Mental Suffering - Abolution of the Traditional Zone of Danger

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Plaintiff witnessed defendant's negligently operated automobile fatally strike her infant daughter. A second daughter also witnessed the accident. Plaintiff brought actions on behalf of herself and the second daughter for emotional disturbance, shock, and injury to the nervous system causing great physical and mental pain and suffering. The trial court granted summary judgment against the mother because she was outside the zone of physical danger, but denied it against the daughter because there was a fact question as to whether she was within the zone of physical danger.[1] *Held, reversed*: A mother may recover for shock caused by witnessing the death of her child resulting from another's negligence, even though the mother is not physically endangered by the defendant's act. *Dillon v. Legg*, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

I. The Bystander-Plaintiff and Recovery for Mental Suffering

While courts generally have been reluctant to allow compensation for any type of mental suffering,[2] they have been particularly hesitant to allow recovery for the mental suffering of a "bystander-plaintiff" (*i.e.*, one who is not directly injured by the defendant's act, but who suffers injury as a consequence of witnessing an act of the defendant[3] that places another in peril or causes harm to another). Courts are loath to allow recovery because the area of mental suffering is relatively uncharted, thereby inviting a host of fraudulent claims. When the plaintiff is a bystander, the possibility of fraud is intensified. Nevertheless, recovery has been granted in a limited number of cases where the bystander witnessed an *intentional* tort and as a consequence suffered physical injury. In such cases, the courts generally rely upon the concept of transferred intent to impose liability.[4]

It is more difficult for a bystander-plaintiff to recover when his mental distress is caused by the defendant's *negligent* act. As in all negligence cases, the doctrine of foreseeability is employed to determine whether the

[1] The declaration of one McKinley disclosed the plaintiff testified in her deposition that when she saw the car rolling over decedent, she noted her other daughter was on the curb, but the deposition of the daughter contradicts such statements.

[2] Mental pain was deemed to be something the law could not value or "pretend to redress." Lord Wensleydale in Lynch v. Knight, 9 H.L.C. 511, 598, 11 Eng. Rep. 854, 863 (1861). Eventually in cases allowing recovery for mental suffering, compensation was limited to parasitic damages to insure the authenticity of the alleged tort. For discussion, see W. Prosser, The Law of Torts 55 (3d ed. 1964); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1034 (1936). Later courts allowed compensation for mental suffering alone in cases where defendant was charged with outrageous intentional infliction of mental distress. *See* Savage v. Boies, 77 Ariz. 355, 272 P.2d 349 (1954) (plaintiff was falsely led to believe that her child had been critically injured); Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952) (creditor harassment); Nickerson v. Hodge, 146 La. 735, 84 So. 37 (1920) (practical jokers led plaintiff to believe pot of dirt was pot of gold thereby causing her to suffer immense embarrassment).

[3] The act of defendant may be negligent or intentional.

[4] *E.g.*, Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890), where a pregnant woman saw the defendant commit an assault and battery and, as a consequence, suffered a miscarriage.

defendant owed the plaintiff a duty of care.[5] Use of this vague doctrine in the already muddled area of mental suffering has made it particularly difficult for courts to administer justice. To lessen the difficulty, and because of the policy against compensation of mental suffering, courts have placed artificial limits on the duty owed to the bystander-plaintiff.

Courts first demanded that the bystander-plaintiff's mental pain be accompanied by some "impact"[6] upon his person. Later, some courts dropped the requirement of impact[7] and, instead, measured foreseeability by determining whether the bystander-plaintiff was so situated at the time of the accident that his *physical* safety was actually, or was believed by him to be, endangered as a result of the defendant's negligence.[8] If a plaintiff was so situated, he was within the "zone of ordinary physical danger"[9] and could recover.[10]

American courts[11] have almost uniformly[12] refused to extend the "zone of danger" theory to encompass the situation where a plaintiff, not himself physically endangered by the defendant's act, suffers injury because of distress at peril or harm negligently inflicted upon another.[13] The rea-

[5] "Duty is only a word with which we state our conclusion that there is or is not to be liability; it necessarily begs the essential question. . . . In the decision whether or not there is a duty, many factors interplay, the hand of history, our ideas of morals and justice, the convenience of administering the rule, and our social ideas as to where the loss should fall." Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953).

[6] "Impact" is not used to denote physical injury inflicted directly by defendant, but physical injury sustained indirectly as a result of fright caused from defendant's act. *See* Cosgrove v. Beymer, 244 F. Supp. 824 (D. Del. 1965); Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958) (not a bystander-plaintiff situation). Justice Musmanno registering a blistering dissent to the impact rule. *Id.* at 267. The impact rule is in effect in Texas. *See* Duty v. General Fin. Co., 154 Tex. 16, 273 S.W.2d 64 (1954); Harned v. E-Z Fin. Co., 151 Tex. 641, 254 S.W.2d 81 (1953).

