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Torts—Emotional Harm: Limitations on Third Party Recovery for Emotional Harm Caused by Fear or Concern for Another—Schurk v. Christensen, 80 Wn. 2d 652, 497 P.2d 937 (1972)

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TORTS—EMOTIONAL HARM: LIMITATIONS ON THIRD PARTY RECOVERY FOR EMOTIONAL HARM CAUSED BY FEAR OR CONCERN FOR ANOTHER—*Schurk v. Christensen*, 80 Wn. 2d 652, 497 P.2d 937 (1972).

Plaintiff hired fifteen-year-old Reed Christensen to care for her five-year-old daughter upon the representation of his parents that he was a good and capable baby-sitter. The parents knew but did not disclose that their son had a lengthy history of sexually assaulting young girls. In the span of five months the baby-sitter molested the plaintiff's daughter between two and five times. Upon learning of the assaults, plaintiff suffered severe emotional distress requiring treatment by a physician, hospitalization, and psychiatric care. The plaintiff's claim against the defendant parents and their son alleged mental anguish proximately caused her by the knowledge of sexual assaults on her daughter. On motion for summary judgment, this claim was dismissed as to the defendant parents.[1] *Held:* As a matter of law there can be no recovery for negligent infliction of emotional harm absent reasonable fear of or actual physical trauma. *Schurk v. Christensen*, 80 Wn. 2d 652, 497 P.2d 937 (1972).[2]

Traditional negligence theory allows a plaintiff to recover for injuries caused by the negligence of another when it can be shown that a duty of care exists toward the plaintiff, the breach of which was the legal cause of his injury.[3] American jurisdictions, however, traditionally have been reluctant to allow recovery in cases alleging only negligent infliction of *emotional harm* and thus have imposed more stringent requirements in such cases.[4] Courts first allowed recovery only where the emotional harm to the plaintiff was accompanied by actual

1. For the sake of clarity and simplicity, the text refers to Mrs. Schurk as the sole plaintiff. In fact, this action was brought by both Schurk parents, each suing in his own behalf. Both missed work after learning of the assault on their daughter, and each sought damages from the defendant parents and their son for lost wages and related expenses. Mrs. Schurk also sought damages from the three defendants for her mental distress. The plaintiffs also brought an action as guardian ad litem in behalf of their daughter against the defendant parents and their son, Reed Christensen. This latter claim was not involved in the appeal.

2. The court reversed the dismissal of the Schurks' claims against the Christensen parents for recovery of past and future expenses incurred for the benefit of their daughter, and for loss of wages of the Schurks, all resulting from the sexual molestations by the defendant, Reed Christensen. The court sustained the trial court's dismissal of Reed Christensen's motion for dismissal of the plaintiff's claim against him.

3. *See* RESTATEMENT (SECOND) OF TORTS § 281 (1965). *See also* McCoy v. Courtney, 25 Wn. 2d 956, 172 P.2d 596 (1946).

4. W. PROSSER, LAW OF TORTS 327 (4th ed. 1971) [hereinafter cited as PROSSER].

physical injury or impact.[5] The majority of American courts have now rejected this "impact rule" and allow recovery for emotional harm when the plaintiff was within the zone of physical danger and feared for his personal safety.[6] Because the courts require either impact or a reasonable fear of impact, plaintiffs who have suffered emotional harm because of fear or concern for another almost universally have been denied recovery.[7]

In 1968 the California Supreme Court rejected the majority rule, holding in *Dillon v. Legg*[8] that a mother who had witnessed her daughter being killed in a traffic accident could recover for mental distress even though the mother was outside the zone of physical harm. Discarding the zone of danger rule as the test for recovery, the court developed its own criteria for determining foreseeability where emotional harm results from fear for another.[9] At present, no other state supreme court has followed California in allowing recovery for emotional harm caused by concern for another.[10] Two other jurisdictions, however, have explicitly rejected the zone of physical danger

5. *Id.* at 332. *See, e.g.,* Spade v. Lynn & Co., 168 Mass. 285, 47 N.E. 88 (1897); Ewing v. Pittsburgh C.C. & St. L.R.R., 147 Pa. 40, 23 A. 340 (1892); Bowles v. May, 159 Va. 419, 166 S.E. 550 (1932). *See also* 64 A.L.R.2d 100, 134 for additional cases following the impact rule.

