supporters to yield to the balancing supporters—here, those Justices willing to examine the reasonableness of the physician's agreement.[63] The author suggested that if individualized inquiry proves unworkable, those in favor of a per se rule will have sufficient ammunition to support their case, and win a reversal.[64]

Given the complexity of the *Maricopa* case, the Court's unfamiliarity with the effects of the physicians' agreement, and the novelty of the issue, the decision to invalidate the agreement as a per se violation is unwise. If a horizontal maximum price-fixing agreement is a boon to consumers, few social policies would be effectuated by applying a per se rule.

The *Maricopa* decision adds a degree of certainty to antitrust law at an uncertain cost. It remains unclear whether the game of certainty and efficiency is worth the candle of consumer protection.

S.E.F.

TORT LAW: DAMAGES FOR EMOTIONAL DISTRESS—BYSTANDER MAY RECOVER FOR MENTAL DISTRESS CAUSED BY WITNESSING A NEGLIGENT ACT. *Haught v. Maceluch,* 681 F.2d 291 (5th Cir.), *reh'g denied,* 685 F.2d 1385 (5th Cir. 1982). Plaintiff checked into the hospital at the direction of defendant-physician when she went into labor.[1] Attending nurses repeatedly phoned defendant to inform him that plaintiff showed clear signs of fetal distress.[2] Defendant, however,

to produce division"). *See generally* Note, *Plurality Decisions and Judicial Decision-making,* 94 HARV. L. REV. 1127 (1981).

63. *See* Easterbrook, *supra* note 62, at 810.

64. *Id.*

1. Haught v. Maceluch, 681 F.2d 291 (5th Cir.), *reh'g denied,* 685 F.2d 1385 (5th Cir. 1982). Plaintiff's initial obstetrician referred her to defendant. Both doctors had examined plaintiff for the duration of her pregnancy. When she checked into the hospital her baby was already eleven days overdue. *Id.* at 294.

2. 681 F.2d at 294. Plaintiff arrived at the hospital at 10:30 p.m., at which time nurses at the hospital notified the doctor that her contractions were moderate and that her cervix was not dilated. One and a half hours later, plaintiff's contractions were irregular. At three a.m., nurses noted that plaintiffs amniotic fluid had appeared and indicated the presence of meconium. Meconium is dark green fluid and "is the matter excreted in the baby's first bowel movement" and is "a symptom of fetal distress, indicating a compromise or interruption of the baby's oxygen

chose not to go to the hospital[3] until more than eight hours later, when the symptoms of fetal distress increased.[4] Upon his arrival at the hospital, defendant examined plaintiff and recognized the severity of the fetus' condition.[5] He nevertheless attended to his morning rounds and performed an elective surgery on another patient.[6] Thereafter,[7] defendant delivered plaintiff's baby by caesarean section. The baby was born with severe brain damage.[8] Plaintiff filed suit against the doctor[9]

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supply." *Id. See id.* at 294 n.1. The doctor was again notified. Defendant called the hospital one hour later and ordered that the baby's heart rate be monitored and that plaintiff be administered a labor-inducing drug. Nurses called the doctor again one hour later to report the baby's irregular heart beat and the continued presence of meconium staining. *See id.* at 294 n.2.

3. *Id.* at 294. Defendant stated that he considered the meconium staining and readings from the heart monitor to be "unreliable" and therefore did not feel it necessary to go to the hospital. *Id.*

4. *Id.* The court noted that at 7:00 a.m., when defendant arrived at the hospital, "gross meconium staining" was apparent. *Id.*

5. *Id.*

6. *Id.* at 295. Defendant stated that the cervix had not properly dilated enough for delivery and he therefore increased the dosage of the labor-inducing drug. *Id.* at 294.

7. *Id.* Nurses informed defendant during the surgery that signs of "fetal heart deceleration" were apparent. Thereafter the doctor ordered that plaintiff be prepared for surgery. He then finished his elective operation.

8. *Id.* at 294. The court stated:

> Upon delivery, Dr. Maceluch noted that the umbilical cord was wrapped three or four times around the baby's neck; he also found gross meconium covering the baby's body and in the baby's throat. These conditions confirmed Dr. Maceluch's pre-operative diagnosis of fetal distress. A nurse immediately incubated the baby to draw the meconium from the throat. Although the baby then began to breath spontaneously and its color returned, it was not in good general condition: its breathing suffered some retractions, its physical functions were depressed, and it exhibited poor muscle tone. Because of these problems, the baby was transferred to Fort Worth Children's Hospital for further treatment.
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> A neonatologist at Fort Worth Children's Hospital diagnosed the baby as suffering from severe perinatal asphyxia—that is, a severe deprivation of oxygen before, during, or after birth—and from meconium aspiration syndrome—the distress caused by inhalation of meconium into the lungs. The baby also suffered seizures, indicating damage to the brain. And the baby's pH level was quite low, an acidotic condition often caused by oxygen deprivation. Even more tragically, within three months the baby's head had shrunk because of the atrophy of her brain. According to the neonatologist, the brain damage was permanent and would necessitate continuing institutionalization for the child. In short, Jamie Marie Haught was doomed to a life limited by extraordinarily severe handicaps.

Id.

