# The Negligent Infliction of Emotional Distress: A Critical Analysis of Various Approaches to the Tort in Light of *Ochoa v. Superior Court*

## I. Introduction

The negligent infliction of emotional distress is a tort that has evolved rapidly since 1968.[1] This rapid evolution has caused courts to analyze and apply the concept in vastly different ways. Four general approaches have emerged out of the chaos — the impact rule, the zone of danger approach, the pure foreseeability approach, and the *Dillon* test. The advantages and disadvantages of each of these views have been the subject of much debate.[2] To date, the "best" approach appears to be an unanswered question.

California broke new ground in this area of the law. In *Dillon v. Legg*,[3] the California Supreme Court created a three-prong foreseeability test as a guideline for determining a defendant's duty to a bystander who witnesses the death or injury of a loved one.[4] Although the *Dillon* approach has been generally well received, it has also provoked some valid criticisms.[5]

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[1] W. Keeton, D. Dobbs, R. Keeton, D. Owen, Prosser and Keeton on the Law of Torts § 54 (5th ed. 1984) [hereinafter cited as Prosser & Keeton]. The negligent infliction of emotional distress has been defined as "a tort against the integrity of the family unit." Ramirez v. Armstrong, 100 N.M. 538, 673 P.2d 822 (1983). "The existence of a marital or intimate familial relationship is the nucleus of the personal interest to be protected." *Id.*

[2] *See, e.g.*, Maragos, *Negligent Infliction of Emotional Distress — Mixed Signals?*, 8 West St. U.L. Rev. 139 (1981); Nolan and Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging From Chaos*, 33 Hastings L.J. 583 (1981-82); Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm — A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477 (1982); Note, Molien v. Kaiser Foundation Hospitals: *California Expands Liability for Negligently Inflicted Emotional Distress*, 33 Hastings L.J. 291 (1981-82); Comment, *Bystander Recovery for Negligent Infliction of Emotional Distress in Iowa: Implementing an Optimal Balance*, 67 Iowa L. Rev. 333 (1981-82); Comment, *Negligent Infliction of Emotional Distress Absent Physical Impact or Subsequent Physical Injury*, 47 Mo. L. Rev. 124 (1982); Comment, *Negligent Infliction of Emotional Distress in New Jersey: Compensating the Foreseeable Plaintiff*, 32 Rutgers L. Rev. 796 (1979); Note, *Recovery for Negligently Inflicted Mental Distress Permitted to Mother Who Witnessed the Violent Death of Her Child Even Though the Mother was Outside Zone of Danger*, 25 Vill. L. Rev. 195 (1979-80).

[3] 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

[4] *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

[5] *See, e.g.*, D'Ambra v. United States, 114 R.I. 643, 665, 338 A.2d 524, 535 (1975) (Joslin, J., dissenting) (*Dillon* approach provides no rational way to limit liability); *see also infra* text accompanying notes 126-55.

Recently, the California Supreme Court was given an opportunity to clarify the application of the *Dillon* test in a factually distinguishable case and thereby eliminate the criticisms of *Dillon*. In *Ochoa v. Superior Court*,[6] the court declined this opportunity. The *Ochoa* court ignored the unsettled debate as to the best approach in mental distress cases and the conflict in its own case law. It limited its holding to the facts of the case and added a few variations to prior case law.[7] The result was the addition of another conflicting mental distress case to a collection of discordant case law.

This Note will survey the benefits and criticisms of each of the four approaches to the tort of negligent infliction of emotional distress. Next, this Note will review the cases that have followed *Dillon* and elucidate the inconsistencies in the case law. The *Ochoa* case will also be analyzed with respect to its inconsistencies with prior *Dillon* progeny, its internal reasoning, and its effect upon future mental distress law in *Dillon* jurisdictions and in jurisdictions that use other approaches. Finally, this Note will propose a more just and equitable solution: a flexible and relaxed standard for liability coupled with an increased burden of proof for recovery.

## II. Various Approaches to Negligent Infliction of Emotional Distress: Different Solutions to Common Problems

The courts have used four vastly different approaches to the tort of negligent infliction of emotional distress: the impact rule, the zone of danger rule, the pure foreseeability approach, and the *Dillon* foreseeability test. Each approach merits a discussion of its advantages and disadvantages.

### *A. The Impact Rule*

The impact rule was the original, and most limiting, of all the mental distress approaches.[8] The jurisdictions that follow this rule allow no cause of action for negligently inflicted emotional distress unless the plaintiff suffers a contemporaneous physical impact.[9] Accordingly, a bystander who witnesses an injury to another cannot recover for his mental distress absent a physical impact.[10]

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[6]39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985).

[7]*Id.* at 170-72, 703 P.2d at 8-9, 216 Cal. Rptr. at 668-69.

[8]Prosser & Keeton, *supra* note 1, at § 54.

[9]*E.g.*, Estate of Harper v. Orlando Funeral Home, Inc., 366 So. 2d 126 (Fla. Dist. Ct. App. 1979); Harkcom v. East Texas Motor Freight Lines, Inc., 104 Ill. App. 3d 780, 433 N.E.2d 291 (1982); Orkin Exterminating Co. v. Walters, 466 N.E.2d 55 (Ind. Ct. App. 1984); Merluzzi v. Larson, 96 Nev. 409, 610 P.2d 739 (1980).

[10]*E.g.*, *Harkcom*, 104 Ill. App. 3d 780, 433 N.E.2d 291.

Several rationales have been advanced in favor of the impact rule. First and foremost, the physical impact rule allows certainty of liability.[11] The defendant may be found liable for the plaintiff's mental distress only if he caused a physical impact upon the plaintiff. Because the impact rule provides simplicity and consistency to the question of liability, some courts have continued to use it, even though its other benefits are doubtful.[12]

The impact rule satisfied the courts' general distrust of emotional distress claims.[13] First, the courts thought the impact rule prevented speculative damage awards.[14] Limiting liability to cases involving impact was thought to limit recovery to situations where the emotional injury could be substantiated.[15] Actual mental injury was thought to be more probable when the plaintiff suffered a physical impact than when he did not.[16] Therefore, the impact rule validated emotional distress awards by restricting them to cases where actual mental injury was most probable.

