Volume 73
Issue 2 *Dickinson Law Review - Volume 73, 1968-1969*

1-1-1969

Recent Cases

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NEGLIGENCE—PHYSICAL INJURY CAUSED BY EMOTIONAL TRAUMA—RECOVERY POSSIBLE WHEN PLAINTIFF WITNESSES ACCIDENT IN WHICH HER INFANT DAUGHTER WAS KILLED BY DEFENDANT'S NEGLIGENT ACT

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

The Supreme Court of California, in *Dillon v. Legg*,[1] has held that a plaintiff may recover damages for physical injuries caused by emotional trauma suffered as a result of personally witnessing an accident in which a close relative was seriously injured or killed by the negligent act of the defendant. The majority[2] expressly overruled *Amaya v. Home Ice, Fuel & Supply Co.*[3] which denied an action for physical injuries predicated upon emotional trauma suffered solely as a result of apprehending danger or witnessing injury to a third person.

Plaintiff Margery M. Dillon alleged that the defendant so negligently operated his vehicle as to cause it to collide with plaintiff's infant daughter, Erin Lee, and that such negligence resulted in injuries to Erin Lee which proximately caused her death.

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1. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

2. The case was a four to three decision. Tobringer, J., wrote the majority opinion, in which Peters, Mosk, and Sullivan, JJ., concurred. Traynor, C.J., dissented for the reasons set forth in Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963). Burke, J., filed a separate dissenting opinion in which McComb, J., joined.

3. The important facts in *Amaya* were that the plaintiff was seven months pregnant, was watching her seventeen-month-old son playing, and was forced to stand helpless while she witnessed the defendants negligently strike him down with their truck. She alleged that she felt no fear for her own personal safety, but only fear for her son. The court denied recovery.

The complaint consisted of three separate causes of action, only two of which are here relevant. The first alleged that Mrs. Dillon was in close proximity to the accident and personally witnessed it. As a result she " 'sustained great emotional disturbance and shock and injury to her nervous system' which caused her great physical and mental pain and suffering."[4] In the second, a similar cause of action was raised on behalf of the plaintiff's other infant daughter, Cheryl, who was also in close proximity to the accident and witnessed it personally.[5]

The defendant filed an answer and moved for judgment on the pleadings as to both causes of action on the grounds that: "No cause of action is stated in that allegation that plaintiff sustained emotional distress, fright or shock induced by apprehension of negligently caused injury to a third person."[6]

The lower court granted the motion as to the mother's cause of action, thereby dismissing her complaint, but denied it as to the daughter's. The court found that Mrs. Dillon was not within the zone of danger. Because of this fact, she could not allege emotional shock resulting from fear for the safety of her own person, and, therefore, did not state a good cause of action.[7]

The defendant's subsequent motion for summary judgment as to Cheryl's cause of action was denied because of conflicting testimony as to the exact location of Cheryl[8] in relation to the accident. There was a "possibility that she was within such zone of danger

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4. Dillon v. Legg, 68 Cal. 2d at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74 (quoting plaintiff's complaint).

5. *Id.*

6. *Id.* at 731-32, 441 P.2d at 914-15, 69 Cal. Rptr. at 74-75 (quoting defendant's motion for judgment on the pleadings).

7. The defendant relied on Reed v. Moore, 156 Cal. App. 2d 43, 319 P.2d 80 (1957), which held that a woman who suffered mental distress and a miscarriage as a result of seeing a collision between the automobile of a negligent defendant and her husband's automobile could not recover.

8. In support of its motion for summary judgment, the defendant filed the declaration of one McKinley, which disclosed that Mrs. Dillon testified at her deposition that, when she saw the car rolling over Erin, she noted that Cheryl was on the curb. Apparently, defendant also filed Cheryl's own deposition, which contradicted Mrs. Dillon's statements regarding Cheryl's location. Plaintiff opposed defendant's motion as to Cheryl's cause of action on the basis of this conflicting evidence:

> Since the declarations filed by defendant are contradictory and the testimony of Mrs. Dillon does not establish as a matter of law that Cheryl Dillon was not in the zone of danger or had fear for her own safety, plaintiff respectfully submits that the motion must be denied.