9. Asserting diversity jurisdiction, plaintiff filed suit against defendant and the referring obstetrician for medical malpractice to recover "damages for the impaired condition of her daughter, for medical expenses in connection with the child's birth and future care, for loss of the child's future earning capacity and for appellant's own mental suffering over her daughter's impaired condition." *Id.* at 293. Only the last count will be dealt with here.

for the mental anguish[10] she sustained as a result of witnessing[11] the birth of her daughter in an "impaired condition."[12] The trial jury ruled in favor of plaintiff.[13] The district court, however, deleted the jury's award, asserting that Texas law did not allow an uninjured bystander to recover for mental suffering.[14] On appeal, the Fifth Circuit reversed and *held*: Under Texas law, a mother may recover, under the general negligence principle of forseeability, for emotional damages resulting from witnessing the tortious delivery of her child.[15]

The issue of whether a witness may recover damages for emotional distress suffered as a result of witnessing a tortiously caused injury to another has been controversial.[16] Courts have long feared that a pleth-

10. The terms "mental anguish," "emotional distress," and "mental suffering" will be used interchangeably to connote "all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea." RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965). A student author noted that these phrases have been described in a variety of ways, all of which have "vague meanings." 25 VILL. L. REV. 195, 196 n.9 (1979). For example, Black's Law Dictionary has no definition for emotional distress but describes mental anguish as "the mental suffering resulting from the excitation of the more poignant and painful emotions, such as grief, severe disappointment, indignation, wounded pride, shame, public humiliation, despair, etc." BLACK'S LAW DICTIONARY 889 (5th ed., 1979). According to one commentator,

> [E]motional distress may be defined as a reaction to a traumatic stimulus which may be physical, psychic, or both.
>
> The reaction itself can be broken down into primary and secondary stages. The primary stage is the individual's initial reaction to the traumatic stimulus, and is normally of short duration without lasting ill effects. By way of contrast, the secondary reaction, or traumatic neurosis as it is commonly termed, develops after the primary stage has diminished and can entail severe, long-lasting ill effects. There are various types of secondary reactions, and they can be classified according to their severity. Although there is no pathological basis for the development of a traumatic neurosis, there is no doubt, from a medical viewpoint, that such a neurosis can cause severe impairment of a person's normal life functions. The affected individual has no control over the debilitating effects of such a neurosis as it is the unconscious organism's means of reacting to a severe emotional shock.

Comment, *Negligent Infliction of Emotional Harm to Bystanders—Should Recovery Be Denied*, 7 ST. MARY'S L.J. 560, 562-63 (1973) (footnotes omitted).

11. The court of appeals noted that the issue is whether "[plaintiff] can recover for the mental anguish she suffered because of the birth of her child in a defective condition, as distinguished from [plaintiff's] suffering caused by the labor and delivery." 681 F.2d at 295.

12. *Id.* at 293.

13. The trial jury awarded $118,000 to plaintiff for her emotional suffering and a total of $1,355,000 for the other counts sued upon. *Id.* at 293. *See supra* note 9.

14. 681 F.2d at 295.

15. *Id.* at 302. *See infra* notes 43-55 and accompanying text.

16. " '[T]he authorities are in a state of dissension probably unequalled in the law of torts; extending from no right to recover, to right to recover, 'where the plaintiffs' emotional disturbance

ora of litigation,[17] fraudulent and trivial claims,[18] and unforseeable and unlimited liability for defendants[19] would result if courts recognized such a cause of action.[20] As a result, three distinct theories emerged to deal with these concerns and to provide for recovery in very limited

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was or should have been reasonably forseeable to the defendant.' " Covington v. Estate of Foster, 584 S.W.2d 726, 728 (Tex. Civ. App. 1979).

As one commentator noted:

> In the ten-year period from 1968, eighty-two cases were decided by appellate courts on the issue of recovery of damages for mental anguish by those observing tortious activity. This was four times the number of recorded appellate cases decided in the previous fifty-six years. The evidence is persuasive that the right to recover damages for mental anguish by those observing tortious activity has become a theory of legal liability of interest to attorneys-at-law in recent times and that this interest is increasing and gaining support.

Lantry, *An Expanding Legal Duty: The Recovery of Damages for Mental Anguish By Those Observing Tortious Activity*, 19 AM. BUS. L.J. 214, 219 (1981).

Adding further fire to the controversy, the Restatement has refrained from taking a clear position on the issue.

> *Caveat*: The Institute expresses no opinion as to whether an actor whose conduct is negligent as involving an unreasonable risk of causing bodily harm to a child or spouse is liable for an illness or other bodily harm caused to the parent or spouse who witnesses the peril or harm of the child or spouse and thereby suffers anxiety or shock which is the legal cause of the parent's or spouse's illness or other bodily harm.

RESTATEMENT (SECOND) OF TORTS § 436 caveat (1965).

17. Many courts and commentators have stated that if bystander recovery were allowed, a "flooding of litigation" would result. *See, e.g.,* Tobin v. Grossman, 24 N.Y.2d 609, 614-15, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558-59 (1969); Joseph, *Dillon's Other Leg: The Extension of the Doctrine Which Permits Bystander Recovery for Emotional Trauma and Physical Injuries to Actions Based on Strict Liability in Tort,* 18 DUQ. L. REV. 1, 7-8 (1979); Note, *Limiting Liability For the Negligent Infliction of Emotional Distress: The "Bystander Recovery" Cases,* 54 S. CAL. L. REV. 847, 851 (1981) [hereinafter cited as Note, *Limiting Liability*]; Note, *Negligent Infliction of Emotional Distress: Keeping* Dillon *in Bounds,* 33 WASH. & LEE L. REV. 1235, 1238 (1980) [hereinafter cited as Note, *Negligent Infliction*].

