard is that the absence of a given factor does not require the denial of recovery for foreseeably serious emotional injury.¹⁷⁸

While the *Rodrigues-Molien* analysis closely tracks principles applied in negligence cases generally, it differs in one respect. Under general negligence law, the tortfeasor is liable to the full extent that his conduct aggravates a preexisting condition. Examples of such conditions include pregnancy or susceptibility to disease, as represented by the case of the "eggshell skulled" plaintiff. Under the objective severity standard, however, such idiosyncratic plaintiffs, predisposed towards emotional harm, will often not recover for even serious emotional injury. Under this standard, where the nature and extent of such a person's emotional injury is due solely to his predisposition towards it, the reasonable, normally constituted person would "cope" with the emotional distress that he suffered as a result of the same circumstances. Where the reasonable man would cope, the plaintiff will be denied recovery. Although this digression from general negligence principles appears to be significant, it is warranted given the nature of emotional injury and the ample opportunities for its precipitation in today's society. It is in this situation that the argument regarding the "undue burden" resulting from emotional distress liability has merit.¹⁷⁹

178. The flexibility that the *Rodrigues-Molien* analysis lends to the bystander case is aptly demonstrated by the Hawaii Supreme Court's decision in *Leong v. Takasaki*, 55 Hawaii, 398, 520 P.2d 758 (1974). In *Leong*, a ten year old boy, who had been walking hand in hand with his stepfather's mother witnessed, from a location of safety, the woman struck and killed by an automobile. The defendant contended liability could not lie because, *inter alia*, the plaintiff was not a close relative of the woman struck. The court noted the Hawaiian tradition of close ties among the extended family group, and concluded: "Hence the plaintiff should be permitted to prove the nature of his relationship to the victim and the extent of damages he has suffered because of this relationship." 55 Hawaii at 411, 520 P.2d at 766.

179. One author cites a study showing that out of 301 cases of injury from psychic stimuli, 216 produced evidence of some predisposition towards psychic injury. Smith, *Cross-Examination of Neuropsychiatric Testimony in Personal Injury Cases*, 41 VAND. L. REV. 1, 53 (1950). A number of courts have concluded that extending liability to a plaintiff with preexisting susceptibilities would place an undue burden on defendants. *Cosgrove v. Beymer*, 244 F. Supp. 824 (D. Del. 1965); *Cote v. Litawa*, 96 N.H. 174, 71 A.2d 792 (1950); *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935).

CONCLUSION

There is no doubt that claims of negligently inflicted emotional distress present issues unique to the law of tort. The usual problems of proving causation, the existence of cognizable injury, and the extent of that injury are particularly acute in the case of emotional distress claims. Yet in recent years these administrative concerns have waned in the face of the growing sophistication of medical science in the field of emotional distress. Thus while Illinois' zone of danger and physical injury rules might have been arguably justified at one time, they now stand as vestigial reminders of the days when emotional distress was left "to be helped and vindicated by the tremendous force of sympathy."¹⁸⁰ The growing confidence of the courts in administering emotional distress claims is more fully realized through the application of the *Rodrigues-Molien* analysis.

Society has vastly changed in recent years. With these changes, and the rapidly increasing population density, the negligent infliction of serious emotional distress has been made that much more likely.¹⁸¹ As one court noted while rejecting the zone of danger rule in this context: "Where there is a widespread need for redress, the judicial system should consider very carefully before it undertakes to reject, as a matter of law, an entire class of claims."¹⁸² In adopting the zone of danger rule and in affirming the physical injury requirement at this juncture in the evolution of this tort, the Illinois Supreme Court seemingly ignored the fundamental changes in American life and in medical science that have occurred since these rules were first announced. Thus, the *Rickey* decision now stands as an unreasonable impediment to deserving plaintiffs.

It is likely that the zone of danger and physical injury rules will at best enjoy only begrudging acceptance by future Illinois courts. Indeed, this was manifest in the appellate decision of the First District in *Rickey*. There, the court found that the *Dillon* guidelines, rather than the zone of danger rule, provided "adequate safeguards against the hazards of unlimited liability."¹⁸³ Similarly, in *Rahn v. Gerds*,¹⁸⁴ the Third District seemingly ignored *Rickey*'s physical injury requirement. Noting that under Illinois law an action in strict liability would not lie because "the complaint alleges only mental

180. *Chapman v. Telegraph Co.*, 88 Ga. 763, 772, 15 S.E. 901, 904 (1892).

181. *Rodrigues v. State*, 52 Hawaii 156, 173, 472 P.2d 509, 520 (1970).

182. *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524, 529 (1975).

183. *Rickey v. Chicago Transit Authority*, 101 Ill. App. 3d 439, 442, 428 N.E.2d 596, 599 (1981).

184. 119 Ill. App. 3d 781, 455 N.E.2d 807 (1983). For an excellent comprehensive analysis of the *Rahn* decision, see Note, *Rahn v. Gerds: Illinois Strict Products Liability: Recovery For Emotional Distress Denied*, 18 J. MAR. L. REV. 271 (1984).

and emotional injuries,"¹⁸⁵ the court nevertheless found that the complaint stated a cause of action for negligence.¹⁸⁶

It is truly regrettable that the Illinois Supreme Court has so recently given its imprimatur to rules of law so clearly outdated. Given the many cogent arguments against the standards currently imposed, it is hopefully only a matter of time before Illinois joins those jurisdictions recognizing the negligent infliction of emotional distress as an independent tort. *Stare decisis* should yield to the realities of the times.

185. *Id.* at 786, 455 N.E.2d at 809.

186. *Id.* at 786, 455 N.E.2d at 810.

