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Lawrence E. Likar

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COMMENTS

NEGLIGENT INFLICTION OF EMOTIONAL HARM TO BYSTANDERS—SHOULD RECOVERY BE DENIED?

LAWRENCE E. LIKAR

The common law system of jurisprudence has always displayed a reluctance to allow the recovery of damages for emotional harm,[1] as evidenced by early judicial decisions which denied a plaintiff recovery for emotional distress unless he suffered an accompanying physical injury.[2] This blanket denial of recovery was based upon a belief that the occurrence of emotional injury depended upon the individual personality of the person affected,[3] and therefore, a correct determination of money damages was impossible.[4] Moreover, the courts feared that if such recovery was allowed, a flood of unjust claims would result.[5] Because of later advances in the fields of medicine and psychiatry, courts began to award damages for emotional distress without predicating such recovery upon accompanying physical injury.[6] In general, such recovery was, and still is, subject to the requirement that the plaintiff must have suffered physical impact or that the claimant

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1. Margruder, *Mental and Emotional Disturbance in the Law of Torts,* 49 HARV. L. REV. 1033, 1035 (1936). This propensity is aptly pointed out by the frequently cited statement by Lord Wensleydale that "[m]ental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone . . . ." Lynch v. Knight, 11 Eng. Rep. 854, 863 (H.L. 1861).
2. *E.g.*, Braun v. Craven, 51 N.E. 657, 664 (Ill. 1898); Kalen v. Terre Haute & I.R.R., 47 N.E. 694, 697 (Ind. Ct. App. 1897); Spade v. Lynn & B.R.R., 47 N.E. 88, 89 (Mass. 1897); Mitchell v. Rochester Ry., 45 N.E. 354, 355 (N.Y. 1896).

If the injured plaintiff brought his action for an independent tort and also for resulting emotional distress the courts would generally allow damages for such emotional distress as parasitic to the primary injury. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 67, at 154-56 (1956); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12, at 52 (4th ed. 1971); *see, e.g.*, Dixon v. New York Trap Rock Corp., 58 N.E.2d 517, 518 (N.Y. 1944) (nuisance); Garrison v. Sun Printing & Publishing Ass'n, 100 N.E. 430, 432 (N.Y. 1912) (defamation); Goodell v. Tower, 58 A. 790, 792 (Vt. 1904) (malicious prosecution).

3. McNiece, *Psychic Injury and Tort Liability in New York,* 24 ST. JOHN'S L. REV. 1, 9-10 (1949).
4. *See, e.g.*, Chesapeake & Potomac Tel. Co. v. Clay, 194 F.2d 888, 891 (D.C. Cir. 1952); Mitchell v. Rochester Ry., 45 N.E. 354, 355 (N.Y. 1896); Huston v. Borough of Freemasonburg, 61 A. 1022, 1023 (Pa. 1905).
5. Spade v. Lynn & B.R.R., 47 N.E. 88, 89 (Mass. 1897); Bosley v. Andrews, 142 A.2d 263, 266-67 (Pa. 1958); Throckmorton, *Damages for Fright,* 34 HARV. L. REV. 260, 273-74 (1921).
6. *See* Battalla v. State, 219 N.Y.S.2d 34, 35 (1961); Zelinsky v. Chimics, 175 A.2d 351, 354 (Pa. 1961); Gulf C. & S.F. Ry. v. Hayter, 93 Tex. 239, 54 S.W. 944 (1900).

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must have been within the zone of actual or apparent danger.[7] Some jurisdictions, however, have allowed recovery for emotional distress without these requirements.[8] These jurisdictions determine liability by using a general negligence approach, predicating liability upon a finding that the defendant's conduct created an unreasonable and foreseeable risk of emotional harm to a normal person in the plaintiff's position.[9]

By utilizing this general negligence approach a small minority of jurisdictions have recently allowed a bystander to recover for emotional distress suffered upon viewing the negligent infliction of physical harm to another.[10] In allowing such recovery this small minority has expanded a defendant's potential liability for the negligent infliction of emotional distress to include all who could have foreseeably suffered emotional harm from viewing the

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7. The earliest limiting factor on recovery was the requirement of a prior or contemporaneous impact coupled with emotional shock. *See, e.g.*, Kentucky Traction & Terminal Co. v. Roman's Guardian, 23 S.W.2d 272, 275 (Ky. 1929); Herrick v. Evening Express Publishing Co., 113 A. 16, 17 (Me. 1921) (if no bodily injury, there is no basis from which to draw a conclusion of mental suffering); Zelinsky v. Chimics, 175 A.2d 351, 354 (Pa. 1961) (any degree of physical impact is assurance that the mental damages are legitimate).

Some courts recognized the inequities of the impact rule and began to allow a plaintiff to recover for negligently inflicted emotional distress, if in the absence of physical impact the plaintiff had fear for his own safety at the time of the traumatic event, or if he was within the zone of physical danger from the event. *See* Orlo v. Connecticut Co., 21 A.2d 402, 405 (Conn. 1941) (zone of danger); Resavage v. Davies, 86 A.2d 879, 882-83 (Md. 1952) (zone of danger); Falzone v. Busch, 214 A.2d 12, 17 (N.J. 1965) (fear of personal injury).

Intentional infliction of emotional distress was granted protection without limiting factors. *See* Savage v. Boies, 272 P.2d 349, 351 (Ariz. 1954); State Rubbish Collectors Ass'n v. Siliznoff, 240 P.2d 282, 285 (Cal. 1952) (interest in freedom from emotional distress deserves legal protection). The intentional infliction of emotional distress has been accorded the status of a separate tort by the American Law Institute as stated in the following:

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

RESTATEMENT (SECOND) OF TORTS § 46(1) (1965). The intentional infliction of emotional distress will be discussed only for purposes of comparison, as its development and legal application is decidedly different from that of the negligent infliction of emotional distress.