18. *See* Spade v. Lynn & Boston R.R., 168 Mass. 285, 290, 47 N.E. 88, 89 (1897), *overruled,* Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1987)); Manie v. Matson Oldsmobile-Cadillac Co., 378 Mich. 650, 655, 148 N.W.2d 779, 781-82 (1967); Mitchell v. Rochester Ry., 151 N.Y. 107, 110, 45 N.E. 354, 354-55 (1896); Lantry, *supra* note 16, at 220; Joseph, *supra* note 17, at 118; Note, *Limiting Liability, supra* note 17, at 847; Note, *Negligent Infliction, supra* note 17, at 1238 n.23.

19. *See* Sinn v. Burd, 486 Pa. 146, 175-85, 404 A.2d 672, 687-92 (1979) (Roberts, J., dissenting). As early as 1897 the courts' concern was that any rule allowing recovery for mental distress would be arbitrary, unfair, and impossible to administer. *See, e.g.,* Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897), *overruled,* Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978). *See also* Dillon v. Legg, 68 Cal. 2d 728, 730, 441 P.2d 912, 914, 69 Cal. Rptr. 72, 74 (1968) (stating that, according to those courts denying recovery, the "definition of liability being impossible, denial of liability is the only realistic alternative").

20. Although the trend is reversing, it took a long time for "courts to recognize a cause of action based upon observation of negligently caused injury to another causing emotional shock [or] physical injuries to the observer." Joseph, *supra* note 17, at 4. *See, e.g.,* Spade v. Lynn &

instances.[21] The first theory, the "impact rule," provided that a bystander could not recover for mental distress unless he himself was physically injured by the tortfeasor's act.[22] The impact rule failed,

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Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897), *overruled,* Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).

Prior to 1970, only three cases had held in favor of allowing recovery where the plaintiff suffered no physical injury. Lantry, *Propositioning the Courts,* 8 AM. BUS. L.J. 209, 212 (1970). One court which allowed recovery was reversed 66 years later on the grounds that such a cause of action was not recognizeable. *Id. See* Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (1912), *rev'd,* Slovensky v. Birmingham News Co., 358 So. 2d 474 (Ala. Civ. App. 1978). For other examples of the see-saw effect of the law in some states, see Lantry, *supra* note 16, at 214 n.3.

The problem in this area has been the difficulty in ascertaining whether a bystander has a legal right to recover for what he sees. *See* Comment, *supra* note 10, at 566-67 (1975). As stated in Palsgraf v. Long Island R.R., "[b]efore negligence can be predicated on a given act, back of the act must be sought and found a duty to the individual complaining. . . ." 248 N.Y. 339, 346, 162 N.E. 99, 100 (1928) (quoting West Virginia Central & P.Ry. Co. v. State, 96 Md. 652, 666, 54 A. 669, 671 (1903)). Duty is "the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection." PROSSER, THE LAW OF TORTS § 53, at 325-26 (14th ed. 1971).

Although "a natural sense of justice" seems to require recovery, *see* Lantry, *supra* note 16, at 215, there have been arguments, in addition to those discussed above, that recommend no recovery. First, derived from a fear of fraudulent claims, critics have noted that proof of both mental damages and proximate cause are impossible to determine without resort to speculation. *See id.* at 220; Note, *Limiting Liability, supra* note 17, at 469-70; 25 VILL. L. REV. 195, 197 n.13 (1979). *See also infra* note 42 and accompanying text.

Second, other critics have argued on the principle of stare decisis that a cause of action should not lie because there is no precedent for such a decision. *See, e.g.,* Shurk v. Christensen, 80 Wash. 2d 652, 658, 497 P.2d 937, 941 (1972) (Finley, J., dissenting). One commentator, however, suggested that stare decisis arguments ignore the legal system's response to "changing conditions." Joseph, *supra* note 17, at 5.

21. Note, *Limiting Liability, supra* note 17, at 849. *See also* Comment, *supra* note 10, at 566-67.

22. *See, e.g.,* Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898); Kalen v. Terre Haute & I. R.R., 18 Ind. App. 202, 47 N.E. 694 (1897); Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897), *overruled,* Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896), *overruled,* Battalla v. State, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961).

The impact rule tried to prevent fraud by ensuring that only those who had suffered physical injury could bring a claim. Damages, absent physical injury, would be too hard to assess. *See* Comment, *supra* note 10, at 560 (1975).

In addition, early courts favored denying recovery for emotional distress because there was no precedent for it. *See e.g.,* Lehman v. Brooklyn City R.R., 47 N.Y. Sup. Ct. 355, 356 (1888).

> The impact rule provided the needed transition from traditional physical injury cases by keeping the new action for emotional distress damages within the framework of the old action for physical damages. By allowing recovery for emotional distress which accompanied physical injury, the traditional concept of physical injury was broadened to include such distress.

Note, *Recovery For Negligent Infliction Of Emotional Distress: Changing The Impact Rule In Indiana,* 54 IND. L.J. 467, 467 (1979).

however, to prevent fraudulent claims. The majority of states, therefore, substituted the impact theory with the "zone of danger test."[23] For a bystander to recover under this theory, he must "fear for his threatened safety while occupying a zone of possible physical peril before [he] may recover for negligently inflicted mental distress. . . . There must be a physical invasion of [his] physical security."[24] The majority of courts[25] have adopted this theory as the best method of controlling the outer limits of bystander recovery.[26] Like the impact rule, however, the zone of danger test has met with criticism in the last twenty years because of its "arbitrary"[27] dismissal of persons with viable claims who were unable to meet its rigid standards for recovery.[28]

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23. Note, *Limiting Liability, supra* note 17, at 849. States made the substitution because "plaintiffs devised tortured interpretations of the requirement, allowing the slightest physical impact to be a springboard to get a bystanders recovery case into court. Moreover, as an aid to those suffering true emotional distress in bystander recovery cases, the need to prove a physical impact seemed irrelevant and arbitrary." *Id. See also* Note, *supra* note 22, at 467-70 (impact rule did not resolve problems like fraud and speculation); 33 RUTGERS L. REV. 1171, 1172 (1981) (test requiring impact for recovery can never be met by bystander watching tortious act). Nevertheless, the rule is still followed in Florida, Georgia, Kentucky, Indiana and Missouri. Note, *supra* note 22, at 470 n.24.