Dillon v. Legg, 68 Cal. 2d at 732, 441 P.2d at 915, 69 Cal. Rptr. at 75 (quoting plaintiff's brief on defendant's motion for summary judgment).

or feared for her own safety,"[9] in which case she would be stating a claim upon which recovery could be granted.

Mrs. Dillon appealed from the dismissal of her cause of action thus confronting the supreme court squarely with the issue of whether to extend the liability of a negligent defendant to physical injuries resulting from the emotional trauma suffered by a plaintiff when he apprehends negligently caused danger or injury to a third person, or witnesses such injury, without regard to whether the plaintiff suffered impact, was within the zone of danger, or feared for his own personal safety.

The court granted recovery for Mrs. Dillon. *Dillon*, however, should not mean that recovery will be granted in every such case. *Dillon* held that factually similar cases will, in the future, be recognized and heard in court as a *class* instead of being automatically barred by an arbitrary and unbending rule of law; but only *certain* cases in the class will ultimately result in a recovery by the plaintiff. The determination as to which cases will result in liability and recovery will be made by applying "general guidelines,"[10] set forth by the court and discussed *infra*, "to the specific facts of the cases."[11]

Thus, the specific holding of *Dillon*, being strictly confined to its facts, is that recovery can be granted to a mother who has suffered physical injury as a result of the emotional trauma she suffered upon personally witnessing an accident in which her infant daughter was killed by the negligent act of the defendant.

Dillon is representative of a recent trend[12] toward the expansion of liability in the area of negligent infliction of mental distress.[13] This trend began with the recognition of mental distress as an element of damages. However, recovery was limited by the "impact" rule, which has been abandoned in a majority of jurisdictions.[14] More recent cases have held that a plaintiff within the "zone of danger" may recover for physical injuries resulting from the mental distress he suffered because of fear for the safety of his own person.[15] The American cases prior to *Dillon* unanimously denied recovery when the plaintiff feared only for the safety of some third person.[16]

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9. Dillon v. Legg, 441 P.2d at 915, 69 Cal. Rptr. at 75.
10. *Id.* at 921, 69 Cal. Rptr. at 81.
11. *Id.*
12. It is not within the scope of this paper to present a detailed description and analysis of the development of the law in the area of negligent infliction of mental distress.
13. Annot., 64 A.L.R.2d 100, 103 (1959).
14. *Id.* at 143.
15. *Id.* at 148.
16. Annot., 18 A.L.R.2d 220, 239 (1951). A brief summary of the leading California cases in the area of mental distress might be useful. In *Amaya*, the court said that the "impact rule" had never been the law in California. Amaya v. Home Ice, Fuel & Supply Co., 295 Cal. 2d at 299,

The court in *Dillon* first disposed of a standard policy consideration: the greatly increased possibility that fraudulent claims of physical injury caused by mental distress would be advanced in the future. The court said:

> Indubitably juries and trial courts, constantly called upon to distinguish the frivolous from the substantial and the fraudulent from the meritorious, reach some erroneous results. But such fallibility, inherent in the judicial process, offers no reason for substituting for the case-by-case resolution of causes an artificial and indefensible barrier. Courts not only compromise their basic responsibility to decide the merits of each case individually but destroy the public's confidence in them by using the broad broom of "administrative convenience" to sweep away a class of claims a number of which are admittedly meritorious. The mere assertion that fraud is possible, "a possibility [that] exists to some degree in all cases," . . . does not prove a present necessity to abandon the neutral principles of foreseeability, proximate cause and consequential injury that generally govern tort law.[17]

It is interesting to note that, in the *Amaya* case, decided in 1963, this same court relied heavily upon the fraudulent claims con-

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379 P.2d at 515, 29 Cal. Rptr. at 35. The court's authority for this statement was a lower court decision, Cook v. Maier, 33 Cal. App. 2d 581, 92 P.2d 434 (1939), which relied, in turn, on the earlier supreme court decision of Sloane v. So. Cal. R.R., 111 Cal. 668, 44 P. 320 (1896).