[7] At least the following states allow recovery in mental suffering cases without the requirement of physical impact: Colorado, Hopper v. United States, 244 F. Supp. 314 (D. Colo. 1965); California, Cook v. Maier, 33 Cal. App. 58, 92 P.2d 434 (1939); Maryland, Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); New York, Battala v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

[8] Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402, 405 (1941).

[9] *Id.*, "Where it is proven that negligence proximately caused fright or shock in one who is within the *range of ordinary physical danger* from negligence, and this in turn produced injuries such as would be elements of danger had a bodily injury been suffered, the injured party is entitled to recover." (Emphasis added.)

[10] It is reasonable to argue that if the plaintiff is threatened with physical injury (*i.e.*, is within the zone of danger), but suffers a mental rather than a physical injury, she can recover as she was a foreseeable plaintiff and it is merely a matter of the unexpected manner in which the harm occurred. W. PROSSER, THE LAW OF TORTS 353 (3d ed. 1964).

[11] British and Australian courts have allowed recovery. King v. Phillips, [1953] 1 Q.B. 429 (rejected zone of physical danger as limit of foreseeability, stating relevant area was one of emotional shock, not physical danger and not necessarily fear for self); Hambrook v. Stokes Bros., [1925] 1 K.B. 141; Richards v. Baker, [1943] S. Austl. 245 (father recovered for shock of seeing infant child injured).

[12] Exceptions have been made in the area of public carriers to whom the law ascribes a higher duty to exercise care. Gulf C. & S.F. Ry. v. Coopwood, 96 S.W. 102 (Tex. Civ. App. 1906), *error ref.*

[13] Illustrative cases denying recovery include the following: Beaty v. Buckeye Fabric Finishing Co., 179 F. Supp. 688 (D. Ark. 1959) (applying Arkansas law) (witnessed father crushed by tractor trailer); Reed v. Moore, 156 Cal. App. 2d 43, 319 P.2d 80 (1957) (wife witnessed husband killed in car accident); Maury v. United States, 139 F. Supp. 532 (N.D. Cal. 1956) (mother watched building burn knowing son was trapped in it and suffered mental breakdown as a result); Cleveland, C., C. & St. L. Ry. v. Stewart, 24 Ind. App. 374, 56 N.E. 917 (1900) (saw daughter dragged by train); Knaub v. Gatwalt, 422 Pa. 267, 220 A.2d 646 (1966) (saw son impaled on iron fence picket); Frazee v. Western Dairy Prods., 182 Wash. 578, 49 P.2d 1037 (1935) (saw offspring in path of runaway truck). Recovery also denied in Strazza v. McKittrick, 146 Conn. 714, 156 A.2d 149 (1959); Cote v. Litawa, 96 N.H. 174, 71 A.2d 792 (1950); Resavage v.

soning of the courts is exemplified by the California case of *Amaya v. Home Ice, Fuel & Supply Co.*[14] In *Amaya* a pregnant mother not physically endangered sought recovery for emotional shock and fright allegedly induced by witnessing her infant son struck by the defendant's negligently operated truck. In denying recovery, the court emphasized its inability to determine the stopping point of liability and the consequent difficulty of administering justice if the traditional zone of danger approach were abandoned.[15]

II. Dillon v. Legg: A New Test For Bystander Recovery

In *Dillon*[16] the California supreme court took issue with the use of the traditional zone of physical danger rule to define the duty of care owed to a bystander-plaintiff. The court concluded that the policy reasons for the rule (*i.e.*, fear of fraud and administrative difficulties) were inadequate reasons for denying recovery for *emotional shock* occasioned by fear for another. The majority felt that the facts of *Dillon* exposed the "hopeless artificiality"[17] of the traditional rule by contrasting the claim of a mother who admittedly *was not* within the zone of physical danger with the claim of the sister who *may have been* within that zone. Although at the time of the accident the mother and daughter were separated only by a few feet, application of the zone of physical danger rule made recovery possible for the daughter[18] and impossible for the mother. The court refused to "draw a line between the plaintiff who is in the zone of danger of physical impact and the plaintiff who is in the zone of danger of emotional impact."[19] Consequently, the court overruled *Amaya* and held that the zone of danger could not be restricted to the area of those exposed only to physical injury,[20] but must encompass the area of those exposed to emotional injury as well.

