

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS AS AN INDEPENDENT CAUSE OF ACTION IN CALIFORNIA: DO DEFENDANTS FACE UNLIMITED LIABILITY?

I. INTRODUCTION

As society becomes more complex we are faced with a multiplication of psychic stimuli. These stimuli and "the widespread knowledge of the debilitating effect mental distress may have on an individual's capacity to carry on the functions of life in this growing society,"¹ have caused the courts to recognize a need to protect mental equilibrium. "A sound mind within a disabled body can accomplish much, while a disabled mind in the soundest of bodies is rarely capable of making any substantial contribution to society."² Responding to this theory, the California Supreme Court, in *Molien v. Kaiser Foundation Hospitals*,³ declared that individuals have a legally protected right to be free from the negligent infliction of emotional distress, thereby establishing a new basis for recovery of damages.⁴ This comment examines the court's departure from established principles for dealing with emotional distress. In determining whether a significant change has occurred, this comment analyzes (1) the determination of proper plaintiffs, (2) the degree of emotional distress required to bring a cause of action, and (3) the future impact of the *Molien* decision. Furthermore, standards are proposed to aid in the adjudication of negligent infliction of emotional distress claims.

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1. *Rodrigues v. State*, 52 Hawaii 156, 173, 472 P.2d 509, 520 (1970).
2. Comment, *Negligent Infliction of Emotional Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237 (1971) [hereinafter cited as Comment]; See J. COLEMAN, *ABNORMAL PSYCHOLOGY AND MODERN LIFE* 192 (3d ed. 1964).
3. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).
4. "[W]e hold that a cause of action may be stated for the negligent infliction of serious emotional distress." *Id.* at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

II. HISTORICAL OVERVIEW OF EMOTIONAL DISTRESS CLAIMS IN CALIFORNIA

California courts have not traditionally provided complete protection from negligently inflicted emotional distress.⁵ The courts were hesitant to protect this interest because of the likelihood of fraudulent claims and the potentially unlimited liability of the defendant for every type of mental disturbance.⁶ Mental distress has been protected, however, when the dangers of fraudulent claims and undue liability were outweighed by assurances of genuine and serious mental distress.⁷ In drawing exceptions to the rule of no recovery, the courts found an assurance of genuineness in accompanying physical injury or impact.

A plaintiff can recover damages for physical injury and also for any mental distress that may naturally flow from it.⁸ Because California, however, is a "no-impact" jurisdiction, it is not necessary for a plaintiff to show that he suffered contemporaneous physical impact in order to recover damages for injuries sustained as a result of emotional distress.⁹ In other words, in addition to being entitled to compensation for mental suffering sustained as a result of physical injury or impact, a plaintiff in California may also state a cause of action for physical injury resulting from emotional distress.¹⁰ For ex-

5. *Id.* at 926, 161 P.2d at 819, 167 Cal. Rptr. at 837.

6. *Rodriguez v. State*, 52 Hawaii at 172, 472 P.2d at 519.

7. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 54 (4th ed. 1971), [hereinafter cited as PROSSER].

8. "[M]ental suffering frequently constitutes the principle element of tort damages (Rest. 2d Torts, § 905, Com. C); awards which fail to compensate for pain and suffering have been held inadequate as a matter of law." *Capelouto v. Kaiser Foundation Hosps.*, 7 Cal. 3d 889, 892-93, 500 P.2d 880, 882-83, 103 Cal. Rptr. 856, 858-59 (1972).

9. *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963), *overruled on other grounds*, *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); *Vanoni v. Western Airlines*, 247 Cal. App. 2d 793, 56 Cal. Rptr. 115 (1967). For a summary of the treatment of emotional distress claims in light of the physical injury requirement in jurisdictions other than California, see Brody, *Negligently Inflicted Psychic Injuries: A Return to Reason*, 7 VILL. L. REV. 232 (1961) [hereinafter cited as Brody].

10. *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 44 P. 320 (1896).

There can be no recovery of damages for emotional distress unaccompanied by physical injury where such emotional distress arises only from negligent conduct.

However, if a plaintiff has suffered a shock to the nervous system or other physical harm which was proximately caused by negligent conduct

ample, a plaintiff may recover damages for severe shock to his entire nervous system which resulted in high blood pressure.¹¹ Regardless of the sequence of events, physical injury has traditionally been a requirement when dealing with negligently inflicted emotional distress.

The physical injury requirement, however, has been defined expansively. Damages are recoverable for many nervous disturbances or disorders that are themselves properly classified as physical injuries.¹² In addition to physical pain,¹³ the courts have defined gastric disturbance, loss of sleep, nervous disorder,¹⁴ nervousness,¹⁵ anxiety or grief, shock, worry, distress, mortification, indignity, humiliation,¹⁶ and nausea¹⁷ as physical injuries. Until *Molien*, however, California courts refused to allow a plaintiff to state a cause of action purely for negligent infliction of emotional distress without physical injury,¹⁸ reasoning that the physical injury provided a guarantee

of a defendant, then such plaintiff is entitled to recover damages from such a defendant for any resulting physical harm and emotional distress.

California Jury Instruction, BAJI No. 12.80 (6th ed. 1977). The language of this instruction appears to be derived mainly from the opinions in *Vanoni v. Western Airlines*, 247 Cal. App. 2d 793, 795-97, 56 Cal. Rptr. 115, 116-17 (1967) and *Espinosa v. Beverly Hosp.*, 114 Cal. App. 2d 232, 234, 249 P.2d 843, 845 (1952) which derived their reasoning from *Sloane*. See also *Fuentes v. Perez*, 66 Cal. App. 3d 163, 168, 136 Cal. Rptr. 275, 276-77 (1977); *Leasman v. Beech Aircraft Corp.*, 48 Cal. App. 3d 376, 381, 121 Cal. Rptr. 768, 770-71 (1975); *Gautier v. Gen. Telephone Co.*, 234 Cal. App. 2d 302, 307, 44 Cal. Rptr. 404, 407-08 (1965).

11. *Lindner v. Barkley*, 109 Cal. App. 337, 293 P. 112 (1930).

12. *Lindley v. Knowlton*, 179 Cal. 298, 176 P. 440 (1918). See *Di Mare v. Cresci*, 58 Cal. 2d 292, 373 P.2d 860, 23 Cal. Rptr. 772 (1962); *Vanoni v. Western Airlines*, 247 Cal. App. 2d 793, 56 Cal. Rptr. 115 (1967); *Lowenthal v. Mortimer*, 125 Cal. App. 2d 636, 270 P.2d 942 (1954).

13. *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

14. *Krouse v. Graham*, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977); *Espinosa v. Beverly Hosp.*, 114 Cal. App. 2d 232, 249 P.2d 843 (1952); *Cook v. Maier*, 33 Cal. App. 2d 581, 92 P.2d 434 (1939).

15. *Taylor v. Pole*, 16 Cal. 2d 668, 107 P.2d 614 (1940).

16. *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

17. *Medeiros v. Coca-Cola Bottling Co.*, 57 Cal. App. 2d 707, 135 P.2d 676 (1943).

18. There is one exception to this rule in California. The courts allow recovery for emotional distress, regardless of physical injury, which results from negligent embalming. *Chelini v. Nieri*, 32 Cal. 2d 480, 196 P.2d 915 (1948); *Allen v. Jones*, 104 Cal. App. 3d 207, 163 Cal. Rptr. 445 (1980); *Carey v. Lima, Salmon and Tully Mortuary*, 168 Cal. App. 2d 42, 335 P.2d 181 (1959). The courts reason that there is a special likelihood of genuine and serious emotional distress, arising from the special and delicate circumstances of the case, which provides a guarantee that the claim is not spuri-

of the genuineness of the mental distress claim.