In Lindley v. Knowlton, 179 Cal. 298, 176 P. 440 (1918), it was held that liability may be predicated upon fright and consequent illness induced by the plaintiff's reasonable fear for her own safety, even when the plaintiff may *also* have feared for the safety of her children. Clough v. Steen, 3 Cal. App. 2d 392, 39 P.2d 889 (1934), presented a question closely related to the one presented in *Dillon*. In that case, the plaintiff, her husband and her minor child were involved in an automobile accident. The minor son was killed, and the plaintiff sought to recover damages on the grounds that the knowledge of her son's violent death caused her to suffer great mental anguish and nervous shock. Recovery was denied. Two federal cases, applying California law, reached similar results: Minkus v. Coca-Cola Bottling Co., 44 F. Supp. 10 (N.D. Cal. 1942) (shock suffered by parents when minor son found decomposed mouse in soft-drink bottle), and Maury v. United States, 139 F. Supp. 532 (N.D. Cal. 1956) (parents present outside their burning home with knowledge that their child was caught inside).

Reed v. Moore, 156 Cal. App. 2d 43, 319 P.2d 80 (1957), is similar to *Dillon* factually. In that case plaintiff sat on her porch and watched defendant's automobile collide with her husband's automobile. She suffered extreme fright and a miscarriage. She was denied recovery because she feared solely for her husband's safety and was not within the zone of danger herself.

The last California case before *Dillon* to pass on this question was the *Amaya* case, in which the supreme ourt affirmed the principle set down by the appellate court in *Reed*.

17. Dillon v. Legg, 441 P.2d at 918, 69 Cal. Rptr. at 78, *quoting* Klein v. Klein, 58 Cal. 2d 692, 695, 376 P.2d 70, 72, 26 Cal. Rptr. 102, 104 (1962).

sideration in reaching a conclusion exactly opposite to that reached in *Dillon*. In *Amaya*, the court felt that to impose liability would " 'open the way to fraudulent claims, and enter a field that has no sensible or just stopping point.' "[18]

The majority in *Dillon* based its reasoning on the standard of foreseeability: " 'The risk reasonably to be perceived defines the duty to be obeyed.' "[19] Realizing that the foreseeability standard has traditionally involved a "zone of danger" concept, the court was careful to point out that some modern legal thinkers have expanded the "zone" to include a plaintiff in Mrs. Dillon's position:

> The concept of the zone of danger cannot properly be restricted to the area of those exposed to *physical* injury; it must encompass the area of those exposed to *emotional* injury . . . [I]n awarding recovery for emotional shock upon witnessing another's injury or death, we cannot draw a line between the plaintiff who is in the zone of danger of physical impact and the plaintiff who is in the zone of danger of emotional impact.[20]

Having laid this foundation, the court set forth the general guidelines to be used in determining whether the defendant could have reasonably foreseen the injury suffered by the plaintiff and, therefore, whether the defendant owed a legally cognizable duty to the plaintiff:

> In determining . . . whether defendant should reasonably foresee the injury to the plaintiff, . . . the courts will take into account such factors as the following: (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 the plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.[21]

In *Amaya*, the court had recognized that such guidelines as those set forth above would be criticized as insufficiently defined and would lead to something approaching limitless liability.

> Another . . . administrative factor to be weighed is the problem of setting some limits to such liability for fright or shock allegedly caused by the apprehension of danger or injury not to the plaintiff but to a third person.[22]

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18. Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d at 311, 379 P.2d at 522, 29 Cal. Rptr. at 42, *quoting* Waube v. Warrington, 216 Wis. 603, 613, 258 N.W. 497, 501 (1935).