6. PROSSER at 332. Most frequently cited in support of the zone of danger rule is Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935), where the court denied recovery to mother because she was outside the zone of physical danger when she witnessed her child being run over by the defendant.

7. *See, e.g.,* Jelly v. LaFlame, 238 A.2d 728 (N.H. 1968); Tobin v. Grossman, 30 App. Div. 2d 213, 219 N.Y.S.2d 227 (Super. Ct. 1968). *But see* Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). For an extensive list of cases, *see* Smith, *Negligently Inflicted Emotional Shock from Witnessing the Death or Injury of Another,* 10 ARIZ. L. REV. 508 n.2 (1968).

The great preponderance of case authority caused the ALI to omit its caveat as to third party recovery from RESTATEMENT (SECOND) OF TORTS § 313 (1965). *See* 37 ALI PROCEEDINGS 163, 169-70 (1960), and 40 ALI PROCEEDINGS 303, 308 (1963), which suggest that the reporter and advisors acted on the basis of overwhelming case authority rather than on personal conviction.

8. Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). The state supreme court's decision was extended by the court of appeals in Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969), where the mother who did not see the accident but arrived on the scene immediately afterwards was allowed to recover. *But see* Capelouto v. Kaiser Foundation Hosp., 21 Cal. App. 3d 568, 98 Cal. Rptr. 631 (1971).

9. *See* text accompanying note 29 *infra.*

10. PROSSER at 334. *But see* Hopper v. United States, 244 F. Supp. 314 (D. Colo. 1965) (the opinion indicated that the court would have allowed recovery but for the fact that it was bound by Colorado law), and Mason v. Gray, No. 22544 (Kootenai City Ct., Idaho, filed Sept. 26, 1967) (recovery allowed).

rule in cases not involving third party recovery for emotional distress.[11]

Washington is in accord with the majority of jurisdictions, holding that recovery for negligent infliction of emotional harm is allowed only where there has been an actual invasion of the plaintiff's person or security, or a direct possibility thereof.[12] The court in *Schurk* suggested, however, that the rule would be re-evaluated when an appropriate case is presented.[13] The court concluded that *Schurk* was not the proper case in which to make a change because it did not meet the criteria developed in *Dillon*.[14]

It is the thesis of this note that the zone of danger rule must be abandoned and that, furthermore, the *Dillon* test is not a viable alternative. Instead, recovery for emotional harm should be predicated

11. Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970) (action under state tort liability act by homeowners seeking damages for the flooding of their home); Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970) (action for emotional distress caused by drinking from a bottle containing an unpackaged prophylactic; while this is essentially a food case, the court predicated recovery on a negligence theory rather than strict liability).

12. The question was presented to the Washington court first in O'Meara v. Russell, 90 Wash. 557, 156 P. 550 (1916). There the court stated the zone of danger rule, but decided the case on other grounds. The rule was considerably muddled when the court, in Kneass v. Cremation Soc'y, 103 Wash. 521, 175 P. 172 (1918), stated that O'Meara's mental anguish was the result of her physical injury and that since the Kneass' physical harm was the result of their mental anguish they couldn't recover. Cherry v. General Petroleum Corp., 172 Wash. 688, 21 P.2d 520 (1933), added to the confusion when the court seemingly approved the impact rule. This discord finally was resolved by Frazee v. Western Dairy Products, 182 Wash. 578, 47 P.2d 1037 (1935). The court specifically repudiated the impact rule and explained and approved *O'Meara*. *See* Richards, *Recovery For Injury Without Impact: The Washington Cases*, 13 WASH. L. REV. 1 (1938).