24. Flanary, *Bystander Recovery in Texas,* 44 TEX. B. J. 746, 747 (1981).

25. Owens v. Children's Memorial Hospital, 480 F.2d 465 (8th Cir. 1973); Welsh v. Davis, 307 F. Supp. 416 (D. Mont. 1969); Cograve v. Beymer, 244 F. Supp. 824 (D. Del. 1965); Keck v. Jackson, 122 Ariz. 114, 593 P.2d 668 (1979); Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941); Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965); Williamson v. Bennett, 251 N.C. 498, 112 S.E.2d 48 (1960); Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969); Whetham v. Bismarck Hosp., 197 N.W.2d 678 (N.D. 1972); Guilmette v. Alexander, 128 Vt. 116, 259 A.2d 12 (1969); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935). *See also* RESTATEMENT (SECOND) OF TORTS §§ 313, 436 (1965). For a complete list of jurisdictions supporting the zone of danger test, see Lantry, *supra* note 16, at 218 n.14.

26. *See, e.g.,* Tobin v. Grossman, 24 N.Y.2d 609, 618, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969).

27. Dillon v. Legg, 68 Cal. 2d 728, 733, 441 P.2d 912, 915, 69 Cal. Rptr. 72, 75 (1969). *See e.g.,* Leong v. Takasaki, 55 Haw. 398, 404, 520 P.2d 758, 762 (1974) ("artificial [bar] to recovery for mental distress"); Barnhill v. Davis, 300 N.W.2d 104, 107 (Iowa 1981) ("harshness and artificiality of zone of physical danger test"); Dziokonski v. Babineau, 375 Mass. 555, 564, 380 N.E.2d 1295, 1300 (1978) (rule "lacks strong logical support"); Toms v. McConnell, 45 Mich. App. 647, 653-54, 207 N.W.2d 140, 144 (1973) ("hopeless artificiality and harshness of the rule"); Portee v. Jaffee, 84 N.J. 88, 96, 417 A.2d 521, 525 (1980) ("artful yet artificial approach"); Sinn v. Burd, 486 Pa. 146, 157, 404 A.2d 672, 683 (1979) (test is "overly restrictive and prevents recovery where it should be had"); Landreth v. Reed, 570 S.W.2d 486, 489 (Tex. Ct. App. 1978) (zone of danger test creates "artificial distinctions").

28. *See e.g.,* Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (mother and daughter watched son hit and killed by car, but under the zone of danger rule only the sister could recover because, unlike her mother, she was standing close to the decedent and was therefore in

The most salient rejection of the zone of danger test came in the landmark case of *Dillon v. Legg*.[29] In *Dillon*, the California Supreme Court[30] rejected the zone of danger test in favor of the forseeable risk of harm doctrine.[31] Under this doctrine, "liability is predicat[ed] upon a finding that the defendant's conduct created an unreasonable and forseeable risk of emotional harm[32] to a normal person in the plaintiff's position."[33] Thus, the tortfeasor owes a duty[34] to the bystander

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the zone of physical peril). *See also* Corso v. Merrill, 119 N.H. 647, 658, 406 A.2d 300, 307 (1979) ("zone of danger rule imposes unjust limitations on recovery and fails to protect worthy interests"); D'Ambra v. United States, 114 R.I. 643, 657, 338 A.2d 524, 531 (1975) (zone of danger rule ignores "psychological reality" of what occurs if parent witnesses death of child). Commentators have agreed on this issue. They have stated that the zone of danger fails to correct the problems the impact rule left unresolved. *See* Note, *supra* note 22, at 472.

29. Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). In *Dillon*, both the mother and sister witnessed a car run over the younger sister as she crossed the street. *Id.* at 730, 441 P.2d at 914, 69 Cal. Rptr. at 74. The court rejected arguments that a cause of action should be denied those suffering emotional distress simply because of a fear of a plethora of litigation. *Id.* at 736, 441 P.2d at 917-18, 69 Cal. Rptr. at 77-78 ("possibility that fraudulent assertions may prompt recovery in isolated areas does not justify a wholesale rejection of the entire class of claims in which that potentiality arises . . . interests of meritorious plaintiffs should prevail over aledged administrative difficulties"). *Accord* Barnhill v. Davis, 300 N.W.2d 104, 106-07 (Iowa 1981).

The *Dillon* court advocated determinations of recovery on a case-by-case basis to deal with the fears which proponents of the zone of danger rule were concerned with. Dillon v. Legg, 68 Cal. 2d at 737, 441 P.2d at 918, 69 Cal. Rptr. at 78. *Accord* Barnhill v. Davis, 300 N.W.2d 104, 106 (Iowa 1981).

30. In this split decision, Justices Traynor, Burke and McComb dissented.

31. 68 Cal. 2d at 748, 441 P.2d at 925, 69 Cal. Rptr. at 85. In doing so, the court overruled Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963). For a discussion of the *Dillon* case and its implications, see Leibson, *Recovery of Damages For Emotional Distress Caused By Physical Injury To Another,* 15 J. FAM. L. 163 (1976-1977); Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute Between California and New York,* 51 ST. JOHN'S L. REV. 1 (1976); Note, *Negligent Infliction, supra* note 17.