California courts have extended broader protection to emotional well-being when the defendant was more than merely negligent. A cause of action may be instituted for mental suffering alone, without consequent physical injury, in cases where the defendant's conduct amounts to extreme and outrageous intentional invasion of mental and emotional tranquility.¹⁹ But without proof of outrageous conduct on the part of the defendant, no cause of action for intentional infliction of emotional distress will stand absent physical injury.²⁰

The courts also recognize a claim for emotional distress damages when the plaintiff has another actionable tort claim against the defendant arising out of the same transaction.²¹ Breach of implied covenant of good faith and fair dealing,²²

ous. See Lezin, *Mortuary Liable for Mental Distress Damages for Mishandling a Corpse*, L. A. Daily J., Apr. 9, 1980 at 1.

19. *Alcorn v. Anbro Eng'r, Inc.*, 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970); *State Rubbish etc. Ass'n. v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952); *Renteria v. Orange County*, 82 Cal. App. 3d 835, 147 Cal. Rptr. 447 (1978); *Leavy v. Cooney*, 214 Cal. App. 2d 496, 29 Cal. Rptr. 580 (1963); *Perati v. Atkinson*, 213 Cal. App. 2d 472, 28 Cal. Rptr. 898 (1963); *Vargas v. Ruggiero*, 197 Cal. App. 2d 709, 17 Cal. Rptr. 568 (1961); *Guillory v. Godfrey*, 134 Cal. App. 2d 628, 286 P.2d 474 (1955); *Richardson v. Pridmore*, 97 Cal. App. 2d 124, 217 P.2d 113 (1950). See also RESTATEMENT (SECOND) OF TORTS § 46 (Supp. 1978); McCubbin, *Torts: An Analysis of Mental Distress as an Element of Damages and as a Basis of an Independent Cause of Action When Intentionally Inflicted*, 20 WASHBURN L.J. 106, 110-121 (1980).

20. "The defendant must have the intention of causing the emotional distress; his conduct must be outrageous where damages are sought for emotional distress alone; and it must be unreasonable where recovery is sought for foreseeable physical injury." 6 CAL. JUR. 3d *Assault & Other Willful Torts*, Summary § 100-01 (1973). See *Ankeny v. Lockheed Missiles and Space Co.*, 88 Cal. App. 3d 531, 151 Cal. Rptr. 828 (1979); *Altman v. Manhattan Sav. Bank*, 83 Cal. App. 3d 761, 148 Cal. Rptr. 100 (1978); *Murphy v. Allstate Ins. Co.*, 83 Cal. App. 3d 38, 147 Cal. Rptr. 565 (1978); *Cornblith v. First Maintenance Supply Co.*, 268 Cal. App. 2d 564, 74 Cal. Rptr. 216 (1968); *Spackman v. Good*, 245 Cal. App. 2d 518, 54 Cal. Rptr. 78 (1966).

21. See 27 Cal. 3d at 927, 616 P.2d at 819, 167 Cal. Rptr. at 837. *Contra*, *Quezada v. Hart*, 67 Cal. App. 3d 754, 136 Cal. Rptr. 815 (1977) (independent causes of action have some element of intentional conduct that justifies the emotional distress claim under *State Rubbish*).

22. *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal. App. 3d 917, 122 Cal. Rptr. 470 (1975). The court upheld a \$200,000 verdict for emotional suffering by four plaintiffs as a result of title company's tortious breach of implied covenant of good faith and fair dealing in negligently researching and issuing a title report and later intentionally refusing to clear title and defend the insureds. See also *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973) (an insurance company tortiously breached an implied covenant of good faith and fair dealing by refusing to settle claims with its policy holders); *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967) (an insurance company's failure to settle a claim within insured's policy limit justified emotional distress claim).

wrongful dishonor of a check,²³ breach of bailor-bailee relationship,²⁴ and tortious breach of contract²⁵ constitute independent causes of action to which the emotional distress is treated as a parasitic claim. When the defendant commits a legally recognized wrongful act the courts will conclude that emotional distress is a natural result of the conduct, thus allowing the plaintiff to supplement his independent cause of action with a claim of emotional distress, regardless of physical injury.

The presence of outrageous conduct or an independent cause of action provides a guarantee that the emotional distress claim is not spurious, in much the same manner as the physical injury requirement in negligence cases insures the validity of the emotional distress claim. In *Molien*, the California Supreme Court established an independent cause of action for negligent infliction of emotional distress, thereby abolishing the physical injury requirement. Many commentators believe abandonment of physical injury is a broad step that may lead to an uncontrollable flood of litigation.²⁶ As will be seen, however, *Molien* does require proof of genuineness of the emotional distress claim. While the requisite proof is not specified, the need for some showing of genuineness may indi-

23. *Kendall Yacht Corp. v. United California Bank*, 50 Cal. App. 3d 949, 123 Cal. Rptr. 848 (1975) (bank wrongfully dishonored a corporation's check causing emotional distress to the corporate officers from subsequent criminal and administrative investigation and charges).

24. *Windeler v. Scheers Jewelers*, 8 Cal. App. 3d 844, 88 Cal. Rptr. 39 (1970) (jeweler negligently breached a bailor-bailee relationship and was held liable for damages upon failing to return rings of known sentimental value thereby causing emotional suffering).

25. *Acadia, California, Ltd. v. Herbert*, 54 Cal. 2d 328, 353 P.2d 294, 5 Cal. Rptr. 686 (1960) (tortious breach of contract for failure to supply water to plaintiff supports damages for plaintiff's emotional suffering in witnessing his wife's mental illness brought on by the breach).

26. What is daring about the decision is not so much that the court allowed recovery for negligent emotional distress, but its willingness to designate this conduct as tortious because of the unreasonable risk of emotional distress. . . . The court is expanding the standard of liability. . . . The only conduct that was actionable before was when it was extreme and outrageous—and intentional.

Granelli, *Mental Distress Tort Expanded*, THE NATIONAL LAW JOURNAL, Sept. 8, 1980 (quoting Gary Schwartz, Law Professor, University of California at Los Angeles). See the editorial comment to Kornblum, *Negligent Infliction of Emotional Distress Recognized as Independent Tort*, 29 DEF. L.J. 429 (1980) in which the author expresses his opinion that the court, after *Molien*, will sanction recovery of damages for "hurt feelings."

cate that *Molien* is not a drastic departure from established principles.

III. CASE ANALYSIS: *Molien v. Kaiser Foundation Hospitals*

A. *The Facts*

Steven Molien, plaintiff, brought an action against Kaiser Foundation Hospitals and one of its doctors, Thomas Kilbridge, M.D., alleging loss of consortium and emotional distress resulting from defendants' negligence in incorrectly diagnosing and treating his wife for syphilis. During a routine physical examination, plaintiff's wife, Valerie Molien, was diagnosed as having a contagious form of syphilis and was given large doses of penicillin in treatment of the disease. Plaintiff, who was advised of the diagnosis by his wife as instructed by the defendant doctor, was given a blood test that proved he did not have syphilis. As a result of this incident, plaintiff's wife accused him of infidelity and dissolution proceedings were instituted. The trial court granted demurrers to both causes of action when plaintiff failed to amend his complaint and the First District Court of Appeal affirmed.²⁷ The California Supreme Court reversed the demurrer to the loss of consortium cause of action²⁸ and held that a cause of action may be stated for the negligent infliction of emotional distress.²⁹

B. *Abolishing the Physical Injury Requirement*

The trial court granted the demurrer to the emotional

27. See former opinion *Molien v. Kaiser Foundation Hosps.*, superseded upon grant of hearing by the supreme court pursuant to Cal. R. Ct. 976(d), found at 157 Cal. Rptr. 107 (1st Dist. 1979).