8. *See* Gulf, C. & S.F. Ry. v. Hayter, 93 Tex. 239, 242, 54 S.W. 944, 945 (1900) (proximate cause and foreseeability determine liability for infliction of emotional distress); Hughes v. Moore, 197 S.E.2d 214, 219 (Va. 1973) (to recover for negligent infliction of emotional distress all that is necessary is a causal connection).

9. Gulf, C. & S.F. Ry. v. Hayter, 93 Tex. 239, 242, 54 S.W. 944, 945 (1900).

10. D'Ambra v. United States, 354 F. Supp. 810 (D.R.I.), *cert. denied*, 414 U.S. 1075 (1973); Dillon v. Legg, 69 Cal. Rptr. 72 (1968); D'Amicol v. Alvarez Shipping Co., 326 A.2d 129 (Conn. Super. Ct. 1973); Leong v. Takasaki, 520 P.2d 758 (Hawaii 1974); Toms v. McConnell, 207 N.W.2d 140 (Mich. Ct. App. 1973); D'Ambra v. United States, 338 A.2d 524 (R.I. 1975). *Contra*, Rogers v. Hexol, Inc., 218 F. Supp. 453, 458 (D. Ore. 1962); Amaya v. Home Ice, Fuel & Supply Co., 29 Cal. Rptr. 33, 44 (1963) (rule in California before *Dillon*); Tobin v. Grossman, 301 N.Y.S.2d 554, 561-62 (1969); Williamson v. Bennett, 112 S.E.2d 48, 55 (N.C. 1960); Waube v. Warrington, 258 N.W. 497, 501 (Wis. 1935).

defendant's negligent act. The question, then, is whether this trend is a beneficial progression in the area of tort law or whether it imposes an undue burden upon a merely negligent defendant.

In examining the issue of bystander recovery, two essential problems are presented: (1) the realistic and accurate compensation for emotional distress and (2) determining the limits of liability if recovery is allowed. In arriving at an answer to these problems, first the etiology of emotional distress from a medical standpoint will be examined. Second, it will be necessary to compare recent cases in the jurisdictions which allow a bystander to recover for emotional distress to determine the judicial limitations that have been imposed upon such recovery. Finally, the position of the Texas courts on bystander recovery will be examined.

ETIOLOGY OF EMOTIONAL DISTRESS

Nature of Emotional Distress

Although the problem of bystander recovery is ultimately a legal issue, to fully understand its implications the problem must be viewed in light of current medical theory on emotional distress. Although judicial definitions vary, from a medical standpoint emotional distress may be defined as a reaction to a traumatic[11] stimulus which may be physical, psychic, or both.[12]

The reaction itself can be broken down into primary and secondary stages.[13] The primary stage is the individual's initial reaction to the traumatic stimulus, and is normally of short duration without lasting ill effects.[14] By way of contrast, the secondary reaction, or traumatic neurosis as it is commonly termed, develops after the primary stage has diminished

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11. From a legal standpoint, trauma has been defined as an injury, wound, shock or the resulting neurosis. Ortkiese v. Clarson & Ewell Eng'r, 126 So. 2d 556, 561 (Fla. 1961); *accord*, Lyng v. Rao, 72 So. 2d 53, 56 (Fla. 1954); Smith v. Garside, 355 P.2d 849, 852 (Nev. 1960).

12. Brickner, *The Psychology of Disability*, in TRAUMATIC MEDICINE & SURGERY FOR THE ATTORNEY 65, 85 (P. Cantor ed. Supp. 1964); Laughlin, *Neuroses Following Trauma*, in 6 TRAUMATIC MEDICINE & SURGERY FOR THE ATTORNEY 76, 77 (P. Cantor ed. 1962). *See* Gautier v. General Tel. Co., 44 Cal. Rptr. 404, 408 (Dist. Ct. App. 1965) (a form of injury resulting from tortious conduct); Crews v. Provident Fin. Co., 157 S.E.2d 381, 386 (N.C. 1967) (madness or anger to the extent of causing an acute angina condition and substantially increasing the blood pressure).

13. *See* Adams, *Symposium on Trauma: Trauma and the Psychiatrist*, in TRAUMA AND DISEASE: SELECTIONS FROM RECENT LITERATURE 71, 72-73 (A. Moritz & D. Helberg eds. 1959). A legal application of the principles of the primary and secondary reaction can be found in Leong v. Takasaki, 520 P.2d 758, 766-67 (Hawaii 1974).

14. The primary reaction is characterized by physiological responses caused by the organism's attempt to achieve equilibrium between the stress to which it has been subjected and the individual's emotional reaction to that stress. Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 287 (1944); Smith & Solomon, *Traumatic Neuroses in Court*, 30 VA. L. REV. 87, 123 (1944).

and can entail severe, long-lasting ill effects. There are various types of secondary reactions, and they can be classified according to their severity.[15]

Although there is no pathological basis for the development of a traumatic neurosis, there is no doubt, from a medical viewpoint, that such a neurosis can cause severe impairment of a person's normal life functions. The affected individual has no control over the debilitating effects of such a neurosis as it is the unconscious organism's means of reacting to a severe emotional shock.[16]

Compensation for Emotional Distress

Emotional distress, therefore, develops in the following sequence: traumatic event—primary reaction—possible secondary reaction. The primary reaction, due to its subjective nature and short duration, cannot be evaluated medically and thus proven by expert testimony.[17]

If the traumatic event also causes a secondary reaction, a close scrutiny is necessary, for although a medical examination can aid in determining the

15. There are five classifications: (1) post traumatic psychoses which entail a serious breakdown in personality functioning; (2) post traumatic neuroses, which develop due to an individual's inability to cope with the stress to which he has been subjected; (3) post traumatic hysteria involving functional impairment of a body part; (4) compensation neuroses, which although an actual neurosis, develops because of a mixture of conscious and unconscious desire for monetary compensation; (5) malingering, which is characterized by an exaggeration of complaints or manufacturing of symptoms consciously and for profit. Palmer, *Mental Reactions Following Injuries in Which There is No Evidence of Damage to Nervous Tissues*, in TRAUMA AND DISEASE: SELECTIONS FROM RECENT LITERATURE 81, 85-90 (A. Moritz & D. Helberg eds. 1959). The term traumatic neurosis is used in both legal and medical circles to refer collectively to the five distinct types of post traumatic neurotic states. Laughlin, *The Emotional Traumatic Reactions*, in 3B R. GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 104.01(1), at 104-4 (1972).