32. According to the court, two types of injuries are forseeable: physical injuries and "bodily injury or sickness brought on by . . . the defendant's conduct even where the plaintiff is outside the zone of physical danger." 68 Cal. 2d at 739-40, 441 P.2d at 920, 69 Cal. Rptr. at 80 (quoting 2 HARPER & JAMES, THE LAW OF TORTS 1035-36 (1956) (footnotes omitted).

33. Comment, *supra* note 10, at 561. As the District Court of Rhode Island stated:

> The . . . appropriate and relevant approach in order to effect justice is to ask whether the defendant or the plaintiff should more properly pay the costs of plaintiff's injuries. When it is foreseeable to the defendant that the plaintiff may well experience the shock of seeing an accident involving his child, he has the obligation of exercising reasonable care to avoid the infliction of psychic injury, and a breach of such obligation should result in his bearing of liability.

D'Ambra v. United States, 354 F. Supp. 810, 821 (D. R.I.), *aff'd,* 481 F.2d 14 (1st Cir.), *cert. denied,* 414 U.S. 1075 (1973). *See also* Note, *supra* note 22, at 477-78. For a discussion of foreseeability of the plaintiff, see *infra* notes 36-38 and accompanying text.

34. At least one court called the concept of duty "elastic." D'Ambra v. United States, 354 F. Supp. 810, 816 (D. R.I.), *aff'd,* 481 F.2d 14 (1st Cir.), *cert. denied,* 414 U.S. 1075 (1973). Moreover,

whether or not in the zone of danger, if a risk to the bystander was clearly forseeable.[35] In order to determine the forseeability of harm, the court inquired whether plaintiff was near the accident scene,[36] whether plaintiff encountered a "direct emotional impact" arising from her observance of the accident,[37] and whether plaintiff had a close rela-

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one court noted that "a bystander has an interest in mental tranquility that the law of torts should protect in certain carefully delineated cases." Barnhill v. Davis, 300 N.W.2d 104, 106 (Iowa 1981). The court in *Dillon* recognized that "modern courts" do not wish to impose a duty on the tortfeasor to the bystander. As the court explained, these courts assert that

> [d]uty . . . must express public policy; the imposition of duty here would work disaster because it would invite fraudulent claims and it would involve the courts in the hopeless task of defining the extent of the tortfeasor's liability. In substance, they say, definition of liability being impossible, denial of liability is the only realistic alternative.

68 Cal. 2d at 730, 441 P.2d at 914, 69 Cal. Rptr. at 74.

35. Professor Prosser stated:

> All ordinary human feelings are in favor of her action against the negligent defendant. If a duty to her requires that she herself be in some recognizable danger, then it has properly been said that when a child is endangered, it is not beyond contemplation that its mother will be somewhere in the vicinity, and will suffer serious shock.

PROSSER, THE LAW OF TORTS § 54 (1971). *Accord* D'Ambra v. United States, 354 F. Supp. 810, 821 (D. R.I.) ("we should not close our minds and that is what we do when we adopt a rule that persons suffering fright from witnessing injury to another are invariably beyond the risk"), *aff'd,* 481 F.2d 14 (1st Cir.), *cert. denied,* 414 U.S. 1075 (1973) (quoting Hopper v. United States, 244 F. Supp. 314, 318 (D. Colo. 1965)).

36. This has been called "the least important factor" of the *Dillon* criteria because if "the sensory factor is not satisfied, the location factor certainly will not be satisfied." Lantry, *supra* note 16, at 223. *See e.g.,* Parsons v. Superior Ct. of Monterey County, 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978) (no recovery because accident occured behind "bend in road" and plaintiff was out of sight); Kelley v. Kokua Sales & Supply Ltd., 56 Haw. 204, 532 P.2d 673 (1975) (no recovery because plaintiff was in California when the accident occured in Hawaii). For other examples, see Lantry, *supra* note 16, at 223.

37. One commentator noted that, to satisfy this test,

> the plaintiff must experience a disabling shock. A state of general anxiety will not be sufficient. What is contemplated is a sudden and brief event which results in a sensory awareness of injury to a third party. While visual perception of the accident is not a requirement, mere physical presence is not enough. Momentary delay in sensing the fact of the accident is not fatal to the plaintiff's cause of action; but a delay as long as five minutes may be.
>
> The standard can be stated as follows: There must be a sensory shock, precipitated by an awareness of the happening of an accident, which is fairly contemporaneous with the accident itself. The application of the sensory requirement has acted as a safeguard against the infinite potential for liability forecast by the detractors of California's case law.

Lantry, *supra* note 16, at 225. *See e.g.,* Madison v. Desert Livestock Co., 574 F.2d 1027 (10th Cir. 1978) (no recovery to wife who witnessed "effects" of injury at later date); Amader v. Johns-Manville Corp., 514 F. Supp. 1031 (E.D. Pa. 1981) (cannot recover for witnessing deterioration of injured person; must be "discrete and identifiable traumatic event to trigger recovery"); Burke v. Pan Am. World Airways, 484 F. Supp. 850 (S.D.N.Y. 1980) (plaintiff who allegedly suffered emotional distress by witnessing plane crash of sister by ESP cannot recover); Aravz v. Gerhardt, 68 Cal. App. 3d 937, 137 Cal. Rptr. 619 (1977) (plaintiff who observed injury five minutes after

tionship with the victim.[38]

The risk of forseeable harm doctrine has been well received in many jurisdictions[39] and has been heralded as the "modern rule"[40] under

occurence not allowed recovery); Jansen v. Children's Hosp. Med. Center, 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1973) (observing worsening health of third party inadequate); Amodio v. Cunningham, 182 Conn. 80, 438 A.2d 6 (1980) (no recovery for witnessing "deterioration" of daughter's condition due to malpractice of doctor). *But see* Bliss v. Allentown Pub. Library, 497 F. Supp. 487, 489 (E.D. Pa. 1980) (mother who turned to see statue crush daughter moments after accident may recover as a "precipient witness" to prevent arbitrary rejection of claims). *See also* Lantry, *supra* note 16, at 224-25; 33 RUTGERS L. REV. 1171, 1181 (1981).