28. It is unknown why the cause of action for loss of consortium was dismissed at the trial level since the trial court record is silent on that issue. The defendants in *Molien* relied on *Rodriquez v. Bethlehem Steel Corp.*, 12 Cal. 2d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974), to assert that plaintiff failed to state a cause of action for loss of consortium. *Rodriquez* requires that the non-plaintiff spouse suffer a "severely disabling" injury to justify damages to the plaintiff spouse, *Id.* at 400, 525 P.2d at 680, 115 Cal. Rptr. at 776. In his complaint Molien alleged that his wife suffered emotional distress resulting in "injury to her body and shock and injury to her nervous system." 27 Cal. 3d at 931 n.2, 616 P.2d at 822 n.2, 167 Cal. Rptr. at 840 n.2. The supreme court held that "obviously a person may become 'severely disabled' mentally no less than physically, and the resulting detriment to that individual's spouse is no less serious than if the disability were an impairment of mobility or other bodily function." *Id.* at 931, 616 P.2d at 822, 167 Cal. Rptr. at 840.

29. 27 Cal. 3d 916, 930, 616 P.2d 813, 821, 167 Cal. Rptr. 831, 839 (1980).

distress cause of action because plaintiff did not allege any physical manifestation of his emotional distress which resulted from marital discord and subsequent dissolution proceedings. The supreme court, however, recognized that "[t]he primary justification for the requirement of physical injury appears to be that it serves as a screening device to minimize a presumed risk of feigned injuries and false claims."³⁰ The court found that such artificial barriers to recovery are unnecessary for two reasons.³¹ First, the requirement of physical injury is both overinclusive and underinclusive. It is overinclusive in permitting recovery for emotional distress when the suffering accompanies or results in any physical injury, no matter how trivial.³² The requirement is underinclusive because it mechanically precludes the litigation of claims that may well be valid and could be proved if the plaintiff were permitted to go to trial.³³ Second, the requirement of physical injury encourages extravagant pleadings and distorted testimony.³⁴ Therefore, the court abolished the long-established general rule that there can be no recovery for emotional distress or mental suffering unaccompanied by physical harm arising from solely negligent acts.

30. *Id.* at 925, 616 P.2d at 818, 167 Cal. Rptr. at 836. See PROSSER, *supra* note 7, at § 54; 1 DOOLEY, MODERN TORT LAW § 1507 (Supp. 1977); RESTATEMENT (SECOND) OF TORTS, § 436A, Comment b (1965); Comment, *supra* note 2, at 1244.

31. 27 Cal. 3d at 926, 616 P.2d at 818, 167 Cal. Rptr. at 836. The court relies on Prosser's explanation:

[T]he difficulty is not insuperable. Not only fright and shock, but other kinds of mental injury are marked by definite physical symptoms, which are capable of clear medical proof. It is entirely possible to allow recovery only upon satisfactory evidence and deny it when there is nothing to corroborate the claim, or to look for some guarantee of genuineness in the circumstances of the case. The problem is one of proof, and it will not be necessary to deny a remedy in all cases because some claims may be false.

PROSSER, *supra* note 7, at § 54; see also DOOLEY, *supra* note 30.

32. 27 Cal. 3d at 928, 616 P.2d at 820, 167 Cal. Rptr. at 838. Proponents of the physical injury requirement claim that removal of this barrier will inundate the court with more litigation than it can handle. But, as the court in *Molien* recognized, "the doors are already wide open" due to the broad definition of physical injury. *Id.* at 929, 616 P.2d at 820, 167 Cal. Rptr. at 838.

33. *Id.* at 929, 616 P.2d at 820, 167 Cal. Rptr. at 838.

34. *Id.* See Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1059 (1936); see *Annot.* 64 A.L.R. 2d 100, 117 n.18, 128 n.8 (1959), in which the authors assert that through the ingenuity of counsel in framing the pleadings, physical consequences can be found to support any emotional distress claim.

C. Guidelines for Lower Courts

Instead of merely removing the requirement of physical injury, the court declared a new and independent cause of action. In addition, it established guidelines for the lower courts to aid in their analysis of future claims. First, recovery must be limited to claims of serious mental distress.³⁵ Second, "[i]n cases other than where proof of mental distress is of a medically significant nature, the general standard of proof required to support a claim of mental distress is some guarantee of genuineness in the circumstances of the case."³⁶ Finally, the determination of genuineness is a question of fact to be determined by the jury.³⁷

As with any seminal case, it is impossible for the court to anticipate all situations in which the new cause of action will apply and thus solve all the problems that may arise. This comment proposes standards to be used for identifying the plaintiff and defining serious emotional distress when causes of action are instituted for the negligent infliction of emotional distress.

35. 27 Cal. 3d at 928, 616 P.2d at 819, 167 Cal. Rptr. at 837. The court notes that the requirement of seriousness will avoid the possibility that defendants will be exposed to potentially unlimited liability for invasions of emotional tranquility. The court declared: "[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Id.* While not specifically stating that the reasonable man standard would be the test, the court's extensive reliance on the *Rodrigues* decision implies that such a standard will be used.

36. *Id.* at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839 (quoting *Rodrigues v. State*, 52 Hawaii 156, 172, 472 P.2d 509, 520 (1970)). The court states that this standard is not difficult to apply, relying on *State Rubbish etc. Ass'n. v. Siliznoff*, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952), which dealt with the same standard when confronted with a claim of intentional infliction of emotional distress. The court, however, fails to recognize that the jury hearing a claim for *intentional* infliction of emotional distress is guided by the fact that they must find extreme and outrageous conduct on the part of the defendant before they can compensate the plaintiff for damages. See PROSSER, *supra* note 7, at § 54.

Furthermore, this standard is to be used by the courts to find the existence of emotional distress; it does not indicate the level of distress which will be given legal recognition. See notes 66-119 and accompanying text, *infra*, for a discussion of alternative methods to be used by the courts in determining the severity of emotional distress which merits compensation.

37. [T]he jurors are best situated to determine whether and to what extent defendant's conduct caused emotional distress, by referring to their own experience. . . . The screening of claims on this [guarantee of genuineness] basis at the pleading stage is an usurpation of the jury's function.

27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839 (citations omitted).

IV. IDENTIFYING THE PLAINTIFF

A. *The Direct Victim versus the Bystander: Distinguishing Dillon.*

Bystanders are plaintiffs who state a cause of action for injuries suffered as a result of witnessing injury to a third person. At first glance *Molien* appears to be a bystander case, since the negligent diagnosis pertained to plaintiff's wife and not to the plaintiff. Bystander scenarios have traditionally been analyzed under the holding of *Dillon v. Legg*.³⁸ In that case plaintiff witnessed the defendant drive his automobile so negligently as to cause the death of her daughter. The plaintiff brought an action to recover damages for emotional distress resulting in shock and injury to her nervous system. The court abandoned the zone of danger rule,³⁹ which would have denied the mother recovery because she did not fear for her own safety, and allowed the plaintiff to state a cause of action based on the fact that there was a foreseeable risk of harm to her. The court listed three factors to be taken into account in determining foreseeability:

- (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 a sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence.
- (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.⁴⁰

Dillon applies only to persons claiming emotional distress from witnessing injury to a third person. If the supreme court in *Molien* rigidly applied the *Dillon* foreseeability factors to the plaintiff, as the appellate court did,⁴¹ he would have been barred from recovery because (1) he was not present when the

38. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

39. See *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963), which implemented the zone of danger test.

40. 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

41. See former opinion *Molien v. Kaiser Foundation Hosps.* superseded upon grant of hearing by the supreme court pursuant to Cal. R. Ct. 976(d), found at 158 Cal. Rptr. 107 (1st Dist. 1979). The appellate court affirmed the trial court's dismissal on the ground that *Molien* did not state a sufficient cause of action in light of the factors announced in *Dillon* to determine foreseeability.

diagnosis was announced and (2) the incident could not have caused a direct emotional impact upon the plaintiff from a sensory and contemporaneous observance of the event. The supreme court, however, distinguished *Dillon* by finding Molien to be a "direct victim" of defendants' negligent conduct. The court reasoned that "the alleged tortious conduct was directed to [the plaintiff] as well as to his wife."⁴²

In an effort to leave the *Dillon* factors intact and at the same time avoid applying them in *Molien*, the court introduced the term "direct victim." To supply a test for identifying a proper plaintiff the court relied on the underlying principle of foreseeability present in *Dillon* to define "direct victim" as one to whom the risk of harm is reasonably foreseeable to the defendant.⁴³

B. Foreseeability of the Risk

Foreseeability of the risk is a primary consideration in establishing the element of duty.⁴⁴ In negligence cases duty may be defined as "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another."⁴⁵ The presence of a duty is determined

42. 27 Cal. 3d at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835. The court went on to state:

It is easily predictable that an erroneous diagnosis of syphilis and its probable source would produce marital discord and resultant emotional distress to a married patient's spouse; Dr. Kilbridge's advice to Mrs. Molien to have her husband examined for the disease confirms that plaintiff was a foreseeable victim of the negligent diagnosis. Because the disease is normally transmitted only by sexual relations, it is rational to anticipate that both husband and wife would experience anxiety, suspicion, and hostility when confronted with what they had every reason to believe was reliable medical evidence of a particularly noxious infidelity.