Neurosis has been defined as an unconscious effort to display a conflict by developing symptoms without an organic basis in Turner v. W. Horace Williams Co., 80 So. 2d 162, 163 (La. Ct. App. 1955), or as a "functional nervous disorder without demonstrable physical lesion," in McGill Mfg. Co. v. Dodd, 59 N.E.2d 899, 900 (Ind. App. Ct. 1945).

16. Schwartz, *Neuroses Following Trauma*, in 4 TRAUMA 31(1) (1959). Emotional disabilities are as painful and troubling to the victim as are physical ones. In many aspects, emotional distress can be more harmful than physical injury, especially since it is less subject to medical understanding and knowledge. Laughlin, *Neuroses Following Trauma*, in 6 TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY 76, 77 (P. Cantor ed. 1962).

17. *See* Smith, *Relations of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli,* 30 VA. L. REV. 193, 212-13 (1944). As a general rule recovery for the primary reaction alone is not allowed in cases of the negligent infliction of emotional distress. *See, e.g.,* Dillon v. Legg, 69 Cal. Rptr. 72 (1968); Toms v. McConnell, 207 N.W.2d 140, 145 (Mich. Ct. App. 1973); Laney v. Rush, 152 S.W.2d 491, 493 (Tex. Civ. App.—Amarillo 1941, no writ).

> [E]motional disturbance which is not so severe and serious as to have physical consequences is normally in the realm of the trivial . . . . It is likely to be so . . . relatively harmless . . . that the task of compensating for it would unduly burden the courts and the defendants.

RESTATEMENT (SECOND) OF TORTS § 436A, comment b at 461 (1965).

actual existence of emotional distress and in measuring the portion of neurosis attributable to the traumatic event, there are problems involved in both evaluations. In dealing with a secondary reaction it is possible that, instead of a traumatic neurosis, the reaction is an example of malingering or a compensation neurosis. Malingering often follows traumatic situations, and it is difficult to differentiate between the malingerer and those truly emotionally disturbed, since both lack conclusive and identifiable pathologic changes.[18] In most instances, however, the malingerer can be discovered by close medical and psychiatric examination.[19]

The individual suffering from a compensation neurosis presents a more difficult problem since he actually undergoes neurotic symptoms. In a compensation neurosis, however, the unconscious desire for secondary gain—money or sympathy—has encouraged the development of the emotional disability.[20] Moreover, the development of a compensation neurosis is often aided by an overzealous attorney who can enhance the neurosis by encouraging the victim's desire for compensation.[21] Although distinctly different from other secondary reactions, the compensation neurosis does cause severe symptoms such as extreme pain and functional limitations.[22] This fact has persuaded some courts to award damages for such a neurosis in workmen's compensation cases.[23]

While tort cases involving the problems of liability for a compensation neurosis are virtually nonexistent, recovery for such a neurosis will probably be denied because it is unlikely that the courts would hold that the development of a compensation neurosis is foreseeable.[24] Tort actions involving emotional distress, however, rarely deal with the problem of

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18. Harper, *Malingering*, in 6 TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY 35, 40 (P. Cantor ed. 1962).

19. *Id.* at 42. There are a variety of means by which a malingerer can be detected:

> [A] simple test to detect a fraudulent claim of unilateral blindness is carried out by having the patient read small print and then suddenly placing a pencil 4 inches in front of the page from which he is reading. If blind in one eye the patient will stop because one or two words are obscured. Should he be seeing with both eyes he will continue to read because he can see around the pencil.

Id. at 42-43.

20. Laughlin, *The Emotional Traumatic Reaction*, in 3B R. GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 104.71, at 104-103 (1972); Shannon, *Post-Traumatic Neuroses*, 28 INS. COUNSEL J. 472, 474 (1961).

21. Shannon, *Post Traumatic Neuroses*, 28 INS. COUNSEL J. 472, 474 (1961).

22. See Laughlin, *The Emotional Traumatic Reaction*, in 3B R. GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 104.71, at 104-103 (1972).

23. Miller v. United States Fidelity & Guar. Co., 99 So. 2d 511, 520 (La. Ct. App. 1957) (if physical injury is compensable then so is the compensation neurosis); Hood v. Texas Indem. Ins. Co., 146 Tex. 522, 526, 209 S.W.2d 345, 347-48 (1948) (disability flowing from an original compensable injury is itself compensable).

24. *See* Kaufman v. Miller, 414 S.W.2d 164, 171 (Tex. 1967) (compensation neurosis was a factor in denying recovery for emotional distress); *cf.* Kowalski v. New York, N.H. & H.R.R., 164 A. 653, 655 (Conn. 1933); Swift & Co. v. Ware, 186 S.E. 452, 456 (Ga. Ct. App. 1936).

compensation neuroses even though it is highly probable that in the majority of such actions, what are classified as true traumatic neuroses, are actually compensation neuroses.[25] This situation is probably due to the fact that it would be extremely difficult for a plaintiff's lawyers to establish the requisite causal relationship between the negligent act and the resulting compensation neurosis. As for the defendant's lawyers, perhaps they realize the difficulty in attempting to prove that an alleged traumatic neurosis is in fact a compensation neurosis and regard such an attack as futile.

Although the determination of authentic emotional distress presents difficulties, the problem of compensation does not end with proof of its existence. To accurately determine the emotional harm caused to an individual by a traumatic experience, his predisposition to traumatic events must also be examined.[26] Predisposition or the term "psychological soil" refers to the psychological principle that a person's past life, and the forces at work in his life at the time of the accident, play a large part in the development of a post traumatic reaction.[27] The principle of predisposition causes adverse secondary reactions to be unpredictable, because it is undeterminable what seed of reaction was planted in an individual's "psychological soil."[28] Moreover, it is obvious that in an action based on negligence, the presence and effect of the plaintiff's predisposition could not be deemed foreseeable; consequently, from a medical standpoint this lack of foreseeability obviates a pure negligence approach to the problem of bystander recovery.[29]

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25. *See* Kamman, *Traumatic Neurosis, Compensation Neurosis or Attitudinal Pathosis?*, in TRAUMA AND DISEASE: SELECTIONS FROM RECENT LITERATURE 92, 96-102 (A. Moritz & D. Helberg eds. 1959).