In certain well defined areas Washington does allow recovery for negligently inflicted emotional harm where the plaintiff was outside the zone of physical risk. *See Kneass, supra* (improper burial of plaintiff's deceased); Corcoran v. Postal Telegraph-Cable Co., 80 Wash. 570, 142 P. 29 (1914) (negligent delivery of a telegram concerning a serious illness—plaintiff was denied recovery, however, because he had not suffered any physical harm as a result of his mental distress); Wright v. Beardsley, 46 Wash. 16, 89 P. 172 (1907) (mutilation of a corpse).

Washington also allows a plaintiff to recover where the defendant's act was willful or intentional. *See, e.g.*, Theis v. Federal Finance Co., 4 Wn. App. 146, 480 P.2d 244 (1971) (wrongful seizure of property during attempted foreclosure); Brillhard v. Ben Tipp, Inc., 48 Wn. 2d 722, 297 P.2d 232 (1956) (telephone harassment); Winston v. Terrace, 78 Wash. 146, 138 P. 673 (1914) (forceable entry and assault); Nordgren v. Lawrence, 74 Wash. 305, 133 P. 436 (1913) (wrongful entry); McClure v. Campbell, 42 Wash. 252, 84 P. 825 (1906) (wrongful eviction); Ott v. Press Publishing Co., 40 Wash. 308, 82 P. 403 (1905) (libel); Davis v. Tacoma Ry. & Power Co., 35 Wash. 203, 77 P. 209 (1904) (expulsion from public park); and Willson v. Northern Pac. Ry., 5 Wash. 621, 32 P. 468 (1893) (expulsion from train).

13. 80 Wn. 2d at 657, 497 P.2d at 940.

14. *See* text accompanying note 29 *infra*.

upon traditional negligence principles. *Schurk* was a proper case in which to make the change.

The usual justifications for the zone of danger rule are the threat of fraudulent claims and the potentially unlimited liability of defendants for every type of mental disturbance.[15] In *Dillon* the California court rejected the fraudulent claims argument, recognizing that emotional harm can cause physical harm and that it is inequitable to deny an entire class of claims because a few isolated cases might be fraudulent.[16] An even more compelling argument is that medical science is sufficiently competent to determine the existence of emotional trauma and to detect fraudulent claims, thus minimizing the threat of unwarranted recovery.[17] Since the courts appear satisfied with the ability of medical science to ferret out fraudulent claims when mental distress is incidental to an independent cause of action, they should be satisifed with the medical profession's ability to identify fraudulent claims when the cause of action is founded on emotional harm alone.[18]

Moreover, there is no evidence that the zone of danger rule actually prevents all fraudulent claims.[19] A person within the zone of physical danger can just as easily initiate a fraudulent claim as can a person

15. 80 Wn. 2d at 655, 497 P.2d at 939.

16. 441 P.2d at 917, 69 Cal. Rptr. at 77. The Washington court in Borst v. Borst, 41 Wn. 2d 642, 653, 251 P.2d 149, 155 (1952), a parent-child immunity case, expressed a similar sentiment, stating that:

> [T]he fact that there may be a greater opportunity for fraud or collusion in one class of cases than another does not warrant courts of law in closing the door to all cases of that class. Courts must depend upon the efficacy of the judicial process to ferret out the meritorious from the fraudulent in particular cases.

For a more spirited reply to the fraudulent claim argument, *see* Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263, 270 (1958) (dissenting opinion). The policy arguments noted by the majority in *Schurk* are ably refuted by Justice Finley in his dissent. 80 Wn. 2d at 658, 497 P.2d at 941.

17. *See, e.g.*, Comment, *Mental Distress in Psychological Research*, 21 BAYLOR L. REV. 520 (1969), in which the author discusses the various physiological changes which occur when a person suffers emotional stress. Wasmuth, *Medical Evaluation of Mental Pain and Suffering*, 6 CLEV.-MAR. L. REV. 7 (1957), discusses investigations seeking to evaluate emotional trauma on the basis of variations in the number and characteristics of white blood cells. *See also* Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970), where the court notes that RESTATEMENT (SECOND) OF TORTS § 436 (1965) has eliminated its caveat about the medical profession's ability to establish a causal relationship between the actor's negligence and the plaintiff's injury.