Id.

43. [T]he significance of *Dillon* for the present action lies not in its delineation of guidelines fashioned for resolution of the precise issue then before us; rather, we apply its general principle of foreseeability to the facts at hand, much as we have done in other cases presenting complex questions of tort liability.

27 Cal. 3d at 923, 616 P.2d at 816-17, 167 Cal. Rptr. at 834-35.

44. 68 Cal. 2d at 739, 441 P.2d at 919, 69 Cal. Rptr. at 79.

The essential elements of an actionable tort are existence of a legally protected primary right in favor of the plaintiff, a corresponding duty on the part of the defendant, breach of that duty by the defendant, and injury proximately suffered by the plaintiff.

47 CAL. JUR. *Torts* 2d, § 4 (1959).

45. PROSSER, *supra* note 7, at § 53.

by whether the plaintiff's interests are entitled to legal protection against the defendant's conduct.⁴⁶ If a duty is owed to a person, then that person may bring a cause of action if the defendant breaches that duty and injury to the plaintiff results.

But duty is simply "a shorthand statement of a conclusion, rather than an aid to analysis in itself. . . . [D]uty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."⁴⁷ Such protection is afforded whenever the risk of harm to the plaintiff is reasonably foreseeable to the defendant. In *Molien* the court reasoned that when the doctor instructed Mrs. Molien to tell her husband of the syphilis diagnosis and have him tested for the disease, the risk of harm to the plaintiff was reasonably foreseeable; therefore, the "defendants owed plaintiff a duty to exercise due care in diagnosing the physical condition of his wife."⁴⁸

But what risk of harm was foreseeable? Is the definition of "direct victim" dependent upon the type of harm which is foreseeable? If the foreseeable harm was a second misdiagnosis, then this would aid in defining a direct victim as one who comes in contact with the defendant. Molien's cause of action, however, was for emotional distress arising from marital discord, not from the misdiagnosis. In analyzing the harm that must be foreseeable it is helpful to turn to the issue of causation, which is a necessary element in a negligence cause of action.⁴⁹

C. Causation

If the defendant breaches a duty of due care that he owes to the plaintiff, then the plaintiff must prove that the injuries he suffered were *caused* by the defendant's breach. It would appear that if duty is not established the question of causa-

46. Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928); GREEN, *JUDGE AND JURY*, ch. 3 (1930); Morison, *A Re-examination of the Duty of Care*, 11 MOD. L. REV. 1 (1948); Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953).

47. PROSSER, *supra* note 7, at § 53.

48. 27 Cal. 3d at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.

49. PROSSER, *supra* note 7, at § 41. See Shavell, *Analysis of Causation and the Scope of Liability in the Law of Torts*, 9 J. LEGAL STUDIES 463 (1980).

tion is never raised, but the two issues are not so easily separable. Both hinge on the concept of foreseeability.⁵⁰

Duty and causation distinguish bystanders from direct victims. A direct victim is one who suffers injury that is actually caused by the defendant. Actual causation is determined by a "but for" standard: but for defendant's conduct the plaintiff would not have suffered injury.⁵¹ Bystanders, on the other hand, are persons who suffer injury that is proximately caused by defendant's conduct. Proximate causation is a limitation on actual causation and determines the extent to which the law will recognize a defendant's liability for the plaintiff's injury.⁵² There is proximate cause when the plaintiff's injuries, although not the primary result of the defendant's conduct, are closely connected to the defendant's conduct.⁵³ They are a secondary result—an injury that occurred from a connection to the primary result. In *Dillon*, the child suffered an injury which was a primary result of defendant's negligent driving, the plaintiff suffered injury from witnessing the injury to her child—a secondary result. Therefore, bystanders suffer injury in a secondary capacity.

The inherent problem in using an unqualified foreseeability test is best illustrated by analysis of *Molien's* loss of consortium cause of action.

D. *Loss of Consortium*

In *Rodriquez v. Bethlehem Steel Corp.*⁵⁴ the California Supreme Court was called upon to decide whether California should continue to adhere to the rule that a married person whose spouse has been injured by the negligence of a third

50. "[T]he obligation to refrain from . . . particular conduct is owed only to those who are foreseeably endangered by that conduct [the duty element] and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous [the causation element]." 2 HARPER & JAMES, *THE LAW OF TORTS* § 16.15 (1956).

51. PROSSER, *supra* note 7, at § 41 n.8.

52. See C. MORRIS & C. MORRIS, *MORRIS ON TORTS*, chs. 7 & 9 (2d ed. 1980) [hereinafter cited as MORRIS] for a discussion of the extent to which the law will grant recovery for foreseeable consequences of a defendant's negligence.

53. PROSSER, *supra* note 7, at § 41; MORRIS, *supra* note 52.

54. 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974). The use of the foreseeability test to distinguish bystanders from direct victims is illustrated in this case. The *Molien* court relies on *Rodriquez* in reversing the demurrer to plaintiff's loss of consortium claim.

party has no cause of action for loss of consortium.⁵⁵ The court concluded that "one who negligently causes a severe and disabling injury to an adult may reasonable expect that the injured person is married and that his or her spouse will be adversely affected by that injury."⁵⁶ The court continued by analogizing the situation to the *Dillon* facts finding that it is as likely that someone will witness an injury to their spouse as that a mother will witness an injury to her child.⁵⁷ Due to this equally substantial probability that the spouse of a severely disabled person will suffer a personal loss by reason of that injury, the spouses' injuries were found to be proximately caused by defendant's conduct and thus recovery was allowed.

The fact that plaintiff's injuries were a secondary result of defendant's conduct made the plaintiff a bystander *per se*. Since the court relied on *Rodriquez* in deciding *Molien*, it apparently found *Molien* to be a bystander, or an indirect victim, in the loss of consortium action. In finding *Molien* to be a direct emotional distress victim, an inherent conflict arose with the finding that he was an indirect victim of his wife's injuries which allowed him to seek relief for loss of consortium. Both the emotional distress and the loss of consortium arose out of the same transaction. The wife was the primary victim of the negligent diagnosis; the plaintiff was a bystander since his injuries arose out of the marital discord which was a secondary result of the defendant's negligence.

E. Summation

By finding *Molien* to be a "direct victim" under circumstances which indicate "indirect victim" status, the court upsets previously defined categories of plaintiffs. Future claims which involve a chain of events leading ultimately to emo-

55. See *Agis v. Howard Johnson*, 371 Mass. 140, 355 N.E.2d 315 (1976); *Slovensky v. Birmingham News Co.*, 358 So.2d 474 (Ala. App. 1978); *Belli, Loss of Consortium: Academic Addendum or Substantial Right?*, 16 TRIAL 20 (Feb., 1980); *Note, Right to Recover for Loss of Consortium*, 63 CALIF. L. REV. 323 (1975).