Even if medical science could establish mental injury to a reasonable degree of certainty, advocates of the impact rule argued that causation of those damages would be difficult to prove absent impact.[17] Even if the mental damage could be established, there was no proof that the defendant's conduct was the proximate cause of the injury in question.[18] Thus, physical impact was required to prove causation.[19]

By substantiating the injury and causation elements of the cause of action, the impact rule reduced the potential for fraudulent claims.[20] The argument was that if one could not establish mental injury or causation to any degree of medical certainty, then the potential for fraudulent claims would increase.[21] Thus, as impact substantiated both mental injury and causation, it decreased the opportunity for fraud.

Moreover, the impact rule prevented potential theoretical problems. First, the courts were fearful of a flood of litigation over trivial claims if the impact restriction were removed.[22] A physical impact limited

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[11]*See generally* PROSSER & KEETON, *supra* note 1, § 54 at 363-64.

[12]The impact rule originally provided causation and proof of damages when medical science could not. Today, the medical field has made great advances in the areas of psychiatry and mental illness, and such proof is no longer needed. Towns v. Anderson, 195 Colo. 517, 579 P.2d 1163 (1978).

[13]PROSSER & KEETON, *supra* note 1, § 54 at 363.

[14]*Towns*, 195 Colo. 517, 579 P.2d 1163.

[15]*Id.*

[16]*Id.*

[17]*See* Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979).

[18]*See id.*

[19]*See id.*

[20]*See Towns*, 195 Colo. at 519, 579 P.2d at 1164.

[21]*See id.*

[22]*See Sinn*, 486 Pa. at 162, 404 A.2d at 680.

litigation to cases deserving recovery.[23] Second, once the impact restriction was removed, liability would be greatly extended and difficult to limit at any stage.[24] The courts feared the lack of a rational basis for limiting liability.[25] Thus, absent the impact requirement, it was thought that the courts would eventually be forced to recognize a cause of action for mental distress under any circumstances.[26] Finally, the elimination of the impact rule was thought to impose a new duty upon the defendant.[27] A new duty created a new cause of action.[28] Therefore, judicial conservatism favored the retention of the impact rule.[29]

Although the impact rule was initially a majority approach to the negligent infliction of emotional distress, it has fallen into disfavor in recent years.[30] Many of the rule's rationales have become outmoded.

The most important reason for the decline of the impact rule was the advance in medical science in the area of mental ailments.[31] Psychiatry can now prove injury and causation to some degree.[32] Thus, the potential for fraudulent claims, absent impact, is reduced.[33]

Furthermore, the flood of litigation argument has been rejected as a valid reason for requiring physical impact.[34] A court's caseload is, by itself, an unacceptable reason for denying recovery where it is deserved.[35] In fact, those courts that have abandoned the impact rule have not encountered an increase in this type of litigation.[36]

Finally, the impact rule has been criticized as arbitrary, capricious, and inequitable.[37] Requiring impact denies deserving plaintiffs a recovery for a sometimes debilitating injury.[38] An emotional injury can be as devasting to one's health as a physical injury[39] and therefore also deserves

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[23]PROSSER & KEETON, *supra* note 1, § 54 at 363.

[24]Tobin v. Grossman, 24 N.Y.2d 609, 615, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558 (1969).

[25]*Id.*

[26]*Id.*

[27]*Id.* at 613, 249 N.E.2d at 421, 301 N.Y.S.2d at 556.

[28]*Id.*

[29]*Id.* at 617, 249 N.E.2d at 423, 301 N.Y.S.2d at 560.

[30]*See, e.g., Towns*, 195 Colo. 517, 579 P.2d 1163; PROSSER & KEETON, *supra* note 1, at § 54.

[31]*See, e.g.*, Culbert v. Sampson's Supermarket, 444 A.2d 433, 435 (Me. 1982).

[32]*See, e.g., Sinn*, 436 Pa. at 158, 404 A.2d at 678.

[33]*Id.*

[34]*Id.* at 162-63, 404 A.2d at 680-81.

[35]*Id.* at 163, 404 A.2d at 681; *see also* Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 877 (1939).

[36]*See Sinn*, 486 Pa. at 162 n.12, 404 A.2d at 680 n.12.

[37]*E.g.*, Bass v. Nooney Co., 646 S.W.2d 765, 769 (Mo. 1983) (en banc).

[38]*See* Estate of Harper v. Orlando Funeral Home, Inc., 366 So. 2d 126 (Fla. Dist. Ct. App. 1979).

[39]*See, e.g.*, Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978) (mother died from shock of witnessing daughter being hit by car).

compensation. The rule is arbitrary because it has been used as a legal fiction.[40] For example, smoke, dust, trivial burns, or jolts may supply the impact necessary for recovery.[41] Because claims of pain and suffering in physical injury suits may be fraudulent or exaggerated, the argument that physical impact in emotional distress suits reduces fraud is unfounded.[42] These serious criticisms of the impact rule have led many courts to abandon it in favor of one of the newer approaches.

### *B. Zone of Danger*

The zone of danger rule is succinctly stated in the Restatement (Second) of Torts. Section 313 provides:

> (1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor
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> (a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and
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> (b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.
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> (2) The rule stated in Subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, *unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.*[43]

In other words, the actor will not be found liable for a bystander's emotional distress unless: (1) the actor's conduct was negligent; (2) it was foreseeable that the bystander would suffer distress; and (3) the bystander was within the zone of danger created by the defendant's conduct.[44] Many states follow this zone of danger approach.[45]

The zone of danger rule has several advantages. First, the zone of danger determination is objective and can be readily and consistently

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[40]PROSSER & KEETON, *supra* note 1, § 54 at 363.

[41]*Id.* at 363-64.

[42]*See, e.g.*, Schultz v. Barberton Glass Co., 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983).

[43]RESTATEMENT (SECOND) OF TORTS § 313 (1965) (emphasis added).

[44]*Id.*

[45]*E.g.*, Keck v. Jackson, 122 Ariz. 114, 593 P.2d 668 (1979) (en banc); *Towns*, 195 Colo. 517, 579 P.2d 1163; Stadler v. Cross, 295 N.W.2d 552 (Minn. 1980); Vaillancourt v. Medical Center Hosp. of Vt., Inc., 139 Vt. 138, 425 A.2d 92 (1980); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).

applied.[46] The zone of danger rule permits a simple determination of which persons may recover.[47]

Second, the defendant's liability is based to some degree upon his reasonable expectations of what injury could result from his conduct.[48] If the defendant injures a small child, he should expect a parent to be nearby and to suffer severe mental distress from realization of the child's injury.[49] Although this rationale does not apply in every situation, it does give some legitimacy to the rule.[50]

Finally, the courts have used some of the same rationales for the zone of danger rule that supported the impact rule. The zone of danger approach limits liability by limiting the class of persons who may recover.[51] Thus, the rule arguably prevents a flood of litigation.