26. *See* Laughlin, *The Emotional Traumatic Reaction*, in 3B R. GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 104.53(1), at 104-64 (1972); Selzer, *Psychic Disabilities Following Trauma*, in C. WECHT, LEGAL MEDICINE ANNUAL 389, 392 (1970).

27. Laughlin, *The Emotional Traumatic Reaction*, in 3B R. GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 104.53, at 104-64 (1972); Selzer, *Psychic Disabilities Following Trauma*, in C. WECHT, LEGAL MEDICINE ANNUAL 389, 392 (1970).

> Predisposition for mental illness is an important factor and an error will be committed in almost every case if complete responsibility for the neurosis or psychosis is assigned to the injury, and if the illness potentialities in the background of the pretraumatic personality are not investigated or are held to be inconsequential.

Palmer, *Mental Reactions Following Injuries in Which There Is No Evidence of Damage to Nervous Tissues*, in TRAUMA AND DISEASE: SELECTIONS FROM THE RECENT LITERATURE 81, 84 (A. Moritz & D. Helberg eds. 1959).

28. *See* G. MOSS, ILLNESS, IMMUNITY AND SOCIAL INTERACTION 53, 57 (1973).

29. Laughlin, *The Emotional Traumatic Reactions*, in 3B R. GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 104.71(1), at 104-107 (1972); Modlin, *Psychiatric Reactions to Accidents*, 6 WASHBURN L.J. 317, 318 (1967); Palmer, *Mental Reactions Following Injuries in Which There Is No Evidence of Damage to Nervous Tissues*, in TRAUMA AND DISEASE: SELECTIONS FROM THE RECENT LITERATURE 81, 85 (A. Moritz & D. Helberg eds. 1959).

Under a general negligence approach to liability, foreseeability refers to harm in general and not the specific injury which occurs to the plaintiff. *See* Smith, *Relations of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 241-42 (1944). In regard to emotional distress actions, the defendant's conduct

RECENT DEVELOPMENTS IN BYSTANDER RECOVERY

Although the medical profession determines responsibility for the development of emotional distress by isolating the causal factors, the law requires more than mere causation in determining liability.[30] Under the general principles of negligence law a legally protected right must be unreasonably invaded before liability exists.[31] The determination of this right underlies the problem of bystander recovery as evidenced by the following hypothesis. Assume that A and B are crossing the street while C stands on the curb watching. D negligently strikes A with his automobile while narrowly missing B. C observes the entire event. Both B and C suffer severe emotional reactions culminating in a traumatic neurosis. A, B, and C bring suit against D to recover damages for emotional distress. At one time the courts followed the "impact rule" and would only allow A to recover for the traumatic neurosis.[32] Presently, in the majority of jurisdictions, B would also be able to recover since B was within the zone of physical danger.[33] The problem arises, however, in attempting to determine whether the bystander, C, also has a right to recover. On the one hand, in the vast majority of jurisdictions a bystander cannot recover in the absence of impact or physical danger.[34] On the other hand, some courts regard the impact and zone of danger rules as too rigid and arbitrary, and have allowed bystanders such as C to recover by adopting a general negligence approach to bystander recovery with the

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must have created a substantial and unreasonable risk of "emotional harm" to a normal individual in the plaintiff's position, before the plaintiff should be allowed recovery. Once this risk to a normal person is proven, then the plaintiff may recover to the full extent of his injuries. The problem with this approach lies in the medical fact that normal individuals do not suffer secondary reactions upon witnessing an accident. Only idiosyncratic plaintiffs suffer secondary reactions because of a traumatic stimulus.

30. Greene, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 547-52 (1962).

31. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 42, at 244 (4th ed. 1971). The determination of whether the right exists and that a duty of care runs from the defendant to the plaintiff is a question for the court and not the jury. Greene, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 570-71 (1962).

32. *See, e.g.*, Gilliam v. Stewart, 291 So. 2d 593, 595 (Fla. 1974); Kentucky Traction & Terminal Co. v. Roman's Guardian, 23 S.W.2d 272, 275 (Ky. 1929); Herrick v. Evening Express Publishing Co., 113 A. 16, 17 (Me. 1921); Consolidated Traction Co. v. Lambertson, 36 A. 100, 102 (N.J. 1896).

33. *E.g.*, Cosgrove v. Beymer, 244 F. Supp. 824, 826 (D. Del. 1965) (applying Delaware law); Hopper v. United States, 244 F. Supp. 314, 317 (D. Colo. 1965) (applying Colorado law); Resavage v. Davies, 86 A.2d 879, 883 (Md. 1952).

34. In denying such recovery the court in Tobin v. Grossman, 301 N.Y.S.2d 554, 561-62 (1969) cited as pertinent factors the problems of foreseeability of the injury to the plaintiff bystander, the defendant's unlimited liability, and the difficulty of obtaining any reasonable circumscription within tolerable limits required by public policy *if* a rule creating such liability were adopted. In Waube v. Warrington, 258 N.W. 497, 501 (Wis. 1935) the court denied recovery because of its belief that once recovery was allowed there would be no end "short of a recovery for every person who has sustained physical injuries as a result of shock or emotional distress by reason of seeing or hearing of the peril or injury of another."

element of foreseeability determining the imposition of liability.[35] The general negligence approach, however, has not been developed to its full potential by these jurisdictions, because of the continual unstated apprehension that this approach will eventually lead to the imposition of absolute liability.[36] Consequently, although espousing a pure negligence approach these courts have felt compelled to establish certain limitations upon recovery.