56. 12 Cal. 3d at 400, 525 P.2d at 680, 115 Cal. Rptr. at 776. *Rodriquez* requires severe injury to the non-plaintiff spouse in order for the plaintiff spouse to state a cause of action for loss of consortium. The *Molien* court found that "a person may become 'severely disabled' mentally no less than physically, and the resulting detriment to that individual's spouse is no less serious than if the disability were an impairment of mobility or other bodily function." 27 Cal. 3d at 931, 616 P.2d at 822, 167 Cal. Rptr. at 840.

57. 12 Cal. 3d at 400, 525 P.2d at 680, 115 Cal. Rptr. at 776.

rious." Rather, it makes reference to the Hawaii Supreme Court's standard that serious emotional distress is to be found where "a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."⁶⁷ There are two problems with this definition: first, the reasonable man is being used as a standard outside the context of its original purpose; second, pre-existing susceptibility of the plaintiff is not taken into consideration.

The reasonable man represents a model human being "with only those human shortcomings and weaknesses which the community will tolerate on the occasion. . . ."⁶⁸ He is a fictitious person created by the courts to establish a uniform standard of behavior.⁶⁹ The standard is traditionally used to determine whether a particular defendant is negligent. Negligence arises if the defendant's conduct did not conform to the actions of a reasonable person under like circumstances. Application of the reasonable man standard to determine the compensability of the injury sustained by the plaintiff is inappropriate. The "reasonable man" was not created for comparison with the plaintiff, but rather for comparison with the defendant.

The inappropriateness of the reasonable man standard is evidenced by the fact that there exists a tremendous variability in the capacity of individuals to withstand the trauma generated in a particular situation.⁷⁰ The ability to cope depends upon such factors as the education, family relations and economic background of each individual.⁷¹ Emotional injury is always a product of predisposition and psychic stimuli,⁷² "the

67. *Id.* at 928, 616 P.2d at 819-20, 167 Cal. Rptr. at 837-38 (quoting *Rodriguez v. State*, 52 Hawaii 156, 173, 472 P.2d 509, 520 (1970)). The court states that an emotional distress claim may be supported by "some guarantee of genuineness in the circumstances of the case." See note 36, *supra*, and accompanying text. Once emotional distress is found, it will be necessary for a standard to be applied to determine whether the emotional distress is "serious" enough to warrant legal recognition. The failure of the court to supply a definition of "serious" may cause lower courts to rely on the reasonable man standard since the court referred to it in the *Molien* opinion. See note 35, *supra*, and accompanying text.

68. PROSSER, *supra* note 7, at § 32.

69. *Id.*

70. See generally S. Schreiber, *Damages in Personal Injury and Wrongful Death Cases*, PRACTISING LAW INSTITUTE, 313 (1965) [hereinafter cited as Schreiber].

71. *Id.*

72. S. FREUD, A GENERAL INTRODUCTION TO PSYCHOANALYSIS 243, 316 (1920).

amount of stress required to precipitate the injury being inversely proportional to the predisposition for it."⁷³ Since every person has some predisposition to stress it will be difficult to give meaning to the reasonable man standard. If the reasonable man is to be a person with pre-existing susceptibility, the level of susceptibility will be difficult to determine since there does not appear to be an average level. Susceptibility is totally unique to each individual.

By ignoring the predisposition of a plaintiff, the reasonable man standard conflicts with the general rule that "the defendant who is negligent must take his victim as he finds him."⁷⁴ A defendant is liable to the full extent of plaintiff's damage when "his negligence, operating on a latent disease or susceptibility, produces physical injuries far more serious than anticipated."⁷⁵ The rule is subverted when the plaintiff is required to maintain a certain level of susceptibility.⁷⁶

Use of the normally constituted reasonable man standard may also open the door to a new defense to negligent infliction of emotional distress—proof of a pre-existing susceptibility of the plaintiff.⁷⁷ Since the ability to cope is dependent upon the background of each individual, it would be difficult to determine how the normally constituted reasonable man would react, and thus cope, under the circumstances. If the reasonable man has no pre-existing susceptibilities, proof of plaintiff's predisposition may limit or bar a defendant's liability.

73. Schreiber, *supra* note 70, at 313. See also BRILL & BEEBE, A FOLLOW-UP STUDY OF WAR NEUROSES (1955).

74. Schreiber, *supra* note 70, at 313.

75. *Id.* at 310. The rationale is that as between the innocent victim with a substantial injury and the wrongdoer who failed to take reasonable precautions against foreseeable damage, the loss should fall on the latter. PROSSER, *supra* note 7, at § 43.

76. The majority view is that absent knowledge of a plaintiff's pre-existing susceptibility, there should be no recovery where a normal individual would not be affected under the circumstances. PROSSER, *supra* note 7, at § 54. See *Vargas v. Ruggiero*, 197 Cal. App. 2d 709, 17 Cal. Rptr. 568 (1961); *Richardson v. Pridmore*, 97 Cal. App. 2d 124, 217 P.2d 113 (1950); RESTATEMENT (SECOND) OF TORTS § 46, Comment f (1965).

77. Many courts have expressed concern regarding liability to plaintiffs with a pre-existing susceptibility due to the unreasonable burden placed upon defendants. See *Cosgrove v. Beymer*, 244 F. Supp. 824 (D. Del. 1965); *Cote v. Litawa*, 96 N.H. 174, 71 A.2d 792 (1950); *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935). Some courts use the proximate causation test to limit the defendant's liability for emotional distress which results from a pre-existing susceptibility. Other courts freely apply the rule that the tortfeasor is liable for all resulting damages. *Brody, supra* note 9, at 256.

Under *Molien*, determination of the severity and genuineness of emotional distress at the demurrer stage is an "usurpation of the jury's function."⁷⁸ Therefore, the court will need a standard to present to the jury at the instruction stage to aid them in applying the law to the facts of the case. The court's reference to the reasonable man standard was probably not intended to place such a stringent limitation on recovery. Lower courts, however, may adopt it as an alternative to the requirement of physical injury to determine the level of emotional distress that should be given legal recognition.

B. *Alternative Methods for Determining Severity*

Because of the inherent problems with use of the reasonable man standard as a substitute for physical injury, three alternative methods for determining legally recognized emotional distress will be presented: (1) the primary-secondary response distinction; (2) the substantial quantity and enduring quality standard; and (3) the medical proof requirement. Each alternative method, while possessing problems unique to itself, is more appropriate than the reasonable man standard for determining serious emotional distress.

1. *The Primary-Secondary Response Distinction*

From a medical viewpoint, there are two types of emotional distress, primary and secondary,⁷⁹ that can result from a traumatic stimulus.⁸⁰ A primary reaction to stimulus is automatic and instinctive, and "constitutes the individual's at-

78. 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

79. See Comment, *supra* note 2, at 1248-53, for an excellent medical analysis of mental distress. This law review article was cited by the *Molien* court in reaching its decision that recovery should be allowed for serious emotional distress. The court, however, did not adopt the medical analysis of emotional distress the author presented, nor the conclusion that medical proof should be required to state a claim. This article was also cited by the Hawaii Supreme Court in *Leong v. Takasaki*, 55 Hawaii 398, 520 P.2d 758 (1974), which did adopt the analysis and conclusion presented. See text accompanying notes 113-119, *infra*. The California Supreme Court relies not only on the article, but on the Hawaii Supreme Court decisions to shape its decision in *Molien*. Therefore, presentation of this medical framework is imperative to an analysis of serious emotional distress under *Molien*.