Despite its positive aspects, the rule has many drawbacks. The zone of danger rule is considered to be an unnecessary, narrow, rigid, and unjust limitation on the class of persons who may recover.[52] For example, the rule denies recovery to a mother who sees her child hit by a car from a distance, yet allows recovery to a mother who stood a few feet closer to the accident.[53] Both mothers would foreseeably suffer the same emotional injury. In this respect, the rule fails to protect worthy interests.[54] Thus, limiting recovery by physical distance is as arbitrary as requiring a physical impact.[55]

Finally, the courts that have abandoned the zone of danger approach in favor of more expansive approaches have not encountered an increased number of fraudulent claims[56] or a flood of litigation.[57]

### *C. Pure Foreseeability*

Two jurisdictions have adopted a new approach to the negligent infliction of emotional distress. Both Ohio[58] and Hawaii[59] have expanded

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[46]*E.g.*, *Stadler*, 295 N.W.2d at 554.

[47]*Dziokonski*, 375 Mass. at 564, 380 N.E.2d at 1300.

[48]*See* PROSSER & KEETON, *supra* note 1, § 54 at 366.

[49]*Id.*

[50]For example, a wife who witnesses a husband's injury could reasonably suffer severe mental distress yet not be a foreseeable witness to the defendant.

[51]*See* Culbert v. Sampson's Supermarket, 444 A.2d 433, 436 (Me. 1982).

[52]*Id.*

[53]In *Dillon*, the trial court dismissed the mother's claim based on the zone of danger rule because the mother witnessed the accident from a few feet further than the victim's sister, who was allowed to proceed with her claim. *Dillon*, 68 Cal. 2d at 732, 441 P.2d at 915, 69 Cal. Rptr. at 75.

[54]*E.g.*, Corso v. Merrill, 119 N.H. 647, 406 A.2d 300 (1979).

[55]*Sinn*, 486 Pa. at 157, 404 A.2d at 677-78.

[56]*See id.* at 162 n.12, 404 A.2d at 680 n.12.

[57]*See id.*

[58]Paugh v. Hanks, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983).

[59]Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974).

liability on a "pure foreseeability" basis. Where serious emotional distress to a plaintiff-bystander is the reasonably foreseeable consequence of the defendant's negligent act, liability is imposed based on the application of general tort principles.[60]

Many of the previous restrictions upon liability are absent in the "pure foreseeability" approach. The plaintiff's recovery is not limited to situations where the defendant actually causes injury or death to another.[61] The defendant's act need not result in physical harm to the victim.[62] In addition, the plaintiff has a cause of action for emotional distress for negligent damage to his personal[63] or real[64] property. Moreover, if the bystander's emotional distress is serious, physical harm is not required.[65] Without the requirements of actual physical harm to a third person or resulting physical injury to the plaintiff from his distress, the pure foreseeability approach allows recovery in a broad range of circumstances.[66]

The pure foreseeability approach has one additional advantage over previous approaches. It defines the tort in a manner that conforms to other aspects of negligence law[67] by basing duty on foreseeability principles.[68] In addition, the plaintiff must prove a breach of duty, causation, and harm.[69] The only limitation imposed upon recovery, other than the usual negligence constraints, is that the distress must be serious,[70] which is determined objectively.[71] Once the objective threshold is met, the plaintiff may recover for any distress actually suffered.[72]

The scope of recoverable damages also conforms to other aspects of tort law.[73] If the defendant had caused a bodily injury to the plaintiff, he would be liable for pain and suffering.[74] Therefore, if he causes a

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[60]Rodrigues v. State, 52 Hawaii 156, 174, 472 P.2d 509, 520 (1970).

[61]*Paugh*, 6 Ohio St. 3d at 80, 451 N.E.2d at 767.

[62]*Id.*

[63]Campbell v. Animal Quarantine Station, 63 Hawaii 557, 632 P.2d 1066 (1981) (recovery for mental distress due to death of family dog).

[64]*Rodrigues*, 52 Hawaii 156, 472 P.2d 509 (recovery for mental distress due to negligent damage to house).

[65]*See id.* Emotional distress is serious when "a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Id.* at 173, 472 P.2d at 520.

[66]*See, e.g., Campbell*, 63 Hawaii 557, 632 P.2d 1066 (distress from death of dog); *Leong*, 55 Hawaii at 398, 520 P.2d at 758 (distress from seeing step-grandmother killed); *Rodrigues*, 52 Hawaii 156, 472 P.2d 509 (distress from damage to home).

[67]*See, e.g., Leong*, 55 Hawaii at 408, 520 P.2d at 764-65.

[68]*Id.*

[69]*Id.* at 407, 520 P.2d at 764.

[70]*Rodrigues*, 52 Hawaii at 172-73, 472 P.2d at 520.

[71]*See supra* note 65.

[72]In tort law, the plaintiff may recover for any injury actually suffered under the "Eggshell Skull" theory. PROSSER & KEETON, *supra* note 1, § 43 at 291-92.

[73]*See Leong*, 55 Hawaii 398, 520 P.2d 758.

[74]*See Paugh*, 6 Ohio St. 3d at 75, 451 N.E.2d at 763.

mental injury, regardless of the source of the distress, he should be liable for the pain and suffering or distress that such an injury involves.[75]

Despite these advantages, the courts have struggled to utilize the pure foreseeability theory without extending liability beyond what would be expected.[76] The greatest difficulty with the pure foreseeability approach is the determination of the defendant's duty. While all courts that have used this approach agree that foreseeability is the basis of duty, the courts are in conflict as to what must be foreseeable to impose that duty.

One view is that duty is based upon a foreseeable injury.[77] The plaintiff may recover if his mental distress was reasonably foreseeable.[78] This approach is too broad. Many of life's events cause reasonably foreseeable mental distress. For example, rejection of a child by his social peers may cause foreseeable distress to the child's parents. Likewise, a car accident that killed a distant relative to the plaintiff could foreseeably cause mental distress. Thus, this broad test of foreseeable injury imposes a duty in situations that the law may not deem worthy of compensation.