19. Dillon v. Legg, 441 P.2d at 919, 69 Cal. Rptr. at 79, *quoting* Palsgraf v. Long Island R.R., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928).

20. Dillon v. Legg, *Id.* at 920 n.5, 69 Cal. Rptr. at 80 n.5. See 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1035-36 (1956).

21. Dillon v. Legg, 441 P.2d at 920, 69 Cal. Rptr. at 80.

22. Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d at 312, 379 P.2d at 523, 29 Cal. Rptr. at 43.

The court in *Dillon*, however, anticipated this criticism and sought to meet it by showing that:

> The courts have in the past, in analogous situations, drawn the limits of liability, applying general guidelines such as those above set forth to the specific facts of the cases. As examples of that process of definition we set forth the history of the "open car" cases, the rulings on recovery by persons not in privity of contract for defendant's negligence in drafting instruments, the decisions in the intentional infliction of emotional injury, the modern English cases, and some illustrative opinions that adjudicate the specific issue before us.[23]

After showing that the application of general guidelines to the types of cases listed above has not resulted in limitless liability in these areas, the court discussed the three English cases which were the only authority cited in support of its decision. The court seemed to feel that, if the English courts have been able to grant recovery in cases like *Dillon*, while still placing reasonable limitations on liability, American courts can do the same:

> The fear of an inability to fix boundaries has not impelled the courts of England to deny recovery for emotional trauma caused by witnessing the death or injury of another due to defendant's negligence.[24]

The most important Engish case cited by the court is *Hambrook v. Stokes Bros.*[25] In that case, a servant of the defendant left a truck parked at the top of a hill with the engine running. A pregnant woman was walking her children to school and left them at the street in which the truck was parked. The mother saw the truck break loose and she feared for her children's safety. She was never in danger herself and did not actually witness the ensuing accident. Upon inquiry, she learned that one of her children had been struck and had been seriously injured. Several months later, both mother and foetus were dead. The trial court held that the husband could not recover unless the decedent had feared for her own personal safety. The appellate court reversed, holding that recovery was warranted even if the mother's death had resulted *solely* from fear for her children's death.

The court in *Dillon* also cited *Chadwick v. British Rwys. Board*[26] and *Boardman v. Sanderson.*[27] In the former case, an English court permitted recovery by the widow of a man who

23. Dillon v. Legg, 441 P.2d at 921, 69 Cal. Rptr. at 81.
24. *Id.* at 922, 69 Cal. Rptr. at 82.
25. [1925] 1 K.B. 141.
26. [1967] 1 W.L.R. 912.
27. [1964] 1 W.L.R. 1317 (C.A.).

suffered severe nervous shock, not involving his own personal safety, while serving as a rescuer at a gruesome train wreck. In the latter case, a father and his young son had taken the family automobile to a service station, had driven into it, and just alighted. Through the negligence of a garage attendant, the boy's foot was caught under one of the car's wheels. The father did not see the accident and did not fear for his own safety. But upon hearing his son's screams, he suffered mental shock for which the court permitted him to recover.

In each of these English cases someone suffered emotional trauma and neverous shock but did not contemporaneously fear for his own safety. Two of the three cases, *Hambrook* and *Boardman*, are analogous to *Dillon* in that they involve a parent who suffered mental distress and resultant physical injuries because of fear for the safety of his child. The *Chadwick* case falls into the category of cases generally known as "rescuer" cases and is not, therefore, truly analogous to *Dillon*.[28]

It would appear that the majority was, perhaps, "embarking upon a first excursion into the 'fantastic realm of infinite liability'. . . ."[29] Feeling that such a result would be an extreme injustice, the court labored to base its decision on sound legal principles. The majority was particularly appalled by the seemingly anomalous situation in which Cheryl, "who observed the accident, would be granted recovery because she was in the 'zone of danger,' but [Mrs. Dillon], not far distant would be barred from recovery."[30]

The dissent is largely a reiteration of the majority opinion in the *Amaya* case. Although sympathizing with the plaintiff's plight, the dissent offers that a line must be drawn somewhere which will set a definite limit upon defendant's liability. It posits that the majority's guidelines are so vague as to lead to infinite liability. Another dissenting argument is that the majority's far-reaching liability is out of proportion to defendant's fault.