Limitations on Bystander Recovery

The pure negligence approach to bystander recovery was precipitated by the California Supreme Court in *Dillon v. Legg*.[37] There a mother brought an action to recover damages for the emotional distress suffered when she witnessed an accident in which her infant daughter was run over by a car. The court in *Dillon* dispensed with California's zone of danger rule, basing the defendant's liability upon general negligence principles.[38] In doing so, the court acknowledged the possibility of imposing absolute liability upon a negligent defendant, and established guidelines for determining when the occurrence of psychic trauma in a bystander should be foreseeable.[39] The court in *Dillon* recognized three factors as being relevant to the scope of

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35. *See* D'Ambra v. United States, 354 F. Supp. 810, 819 (D.R.I.), *cert. denied*, 414 U.S. 1075 (1973); Dillon v. Legg, 69 Cal. Rptr. 72 (1968); D'Amicol v. Alvarez Shipping Co., 326 A.2d 129, 130 (Conn. Super. Ct. 1973); Leong v. Takasaki, 520 P.2d 758, 764-65 (Hawaii 1974); Toms v. McConnell, 207 N.W.2d 140, 145 (Mich. Ct. App. 1973). In D'Ambra v. United States, 338 A.2d 524, 528 (R.I. 1975) bystander recovery was allowed on the basis of policy considerations because the court did not feel the principle of foreseeability was suited to determine an essentially moral culpability. Some jurisdictions, while adopting a general negligence approach to recovery for the negligent infliction of emotional distress, have stopped short of allowing such recovery to a bystander. Resavage v. Davies, 86 A.2d 879, 883 (Md. 1952); Hughes v. Moore, 197 S.E.2d 214, 219 (Va. 1973).

36. *See* Dillon v. Legg, 69 Cal. Rptr. 72, 79-80 (1968) (foreseeability checks unlimited liability); D'Ambra v. United States, 338 A.2d 524, 531 (R.I. 1975) (zone of danger requirement or mother-child relationship limits the field of liability).

37. 69 Cal. Rptr. 72 (1968).

38. The court in *Dillon* stated: "We see no good reason why the general rules of tort law, including the concepts of negligence, proximate cause, and foreseeability, long applied to all other types of injury, should not govern the case now before us." *Id.* at 84. Although the logic of the pure negligence approach to bystander recovery is apparent, other jurisdictions have expressly rejected the *Dillon* rationale and continue to deny bystander recovery. *See* Jelley v. LaFlame, 238 A.2d 728, 730 (N.H. 1968); Tobin v. Grossman, 249 N.E.2d 419 (N.Y. 1969); Whethan v. Bismarck Hosp., 197 N.W.2d 678, 684 (N.D. 1972); Grimsby v. Samson, 530 P.2d 291, 294 (Wash. 1975). The argument prevailing in these jurisdictions is that "if foreseeability be the sole test, then once liability is extended the logic of the principle would not and could not remain confined." Tobin v. Grossman, 249 N.E.2d 419, 423 (N.Y. 1969); *accord*, Jelley v. LaFlame, 238 A.2d 728, 730 (N.H. 1968); Grimsby v. Samson, 530 P.2d 291, 294 (Wash. 1975). *But see* Hopper v. United States, 244 F. Supp. 314, 315-17 (D. Colo. 1965) (reliance upon the principle of foreseeability does not automatically assure that liability will increase).

39. Dillon v. Legg, 69 Cal. Rptr. 72, 80 (1968).

potential liability: physical proximity, the actual witnessing of the accident, and the relationship between the victim and the bystander.[40] As these were only guidelines, the court stressed that the actual limits of liability should be determined on a case by case basis.[41]

The *Dillon* decision dealt only with the foreseeability of emotional distress occurring in a bystander. In *Leong v. Takasaki*,[42] the Hawaii Supreme Court decided that similar considerations should be established to determine the foreseeability of the presence of the plaintiff at the scene of the accident. Such foreseeability was to be evaluated by considering: "(1) the child's age, (2) the type of neighborhood in which the accident occurred, (3) the familiarity of the tortfeasor with the neighborhood, (4) the time of day, and (5) any other factors which would put the tortfeasor on notice of the witness' presence."[43]

The principle of foreseeability has been difficult to apply despite the *Dillon* and *Leong* decisions. For example, two recent California cases have attempted to apply the principle of foreseeability in determining the limits that should be imposed upon bystander recovery. In *Archibald v. Braverman*[44] a mother arriving on the scene moments after her son was negligently injured was allowed recovery for her resulting emotional distress. The court stated that "[m]anifestly, 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."[45] The second California case, *Powers v. Sissoev*,[46] involved a 30 to 60 minute period between the accident and the mother's viewing of her injured daughter. Recovery was not extended to the parent because the court did not feel the circumstances were any different from those undergone by "every parent whose child has been injured in a non-observed and antecedent accident."[47]

In both *Archibald* and *Powers*, foreseeability was considered in establishing liability. Logically, emotional distress suffered by a mother upon viewing her injured child 30 minutes after an accident is just as foreseeable as if she viewed the child one minute after the accident. In actuality, the court in *Powers* imposed an arbitrary limitation upon bystander recovery because of a fear of absolute liability.[48]

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40. *Id.* at 80.
41. *Id.* at 81.
42. 520 P.2d 758 (Hawaii 1974).
43. *Id.* at 765, *quoting* D'Ambra v. United States, 354 F. Supp. 810, 819-20 (D.R.I.), *cert. denied*, 414 U.S. 1075 (1973).
44. 79 Cal. Rptr. 723 (Ct. App. 1969).
45. *Id.* at 725.
46. 114 Cal. Rptr. 868 (Ct. App. 1974).
47. *Id.* at 874.
48. *See id.* at 874. A similar arbitrary limitation was imposed in Kelley v. Kokua Sales & Supply, Ltd., 532 P.2d 673 (Hawaii 1975), where the distance of the plaintiff from the scene of the accident was the determining factor in regard to bystander recov-

The elements of distance and time are crucial factors in allowing bystander recovery. The type of relationship, however, which exists between the bystander and the victim of a negligent act is also a determinative factor, in regard to the foreseeability of emotional distress to a bystander. To date, in every jurisdiction where bystander recovery has been allowed, with the exception of Hawaii, the relationship between the victim and the bystander was parental.[49] The rationale for this limitation seems to be based upon a two prong test of foreseeability in regard to both the plaintiff's development of emotional distress[50] and the plaintiff's presence at the scene of the accident.[51]

There is one limitation upon bystander recovery that is not concerned with the principle of foreseeability but rather with proof of emotional distress.