The qualifications regarding time, distance, and blood relation, provide limits on recovery. *Compare* Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969) (mother who arrives seconds after accident may recover) *with* Powers v. Sissoev, 39 Cal. App. 3d 865, 114 Cal. Rptr. 868 (1974) (mother who arrives 30-60 minutes after accident may not recover because all parents experience such post-accident trauma). For a discussion of these cases, see Comment, *supra* note 10, at 568.

38. 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 70.

As Lantry stated, the emotional attachments of the relationship and not the blood relation dictate the operation of the *Dillon* court's third requirement. Lantry, *supra* note 16, at 222. Acceptable ties have included foster child-mother, *see* Mobaldi v. Board of Regents of Cal., 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976), husband-wife, *see* Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977), ward-guardian, *see* Arauz v. Gerhardt, 68 Cal. App. 3d 937, 137 Cal. Rptr. 619 (1977). Courts have not found the relationship of two friends sufficiently close to warrant recovery. *See* Beanland v. Chicago R.I. & P. R.Y. Co., 480 F.2d 109 (8th Cir. 1973).

It is not uncommon for parents to witness their childrens' accidents. Smith, *Relation of Emotions to Injury and Disease: Legal Liability For Psychic Stimuli,* 30 VA. L. REV. 193, 239 n.152 (1944) ("If defendant's negligence injures a child of any age in his own yard or house, the likelihood that relatives may witness the episode would seem to be a foreseeable risk"). Several courts have adopted standards for determining the forseeability of the presence of a parent. These include:

(1) age of the child;
(2) the type of neighborhood in which the accident occurred;
(3) the familiarity of the tortfeasor with the neighborhood;
(4) the time of day; and
(5) all other circumstances which would have put the tortfeasor on notice of the likely presence of a parent.

D'Ambra v. United States, 354 F. Supp. 810, 820 (D. R.I.), *aff'd,* 481 F.2d 14 (1st Cir.), *cert. denied,* 414 U.S. 1075 (1973); Arauz v. Gerhardt, 68 Cal. App. 3d 937, 137 Cal. Rptr. 619 (1977); Leong v. Takasaki, 55 Haw. 398, 409, 520 P.2d 758, 765 (1974). These courts have expressly adopted this additional criteria to determine the total forseeability of harm.

39. *See* Buckner v. Freightliner Corp., 403 F. Supp. 671 (W.D. Okla. 1975); D'Ambra v. United States, 354 F. Supp. 810 (D. R.I.), *aff'd,* 481 F.2d 14 (1st Cir.), *cert. denied,* 414 U.S. 1075 (1973); Austin v. Regents of Univ. of Cal., 89 Cal. App. 3d 354, 152 Cal. Rptr. 420 (1979); D'Amicol v. Alvarez Shipping Co., 31 Conn. Supp. 164, 326 A.2d 129 (1973); Kelley v. Kokua Sales Supply Ltd., 56 Haw. 204, 532 P.2d 673 (1975); Richey v. Chicago Transit Auth., 101 Ill. App. 3d 439, 428 N.E.2d 596 (1981); Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981); Culbert v. Sampson's Supermarket Inc., 444 A.2d 433 (Me. 1982); Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978); Williams v. Citizens Mut. Ins. Co. of Am., 94 Mich. App. 762, 290 N.W.2d 76 (1980); Corso v. Merrill, 119 N.H. 647, 406 A.2d 300 (1979); Portee v. Jaffee, 84 N.J.

which a bystander may recover for emotional distress.[41] Proponents have praised the rule because of its easy application and because it has alleviated such problems as fraudulent claims, increased litigation, and unlimited liability.[42]

88, 417 A.2d 521 (1980); Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979); Landreth v. Reed, 570 S.W.2d 486 (Tex. Civ. App. 1978); Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976). *See also* Note, *Bystander Recovery in Arizona for Negligent Infliction of Emotional Distress,* ARIZ. ST. L.J. 981 (1980); Comment, *Duty, Forseeability, and the Negligent Infliction of Mental Distress,* 33 ME. L. REV. 303 (1981); Comment, Portee v. Jaffee: Dillon *Comes to New Jersey,* 33 RUTGERS L. REV. 1171 (1981); 25 VILL. L. REV. 195 (1979).

40. Haught v. Maceluch, 681 F.2d 291, 297 (5th Cir.), *reh'g denied,* 685 F.2d 1385 (5th Cir. 1982). *See infra* note 47 and accompanying text.

41. Whether plaintiff's alleged mental distress must be accompanied or evidenced by a physical injury is not clear. There is a split of opinion on this issue. For examples of cases where the court has held that a physical injury must accompany the distress, see Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295, 1302 (1978); Tom v. McConnell, 45 Mich. App. 647, 656-57, 207 N.W.2d 140, 145 (1973); Corso v. Merrill, 119 N.H. 647, 653, 406 A.2d 300, 306 (1979); Dave Snelling Lincoln Mercury v. Simon, 508 S.W.2d 923, 924-25 (Tex. Civ. App. 1974). *See also* Barnhill v. Davis, 300 N.W.2d 104, 107-08 (Iowa 1981) (dictum) ("compensable mental distress should ordinarily be accompanied with physical manifestations of the distress").