80. See Brickner, *The Psychology of Disability*, TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY 65 (P. Cantor ed. Supp. 1964) [hereinafter cited as Brickner]; Laughlin, *Neuroses Following Trauma*, 6 TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY 76, 77 (P. Cantor ed. 1962). Traumatic stimulus may be defined as an impact, force, or event which acts upon an individual for a brief or extended period of time. Cantor, *Psychosomatic Injury, Traumatic Psychoneurosis and Law*, 6 CLEV.-MAR. L. REV. 428, 430 (1957).

tempt to combat the stress engendered by the defendant's . . . act, and is exemplified by such emotional responses as fear, anger, grief, shock, humiliation, or embarrassment."⁸¹ This reaction is usually of short duration and totally subjective in nature, the degree of severity varying according to the individual and the circumstances surrounding the stress.⁸² Primary reactions are simply the mechanism inherent in an individual to adjust normally to a traumatic event.⁸³

Secondary reactions, which may be termed traumatic neuroses,⁸⁴ are continuations of the primary reactions and "are caused by an individual's continued inability to adequately adjust to a traumatic event."⁸⁵ This type of reaction is far more serious in nature than the primary reaction, produces symptoms that are real and identifiable, and can be seriously disabling.⁸⁶

Medical science has identified three forms of secondary responses that occur frequently. The first is the anxiety response in which the trauma produces severe tension which results in nervousness, nausea, weight loss, stomach pains, genito-urinary distress, fatigue, weakness, headaches, backaches, irritability, or indecision as long as the tension lasts.⁸⁷ The second, the conversion reaction, is a reaction to trauma in which the individual converts consciously disowned impulses into paralysis, loss of hearing or sight, pain, and muscular spasm or other physiological symptoms which cannot be explained by actual physical impairment.⁸⁸ The third, the hypochondriasis response, is characterized by an over-concern with health, a fear of illness, and other unpleasant sensations which are commonly known as phobias.⁸⁹

The Hawaii Supreme Court, which recognizes a cause of

81. Comment, *supra* note 2, at 1249.

82. *Id.*

83. *Id.* at 1249 n.67. "By definition, the primary reaction involves no lasting debilitating effects. The frequency and possible severity and unpleasantness of these emotional states are part and parcel of common human experience and do not lie within the exclusive expertise of medical science." *Id.* at 1252 n.84.

84. See J. COLEMAN, *ABNORMAL PSYCHOLOGY AND MODERN LIFE* 192 (3d ed. 1964); Brickner, *supra* note 80, at 86-88.

85. Comment, *supra* note 2, at 1250.

86. *Id.*

87. *Id.*

88. Schwartz, *Neuroses Following Trauma*, *TRAUMA* 64 (Dec. 1959) [hereinafter cited as Schwartz].

89. Comment, *supra* note 2, at 1251.

action for the negligent infliction of emotional distress,⁹⁰ allows recovery for both primary and secondary responses to psychic stimuli.⁹¹ But the court realizes the problem inherent in allowing this broad recovery.⁹² When primary reactions occur, the physician or psychiatrist must rely on the plaintiff's testimony, the circumstances surrounding the trauma, "the psychiatrist's knowledge of pain and disability likely to result from the trauma, and even the framework of human experience and common sense"⁹³ to determine whether the response surpasses the level of stress with which a person may be expected to cope.

The calculation of damages is easier when the victim suffers secondary responses because objective standards may be applied to assess the damages.⁹⁴ Proof of secondary reactions focuses on the suffering and disability *actually incurred* by the plaintiff, whereas proof of primary reactions focuses on the pain and disability the plaintiff *possibly could have incurred*. The possibility of occurrence and the hypothetical proof associated with primary reactions increase the possibility of fraudulent claims.

Since secondary reactions are far more detrimental than primary reactions, it is that type of emotional distress which

90. *Rodrigues v. State*, 52 Hawaii 156, 472 P.2d 509 (1970). Hawaii was the first state to grant such expansive protection for mental equilibrium. *New York, in Ferrarra v. Galluchio*, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958), found freedom from mental disturbance to be a protected interest, *id.* at 21, 152 N.E.2d at 252, 176 N.Y.S.2d at 999, but subsequently limited the holding simply to an abolishment of the impact rule. *See* note 126 *supra*.

91. *Leong v. Takasaki*, 55 Hawaii at 413, 520 P.2d at 767 (1974). *Leong* severely limits the protection provided in *Rodrigues*; it not only adopts the *Dillon* foreseeability factors, but also requires medical proof of emotional distress. *Id.* at 413, 520 P.2d at 767.

92. [Secondary responses] are more susceptible to medical proof than primary reactions because they are of longer duration and usually are manifested by physical symptoms which may be objectively determined. . . . A psychiatrist can give a fairly accurate estimate of the probable effects [defendant's] act will have upon the plaintiff and whether the trauma induced was a precipitating cause of neurosis. . . . In a situation where only the primary response to trauma occurs, the defendant's negligence may produce transient but very painful mental suffering and anguish. Because this reaction is subjective in nature and may not result in any apparent physical injury, precise levels of suffering and disability cannot be objectively determined.

Id. at 413, 520 P.2d at 767.

93. *Id.*

94. *Id.*

should be given recognition by the courts.⁹⁵ There are several policy reasons for denying recovery for primary reactions to traumatic stimuli.⁹⁶ Individual exposure to some psychic stimuli is a necessary element in building resistance to them and enabling an individual to adequately cope in our complex society.⁹⁷ There is also a need for the efficient administration of justice.⁹⁸ Furthermore, freedom from emotional distress must be balanced against society's interest in freedom of action and community progress.⁹⁹ Any law which unduly protects mental equilibrium will "stifle initiative and thus inhibit cultural advancement."¹⁰⁰

While this approach limits recovery to identifiable forms of emotional distress, problems may arise in drawing a line between primary and secondary reactions. The most significant problem is the inability of psychiatrists and medical experts to agree on the classification of a particular response. Many commentators believe this conflict will result in injustice and the role of the jury will be subordinated to that of the psychiatrist.¹⁰¹ That problem, however, is not unique to emotional distress cases¹⁰² and should not be the sole reason for abandoning the proposed definition.

95. It is interesting to note that all secondary reactions, as well as most primary reactions, have corresponding physical ramifications, differing only in the degree of disability to the inflicted person. Comment, *supra* note 2, at 1260. "It is now clearly recognized by medical experts that mental injury and physical injury are not separate and distinct types of harm. All emotional disturbances necessarily possess some physical aspect." *Id.* See also Brickner, *supra* note 80, at 65.

96. See Schreiber, *supra* note 70, at 310.

97. *Id.* See also Smith, *Relations of Emotions to Injury and Disease*, 30 VA. L. REV. 193, 255 n.194 (1944).

98. "In order to protect the courts from being flooded with insignificant grievances, the law has always refused to concern itself with trifles. Into this category must be placed the minor disturbances which are part of the wear and tear of everyday life." Schreiber, *supra* note 70, at 310.

99. *Id.*

100. *Id.* Other factors include convenience of administration, capacity of the parties to bear the loss, a policy of preventing future injuries, the moral blame attached to the wrongdoer, and many others. See Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 12-15 (1953).

101. Schwartz, *supra* note 88, at 52; Diamond & Louisell, *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations*, 63 MICH. L. REV. 1335 (1965).

102. Smith, *Ideal Use of Expert Testimony in Psychology*, 6 WASHBURN L.J. 300, 301 (1967).

2. *The Substantial Quantity and Enduring Quality Standard*

The second alternative to the reasonable man standard arises from the long-established cause of action for intentional infliction of emotional distress. Independent protection for mental equilibrium was initially recognized in California in the 1952 case, *State Rubbish, etc. Assn. v. Siliznoff*.¹⁰³ In that case, plaintiffs brought an action for payment on promissory notes. The defendant cross-complained for the intentional infliction of emotional distress resulting from harassment and threats of bodily injury if defendant did not join plaintiff's association and pay for a collection account taken from an association member. The Supreme Court of California affirmed the damage award to the defendant, stating:

The interest in freedom from severe emotional distress is regarded as of sufficient importance to require others to refrain from conduct intended to invade it. Such conduct is tortious. The injury suffered by the one whose interest is invaded is frequently far more serious to him than certain tortious invasions of the interest in bodily integrity and other legally protected interests. In the absence of a privilege, the actor's conduct has no social utility; indeed it is anti-social. No reason or policy requires such an actor to be protected from the liability which usually attaches to the willful wrongdoer whose efforts are successful.¹⁰⁴

The court not only protected mental equilibrium from intentional invasion, but also abolished the requirement of physical injury.¹⁰⁵ Unfortunately, the court provided no specific definition of serious emotional distress, but rather permitted the jury to find serious emotional distress solely by referring to the defendant's conduct. In other words, mere proof that the defendant's conduct was outrageous and extreme was sufficient indication of the genuineness of the emotional distress.¹⁰⁶ This rationale is similar to the one presented in

103. 38 Cal. 2d 330, 240 P.2d 282 (1952).