It is submitted that *Amaya* and the dissent in *Dillon* are based on sounder legal reasoning than the majority opinion in *Dillon* for several reasons. First, the *Dillon* court, and most other progressively-minded courts, gave little consideration to the so-called "floodgates" and "fraudulent claims" arguments. Yet, such considerations cannot be safely rejected in all cases. At least one legal writer has concluded that the possibility of maintenance of fraudulent claims is a real one. The *Amaya* court cited this writer as follows:

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28. See p. 357 *infra*.

29. Dillon v. Legg, 441 P.2d at 926, 69 Cal. Rptr. at 86 (dissenting opinion), *quoting* Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d at 315, 379 P.2d at 525, 29 Cal. Rptr. at 45.

30. Dillon v. Legg, 441 P.2d at 925, 69 Cal. Rptr. at 85.

> Dr. Smith reports on his study of 301 cases involving injuries allegedly caused by psychic stimuli, and concludes (1) that a "majority of persons claiming injury from psychic causes possessed sub-normal resistance to such stimuli"; (2) that "[i]n only 55 of the 301 cases surveyed could we say actual causation was proven by a preponderance of substantial and credible evidence"; and (3) that hence "[t]he skeptical courts were . . . correct in doubting whether adequate criteria of proof existed in this field to make administration of a remedy feasible. . . . Taking all cases decided between 1850 and 1944 . . . , the net balance of justice would have been greater had all courts denied damages for injury imputed to psychic stimuli alone.[31]

Second, *Dillon* attempted to analogize the case before it to the "open-car" cases and privity of contract cases. It is submitted that this analogy is unsound. The court in *Amaya* agreed with this conclusion. In further rejecting an analogy between the "rescuer" cases and the *Dillon-Amaya* situation, the dissent cited Professor Fleming:

> [T]here are weighty policy considerations which, in one case, militate in favour and, in the other, against the plaintiff's claim to legal protection. Behind the ambivalence of the foreseeability formula, there lies the desire, on the one hand, to encourage altruistic action and, on the other, a decided hesitation based on administrative grounds to permit recovery for injury to the nervous system. Hence, no true analogy is offered by decisions from one group of cases which could be of assistance in the solution of a problem falling within the other.[32]

Third, the majority's "guidelines" are not sufficiently well-defined to place any reasonable limitations on liability. Of these guidelines, the dissent said:

> Upon analysis, their seeming certainty evaporates into arbitrariness, an [sic] inexplicable distinctions appear. As we asked in *Amaya*: What if the plaintiff was honestly *mistaken* in believing the third person to be in danger or to be seriously injured? . . . How "close" must the relationship be between the plaintiff and the third person? I.e., [sic] what if the third person was the plaintiff's beloved niece or nephew, grandparent, fiancee, or lifelong friend, more dear to the plaintiff than her immediate family? Next, how "near" must the plaintiff have been to

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31. Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d at 311, 379 P.2d at 523, 29 Cal. Rptr. at 43, *quoting* Smith, *Relation of Emotions to Injury and Disease*, 30 VA. L. REV. 193, 303-06 (1944).

32. Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d at 310 n.8, 379 P.2d at 522 n.8, 29 Cal. Rptr. at 42 n.8, quoting J. FLEMING, TORTS at 179 (1957).