For examples of cases where the court has not required the presence of a physical injury before awarding recovery for mental distress, see Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980); Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974); Culbert v. Sampson's Supermarket Inc., 444 A.2d 433 (Me. 1982); Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979). Courts that do not require the presence of an accompanying injury for recovery for emotional distress, however, sometimes require that the mental distress be serious. *See, e.g.,* Sinn v. Burd, 486 Pa. 146, 168, 404 A.2d 672, 686 (1979) (dictum). One commentator stated that a "medically diagnosed traumatic neurosis that has developed from an emotional shock should suffice . . . [for] recovery." Comment, *supra* note 10, at 573. *See also* Note, *supra* note 22, at 477 (degree of mental distress is important in terms of weeding out insignificant claims based on "minor emotional shocks").

Courts that refute the need for evidence of an injury do so because: "First, the requirement in its application is overinclusive since it permits recovery for demonstrably trivial mental distress claims accompanied by physical symptoms. Second, it is underinclusive since serious distress is arbitrarily deemed not compensable if not accompanied by physical symptoms. Third, such a rule encourages 'extravagant pleading and distorted testimony.'" Culbert v. Sampson's Supermkt., Inc., 444 A.2d 433, 437 (Me. 1982) (quoting Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 929, 616 P.2d 813, 820, 167 Cal. Rptr. 831, 838 (1980)).

42. The *Dillon* forseeability analysis eliminates earlier concerns of unlimited liability because "[m]ost bystander recovery cases do not exhibit bizarre chains of events that reasonable persons could not expect. To the contrary, it seems clear that the average person who has witnessed the death or injury of another would be emotionally upset, regardless of whether [he] was in danger." Note, *Limiting Liability, supra* note 17, at 851 (footnote omitted). Problems of measuring damages and of proof are not unresolveable and should not bar the cause of action. Joseph, *supra* note 17, at 8-12. The problem of fraudulent claims is unlikely because emotional distress can be medically proven. *See* 25 VILL. L. REV. 195, 197 n.13 (1979). *Contra infra* note 58 and accompanying text.

In *Haught v. Maceluch*,[43] the Fifth Circuit became the latest convert to the doctrine of forseeable harm. Noting that the Texas[44] Supreme Court had never directly addressed this issue,[45] the Fifth Circuit analyzed the treatment of the issue at all levels of the state court system[46] and concluded that Texas would follow the modern rule of measuring bystander recovery.[47] The court then proceeded to apply the *Dillon* criteria.[48] Although the court had no trouble determining that plaintiff had satisfied the first and third criteria for forseeability,[49] there was a question of whether she had contemporaneously perceived the acci-

43. 681 F.2d 291 (5th Cir.), *reh'g denied,* 685 F.2d 1385 (5th Cir. 1982). Circuit Judge Thornberry authored the opinion.

44. Sitting as a federal court in a diversity action, the Fifth Circuit was "bound to follow the substantive law of Texas." 681 F.2d at 295. *See* Erie v. Tompkins, 304 U.S. 64, 78 (1938).

45. 681 F.2d at 296. The court noted that the Texas Supreme Court had ruled on relevant issues and had "accepted 'the uninjured bystander' cause of action as a matter of general negligence law." *Id.* at 297 n.6. For example, the Texas Supreme Court had applied general negligence principles to early claims for mental distress with varying results. The court examined the following cases: Kaufman v. Miller, 414 S.W.2d 164 (Tex. 1967) (case-by-case analysis to determine recovery); Gulf, C. & S.F. Ry. v. Hayter, 93 Tex. 239, 54 S.W. 944 (1900) ("where a physical injury results from fright or other mental shock . . . the injured party [can] recover his damages provided . . . injury . . . [was forseeable]"); Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890) (bystander allowed to recover for emotional distress after witnessing tortious assault which caused her to miscarry baby). *See* Haught v. Maceluch, 681 F.2d at 296-302. For a discussion of the development of Texas law in this area, see Flanary, *supra* note 24, at 746-50.

46. The court announced that the doctrine of forseeable harm to determine bystander recovery had "firm roots in Texas Supreme Court jurisprudence, and the Court of Civil Appeals." 681 F.2d at 296. The court examined the following Texas Court of Civil Appeals cases: Bedgood v. Madalin, 589 S.W.2d 797 (1979), *rev'd on other grounds,* 600 S.W.2d 773 (Tex. 1980) (father in backyard who heard sound like watermelon being dropped from great height in front yard, which was impact of son hit by car, can recover under forseeability principles); Covington v. Estate of Foster, 584 S.W.2d 726 (Tex. Civ. App. 1979) ("not unforseeable as a matter of law that" person who drives recklessly might hit car with children and parents in it thereby causing parents emotional distress); Landreth v. Reed, 570 S.W.2d 486 (Tex. Civ. App. 1978) (under principles of forseeability, plaintiff who did not see her sister drown but who saw attempts to resuscitate her at nursery school could recover); Dave Snelling Lincoln Mercury v. Simon, 508 S.W.2d 923 (Tex. Civ. App. 1974) (mother in back seat who saw son fall out of car and get run over could recover for mental distress).

47. 681 F.2d at 298. The court cited Hott v. Mitsubishi Int'l Corp., 636 F.2d 1073, 1074 (5th Cir. 1981) for the proposition that "[a] decision of the Court of Civil Appeals is controlling on questions of state law in this court, absent strong indication that the Texas Supreme Court would decide the issue differently." 681 F.2d at 298.