Another approach to duty used under the pure foreseeability rule is the foreseeable plaintiff.[79] The defendant's duty is limited to the risks of his negligent act.[80] The defendant owes a duty only to those plaintiffs who are foreseeably endangered by the risks that made the conduct unreasonably dangerous.[81] Despite this limitation upon duty, the courts have struggled with liability beyond that which the defendant could or should expect.[82] For example, the defendant could be liable for emotional distress of the victim's entire family because they are foreseeable plaintiffs.[83] Thus, despite the objective that emotional distress should conform to other aspects of negligence law, the courts began to impose arbitrary restrictions, such as distance, upon duty.[84] Limiting liability by geographical distance between the event and the plaintiff creates the same problems as the zone of danger approach.[85]

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[75]*Id.* at 77, 451 N.E.2d at 765.

[76]*See, e.g.*, Kelley v. Kokua Sales & Supply, 56 Hawaii 204, 532 P.2d 673 (1975) (plaintiff must be located within reasonable distance from accident in "pure foreseeability" cases even though physical distance should not alone bar recovery).

[77]*See Leong*, 55 Hawaii at 408, 520 P.2d at 764-65.

[78]*Id.*

[79]*See Rodrigues*, 52 Hawaii at 174, 472 P.2d at 521.

[80]*Id.*

[81]*Id.*

[82]*See Kelley*, 56 Hawaii 204, 532 P.2d 673.

[83]Before *Kelley* was decided, any "foreseeable" plaintiff could have recovered. *See Rodrigues*, 52 Hawaii 156, 472 P.2d 509.

[84]*See Kelley*, 56 Hawaii at 209, 532 P.2d at 676.

[85]*See supra* notes 53-57 and accompanying text.

The extension of duty to mental distress caused by injury to property has also been a source of controversy. Recovery for emotional distress caused by property loss promotes materialism.[86] Furthermore, a plaintiff who is economically compensated for property loss should not objectively suffer severe emotional distress. In other words, the defendant would not expect that an economically compensated loss would cause severe emotional distress. While there may be some basis for emotional distress when the defendant destroys unique and irreplaceable property, the courts have not specifically limited duty in this manner.[87] Thus, under this approach, a plaintiff could recover for emotional distress resulting from damage to his car, boat, or clothes. Although an individual could foreseeably develop an emotional attachment to these items, the defendant has no reasonable expectation of liability. Until these theoretical conflicts are settled, most courts will probably not follow the pure foreseeability approach.

### *D. The* Dillon *Approach*

The final approach to the negligent infliction of emotional distress is that espoused in *Dillon v. Legg*.[88] *Dillon* was a classic example of the problems associated with the zone of danger approach. A child was negligently struck and killed by the defendant automobile driver. Both the victim's mother and sister suffered severe emotional distress from observing the accident. Because the sister had been standing a few feet closer to the victim, she was within the zone of danger, while the mother was not. Therefore, the trial court dismissed the mother's claim. On review of the dismissal, the California Supreme Court held that the plaintiff should recover if the defendant should foresee fright or shock severe enough to cause substantial injury in a person "normally constituted."[89]

The California court carefully delineated guidelines for the determination of the defendant's duty. These guidelines are: 1) "Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it;"[90] 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;"[91] and 3) "Whether

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[86] *E.g., Rodrigues*, 52 Hawaii at 178-79, 472 P.2d at 522-23 (Levinson, J., concurring and dissenting).

[87] *See, e.g., id. Rodrigues* dealt with the negligent flooding of plaintiff's home. There is no indication that such a decision would not be extended to other property items.

[88] 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

[89] *Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

[90] *Id.*

[91] *Id.*

plaintiff and the victim [are] closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship."[92] The court noted that while the defendant's duty could not be predetermined in every instance, that duty should be based upon the degree of foreseeability;[93] the case should be governed by general rules of tort law, including the concepts of negligence, proximate cause, and foreseeability.[94]

Many courts follow the *Dillon* approach.[95] *Dillon* discards arbitrary limitations on the defendant's duty in favor of a more rational foreseeability approach.[96] The imposition of duty by the foreseeability factors set forth in *Dillon* comports with public policy.[97] Public policy demands a remedy for one who suffers a wrong.[98] Courts have considered that this method does not drastically increase the defendant's burden, as the departure from prior law is only in the scope of recognizable damages flowing from the negligent conduct.[99]

The *Dillon* foreseeability test is a middle-of-the-road approach. It recognizes the benefits of using foreseeability to determine duty, yet limits the duty where pure foreseeability cannot. It balances the need for flexible plaintiff recovery against the hardship of unlimited liability for the defendant. The *Dillon* standard incorporates the foreseeable plaintiff test with the foreseeable mental injury test.[100] Despite the theoretical soundness of such an approach, however, California courts have struggled with its application in non-conventional situations.

## III. The California Conflict — The Aftermath of *Dillon* and the *Ochoa* Decision

*Dillon* became the basis for an entire line of mental distress cases. These cases culminated in the recent case of *Ochoa v. Superior Court*.[101]

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[92] *Id.*

[93] *Id.* at 740, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81.

[94] *Id.* at 746, 441 P.2d at 924, 69 Cal. Rptr. at 84.

[95] *See, e.g.*, D'Amicol v. Alvarez Shipping Co., 31 Conn. Supp. 164, 326 A.2d 129 (1973); Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981); Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433 (Me. 1982); Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978); Miller v. Cook, 87 Mich. App. 6, 273 N.W.2d 567 (1978); Corso v. Merrill, 119 N.H. 647, 406 A.2d 300 (1979); Portee v. Jaffee, 84 N.J. 88, 417 A.2d 521 (1980); Ramirez v. Armstrong, 100 N.M. 538, 673 P.2d 822 (1983); Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979); General Motors Corp. v. Grizzle, 642 S.W.2d 837 (Tex. Ct. App. 1982).

[96] *See, e.g., Culbert*, 444 A.2d at 437.

[97] *See Sinn*, 486 Pa. at 161-67, 404 A.2d at 680-83.

[98] *See id.* at 167, 404 A.2d at 683.

[99] *Id.*

[100] *See Dillon*, 68 Cal. 2d at 739, 441 P.2d at 919-20, 69 Cal. Rptr. at 79-80.

[101] 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985).

In *Ochoa*, the court changed *Dillon* appreciably without answering the questions raised by the *Dillon* progeny or by the debate as to which mental distress theory is best.

