

TORTS—MENTAL DISTRESS—DEFENDANT IS LIABLE FOR NEGLIGENCELY INFLICTED EMOTIONAL DISTRESS SUFFERED BY A FORESEEABLE PLAINTIFF WHO IS OUTSIDE THE ZONE OF DANGER.
Dillon v. Legg (Cal. 1968).

On September 27, 1964, while walking across a street near her home, Erin Lee Dillon was struck and killed by the defendant's automobile. Cheryl Dillon, the decedent's sister, was standing near the street and may have been in peril of physical impact while Mrs. Margery Dillon, the decedent's mother, who also viewed the accident, was not placed in physical danger.¹ Both Mrs. Dillon and Cheryl Dillon suffered emotional shock and illness following the accident. On December 30, 1964, Mrs. Dillon—together with her daughter Cheryl—brought an action against the defendant for negligently inflicted mental distress and attending physical injuries.² The superior court granted defendant's motion for summary judgment against Mrs. Dillon on the ground that she was not in the zone of danger.³ The Supreme Court of California reversed, holding that Mrs. Dillon's allegation of negligently inflicted emotional distress had established a prima facie case. *Dillon v. Legg*, 68 Adv. Cal. 766, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

Viewed against the background of the historical development of the law concerning plaintiff's recovery for negligently inflicted mental distress, *Dillon v. Legg* represents a significant change in the law of torts. Initially, at common law, plaintiffs were denied recovery unless they proved a contemporaneous physical impact.⁴ The rationale of this strict common law rule was the speculative nature of damages and the difficulties of proof.⁵ However,

1. "There is general agreement that plaintiff Margery M. Dillon was, at the time of the accident, either sitting or standing on the porch of her residence which is set back from and fronts onto, Bluegrass road." Brief for Appellee at 2, *Dillon v. Legg*, 68 Adv. Cal. 766, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

2. Mrs. Dillon also sought damages for the wrongful death of her daughter. *Id.* at 769, 441 P.2d at 914, 69 Cal. Rptr. at 74.

3. The trial court denied the motion for judgment on the pleadings against Cheryl Dillon because she may have been within the zone of danger or feared for her own safety. *Id.* at 771, 441 P.2d at 915, 69 Cal. Rptr. at 75.

4. *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 45 N.E. 354 (1896) which was subsequently overruled in *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729 (1961). *Victorian Ry. Commissioners v. Coultas*, 13 App. Cas. 222 (P.C. 1888). This case was disapproved in *Dulieu v. White & Sons*, 2 K.B. 669 (1901).

5. *Mitchell v. Rochester Ry. Co.*, 115 N.Y. at 110, 45 N.E. at 354-55.

disenchanted with the harsh and unfair results engendered by the application of this rule, the majority of the American jurisdictions—as well as the Restatement—eliminated the necessity of impact.⁶ In order for the plaintiff to recover, these courts require him to be within the zone of physical danger; they deny recovery when the plaintiff is not personally endangered by the risk of physical harm. The adoption of this limitation, it is argued, facilitates adjudication by providing the jury with an effective standard in determining whether an individual is entitled to compensation. Moreover, this guideline is more advantageous than the impact rule in that it recognizes the possibility that individuals who do not sustain injuries due to physical impact may nevertheless be endangered by physical peril and consequently may foreseeably suffer emotional distress and resulting physical injuries.⁷

Prior to *Dillon*, the California rule as to the limitation of the legal duty owed by the defendant to the plaintiff was set forth in *Amaya v. Home Ice, Fuel & Supply Co.* where the California Supreme Court affirmed its support for the zone of danger limitation.⁸

6. *Belt v. St. Louis—San Francisco Ry. Co.*, 195 F. 2d 241 (10th Cir. 1952); *Strazza v. McKittrick*, 146 Conn. 714, 156 A.2d 149 (1959); *Salmi v. Columbia & N. River Ry. Co.*, 75 Ore. 200, 146 P. 819 (1915); *Padgett v. Colonial Wholesale Distributing Co.*, 232 S.C. 593, 103 S.E.2d 265 (1958); *O'Mear v. Russell*, 90 Wash. 557, 156 P. 550 (1916); *Colla v. Mandella*, 1 Wis. 2d 594, 85 N.W.2d 345 (1957). A small minority of American jurisdictions still follow the impact rule. *See Bosley v. Andrews*, 393 Pa. 161, 142 A.2d 263 (1958). The Restatement requires that the negligence of the defendant create an unreasonable risk of physical harm to the plaintiff. RESTATEMENT (SECOND) OF TORTS § 313 (1965).