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ery. The court held that due to the plaintiff's distant location from the accident the emotional distress he suffered could not have been foreseen. *Id.* at 676. The single dissenting opinion stated that the court was merely imposing another artificial limit on liability, and argued that "the decision to limit the defendant's scope of duty is a policy choice which may be effectuated at too great a price." *Id.* at 679.

49. D'Ambra v. United States, 354 F. Supp. 810, 812 (D.R.I.), *cert. denied*, 414 U.S. 1075 (1973) (mother-child); Dillon v. Legg, 69 Cal. Rptr. 72, 74 (1968) (mother-child); Archibald v. Braverman, 79 Cal. Rptr. 723, 724 (Ct. App. 1969) (mother-child); D'Amicol v. Alvarez Shipping Co., 326 A.2d 129 (Conn. Super. Ct. 1973) (parents-child); Toms v. McConnell, 207 N.W.2d 140 (Mich. Ct. App. 1973) (mother-child); D'Ambra v. United States, 338 A.2d 524, 531 (R.I. 1975) (if bystander is not within the zone of danger, a mother-child relationship must exist for recovery to be granted); Dave Snelling Lincoln-Mercury v. Simon, 508 S.W.2d 923 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ) (mother-child). In Leong v. Takasaki, 520 P.2d 758, 766 (Hawaii 1974) recovery was granted although the relationship was that of a child-step-grandmother, the court holding that a blood relationship was not important in Hawaii where there are close ties between extended family groups.

50. *See* D'Ambra v. United States, 354 F. Supp. 810, 819 (D.R.I.), *cert. denied*, 414 U.S. 1075 (1973) (adopts *Dillon* guidelines in regard to foreseeability of injury); Dillon v. Legg, 69 Cal. Rptr. 72, 80 (1968) (foreseeability of injury governs recovery); D'Amicol v. Alvarez Shipping Co., 326 A.2d 129, 130 (Conn. Super. Ct. 1973) (foreseeability of risk is major element). *But see* D'Ambra v. United States, 338 A.2d 524, 528 (R.I. 1975) (policy, not foreseeability underlies the solution to bystander recovery).

51. *See* D'Ambra v. United States, 354 F. Supp. 810, 819 (D.R.I.), *cert. denied*, 414 U.S. 1975 (1973) (presence of parent must be foreseeable); D'Amicol v. Alvarez Shipping Co., 326 A.2d 129, 131 (Conn. Super. Ct. 1973) (mother's presence near child is foreseeable); Toms v. McConnell, 207 N.W.2d 140, 145 (Mich. Ct. App. 1973) (parents' presence near child is foreseeable). But in Leong v. Takasaki, 520 P.2d 758, 766 (Hawaii 1974) the court stated that recovery "should not be contingent upon defendant's actual knowledge of the plaintiff's presence." The requirement that a parent's presence also be foreseeable means distinguishing between a very young child whose mother can be assumed to be near, and a teen-age child whose parents are not assumed to be nearby. Once again in attempting to impose limits upon liability an irrational distinction has been created. If the presence of parents is a prerequisite, on the basis that the parent would view the accident, then the problem arises as to a mother who was inside her house as opposed to one who was present at the scene of the accident. The possibility of imposing logical limitations upon recovery seems beyond our courts' capability in spite of their faith in the principle of foreseeability. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54, at 334-35 (4th ed. 1971).

This limitation which is imposed to discourage fraudulent claims,[52] requires that there be a resulting physical injury before damages for negligently inflicted emotional distress can be recovered.[53] Only Hawaii has dispensed with this requirement, regarding it as merely another artificial bar to recovery.[54]

Jurisdictions allowing bystander recovery have not avoided the imposition of arbitrary restrictions, even though espousing a pure negligence approach to such recovery. The limitations regarding time, distance, relationship, and injury are just as arbitrary and illogical as the former impact and zone of danger rules. Perhaps this is an area of the law where a logical approach is inappropriate. In effect, the small minority of jurisdictions allowing bystander recovery have recognized the unusual aspects of this area of the law by their inability to apply a logical pure negligence approach to such recovery.

BYSTANDER RECOVERY IN TEXAS

Pure Negligence Approach

Texas is not generally recognized as one of the minority jurisdictions which allow a bystander to recover for emotional distress caused by witnessing a negligently inflicted injury. One reason for this oversight has been the paucity of case law in Texas dealing with the problem. The recent case of *Dave Snelling Lincoln-Mercury v. Simon*[55] seems to clarify the position of the Texas courts. There a mother brought suit against an automobile mechanic for damages for emotional distress suffered as a result of observing her son run over by another car when he fell out of a moving automobile in which his mother was also a passenger. The cause of the accident was the defendant's negligence in repairing the car door. Although Mrs. Simon was a mere bystander, the Houston Court of Civil Appeals held that recovery would be allowed based upon the decisions of the Texas Supreme Court in *Hill v. Kimball*[56] and *Kaufman v. Miller*.[57] The court considered the element of foreseeability as the determinative factor in regard to both the accident and the resultant emotional distress.[58] The court was uncertain

52. *See* D'Ambra v. United States, 354 F. Supp. 810, 818 (D.R.I.), *cert. denied*, 414 U.S. 1075 (1973).

53. D'Ambra v. United States, 354 F. Supp. 810, 818 (D.R.I.), *cert. denied*, 414 U.S. 1075 (1973) (no recovery for emotional distress unless manifested in physical symptoms); Dillon v. Legg, 69 Cal. Rptr. 72, 80 (1968) (shock did result in physical injury); D'Amicol v. Alvarez Shipping Co., 326 A.2d 129, 130 (Conn. Super. Ct. 1973) (recovery where shock resulted in physical injury).