The use of medical science to detect malingering is discussed in Amdursky, *The Interest in Mental Tranquility*, 13 BUFFALO L. REV. 339 (1964), and Cantor, *Psychosomatic Injury, Traumatic Psychoneurosis and the Law*, 6 CLEV.-MAR. L. REV. 428 (1957).

18. *See* note 12 *supra*.

19. 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1034 (1956) [hereinafter cited as HARPER & JAMES].

outside the zone. Indeed, the zone of danger rule itself may encourage persons who have suffered severe emotional distress to claim fraudulently that their harm was caused by fear for their own safety.[20] Ultimately, the question of fraudulent claims can be resolved best by developing standards of proof rather than by denying all recovery.[21]

An additional justification frequently offered in support of the zone of danger rule is that it prevents potentially unlimited liability for every type of mental disturbance.[22] Several factors suggest that this justification is invalid. First, even without the zone of danger rule a defendent is liable only for *severe* emotional harm.[23] This restriction is essential since emotional harm of a trivial nature is inevitable in modern society, and allowing recovery in such instances would create an intolerable burden on the community.[24] What constitutes *severe,* as opposed to *trivial* harm is open to varied interpretation.[25] One possible test is that the plaintiff might be deemed to have suffered severe emotional harm when his condition requires medical attention (*e.g.,* the services of a doctor or hospitalization). This would effectively limit recovery to circumstances where the plaintiff has suffered harm beyond mere grief or outrage and at the same time provide a basis for determining damages.

A second limitation on potential liability is that in order to establish negligence it must be established that a reasonable man in the defendant's position could have foreseen that the defendant's act would cause a normal person to suffer severe emotional harm.[26] This is

20. For a discussion of this possibility see Comment, *Dillon v. Legg—Extension of Tort Liability in the Field of Mental Distress,* 4 U.S.F.L. REV. 116 (1969).

21. *See* Brody, *Negligently Inflicted Psychic Injuries: A Return to Reason,* 7 VILL. L. REV. 232 (1961-62); Tymann, *Bystander's Recovery for Psychic Injury in New York,* 32 ALBANY L. REV. 490 (1968). *See also* Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84, 88 (1970).

22. 80 Wn. 2d at 655, 497 P.2d at 939.

23. *See, e.g.,* Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970); Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E.2d 157 (1961); Taft v. Taft, 40 Vt. 229, 94 Am. Dec. 389 (1867); Browning v. Slenderella Systems of Seattle, 54 Wn. 2d 440, 341 P.2d 859 (1959). *See also* RESTATEMENT (SECOND) OF TORTS § 46, comment *j* (1965); Prosser, *Insult and Outrage,* 44 CALIF. L. REV. 40, 52 (1956).

24. Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970).

25. *Id.* The *Rodrigues* court suggested that mental distress is "severe" when a normally constituted man would be unable to adequately cope with the mental distress engendered by the circumstances of the case. *See also* McNiece, *Psychic Injury and Tort Liability in New York,* 24 ST. JOHN'S L. REV. 1 (1949), where the author would require that the mental distress be manifested by a physical injury or harm.

26. HARPER & JAMES at 1036. *See also* RESTATEMENT (SECOND) OF TORTS § 313, comment *c* (1965). Since normal persons are less likely than those suffering from a

commensurate with the standard negligence principle that a defendant, absent specific knowledge, is not liable for harm to an unusually sensitive person where a normal person would not have suffered harm.[27]

In *Dillon* the California court developed criteria for determining whether the plaintiff's injury was foreseeable in accident cases. The criteria are: (1) whether the 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 the plaintiff and the victim were closely related, as contrasted with lack of any relationship or existence of only a distant relationship.[28] Unfortunately, the *Schurk* court concluded that even if the zone of danger rule were repudiated, under the *Dillon* test the plaintiff would be unable to establish that her injury was foreseeable by the defendant parents.[29]

In relying on *Dillon* as the logical alternative to the zone of danger rule, the *Schurk* court ignored several important considerations. First, the criteria suggested in *Dillon* were not meant as iron-clad rules and should not be construed as such.[30] They were intended to assist in determining foreseeability, not to serve as a definitive test of liability.