### *A. The* Ochoa *Decision*

The *Ochoa* case dealt with the death of a thirteen-year-old boy. The child was being held in a juvenile hall when he became severely ill with bilateral pneumonia. The defendant doctor misdiagnosed the child as having influenza. He visited the child twice in two days, despite repeated communications by the plaintiff-mother that further treatment was needed. Mrs. Ochoa visited her son and found him extremely ill and in severe pain. Despite Mrs. Ochoa's pleas, no x-rays, blood tests, or urine tests were performed. She was denied the opportunity to take her child to their family physician. Mrs. Ochoa visited her son several times, but was not present when he died. Her husband, also a plaintiff in the suit, visited the child once while he was ill. The child died three days after the onset of his illness.

In addition to suing on several other grounds, Mr. and Mrs. Ochoa sued for their mental distress caused by the doctor's negligence in mistreating their son. The trial court dismissed their claim for negligent infliction of mental distress.[102] The plaintiffs then sought a writ of mandate to compel the trial court to reinstate several causes of action, including their mental distress claim.[103] The California Supreme Court held that both plaintiffs had a cause of action for the distress they suffered as a result of their observation of the defendant's conduct, the child's injury, and their contemporaneous awareness that the defendant's conduct or lack thereof was causing injury to the child.[104] Furthermore, the court held that the injury to the victim need not be caused by a sudden occurrence.[105] Requiring the injury to be sudden arbitrarily limits liability when the shock to the plaintiff is highly foreseeable, especially when the shock flows from an abnormal event.[106]

### *B. The* Dillon *Progeny: Cases and Conflicts*

To understand the import of *Ochoa*, the *Dillon* progeny must be analyzed. In the decisions following *Dillon*, three main areas of conflict have arisen. The first area of controversy involves the definition of "contemporaneous" in the second portion of the *Dillon* foreseeability

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[102] *Id.* at 164, 703 P.2d at 4, 216 Cal. Rptr. at 664.
[103] *Id.*
[104] *Id.* at 170, 703 P.2d at 8, 216 Cal. Rptr. at 668.
[105] *Id.* at 168, 703 P.2d at 7, 216 Cal. Rptr. at 667.
[106] *Id.*

test. The guideline requires a contemporaneous perception of the injury-producing event.[107] In cases in which the plaintiff gains knowledge of the victim's injury well after its occurrence, the courts consistently hold the plaintiff has no cause of action for mental distress.[108]

When the plaintiff sees the injury immediately after it was inflicted, however, the courts are split as to whether the observation is "contemporaneous" with the injury-producing event. In *Archibald v. Braverman*,[109] a mother heard an explosion and rushed to the scene to find her son had suffered traumatic amputation of his hand. The court held that her shock was contemporaneous with the explosion, even though she did not observe the event.[110] Other cases have stretched either facts or reasoning to find that the plaintiff's observation of the injury was contemporaneous. In *Krouse v. Grahm*,[111] the plaintiff was sitting in his car when the defendant struck both the car and the plaintiff's wife. The plaintiff did not see the impact. The court held that the husband did "contemporaneously observe" the incident because he was a percipient witness to the impact, knew his wife's position beforehand, saw the defendant approaching, and must have realized the car struck her.[112] The court apparently used "constructive knowledge" to find a "contemporaneous" observation of the event.

In *Nazaroff v. Superior Court*,[113] the court stretched the facts to find a contemporaneous observation of the injury-producing event. In *Nazaroff*, a child drowned in a swimming pool. His mother, alerted by a neighbor's cry, arrived on the scene in time to see the boy's body pulled from the pool. The court held that the mother had contemporaneously observed the drowning because drowning is not an instantaneous event, but a continuous process of reduction of blood-gas levels.[114]

In contrast, other California courts have interpreted the contemporaneous requirement strictly. In *Parsons v. Superior Court*,[115] the plaintiffs were following their daughters in a car when the defendant driver of the daughters' car rounded a curve and crashed. The parents did not see the accident, but arrived on the scene "before the dust had

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[107] *Dillon*, 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

[108] *See, e.g.*, Madigan v. City of Santa Ana, 145 Cal. App. 3d 607, 193 Cal. Rptr. 593 (1983) (parents did not have a cause of action for mental distress because they did not arrive at the scene of their son's auto accident until 15 minutes after its occurrence).

[109] 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969).

[110] *Id.* at 256, 79 Cal. Rptr. at 725.

[111] 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977).

[112] *Id.* at 76, 562 P.2d at 1031, 137 Cal. Rptr. at 872.

[113] 80 Cal. App. 3d 553, 145 Cal. Rptr. 657 (1978).

[114] *Id.* at 566-67, 145 Cal. Rptr. at 664.

[115] 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978).

settled." The court held the plaintiffs did not have a contemporaneous observation of the injury-producing event and dismissed the suit.[116]

Similarly, in *Hathaway v. Superior Court*,[117] a child was electrocuted on an outdoor cooler. The parents, who were indoors, were alerted by the child's friends. They ran outside to find their son lying in a pool of water, gagging and spitting. The child did not die until later. Evidence introduced at trial suggested that electrocution is not an instantaneous event, but a process that may require time. Despite this evidence, the court held that the parents did not contemporaneously observe the event because the child was no longer touching the cooling unit when they arrived.[118] This strict interpretation of "contemporaneous observation" directly contradicts the holdings of *Archibald* and *Nazaroff*.

The second area of conflict in the application of the *Dillon* test is the definition of sensory perception. Perception of the event, other than by sight, has been difficult to define consistently. For example, a mother who witnesses the defendant's act and her child's injury has been held to perceive the event although she was unaware of the negligence at that time.[119] Yet, if the plaintiff directly perceives the negligence and not the injury, he has not sensorily perceived the injury-producing event.[120] Furthermore, courts have included the sense of touch as a sensory perception of the event. A mother in labor who felt her contractions cease and her baby nod its head was held to have a sensory perception of the death of the fetus.[121] It is difficult to imagine that this was actually a sensory perception of death. It is unlikely the mother actually gained direct knowledge at that moment that the fetus was injured. Thus, it appears that the court has stretched the concept of sensory perception to include perception of an event that does not include contemporaneous knowledge of the injury. Therefore, the definition of sensory perception needs to be clarified.

The third area of conflict developed in the reasoning of the "direct victim" approach used in *Molien v. Kaiser Foundation Hospitals*.[122] In that case, the defendant-doctor negligently misdiagnosed the plaintiff's wife as having syphilis. The doctor advised the wife to have her husband undergo treatment. The stress and suspicion of sexual infidelity caused the marriage to dissolve. The court held that the plaintiff-husband was

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[116]*Id.* at 512, 146 Cal. Rptr. at 498.