The following general guidelines were proposed in *Dillon* to aid in determining whether the plaintiff is within the zone of foreseeability, that is, the zone of emotional danger. The plaintiff (1) must be located near the accident scene, (2) must witness the accident, and (3) must be a close relative of the victim. Applying these guidelines to *Dillon*, the court concluded that the plaintiff had alleged a prima facie case. Because the

Davies, 199 Md. 479, 86 A.2d 879 (1952); Carey v. Pure Distrib. Corp., 133 Tex. 31, 124 S.W.2d 847 (1939); Klassa v. Milwaukee Gas Light Co., 273 Wis. 176, 77 N.W.2d 397 (1956).

[14] 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963). *Amaya* cited Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935), to support its reasoning in denying recovery. *Dillon* refuted *Waube*, stating fear of fraud and administrative difficulties to be an insufficient ground for denying recovery.

[15] This fear is expressed in Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).

[16] Dillon v. Legg, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

[17] *Id.* at 915, 69 Cal. Rptr. at 75.

[18] It is here assumed that the daughter if found to be within the zone of danger would be allowed to recover. This suit was collateral to the mother's suit, and the main opinion gives no indication of its outcome.

[19] Dillon v. Legg, 441 P.2d 912, 920 n.5, 69 Cal. Rptr. 72, 80 n.5 (1968).

[20] The California court in Lindley v. Knowlton, 179 Cal. 298, 176 P. 440 (1918), had allowed a mother to recover only because she was physically endangered. Parasitic damages were allowed for mental suffering caused by fear for her children. (Mother fought ape off after it had attacked children.)

victim was a young child, the defendant could reasonably expect the mother to be nearby and to suffer emotional trauma upon witnessing the accident.[21] Since the possibility of harm to the plaintiff was foreseeable, the defendant owed her a duty of care. Having failed in the exercise of that duty, he was negligent to the mother and, therefore, liable for damages.

III. IMPLICATIONS OF DILLON

In *Dillon* the dissent accused the majority of embarking "into the 'fantastic realm of infinite liability.' "[22] Indeed, the three "guidelines" delineated by the majority are difficult to apply. First, the majority requires that the plaintiff must be located "near" the accident; but how near the plaintiff must be is unresolved. Secondly, the plaintiff must witness the accident; but the opinion does not indicate exactly what the plaintiff must witness. Thus, it is questionable whether a mother who hears the noise of impact, or witnesses only the aftermath of the accident, either directly or by having her injured child[23] or husband[24] brought to her door, can recover. Thirdly, the court did not specify how closely related the plaintiff and accident victim must be.[25] It is interesting to speculate whether mental suffering would be compensable if the plaintiff had been decedent's stepmother, adopted mother, foster mother, or even an aunt who had reared her from birth.

It is also interesting to note that the California court couched its holding in terms of physical, rather than emotional, injury. The key to reconciling this statement with the outcome reached by the court in *Dillon* is the definition of physical injury. Most courts seem to define physical injury in terms of actual physical harm, *i.e.*, miscarriage,[26] fainting,[27] or falling.[28] But California has included in this category injuries basically men-

[21] The court cited W. PROSSER, THE LAW OF TORTS 353 (3d ed. 1964) and F. HARPER & F. JAMES, THE LAW OF TORTS 1039 (1956) in support of its holding.

[22] 441 P.2d 912, 928, 69 Cal. Rptr. 72, 86 (1968) (Burke, J.). *See also* Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).

[23] Recovery was denied in this situation in Cote v. Litawa, 96 N.H. 174, 71 A.2d 792 (1950).

[24] This situation was present in Price v. Yellow Pine Paper Mill, 240 S.W. 588 (Tex. Civ. App. 1922) (Recovery was allowed because husband had told defendant not to take him home as shock of his condition might cause injury to his pregnant wife. The court treated this as an intentional tort.)

[25] The caveat to RESTATEMENT (SECOND) OF TORTS § 436 (1965) comments upon defendant's liability to an unrelated bystander. It is to be noted, however, that it is couched in terms of bodily harm. The pertinent sections of § 436 and the caveat are as follows:

> (2) If the actor's conduct is negligent as creating an unreasonable risk causing bodily harm to another otherwise than by subjecting him to fright, shock, or other similar and immediate emotional disturbance, the fact that such harm results solely from the internal operation of fright or other emotional disturbance does not protect the actor from liability.
>
> (3) The rule stated in Subsection (2) applies where the bodily harm to the other results from his shock or fright at harm or peril to a member of his immediate family occurring in his presence.
>
> *Caveat*: The Institute expresses no opinion as to whether the rule stated in Subsection (2) may apply where bodily harm to the other results from his shock or fright at harm or peril to a third person who is not a member of his immediate family, or where the harm or peril does not occur in his presence.

[26] Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890).

[27] Conley v. United Drug Co., 218 Mass. 238, 105 N.E. 975 (1914).

[28] Cohn v. Ansonia Realty Co., 162 App. Div. 791, 148 N.Y.S. 39 (1914).