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pre-existing disorder to suffer emotional harm, this limitation is of considerable importance. McNiece, *supra* note 25. *See also* Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli,* 30 VA. L. REV. 193, 284 (1944), where the author found that out of 301 cases studied, 216 plaintiffs had a pre-existing vulnerability which made them more susceptible to injury than average persons would have been.

27. *See, e.g.,* McKinzie v. Huckaby, 112 F. Supp. 642 (W.D. Okla. 1953); Daley v. LaCroix, 384 Mich. 4, 179 N.W.2d 390 (1970); Lockwood v. McCaskill, 262 N.C. 663, 138 S.E.2d 541 (1964). The reason for this rule, of course, is that to determine whether an act is negligent, it is necessary to determine whether a reasonable person could foresee that the act would cause damage. Once negligence is established, the defendant is liable for any aggravated harm incurred because of the plaintiff's idiosyncracies. *See, e.g.,* Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920); Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916).

28. Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968). *See also* PROSSER at 334 [(1) harm must be serious, resulting in physical harm; (2) action confined to members of immediate family of the one endangered; and (3) the plaintiff must be present at the time of the accident, or at least the shock must be fairly contemporaneous]; Hopper v. United States, 244 F. Supp. 314 (D. Colo. 1965) [(1) strength and vitality of the original force which the defendant set in motion; (2) peculiar susceptibility of the plaintiff to nervous injury; (3) the relationship in time and space to the original negligence; and (4) the relation of the plaintiff to the person endangered].

29. 80 Wn. 2d at 657, 497 P.2d at 940.

30. Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968). *See also* PROSSER at 335. Dean Prosser admits that the restrictions he suggests are arbi-

Second, if the *Dillon* criteria were used as the test for recovery for emotional harm, the court would have succeeded only in substituting one mechanical test for another. Like the zone of danger rule, the *Dillon* criteria place a premium on the plaintiff's fortuitously being in the right place at the right time. If the plaintiff is not in close proximity to the scene of the accident, does not view the accident, and is not a close relative, he is excluded from recovery. This test, like its predecessors, mechanically excludes meritorious claims which traditional negligence theory would allow. For example, it is apparent in *Schurk* that the defendant parents could foresee the possibility of harm when they recommended their son as a baby-sitter. Although traditional negligence principles would clearly give the plaintiff in *Schurk* a cause of action, the *Dillon* test would deny recovery in this case for want of foreseeability. It is apparent that the *Dillon* test cannot accurately measure foreseeability in all cases. Thus, if it were used in place of the zone of danger rule, valid claims would continue to be denied.

Since there is no valid reason for artificially limiting recovery for emotional harm, the *Dillon* test is not a viable alternative to the zone of danger rule. Instead, mechanical rules should be rejected and reliance placed upon traditional negligence theory in determining whether a plaintiff should be compensated for his injuries. Under traditional negligence theory, the plaintiff's recovery would depend solely upon his ability to meet the requirements of a prima facie case of negligence.[31]

A basic requirement of a prima facie case of negligence is the plaintiff's showing that the defendant owed him a duty of due care.[32] Everyone has a general duty to exercise due care and to act as a reasonably prudent person,[33] but in situations such as in *Schurk*, the defendant

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trary, but he feels that they may be necessary to draw the line short of unlimited liability.

It should be noted also that the fact patterns in *Dillon* and *Schurk* are distinguishable. *Dillon* involved a single automobile accident, while *Schurk* involved several assaults over a five month period. The *Dillon* test may be of assistance in determining foreseeability in cases similar to *Dillon*, but it is of little use in cases such as *Schurk*, where more than one act is involved occurring over a period of time.

31. A prima facie case of negligence is established when duty, breach, causation and injury are demonstrated. *See generally* RESTATEMENT (SECOND) OF TORTS § 281 (1965).