[117]112 Cal. App. 3d 728, 169 Cal. Rptr. 435 (1980).

[118]*Id.* at 736, 169 Cal. Rptr. at 440.

[119]*See* Mobaldi v. Board of Regents, 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976).

[120]Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977).

[121]Johnson v. Superior Court, 123 Cal. App. 3d 1002, 1007, 177 Cal. Rptr. 63, 65 (1981).

[122]27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

a direct victim of the defendant's negligent act.[123] The court stated that the *Molien* facts were distinguishable from the *Dillon* scenario.[124] Under *Molien*, the plaintiff has a cause of action without proof of physical injury resulting from his distress.[125] The court noted that the physical injury requirement is an arbitrary and artificial limit on recovery.[126] The physical injury requirement allows recovery when distress is trivial and denies it in cases where recovery is deserved.[127]

Shortly thereafter, another case embellished the direct victim theory. In *Andalon v. Superior Court*,[128] parents sued for the wrongful birth of a child with Down's syndrome. The court stated that the parents had a cause of action under the direct victim theory even though they had not witnessed the gene mutation considered to be the "injury-producing event."[129] Thus, under a direct victim analysis, plaintiffs need not prove sensory perception of the injury-producing event.

The lack of both a physical injury requirement and a sensory perception requirement conflicts with cases following *Dillon*. Yet there appears to be little rational basis for the different standard used under the *Molien* analysis. A "direct victim" is not more likely to have suffered mental distress than a bystander in a *Dillon* situation. Therefore, there is no reason to require physical injury or contemporaneous awareness under the *Dillon* approach and not under the *Molien* approach. If the likelihood of distress experienced by the direct victim is equal to that of the *Dillon* bystander, then the bystander should be allowed to recover, despite the lack of physical injury or contemporaneous sensory perception.

### *C.* Ochoa*'s Effect on Prior Case Law*

*Ochoa* presented an ideal opportunity to clarify and redefine these three inconsistencies in the case law of mental distress. Instead, the California Supreme Court sidestepped the issues.

The *Ochoa* court ignored the "contemporaneous" issue by holding that an observation of the defendant's conduct and of the child's injury and a contemporaneous awareness of the cause of the injury were sufficient.[130] The court did not address whether the observation of the act and the injury must be contemporaneous or what "contemporaneous" means. The court merely required that the plaintiff have a contempor-

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[123] *Id.* at 923, 616 P.2d at 816, 167 Cal. Rptr. at 835.
[124] *Id.*
[125] *Id.* at 928, 616 P.2d at 821, 167 Cal. Rptr. at 838.
[126] *Id.*
[127] *Id.* at 928-29, 616 P.2d at 820, 167 Cal. Rptr. at 838.
[128] 162 Cal. App. 3d 600, 208 Cal. Rptr. 899 (1984).
[129] *Id.* at 605, 208 Cal. Rptr. at 901.
[130] 39 Cal. 3d at 170, 703 P.2d at 8, 216 Cal. Rptr. at 668.

aneous knowledge of the source of the injury. The court did not clarify whether the plaintiff must know of the source of the injury at the time the injury is being inflicted. In *Ochoa*, the negligent conduct was allowing the victim's pneumonia to continue untreated. It is unlikely that the mother became aware that the defendant's failure to treat the child was the source of the child's injury while she observed his suffering. It is more likely that she recognized the cause of the injury subsequent to her realization of an injury. The court's requirement of a "contemporaneous awareness" of the cause of the injury is, therefore, unclear.

The *Ochoa* court also avoided defining "sensory perception of the injury-producing event." In *Ochoa*, the injury-producing event was the negligence of the doctor. It is unclear whether the plaintiff-parents actually witnessed his negligence. The doctor's negligence was his failure to treat his patient. It is unlikely that the mother actually witnessed this non-treatment. It is more likely that she became aware of it through her observations that the child did not become well. It may be argued that this is a sensory observation of only the injury and not the event. Thus, this case does not clarify what is required for sensory perception of the injury-producing event.

Finally, *Ochoa* deals directly with the third area of conflict — the inconsistencies between *Dillon* and *Molien*. *Ochoa* held that the plaintiffs did not have a cause of action under the *Molien* direct victim analysis, as the negligence of the doctor was directed at the boy, not the parents.[131] If the doctor's negligence was a lack of attention, then certainly he ignored the mother's attempt to get medical attention. If he ignored the son, he ignored the mother. Furthermore, the court overlooked the inconsistencies between the two approaches. The differences between *Molien* and *Dillon* regarding the physical injury and sensory perception requirements remain unresolved.

### *D. The* Ochoa *Decision: Consistency or Conflict*

In addition to leaving conflicting case precedent unresolved, the *Ochoa* decision is internally inconsistent. One of the greatest concerns with the *Dillon* standards was that they are sometimes used arbitrarily, creating confusion and artificiality.[132] The *Ochoa* majority, after voicing this concern, appears to use these guidelines in exactly this manner. The court allowed the father to recover only for his distress from observing his son, and not for his distress from hearing his wife's reports.[133] The distress the father suffered from his wife's reports was no less real or

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[131] *Id.* at 172-73, 703 P.2d at 10, 216 Cal. Rptr. at 670.

[132] *See id.* at 182, 703 P.2d at 17, 216 Cal. Rptr. at 676 (Bird, C.J., concurring and dissenting).

[133] *Id.* at 165 n.6, 703 P.2d at 5 n.6, 216 Cal. Rptr. at 665 n.6.

foreseeable than the distress he suffered from witnessing the child's condition himself. Thus, the court made an artificial distinction based on the source of the mental distress. This distinction was based upon the *Dillon* requirement that the shock be from a direct emotional impact caused by a sensory and contemporaneous observation. However, the court used the guideline in an artificial manner — not to limit the defendant's liability where it is not warranted, but rather to distinguish between compensable and non-compensable portions of the same injury.

Another question that arises is the court's use of "serious" mental distress. The majority stated that it would compensate the parents only for their distress resulting from the suffering they witnessed and not for the death of their child, which they did not observe.[134] If the child had not died, the Ochoas' distress probably would not have been serious enough to warrant recovery. A relative of a person who recovers despite medical inattention for two days would probably not suffer "serious mental distress."[135] Therefore, in reality, the court did one of two things. It either discarded the seriousness requirement of mental distress or it compensated the plaintiffs for their son's death. Actually, the court probably allowed recovery for distress suffered from the victim's unobserved death. This result directly conflicts with the *Dillon* requirement that observation is the basis for recovery and contradicts the court's reasoning for not allowing the father a full recovery.