48. 681 F.2d at 298-302. According to the court, a Texas plaintiff cannot recover for emotional injuries unless he has a resultant physically manifested injury. *Id.* 249 n.9. *See supra* note 41.

49. 681 F.2d at 299. The court noted that "not only was [plaintiff] located near the scene of the accident [but] was in some sense the scene itself." *Id.*

dent[50] because she had not actually witnessed the precise injury to her daughter.[51] The court reasoned that this question should be resolved not by asking whether the plaintiff actually witnessed the accident, but by focusing on plaintiff's "experiential perception of the accident" and not the specific injury.[52]

Using this standard, the court found that plaintiff had had an experiential perception of the tortious delivery of her child.[53] The court stressed, however, that a determination of recovery in bystander cases should not depend on whether the plaintiff's case strictly meets the *Dillon* criteria.[54] Rather, the proper inquiry should focus on whether the plaintiff's emotional distress was clearly forseeable.[55]

The Fifth Circuit's[56] use of the doctrine of forseeable harm to determine a bystander's right to recover for emotional distress will provide greater momentum to the general acceptance of this doctrine in other jurisdictions.[57] The doctrine is not, however, without its critics[58] and

50. The district court ruled as a matter of law that, absent this factor, plaintiff's claim was barred. *Id.* at 299-300.

51. *Id.* at 299. The court did not emphasize that this factor might not be met. The court stated that "even in the absence of [plaintiff's] contemporaneous perception of the accident, the Texas courts would not necessarily bar [plaintiff's] cause of action." *Id.* Moreover, the court added that a finding of forseeability could easily be predicated on the facts of this case and that *Dillon* should not be treated as a categorical rule of factors, but a rule of forseeability. *Id.* at 300.

52. *Id.*

53. *Id.* The court noted that the factors in bystander cases are not always so neat. For example, in some cases where recovery has been allowed plaintiff has "seen both the defendant's negligent act and the injury that it causes to a third person." *Id.* In such cases, there is a contemporaneous perception of the event which causes the mental distress. In other cases, however, plaintiff arrives at the accident scene moments after the injury has occured and still is allowed to recover. *See* Bedgood v. Madalin, 589 S.W.2d 797, 802-03 (Tex. Civ. App. 1979). *See* cases cited *supra* note 37. Using these cases as precedent, the court concluded that plaintiff had contemporaneously perceived the negligently inflicted childbirth because she was aware of the severity of the situation and the notable absence of the doctor. Plaintiff was "brought so close to the reality of the accident as to render her experience an integral part of it." 681 F.2d at 301 (quoting Landreth v. Reed, 570 S.W.2d 486 (Tex. Civ. App. 1978)).

54. Such a mode of analysis would force the court to "loose sight of the forest for the trees." 681 F.2d at 301.

55. *Id.*

56. The Fifth Circuit also reviewed the doctor's standard of care to determine if he was held properly liable. For a discussion of these issues, see *id.* at 302-06.

57. Over 10 years ago, one commentator predicted that this doctrine would become the majority rule. *See* Lantry, *Propositioning the Courts,* 8 AM. BUS. L.J. 212, 215 (1970). *See also* Barrera v. E.I. DuPont de NeMours & Co., 653 F.2d 915, 920 (5th Cir.), *reh'g denied,* 661 F.2d 931 (5th Cir. 1981) ("tendency towards expanding concepts of liability and constricting defenses . . . [in] the cognate area of bystander action").

58. The dissent in *Dillon* raised some problems caused by the doctrine:

many have already suggested the use of alternative methods[59] to reduce and more definitively determine a defendant's potential liability in this area.[60] An examination of future state cases will indicate whether the modern rule will indeed become the majority rule.

S.E.W.

> What if the plaintiff was honestly *mistaken* in believing the third person to be in danger or to be seriously injured? What if the third person had assumed the risk involved? How "close" must the relationship be between the plaintiff and the third person? I.e., what if the third person was the plaintiff's beloved niece or nephew, grandparent, fiance, or lifelong friend, more dear to the plaintiff than her immediate family? Next, how "near" must the plaintiff have been to the scene of the accident, and how "soon" must shock have been felt? Indeed, what is the magic in the plaintiff's being actually present? Is the shock any less real if the mother does not know of the accident until her injured child is brought into her home? On the other hand, is it any less real if the mother is physically present at the scene but is nevertheless unaware of the danger or injury to her child until after the accident has occurred? No answers to these questions are to be found in today's majority opinion.

68 Cal. 2d at 749-50, 441 P.2d at 926, 69 Cal. Rptr. at 86 (Burke, J., dissenting) (emphasis in original). *See also* Flanary, *supra* note 24, at 749.

59. Suggested alternatives include "duty definers," *see* Joseph, *supra* note 17, at 16-22, "the emotional unpreparedness rule", *see* Note, *Limiting Liability, supra* note 17, at 866-68, and new formulations of the *Dillon* criteria. For example:

> 1. The bystander was located near the scene of the accident.
> 2. The emotional distress resulted from a direct emotional impact from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence.
> 3. The bystander and the victim were husband and wife or related within the second degree of consanguinity or affinity.
> 4. A reasonable person in the position of the bystander would believe, and the bystander did believe, that the direct victim of the accident would be seriously injured or killed.
> 5. The emotional distress to the bystander must be serious.

Barnhill v. Davis, 300 N.W.2d at 108.

60. For a discussion of bystander recovery and strict liability, see Joseph, *supra* note 17, at 42-50.