104. *Id.* at 337, 240 P.2d at 285 (quoting RESTATEMENT (SECOND) OF TORTS § 46, Comment d (Supp. 1948)).

105. "In cases where mental suffering constitutes a major element of damages it is anomalous to deny recovery because the defendant's intentional misconduct fell short of producing some physical injury." 38 Cal. 2d at 338, 240 P.2d at 286.

106. It may be contended that to allow recovery in the absence of physical injury will open the door to unfounded claims and a flood of litigation, and that the requirement that there be physical injury is necessary

Molien, since the court in *Molien* allows the plaintiff to prove genuineness of the severity of emotional distress through the circumstances of the case.¹⁰⁷

This standard could find a defendant, whose conduct is intentional, liable to a plaintiff who suffered no actual damages, or at least no serious emotional distress. The jury could not only require the compensation of the plaintiff for damages actually sustained, but could also punish the defendant for his extreme and outrageous conduct.¹⁰⁸ Therefore, a test for severity based solely on the defendant's conduct may find a plaintiff compensated for injuries he never sustained.

This discrepancy was recognized eighteen years later by a California appellate court in *Fletcher v. Western National Life Ins. Co.*¹⁰⁹ In that case the court realized that in order for emotional distress to be compensable, it must be shown to actually exist and be of the requisite severity.¹¹⁰ In an effort to establish a standard for determining severe emotional distress the court stated:

'Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and duration of the distress are

to insure that serious mental suffering actually occurred. The jury is ordinarily in a better position, however, to determine whether outrageous conduct results in mental distress than whether that distress in turn results in physical injury. From their own experience jurors are aware of the extent and character of the disagreeable emotions that may result from the defendant's conduct, but a difficult medical question is presented when it must be determined if emotional distress resulted in physical injury. . . . Greater proof that mental suffering occurred is found in the defendant's conduct designed to bring it about than in physical injury that may not have resulted therefrom.

Id. at 338, 240 P.2d at 286. See Theis, *Intentional Infliction of Emotional Distress: A Need for Limits on Liability*, 27 DE PAUL L. REV. 275 (1978).

107. 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

108. PROSSER, *supra* note 7, at § 12. Basing a monetary award on the degree of a defendant's culpability is partly due to the fact that "the jury is asked to evaluate in terms of money a detriment for which monetary compensation cannot be ascertained with any demonstrable accuracy." *Beagle v. Vasold*, 65 Cal. 2d 166, 172, 417 P.2d 673, 675, 53 Cal. Rptr. 129, 131 (1966).

109. 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).

110. *Id.* at 396-97, 89 Cal. Rptr. at 90 (relying on PROSSER, *supra* note 7, at § 12 and RESTATEMENT (SECOND) OF TORTS § 46, Comment j (1965)).

factors to be considered in determining its severity.¹¹¹ It appears, therefore, that in this context, 'severe' means substantial or enduring as distinguished from trivial or transitory. Severe emotional distress means, then, emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it.¹¹²

While the court used the inappropriate reasonable man standard, the definition of serious emotional distress could be modified by excluding this standard, and still provide adequate guidance. Serious emotional distress should be defined as emotional distress of such substantial quantity or enduring quality that the plaintiff is unable to adequately cope in a civilized society. This definition is consistent with the general rule that the negligent defendant must take his victim as he finds him, and at the same time provides a description of the type of injury the law will redress.

Relating this definition to the previous discussion of primary and secondary responses, recovery would be limited to secondary responses since all primary responses are only temporary in nature, regardless of the degree of mental anguish encountered. While the same result would be reached under either the primary-secondary standard or the substantial quantity and enduring quality standard, the latter avoids the discrepancies inherent in medical expert testimony concerning classification of emotional distress. The psychiatrist would not be required to categorize the plaintiff's injury, but only to describe it.

Without the qualification of substantial quantity and enduring quality, the negligent defendant may be liable for transient and trivial emotional upsets. Not only is this liability contrary to public policy, but it would impose greater liability on a defendant who is merely negligent than on a defendant whose conduct is intentional and culpable.

3. *The Medical Proof Requirement*

The third alternative to replace the reasonable man standard is the medical proof requirement. As discussed previ-

111. 10 Cal. App. 3d at 397, 89 Cal. Rptr. at 90 (quoting RESTATEMENT (SECOND) OF TORTS § 46, Comment j (1965)).

112. 10 Cal. App. 3d at 397, 89 Cal. Rptr. at 90. See also *Murphy v. Allstate Ins. Co.*, 83 Cal. App. 3d 38, 147 Cal. Rptr. 565 (1978).

ously, the Hawaii Supreme Court, in 1970, provided independent protection for mental equilibrium. Four years later the court, in *Leong v. Takasaki*,¹¹³ recognized the inherent problems of a broad definition of serious emotional distress¹¹⁴ and thus attempted to limit the defendant's potential liability. Using the primary-secondary response analysis, the court limited recovery to emotional distress that is medically provable. The court stated that:

the absence of a secondary response and its resulting physical injury should not foreclose relief. . . . [P]laintiff should be permitted to *prove medically* the damages occasioned by his mental responses to defendant's negligent act, and the trial court should instruct the jury accordingly.¹¹⁵

Leong eliminates a defendant's liability for claims of emotional distress that lead to no recognizable disability or injury. While it does not automatically deny relief for primary reactions, the case limits recovery to secondary reactions and primary reactions that produce pain and anguish and which are seriously disturbing to the plaintiff,¹¹⁶ provided the reaction is medically provable.¹¹⁷

The requirement of medical proof appears narrower than the *Molien* language that "in cases other than where proof is of a medically significant nature, the general standard of proof required to support a claim of mental distress is some guarantee of genuineness in the circumstances of the case."¹¹⁸ *Molien*, therefore, allows recovery absent medical proof. Medical proof, however, is required in all other personal injury actions.¹¹⁹

113. 55 Hawaii 398, 520 P.2d 758 (1974).

114. *Id.* at 413, 520 P.2d at 767. See text accompanying note 92, *supra*.

115. *Id.* at 413, 520 P.2d at 767 (emphasis added).

116. Comment, *supra* note 2, at 1252.

117. Mental distress should be defined as:

any traumatically induced reaction which is medically detrimental to the individual. . . . Under this approach, the plaintiff's threshold burden of proving legal damage would be satisfied upon demonstration of any medically provable mental distress or harm. The trier of fact would then apply the severity standard in order to determine if the harm is legally sufficient to warrant compensation.

Id. at 1255.

118. 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839 (quoting *Rodriguez v. State*, 52 Hawaii at 172, 472 P.2d at 520) (emphasis added).

119. "In personal injury cases, an initial medical determination must be made

The medical proof standard not only applies to the initial determination of a sufficient cause of action, but also defines the legally recognized level of distress. The standard would deny recovery for slight, temporary disturbances to a plaintiff's mental equilibrium, but allow recovery for emotional distress of a debilitating nature.

C. *Summation*

The California Supreme Court's inference in *Molien*, that serious emotional distress is compensable if a reasonable man, normally constituted, would be unable to adequately cope with the stress engendered under the circumstances of the case, is incapable of just application. Three alternative standards have been proposed. Emotional distress may be found where (1) the plaintiff suffers secondary reactions to the psychic stimuli produced under the circumstances of the case, (2) the emotional distress is of such substantial quantity or enduring quality that the plaintiff is unable to adequately cope in a civilized society, or (3) the plaintiff is capable of proving medically the damages occasioned by his mental response to defendant's negligent act. Adoption of any one of these standards will provide adequate guidance to lower courts.