7. *Waube v. Warrington*, 216 Wis. 603, 612-13, 258 N.W. 497, 501 (1935).

8. 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

The majority of American jurisdictions allow recovery where the plaintiff is within the zone of danger. The American Law Institute is in accord with this view. RESTATEMENT (SECOND) OF TORTS, § 313(2) and comment *d* (1965). Some courts that follow this view also require that the plaintiff's emotional distress result from apprehension as to his own safety, and not fear for the peril of another. *See Strazza v. McKittrick*, 146 Conn. 714, 156 A.2d 149 (1959); *Klassa v. Milwaukee Light Co.*, 273 Wis. 176, 77 N.W.2d 397 (1956); *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935). Other jurisdictions allow recovery even where the plaintiff fears for the peril of another so long as plaintiff is within the zone of physical impact. *See Bowman v. Williams*, 164 Md. 397, 165 A. 182 (1933); *Frazer v. Western Dairy Products Co.*, 182 Wash. 578, 47 P.2d 1037 (1935). *See also* W. PROSSER, LAW OF TORTS § 55 (3d ed. 1964).

It is not clear whether the California view as defined by *Amaya* required the plaintiff to suffer emotional distress from fear of his own peril as a prerequisite to recovery. However, the dissent interprets the opinion of the court as requiring only that the plaintiff be in peril of physical impact. *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d at 318, 379 P.2d at 527, 29 Cal. Rptr. at 47.

The factual situation in *Amaya* was similar to that presented in *Dillon*. Lilian Amaya, who was in close proximity, witnessed her 17 month old son being crushed to death by a truck. Although plaintiff did not fear for her own safety and was not within the zone of danger, she nevertheless suffered severe emotional distress causing physical injuries.

The *Amaya* court denied recovery upon an analysis of administrative, socio-economic and moral considerations. The court reasoned that the proof of psychoneurotic disorders⁹ presents the possibility that the jury might decide liability on sentimental grounds rather than on the bases of medical evidence and legal standards of proof and causation. Therefore, the court prophesied that effective adjudication would be impossible: Permitting compensation to plaintiffs outside the zone of danger would often allow recovery to individuals who were undeserving.¹⁰

Moreover, the court envisioned that economic activity might be discouraged by the imposition of rising insurance premiums in order for individuals to acquire protection from an extension of liability.¹¹ Considering the moral culpability of defendant's conduct, the *Amaya* court adjudged that a negligent act was less blameworthy than intentional misconduct; therefore the negligent tort-feasor should be subjected to a narrower margin of liability than that imposed on an intentional wrongdoer.¹²

In *Dillon v. Legg*, the California Supreme Court has reconsidered these same public policy questions and has reversed its holding in *Amaya* contrary to the weight of judicial authority.

Rejecting the notion that administrative problems would render effective adjudication impossible, the *Dillon* court concluded

9. The court used the word "psychoneural" which may be a misnomer for psychoneurotic. A "psychoneurotic disorder" refers to one who is suffering from a psychoneurosis which is an emotional disorder of varying intensity. *STEDMAN'S MEDICAL DICTIONARY* 1322 (2d ed. 1966).

10. 59 Cal. 2d at 312, 379 P.2d at 523, 29 Cal. Rptr. at 43.

11. *Id.* at 314, 379 P.2d at 525, 29 Cal. Rptr. at 45.

12. *Id.* at 315, 379 P.2d 525, 29 Cal. Rptr. at 45. *RESTATEMENT (SECOND) OF TORTS* § 46 (1965):

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

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

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

that the possibility of fictitious claims should not preclude the recovery by those individuals who have suffered serious injury, and that juries can effectively distinguish fraudulent from legitimate claims.¹³ It has also determined that an extension of liability will not deter economic incentive or unduly burden the defendant.

The *Dillon* court set forth a foreseeability standard to determine the limits of recovery for the negligent infliction of emotional distress. The question of plaintiff's foreseeability will be resolved by considering (1) his proximity to the scene of the accident; (2) the manner in which the emotional shock occurred; and (3) the relationship of the plaintiff to the victim.¹⁴

Thus, the *Dillon* court—recognizing that a defendant's negligence may foreseeably cause a shock which results in physical injury to the plaintiff who is not within the zone of danger—has created a general duty of care which the law of torts has not previously imposed. The scope of liability is measured by a determination of whether the defendant's action foreseeably caused an unreasonable risk of harm to the plaintiff, not by a rigid standard of whether the plaintiff was in the zone of physical danger.