### *E. The* Ochoa *Case as Precedent*

*Ochoa* will have substantial and far-reaching effects as precedent for mental distress cases. First, *Ochoa* poses serious problems of application for future mental distress cases in *Dillon* jurisdictions. Second, *Ochoa* will deepen the division of opinion as to which is the most rational approach to mental distress claims.

*Ochoa's* immediate effects within *Dillon* jurisdictions will be twofold. First and most obviously, the case furthers the confusion and conflict in the case precedent. Thus, mental distress cases are likely to remain in a state of conflict for the present.

More importantly, *Ochoa* may have serious repercussions in the area of medical malpractice. *Ochoa* allowed recovery for mental distress caused by witnessing a loved one suffer from a doctor's negligence. Therefore,

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[134]*See id.* at 167 n.7, 703 P.2d at 6 n.7, 216 Cal. Rptr. at 666 n.7.

[135]The courts have repeatedly emphasized that a "serious" mental disturbance requires more than being upset or having hurt feelings. A serious injury is one that is debilitating. *See, e.g.*, Paugh v. Hanks, 6 Ohio St. 3d 72, 78, 451 N.E.2d 759, 765 (1983). It is reasonable to assume that a "reasonable person normally constituted" would be able to endure some anxiety over a relative's brief stay in the hospital, without suffering debilitating mental injuries.

a claim for a bystander's mental distress for medical malpractice against another is now recognized. The addition of another cause of action in the medical malpractice area will increase the scope of damages that may be recovered. Considering the problems that large recoveries against the medical profession have raised, increasing the scope of damages may have negative consequences.[136]

Furthermore, *Ochoa* will strengthen the arguments of those opposed to the *Dillon* approach. *Dillon* critics fear the possibility of unlimited liability for mental distress.[137] Adding medical malpractice to the scope of mental distress recovery is a large step in the extension of liability. Critics may fear that once this step has been taken, there will be no principled basis on which to limit liability.[138]

*Ochoa* may also be used to further the argument that the *Dillon* standards are too mechanical.[139] Other courts are unlikely to adopt the *Dillon* approach unless it can be proven that its rules of liability are sufficiently generalizable to be applied with reasonable certainty to comparable factual situations.[140] *Ochoa* illustrates that such reasonable certainty of application has not been achieved. Therefore, *Ochoa* may serve as ammunition for jurisdictions that decline to adopt the *Dillon* foreseeability test.

## IV. A Proposed Solution: A Flexible Standard of Duty and Higher Burden of Proof

Obviously, none of the alternatives to the negligent infliction of emotional distress is without fault. A rational approach to the problem would be to consider the most important objectives to be attained and tailor the solution to meet those objectives.

Most, if not all, of the arguments proposed in favor of the various theories support one of two overriding policies. The first is that any

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[136]Increasing medical malpractice awards will raise the already skyrocketing costs of medical malpractice insurance. Such costs are passed on to consumers, who pay higher medical bills. Peterson & Priest, *The Civil Jury* 34 (Rand Corp. Doc. No. R 2881-ICJ, 1982). In some areas of practice, the high cost of insurance or its unavailability has caused a scarcity of doctors. *Id.*

[137]Corso v. Merrill, 119 N.H. 647, 660-61, 406 A.2d 300, 309 (1979) (Grimes, J., dissenting) ("Accidents are often caused not by reprehensible conduct, but by momentary inadvertence or judgment which after the fact is found to have been faulty . . . . [T]he court's new rule can cause the dominoes to start falling subjecting the person to suits . . . by all manner of relatives whose 'mental tranquility' is claimed to have been upset . . . . [T]he genie is now clearly out of the bottle . . . .")

[138]*E.g., id.*

[139]*See, e.g., Ochoa*, 39 Cal. 3d at 182, 703 P.2d at 17, 216 Cal. Rptr. at 676 (Bird, C.J., concurring and dissenting).

[140]*See* D'Ambra v. United States, 114 R.I. 643, 664, 338 A.2d 524, 536 (1975) (Joslin, J., dissenting).

rule imposing liability must not be arbitrary or capricious, yet must be flexible and broad enough to be applied to various factual situations with reasonable certainty.[141] The second goal is an equitable method of avoiding unwarranted liability without unduly restricting recovery where deserved.[142]

A flexible standard of liability, coupled with an increased burden of proof, would be the most effective approach to the negligent infliction of mental distress. By leaving the substantive law flexible to meet unpredictable factual situations and increasing the burden of proof to eliminate unwarranted liability, most of the criticisms to the various approaches to mental distress can be overcome.

Flexible liability standards require flexible duty standards because duty is the key to liability in negligence actions.[143] A flexible standard of duty is one that is based upon foreseeability.[144] Foreseeability as the basis of duty would allow flexibility of recovery without the use of mechanistic or rigid rules.[145] Foreseeability can be a general principle applicable to a variety of factual situations.[146]

In order to avoid problems with the interpretation of *what* must be foreseeable, the *Dillon* standards may be generalized on a simple level. The *Dillon* guidelines require that the plaintiff be a close friend or relative who was near the scene of the accident and who witnessed the accident.[147] These guidelines may be generalized to the concept that the plaintiff and the mental injury be foreseeable. The plaintiff must prove that the defendant could reasonably expect this injury to occur to this person, given the circumstances of the case. In other words, liability should be imposed if the defendant could reasonably foresee this type of liability as a result of his actions.

This approach to liability has many positive aspects. The concept of duty in mental distress cases will conform to other areas of negligence.[148] A flexible approach to duty avoids the criticisms that plague the impact rule and zone of danger rule because the foreseeability approach is a general principle that avoids mechanistic rules. Liability should be imposed if the plaintiff and his injury were foreseeable.

The greatest disadvantage of a flexible standard of duty is the fear of unlimited liability, fraud, and lack of proof of injury and causation.

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[141]*See, e.g.*, Stadler v. Cross, 295 N.W.2d 552, 554 (Minn. 1980); *D'Ambra*, 114 R.I. at 664, 338 A.2d at 536 (Joslin, J., dissenting).

[142]*See, e.g.*, *Dillon*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72.