54. Leong v. Takasaki, 520 P.2d 758, 762 (Hawaii 1974).

55. 508 S.W.2d 923 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

56. 76 Tex. 210, 13 S.W. 59 (1890).

57. 414 S.W.2d 164 (Tex. 1967).

58. Dave Snelling Lincoln-Mercury v. Simon, 508 S.W.2d 923, 926-27 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

about the Texas Supreme Court's exact position on bystander recovery and as a consequence of this uncertainty held that Mrs. Simon could also recover under the zone of danger rule.[59] There was, however, no real need for uncertainty since a close scrutiny of the *Hill* and *Kaufman* cases reveals that if faced with an identical situation, the Texas Supreme Court would decide such a case by the general rules of negligence.

In *Hill v. Kimball*,[60] a pregnant woman suffered a miscarriage as a result of witnessing her landlord's attack upon two of her servants. The issue confronted by the supreme court was whether recovery should be allowed for a physical injury caused by a "strong emotion of the mind," when such emotion is negligently inflicted.[61] The court held that recovery should be granted to the plaintiff since the defendant was negligent in regard to Mrs. Hill, and his negligence caused a "strong emotion" which resulted in bodily harm.[62] The unusual facet of the *Hill* case was that the court regarded the defendant's assault upon the two servants as being negligent toward the plaintiff.[63] This is an important factor because in the majority of cases that have allowed recovery in a similar situation, the prevailing rationale has been that the actions of the defendant were willful, not only toward the injured party but also toward the bystander.[64] Consequently, *Hill v. Kimball* was the beginning of the pure negligence approach in Texas to the problem of bystander recovery for the negligent infliction of emotional distress.[65]

This approach was also used to allow recovery for a secondary reaction to a traumatic stimulus in *Gulf, C. & S.F. Ry. v. Hayter*.[66] There the plaintiff was riding in a train car when it collided with another train. Although uninjured, the plaintiff was frightened and developed a resultant emotional disability diagnosed as "traumatic neurasthenia."[67] The Texas Supreme Court held that recovery would be allowed if the negligent act was the proximate case of the injury and the injury should have been foreseen.[68] With this decision, the use of a pure negligence approach in determining liability for emotional distress became established in Texas.[69]

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59. *Id.* at 925-26.
60. 76 Tex. 210, 13 S.W. 59 (1890).
61. *Id.* at 210, 13 S.W. at 59.
62. *Id.* at 215, 13 S.W. at 59-60.
63. *Id.* at 215, 13 S.W. at 59-60.
64. *See, e.g.*, Rogers v. Williard, 223 S.W. 15, 17 (Ark. 1920); Knierim v. Izzo, 174 N.E.2d 157, 164-65 (Ill. 1961); Jeppsen v. Jensen, 155 P. 429, 430-31 (Utah 1916).
65. *See* Hallen, *Hill v. Kimball—A Milepost in the Law*, 12 TEXAS L. REV. 1, 14 (1934). *Hill* dealt with an actual physical injury and not with a secondary reaction. The case did lay the foundation, however, for bystander recovery for a secondary reaction. It did so by its pure negligence approach to liability and its recognition of the effect emotions can have upon a person's well being. *See* Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890).
66. 93 Tex. 239, 54 S.W. 944 (1900).
67. *Id.* at 240-41, 54 S.W. at 944.
68. *Id.* at 242, 54 S.W. at 945.
69. *See, e.g.*, Kaufman v. Miller, 414 S.W.2d 164, 167-68 (Tex. 1967); Wedgworth

Hayter did not deal with the problem of bystander recovery. That particular problem was left relatively untouched until the Texas Supreme Court decided the case of *Kaufman v. Miller*.[70] There the court denied recovery to a plaintiff who claimed he had suffered a "conversion reaction neurosis" due to his fear for another's safety. The court in denying recovery held that "the defendant could not reasonably have foreseen the injuries suffered by the plaintiff as a natural and probable consequence of her negligent conduct."[71] The court based its decision upon the following: the plaintiff's emotional shock was from fear for others, the plaintiff was susceptible to a conversion reaction neurosis, the disabling neurosis developed after the collision, and the disabling neurosis was slow in development.[72] Although the court in *Kaufman* considered the element of "fear for others" as one factor in arriving at its decision, it did not hold that bystander recovery would never be allowed. The court stated:

> [W]e would be reluctant to hold at this time that any one of the enumerated factors would of and by itself be sufficient to require a judgment denying liability. We are satisfied, however, that public policy is better served by denying liability when all are combined.[73]

In effect, the *Kaufman* case recognizes that bystander recovery for emotional distress could be awarded if reasonably foreseeable.[74] Although the Texas Supreme Court has never established clear-cut guidelines in regard to bystander recovery, the case of *Dave Snelling Lincoln-Mercury v. Simon*[75] seems to clarify what that position will be in awarding such recovery.[76]

Necessity of Physical Injury

Recovery for emotional distress in Texas is predicated upon a resultant physical injury suffered by the plaintiff due to the traumatic experience.[77]

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v. City of Forth Worth, 189 S.W.2d 40, 44 (Tex. Civ. App.—Fort Worth 1945, writ dism'd); Alexander v. St. Louis Sw. Ry., 122 S.W. 572, 573 (Tex. Civ. App.—Dallas 1909, no writ).