The future significance of *Dillon v. Legg* lies in the unanswered question as to what factual circumstances will enable a particular plaintiff to recover. The following hypothetical factual situations may illustrate the potential ramifications. A young child C is seriously injured in an automobile accident caused by the negligent

13. 68 Adv. Cal. at 774-75, 441 P.2d at 917, 69 Cal. Rptr. at 77-78. The court relies on Dean Prosser for support of its contention that the mother who witnesses the death of her child may suffer a legitimate, compensable harm. W. PROSSER, LAW OF TORTS § 55 (3d ed. 1964).

14. 68 Adv. Cal. at 779, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81.

In determining . . . whether defendant should reasonably foresee the injury to plaintiff, . . . the courts will take into account . . . (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

The evaluation of these factors will indicate the *degree* of the defendant's foreseeability. . . .

Prior to the *Dillon* decision, Dean Prosser realized the inadequacies of the zone of danger limitation and suggested a test similar to that adopted in *Dillon*. He suggested that only fairly contemporaneous emotional distress to members of the injured party's immediate family would receive compensation under a foreseeability test. W. PROSSER, LAW OF TORTS § 55 (3d ed. 1964).

driving of X and: (1) her mother M, her niece N, and her friend F, who witness the accident, were not within the zone of danger but were in close proximity.¹⁵ Applying the foreseeability test to this first fact situation, M would recover under the limited *Dillon* holding. N would probably recover since she is a close relative near the scene of the accident. F would probably recover although the absence of a close relationship to C would weigh against her foreseeability; (2) M, N and F, who are in M's house and hear the accident, rush out to view the injured C. In the second fact situation, the issue as to M and N's recovery is not as clear. Although M did not witness the accident, the defendant may reasonably foresee that a mother of the victim—upon hearing the screech of an automobile's sudden stop and coming upon the scene—will suffer emotional upset. Similarly, N's injuries may be foreseeable but her more distant relationship to C, as compared to M's relationship, will militate against her recovery. F would probably be denied compensation since she did not observe the collision and is not a relative of C; (3) M, N and F, who do not see or hear the collision, are informed of the accident and view the injured victim in the hospital. In the third fact situation, an important consideration may be the length of time elapsing between the occurrence of the accident and when the plaintiffs are informed or when they view the injured victim. While the determining factor might be the plaintiff's relationship to the victim, the lack of a contemporaneous observance as well as the lack of a close proximity to the accident will probably result in a denial of recovery to all plaintiffs.

A discussion of the hypothetical cases indicates that the *Dillon* test will probably yield recovery for the harm incurred only under circumstances similar to the first and second fact patterns. Thus, it may be predicted, that the application of a foreseeability standard will not substantially increase the defendant's liability. Moreover, the application of the traditional foreseeability test provides a more flexible standard than the zone of danger concept; the trier of fact

15. The hypothetical factual situations assume that M, N and F suffer emotional distress resulting in physical injuries upon viewing C. The *Dillon* opinion limited recovery to plaintiffs who suffer accompanying physical injuries. See RESTATEMENT (SECOND) OF TORTS § 436(A) comment (b) (1965). Furthermore, it is also assumed that C is not contributorily negligent. The *Dillon* court maintained that if she were contributorily negligent, recovery would be denied any third party who suffered emotional distress as a result of the defendant's negligence. 68 Adv. Cal. at 771, 779, 441 P.2d at 916, 920, 69 Cal. Rptr. at 76, 80.

may now balance several relevant circumstances in evaluating the merits of plaintiff's claim rather than apply an arbitrary limitation on the defendant's legal duty to exercise reasonable care. As the factual pattern in *Dillon* vividly illustrates, and as the California Supreme Court emphasized in its opinion, California courts will be able in the future to avoid anomalous holdings such as denying compensation to a mother who observed the horror of her daughter's death on the street from the vantage point of her porch step, while granting recovery to the decedent's sister who was within the zone of danger.¹⁶

Dillon v. Legg represents the California judicial trend toward eliminating artificial limitations on the general tort duty of care. Subsequent to the *Dillon* decision, the California Supreme Court in *Rowland v. Christian* overturned the traditional no duty limitations in the area of owners and occupiers of land.¹⁷ The court still refuses to impose a legal obligation to extricate a person who is in peril. Perhaps *Dillon* and *Rowland* portend the eventual abrogation of the last major no duty limitation remaining in California.

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16. *Id.* at 771, 441 P.2d at 915, 69 Cal. Rptr. at 75.

17. 69 Adv. Cal. 89, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).