Regardless of which definition the court applies, it is apparent that physical manifestation of the emotional distress will be an important element in a plaintiff's case under *Molien*. It is necessary to compare these physical manifestations with the "substantial injury" requirement of *Dillon* to determine whether *Molien* will be applicable to bystanders.

VI. THE IMPACT ON *Dillon*

The plaintiff in *Dillon* alleged that she suffered shock and injury to her nervous system,¹²⁰ which the court determined to be sufficient to classify as a substantial injury. Nervous shock, however, can be classified as a primary reaction because it produces only a relatively transient upset.¹²¹ Other primary

establishing actual medical harm to the plaintiff. A legal determination must then be reached as to whether plaintiff's injury is sufficiently serious to merit compensation." Comment, *supra* note 2, at 1255 n.102.

120. 68 Cal. 2d at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74.

121. Smith & Soloman, *Traumatic Neuroses in Court*, 30 VA. L. REV. 87, 123

reactions have also satisfied the substantial injury requirement.¹²² Two conclusions may be drawn from this fact: (1) if *Dillon* allows recovery for primary reactions, this may account for the *Molien* court's unwillingness to adopt the secondary response limitation, thus indicating that serious mental distress is compensable when secondary or primary reactions are present; or (2) if *Molien* is limited to secondary reactions or emotional distress of a substantial quantity or enduring quality, then *Dillon* may require a lesser burden of proof by a plaintiff who is a bystander. This second conclusion is without merit. It erroneously indicates that the court is less willing to protect the interests of those persons who come in direct contact with the defendant (direct victims) than those who suffer injury in a secondary capacity (bystanders).

For this reason it must be assumed that the court is presently willing to allow recovery for more than strictly secondary reactions. Therefore, *Molien* and *Dillon* may require the same level of emotional distress to justify compensation. In light of this assumption, it is likely that the court would be willing to abolish the physical injury requirement in *Dillon* for the same reasons it rejected the physical injury requirement in *Molien*.¹²³ This rationale appears to make it easier for a bystander to state a cause of action in the future.¹²⁴

VII. CONCLUSION

In *Molien* the California Supreme Court reaffirmed its favorable attitude toward plaintiffs in personal injury cases. Independent protection of mental equilibrium was a logical progression from the past efforts to grant compensation for emotional injury. Future decisions by the court will hopefully refine the rough edges of the *Molien* decision by providing ad-

(1944). "The initial reaction is usually characterized as nervous shock. Nervous shock from psychic stimuli generally produces only relatively transient upset or disability through excessive physiological responses." *Id.* See Comment, *supra* note 2, at 1249 n.67.

122. See text accompanying notes 13-17, *supra*, for examples of primary reactions.

123. See text accompanying notes 32-34, *supra*, for a discussion of the *Molien* court's reasons for abolishing the physical injury requirement.

124. The *Dillon* foreseeability factors probably will not be abolished since they pertain to the relationship of the plaintiff to the direct victim and the location of the plaintiff to the scene of the accident. They do not necessarily pertain to the degree of emotional distress required to state a cause of action.

equate guidance to the lower courts in applying the standards delineated.

The present status of an action for negligent infliction of emotional distress raises many questions. What type of person may institute a cause of action—direct victims or bystanders? What standard should be used for determining the severity of emotional distress? What is the impact on *Dillon*? Unfortunately no guidance is provided by sister states which recognize negligently inflicted emotional distress as an independent cause of action. The 1957 New York decision, *Ferrara v. Galuchio*,¹²⁵ which granted independent protection to mental equilibrium, has been interpreted as merely abolishing the impact rule, not as removing the physical injury requirement.¹²⁶ The 1970 Hawaii decision, *Rodrigues v. State*,¹²⁷ on which the California Supreme Court heavily relied for its decision in *Molien*,¹²⁸ has been significantly limited by the subsequent *Leong* decision.¹²⁹ Due to the lack of guidance, the California

125. 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958).

126. In *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961), the court struck down the impact rule in New York, failing to cite *Ferrara* as a controlling case decided just three years earlier. Nine years later in *Trobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 544 (1969), the court narrowly interpreted *Ferrara* and *Battalla* as abolishing the physical impact rule, not as removing the physical injury requirement. The *Trobin* court rejected the *Dillon* theory, refusing to allow recovery of emotional distress damages to a witness related to an accident victim. This view was reaffirmed in *Johnson v. State*, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975).

127. 52 Hawaii 156, 472 P.2d 509 (1970).

128. The *Rodrigues* court adopted a policy of recognizing emotional ties to material objects. In *Rodrigues*, plaintiffs brought an action for damage caused to their home by surface waters overflowing a blocked drainage culvert. The court affirmed the award of damages to compensate for the negligent failure of the state highway department (defendant) to clear the culvert when it became blocked. The plaintiffs also brought an independent cause of action for negligent infliction of emotional distress which resulted from viewing their damaged home. While the majority affirmed the damage award for the emotional distress, one dissenting judge stated:

This attachment [to property] should neither be encouraged by society nor made a basis for recovery in a court of law in an age when man has surrounded himself with a veritable plethora of material possessions approaching the limits of what even an affluent society needs or can afford.

Id. at 179, 472 P.2d at 523 (Levinson, J., dissenting).

The California Supreme Court may be faced with claims arising from negligent damage to property. By adopting the standards established in *Rodrigues*, the court will have a difficult time denying recovery. Furthermore, recognition of emotional ties to material objects would preempt any attempt to establish limits on recovery for damages suffered as a result of emotional ties to a human being who is negligently injured.

129. See note 91, *supra*, and accompanying text. *Leong*, in addition to requiring

Supreme Court allows the jury, in its capacity as trier of fact, to answer the aforementioned questions. If the jury finds a close connection between the defendant's conduct and the victim's injury, then the victim is deemed to have standing as a plaintiff. Since the court does not require medical proof of emotional injury, the jury is allowed to examine the circumstances of the case to determine whether the emotional distress is sufficiently genuine to warrant compensation.

Because many of these questions cannot be answered with any degree of certainty prior to trial, a plaintiff may spend a considerable amount of money, and an attorney may spend a considerable amount of time and effort, only to discover at the verdict stage that the claim was without merit. Prior to *Molien*, a defendant was able to move for demurrer and the judge was able to apply relatively stable standards in granting or denying the motion. Now such a decision by the judge is deemed to be an "usurpation of the jury's function."¹³⁰

Regardless of the abolishment of the physical injury requirement, it is quite obvious that a plaintiff will need to demonstrate physical manifestations of emotional distress to justify compensation. Future cases may indicate that these physical manifestations are akin to the previously required physical injuries. The results may also indicate that the physical injuries that provided a plaintiff's verdict in the past are no longer sufficient to meet the severity requirement of *Molien*. Therefore, *Molien* may not be as broad a step as many commentators believe, but the impact will be known

medical proof of emotional distress, adopted the *Dillon* foreseeability factors as a required standard for recovery. 55 Hawaii at 173, 472 P.2d at 520. One year later in *Kelly v. Kokua Sales & Supply Ltd.*, 56 Hawaii 204, 532 P.2d 673 (1975) the court held that the plaintiff must be "located within a reasonable distance from the scene of the accident in order to recover for negligent infliction of emotional distress." *Id.* at 209, 532 P.2d at 676. Within six years the court transgressed from the most extensive recovery allowed for emotional distress to what is now little more than the "zone of danger" rule which California rejected in *Dillon*. See text accompanying note 39, *supra*. For an excellent analysis of *Rodrigues* and the Hawaii Supreme Court's struggle with emotional distress claim standards, see Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime,"* 1 HAWAII L. REV. 1, 9-16 (1979).

130. 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839. See note 78, *supra*, and accompanying text.

only after the adjudication of future claims for negligent infliction of emotional distress.

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