> the scene of the accident, and how "soon" must shock have been felt? Indeed, what is the magic in 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 home? . . . No answers to these questions are to be found in today's majority opinion. Our trial courts, however, will not so easily escape the burden of distinguishing between litigants on the basis of such artificial and unpredictable distinctions.[33]

Fourth, the majority purported to apply the foreseeability standard in *Dillon* and declared that it would be applied to similar cases in the future. It is submitted, however, that the majority did not make proper use of this standard. Briefly stated, the guidelines set down by the majority are the plaintiff's nearness to the accident, his sensory and contemporaneous observation of it, and the relationship between the plaintiff and the injured party. Assume the following admittedly extreme, hypothetical. An aunt is casually chatting with a neighbor and looking on while her infant nephew and other young children are playing in the street. She is from 150 to 200 feet away from the children. A negligent driver recklessly enters the street unobserved by the aunt. The automobile runs directly into the group of children, and the aunt suddenly turns and observed the scene just at the moment of impact. She sees bodies fly through the air and sees the wheels of the car run over one child. She is positive that her nephew must be either seriously injured or dead. As it turns out, her nephew had run to the curb to retrieve a ball and had escaped injury completely. The child who had been run over was killed instantly but was another neighborhood child known only to the aunt as one of her nephew's playmates. The aunt, a woman of normal sensitivity, had feared so greatly for her nephew's safety that she suffered a complete nervous collapse. Subsequently, she is haunted by the memory of the car striking the children and running over one child. As a result of the emotional trauma, her nervous system is permanently damaged, and she brings suit for damages in a California court. According to the guidelines in *Dillon*, it seems fair to assume that the negligent defendant would probably not be liable to the aunt. Yet, the defendant in the *Dillon* case would be.

What is the different between the two situations? Why is the defendant liable in one and not the other? The answer must be that he owed a duty to one plaintiff but not to the other. Duty depends on foreseeability, but foreseeability of what? It is at this point that the majority may have misapplied the foreseeability standard.

Dillon properly began its discussion by saying: "Since the chief element in determining whether defendant owes an obligation

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33. Dillon v. Legg, 441 P.2d at 926, 69 Cal. Rptr. at 86 (dissenting opinion).

to plaintiff is the foreseeability of the *risk*, that factor will be of prime concern in every case."[34] "Risk" is commonly defined as being the chance that something will occur, in this case, the chance that the defendant's negligence will injure someone. However, in the next paragraph, the court made an important alteration in this foreseeability standard: "In determining whether defendant should reasonably foresee the *injury* to plaintiff, . . . the courts will take into account such factors as the following. . . ."[35] The standard, apparently, shifted from foreseeability of *risk* to foreseeability of *injury*, that is, from foreseeability of the chance that plaintiff will be injured to foreseeability of the injury itself.

The court's own examples illustrate the difference between the two standards. "[O]bviously defendant is more likely to foresee that a mother[36] who observed an accident affecting her child will suffer harm than to foretell that a stranger witness will do so."[37] This is indisputable if one assumes, as the court did, that the defendant has already foreseen the risk involved and, somehow, knows that someone is watching and also knows whether that person is the child's mother or a stranger. The court also stated that: "The defendant is more likely to foresee that shock to the nearby, witnessing mother will cause physical harm than to anticipate that someone distant from the accident will suffer more than a temporary reaction."[38] Here again, the court has already assumed that a reasonable-man defendant would have foreseen that a "nearby, witnessing mother," instead of a distant, non-witnessing stranger, was present. Neither of these statements were concerned with the foreseeability of *risk*.