70. 414 S.W.2d 164 (Tex. 1967).
71. *Id.* at 170.
72. *Id.* at 170-71.
73. *Id.* at 171.
74. *Id.* at 167.
75. 508 S.W.2d 923 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).
76. *Id.* at 926.
77. *E.g.*, Houston Elec. Co. v. Dorsett, 145 Tex. 95, 99, 194 S.W.2d 546, 548 (1946); Gulf, C. & S.F. Ry. v. Hayter, 93 Tex. 239, 242, 54 S.W. 944, 945 (1900); Gulf C. & S.F. Ry. v. Trott, 86 Tex. 412, 414, 25 S.W. 419, 420 (1894). *But see* Laney v. Rush, 152 S.W.2d 491, 493(Tex. Civ. App.—Amarillo 1941, no writ) (physical injury not necessary if the emotional distress was intentionally inflicted). The reasons for refusing to allow action predicated upon an emotional disturbance without resultant physical injury are:

(1) [C]laims are regarded as outside wide policy of law, and should be denied

There have been varying decisions as to what constitutes a sufficient physical injury to satisfy this requirement.[78] Generally, a medically diagnosed traumatic neurosis that has developed from an emotional shock should suffice to allow recovery,[79] and even a compensation neurosis has been held compensable under the workmen's compensation statutes.[80] Whether or not the Texas courts would allow such recovery in a tort case remains to be seen.[81] In regard to predisposition to a secondary reaction, the court in *Kaufman v. Miller*[82] held this factor to be a consideration in denying recovery for a conversion reaction neurosis.[83] Once the Texas courts have decided that the plaintiff has suffered a secondary reaction due to his emotional distress, then recovery is allowed for the secondary and primary reaction.[84]

Although bystander recovery for negligently inflicted emotional distress has apparently been recognized in Texas, the law in this area is still in a state of development. Of all the jurisdictions espousing such recovery, Texas is the only one which has not developed a rationale or set of guidelines that attempts to define the limits of such recovery.

> for practical reasons; (2) that the injury is too remote and speculative, and not the proximate result of wrongful act; and (3) that the injury is vague and uncertain, and can be simulated, and too much advantage rests with the injured party in proving such injury . . . .

Houston Elec. Co., v. Dorsett, 145 Tex. 95, 98, 194 S.W.2d 546, 547 (1946).

78. Bailey v. American Gen. Ins. Co., 154 Tex. 430, 431-32, 279 S.W.2d 315, 316-17 (1955) (nightmares, tremor of closed eyelids, high blood pressure, blacking out); Houston Elec. Co. v. Dorsett, 145 Tex. 95, 96-97, 194 S.W.2d 546 (1946) (derangement of nervous system, headaches, brain deterioration); Wedgworth v. City of Fort Worth, 189 S.W.2d 40, 43 (Tex. Civ. App.—Fort Worth 1945, writ dism'd) (loss of memory not sufficient to allow recovery); Alexander v. St. Louis Sw. Ry., 122 S.W. 572, 573 (Tex. Civ. App.—Dallas 1909, no writ) ("every nerve in my body draws, and finally my heart becomes weak").

79. See Dave Snelling Lincoln-Mercury v. Simon, 508 S.W.2d 923, 926-37 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ) (traumatic depressive reaction characterized by loss of weight, lack of control over swallowing, tears); Sutton Motor Co. v. Crysel, 289 S.W.2d 631, 634 (Tex. Civ. App.—Beaumont 1956, no writ) ("[a] neurosis . . . together with its attendant physical aches and pains, is [legally] a physical injury or illness . . . .").

80. Hood v. Texas Indem. Ins., Co., 146 Tex. 522, 528, 209 S.W.2d 345, 348 (1948); Houston & T.C.R.R. v. Gray, 137 S.W. 729, 732 (Tex. Civ. App. 1911, writ ref'd).

The Texas view in regard to compensation neuroses in workmen's compensation cases is in accord with the majority opinion in this country. *E.g.*, Skelly v. Sunshine Mining Co., 109 P.2d 622, 624 (Idaho 1941); Armour Grain Co. v. Industrial Comm'n, 153 N.E. 699, 702 (Ill. 1926); Morris v. Garden City Co., 62 P.2d 920, 922 (Kan. 1936).

81. *See* Kaufman v. Miller, 414 S.W.2d 164, 171 (Tex. 1967).

82. 414 S.W.2d 164 (Tex. 1967).

83. *Id.* at 170. In a workmen's compensation action such predisposition would not be taken into consideration. *See* Texas Employers' Ins. Ass'n v. Parr, 30 S.W.2d 305, 308 (Tex. Comm'n App. 1930, jdgmt. adopted).

84. *See* San Antonio & A.P. Ry. v. Corley, 87 Tex. 432, 435, 29 S.W. 231, 232 (1895); Sutton Motor Co. v. Crysel, 289 S.W.2d 631, 636-37 (Tex. Civ. App.—Beaumont 1956, no writ).

Likar: Negligent Infliction of Emotional Harm to Bystanders - Should Rec

CONCLUSION

The problems involved in allowing a bystander to recover for negligently inflicted emotional distress have not been solved by the use of a pure negligence approach to such recovery. Limitations have been imposed upon such recovery which are just as arbitrary as the ones previously dispensed with by the courts. Utilization of a pure negligence approach to such recovery is admittedly a logical approach, but it should now be apparent that this is an area of the law in which logic does not apply. The doctrine of negligence, which is rooted in the elements of proximate cause and foreseeability, is impractical unless applied to physically observable events. It is, for example, foreseeable that driving an automobile in a negligent manner could cause an injury and if the vehicle strikes someone, proof of causation is relatively simple. These same elements of foreseeability and proximate cause are not as applicable when a bystander is attempting to recover for emotional distress caused by witnessing the negligent infliction of injury to another. A secondary reaction to a specific traumatic stimulus is not foreseeable and is in effect an idiosyncratic reaction heavily dependent upon an individual's prior mental conditioning.

The element of proximate cause has always imposed restrictions upon liability although a causal relationship did in fact exist between a negligent act and the resulting harm. The seemingly artificial limitations upon bystander recovery such as the impact doctrine and the zone of danger rule were merely legal limits upon causation. In fact, the courts in imposing such restrictions, did so in the belief that a balance must be struck between the merely negligent defendant and those who claim to be victims of his negligent act. By allowing bystander recovery for resultant secondary reactions caused by witnessing injury to the initial victim of a negligent act, the balance has been tipped too far in favor of the claimant and an unfair burden has been imposed upon a merely negligent defendant.