[143]*See, e.g.*, PROSSER & KEETON, *supra* note 1, § 54 at 356.

[144]*See supra* note 66 and accompanying text.

[145]*See Ochoa*, 39 Cal. 3d at 191, 703 P.2d at 23, 216 Cal. Rptr. at 683 (Bird, C.J., concurring and dissenting).

[146]*Id.*

[147]*Dillon*, 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

[148]*See* Leong v. Takasaki, 55 Hawaii 398, 407, 520 P.2d 758, 764 (1974).

All three of these concerns may be eliminated by raising the burden of proof to that of "clear and convincing evidence."

In a civil trial, the normal burden of proof is a preponderance of the evidence.[149] This standard serves three functions. First, the low burden allows dispute resolution with reasonable dispatch and finality.[150] Second, there is no substantial reason to burden one party greatly.[151] Finally, the burden of proof deters frivolous actions only in cases where the evidence is in equipoise.[152]

Raising the burden of proof to that of "clear and convincing evidence"[153] would dispose of any criticisms of a flexible-duty approach and promote the goal of limiting unwarranted liability. Furthermore, an increased burden of proof in mental distress claims would be consistent with the rationales for imposing a lower burden in most civil cases. Finally, an increase in the burden of proof would be consistent with case law where the state of mind is the factual issue to be proven.[154]

A standard of clear and convincing evidence should erase most of the criticisms surrounding the flexible duty approach. To dispel the fear of unsubstantiated claims of mental distress, this burden would force the plaintiff to bring forth substantial evidence that he had, in fact, been seriously injured and that such injury was caused, in fact, by the defendant's negligent conduct.[155] A higher burden of proof would allow recovery in those cases where it is most deserved and inhibit litigation of claims that are less well-founded.

An increased burden would also tend to deter frivolous mental distress claims. For example, a plaintiff who witnessed the traumatic death of a loved one would probably be able to convince the jury that he had, in fact, suffered injury, given an appropriate amount of medical evidence. A plaintiff who suffered a mental injury because of property damage, however, would not be able to meet the burden so easily. Such a plaintiff would find the jury more skeptical of his claim. Furthermore, this plaintiff would have a great deal more trouble producing the required quantum of medical evidence. The plaintiff who indeed suffered a devastating

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[149]McCormick, On Evidence § 339 (3d ed. E.W. Cleary 1972).

[150]Winter, *The Jury and the Risk of Non Persuasion*, 5 Law & Soc. Rev. 335, 336 (1975).

[151]*Id.* at 337.

[152]*Id.*

[153]The standard of clear and convincing evidence has been defined as "that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." This is an intermediate standard, falling between the preponderance standard of ordinary civil proceedings and the reasonable doubt standard of criminal proceedings. State v. Addington, 588 S.W.2d 569, 570 (Tex. 1979).

[154]*See infra* notes 158-59 and accompanying text.

[155]A lack of proof regarding both injury and causation was a rationale supporting the impact rule. *See supra* notes 13-17 and accompanying text.

injury from an unusual source, however, would not be automatically precluded from asserting his claim. He would still have an opportunity to put forth evidence that the injury did occur and to let the jury weigh the evidence in view of the burden he must carry.

Increasing the burden of proof would also be consistent with the rationales for maintaining a lower burden in most civil cases. An increase in the burden will not materially slow the litigation process.[156] The change would only force the plaintiff to produce a greater quantum of *convincing* evidence.[157]

However, the most important reason for increasing the burden of proof in mental distress cases is that mental injury is peculiarly within the knowledge of the plaintiff. This fact puts the defendant at a substantial evidentiary disadvantage. Courts have feared compensating for mental distress because of the potential for fraudulent claims.[158] The burden of proof is often raised when there is a special danger of deception.[159] Therefore, there is a substantial reason for burdening one party more than the other.

Finally, there is a real need to deter frivolous actions in cases where the evidence appears on the surface to be just beyond equipoise.[160] The potential for fraud and deception in mental distress cases is an ever-present factor.[161] Therefore, all but the most convincing cases of mental distress should be deterred.

A standard of clear and convincing evidence in mental distress cases would conform to the burden of proof used in many civil cases where the issue to be proved is one's state of mind. For example, malice must be proved by clear and convincing evidence.[162] More importantly, mental illness must usually be proved by clear and convincing evidence.[163] While this issue normally arises in litigation surrounding commitment proceedings, the rationale applies as well to claims of mental distress. If the issue to be proven is objective, the burden of a preponderance of the evidence may be used. If such a determination is subjective, however, a standard of clear and convincing evidence must be met.[164] Because mental illness is not objective, it stands to reason that it should be subject

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[156]*See supra* note 150 and accompanying text.

[157]*Addington*, 588 S.W.2d at 570.

[158]*E.g.*, Towns v. Anderson, 195 Colo. 517, 519, 579 P.2d 1163, 1164 (1978).

[159]*See* McCormick, *supra* note 149, at § 340.

[160]*See supra* note 152 and accompanying text.

[161]*See Towns*, 195 Colo. at 519, 579 P.2d at 1164.

[162]*E.g.*, DiLeo v. Koltnow, 200 Colo. 119, 613 P.2d 318 (1980).

[163]*E.g.*, *In re* Johnston, 118 Ill. App. 3d 214, 454 N.E.2d 840 (1983); Fletcher v. Fletcher, 60 Or. App. 623, 654 P.2d 1121 (1982).

[164]*See, e.g.*, Maine Human Rights Comm'n v. City of Auburn, 425 A.2d 990, 997 (Me. 1981) (question of intentional sex discrimination in hiring practices).

to a higher burden of proof. Therefore, an increased burden of proof for mental distress cases would be both appropriate and in accordance with analogous case law.

## V. Conclusion

While the modern trend of legal thought favors more expansive approaches to liability for mental distress, many problems with the *Dillon* and pure foreseeability tests are still unresolved. *Ochoa* is a prime example of the conflict and confusion that have evolved from the application of *Dillon* to factually dissimilar situations. The *Ochoa* court ignored the conflicts in prior case law and concentrated on one specific factual scenario. It left a host of unanswered questions about the application of the *Dillon* guidelines and the future viability of the *Dillon* mental distress theory.

By combining a general foreseeability test for duty with a burden of proof of "clear and convincing" evidence, the two goals of flexibility and limiting unwarranted liability may be attained. Such an approach will overcome many of the criticisms of the more expansive approaches and avoid the problems associated with an *Ochoa* situation.

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