The court, in effect, would tailor the foreseeability standard to the facts of each case. There is, for example, a plaintiff, such as Mrs. Dillon, who alleges that she stood in close proximity to the accident and personally watched her daughter being struck down. Once these facts are brought out, the court then decides that the de-

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34. *Id.* at 920, 69 Cal. Rptr. at 80 (emphasis added).
35. *Id.* (emphasis added).
36. The court in *Dillon* says: "Surely the negligent driver who causes the death of a young child may reasonably expect that the mother will not be far distant. . . ." 441 P.2d at 921, 69 Cal. Rptr. at 91. Everyday experience might suggest a different conclusion. When one considers the hundreds of children that play in, or in the vicinity of, heavily-travelled streets, especially in urban areas, it is incomprehensible that the mother of each child is in the immediate vicinity, much less within eyeshot. Thus, it is not always safe to say that one can always, or even most of the time, reasonably expect that a child's mother will not be far distant.
37. Dillon v. Legg, 441 P.2d at 921, 69 Cal. Rptr. at 81.
38. *Id.*

fendant could have reasonably foreseen her injury. On the other hand, a plaintiff such as the aunt in our hypothetical cannot recover. Since she was only the child's aunt and was not immediately upon the scene of the accident, or that her apprehension of injury to her nephew was mistaken, her own injury, although just as real as Mrs. Dillon's, is not compensable because not foreseeable by the defendant.

It is submitted that if the foreseeability of risk standard is properly applied, either both plaintiffs should recover, or neither should. The risk involved in such a situation is that someone, anyone, will witness the defendant's negligent act, or even hear of it, and as a result will suffer mental distress or physical injury, or both. Once the court declares this risk to be foreseeable by the reasonable man, a defendant should be liable to anyone who was, in fact, present and who suffered a real injury, or to anyone at all who suffered injury as a result of his act. The English cases cited by the court in *Dillon* seem to apply the foreseeability standard in this way. In *Hambrook* the mother who did not actually witness an injury to her children but only heard of it later was not treated any differently than the parent in *Boardman* who was right on the scene.

What *Dillon* really accomplished was a major policy change in the law of California. *Amaya* struck at the heart of the matter when it said that a duty to a plaintiff exists when the legislature or the courts *say* one exists.[39] If the court in *Dillon* wished to change policy and say that, defendants now owe a legally recognizable duty to plaintiffs in Mrs. Dillon's situation, it should have simply said so and not purported to base its decision on foreseeability. The court was, of course, reluctant to do so because such a decision would pave the way for liability for all consequences of a negligent act, no matter how remote. It attempts, therefore, to exclude liability for remote consequences by using the foreseeability standard.

The dissent recognized that the imposition of liability in *Dillon* and similar cases would be out of proportion to the defendant's fault:

> The answers must be reached by balancing the social interests involved in order to ascertain how far defendant's duty and plaintiff's right may justly and expediently be extended. It is our conclusion that they can neither justly nor expediently be extended to any recovery for physical injuries sustained by one out of the range of ordinary physical peril as a result of the shock of witnessing another's danger. Such consequences are so unusual and extraordinary, viewed after the event, that a user of the highway may be said not to subject others to an unreasonable

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39. Amaya v. Home Ice, Fuel & Supply Co., 295 Cal. 2d at 309, 379 P.2d at 521, 29 Cal. Rptr. at 41.

> risk of them by the careless management of his vehicle. Furthermore, the liability imposed is wholly out of proportion to the culpability of the negligent tortfeasor, would put an unreasonable burden upon users of the highway, open the way to fraudulent claims, and enter a field that has no sensible or just stopping point.[40]

It is difficult to accurately appraise the future impact of the *Dillon* case. The California Supreme Court has by virtue of its decision entered upon heretofore untrodden ground. One reasonable prediction is that the trial courts of the state will bear the onus of making practical application of the somewhat artificial and ill-defined standards laid down in *Dillon*. When the courts of California are forced to apply these standards to factual situations which must inevitably differ from the facts presented in *Dillon*, it is quite possible that they will be led to impose liability upon a defendant for the most remote consequences of his negligence. This liability may be totally unwarranted by his culpability.

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40. Dillon v. Legg, 441 P.2d at 927, 69 Cal. Rptr. at 87 (dissenting opinion), *quoting* Waube v. Warrington, 216 Wis. 603, 613, 258 N.W. 497, 501 (1935).