32. *Id.*

33. *See, e.g.*, Brown v. Kendall, 60 Mass. (6 Cush.) 299 (1850), and Alexiou v. Nockas, 171 Wash. 369, 17 P.2d 911 (1933).

parents' duty is more precise. When parents know that their child had dangerous tendencies, they have a two-fold duty: to exercise reasonable care in controlling their child, and to warn others to whom the child may pose a threat.[34] Once a duty is established, the crucial determination is to whom is the duty owed.[35]

Whether the defendant owes a duty to the plaintiff depends upon whether a reasonable man in the defendant's position would foresee that his act would cause a normal person in the plaintiff's position to suffer harm.[36] Thus, if the defendant should have foreseen that his act might harm the plaintiff, the plaintiff is said to be within the zone of risk in which the defendant owes him a duty of care. If the impact and zone of danger rules are rejected, the zone of risk includes not only the possibility of physical harm but also risk of emotional injury. Hence, if traditional negligence theory is used, a defendant has a duty not to subject others to a foreseeable risk of physical or severe emotional harm.[37] In *Schurk,* whether the plaintiff's emotional harm was foreseeable under standard negligence theory was an issue of fact which should have been determined by the trier of fact rather than by the court as a matter of law.[38]

Once it is established that the defendant owed a duty not to subject the plaintiff to a foreseeable risk of physical or severe emotional harm

34. Caldwell v. Zaher, 344 Mass. 590, 183 N.E. 2d 706 (1962); Norton v. Payne, 154 Wash. 241, 281 P. 991 (1929). *See also* RESTATEMENT (SECOND) OF TORTS § 316 (1965).

35. Courts denying recovery to persons whose mental distress was caused by concern for another generally do so on the basis of a lack of duty owed to the plaintiff. *See* Hopper v. United States, 244 F. Supp. 314 (D. Colo. 1965).

36. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928). *But see* PROSSER at 256. Dean Prosser suggests that it is the nature of the interest invaded and the type of damage suffered which is the real obstacle, rather than foreseeability.

37. It has been persuasively argued that foreseeability is only one aspect of duty, and that other factors also carry considerable weight in determining whether a duty exists. *See, e.g.,* Green, *The Duty Problem in Negligence Cases,* 28 COLUM. L. REV. 1014 (1928). Professor Green would consider the administrative factor, the ethical or moral factor, the economic factor, the prophylactic factor, and the justice factor.

Even assuming this view to be correct, there do not appear to be any policy considerations dictating that recovery for emotional harm be denied. *See* text accompanying notes 15-31 *supra. See also* PROSSER at 328, and Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). *But see* Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963), *overruled in Dillon,* and Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935). In *Amaya* Justice Traynor concluded that foreseeability of harm was outweighed by both administrative problems such as difficulty in proving causation and establishing rational limits on liability, and by the undesirability of imposing liability disproportionate to the degree of culpability. *Accord,* Smith, *Negligently Inflicted Emotional Shock from Witnessing the Death or Injury of Another,* 10 ARIZ. L. REV. 508 (1968).

38. PROSSER at 290.

and that he negligently breached that duty, the plaintiff still must demonstrate that he was injured and that the injury was proximately caused by the plaintiff's conduct.[39] Establishing that an emotional injury has occurred should not prove to be an insurmountable task. Medical science can assist in proving the existence of the injury and in determining the extent of damage.[40] Since the plaintiff in *Schurk* required medical attention, she probably would have had little difficulty proving injury. Whether her injury was proximately caused by the defendant parents was an issue of fact to be resolved by the trier of fact.

Without the restrictive impact, zone of danger, or *Dillon* tests, standard negligence principles would allow persons such as the plaintiff in *Schurk* to have their cases decided on the merits rather than by artificial rules. The artificiality of these rules is demonstrated by the fact that in some cases a plaintiff is allowed to recover where the impact is irrelevant to the resulting emotional injury,[41] or where the injury has no relationship to his being within a zone of physical danger.[42] Negligence theory would eliminate less meritorious claims which now are allowed under the impact or zone of danger rules. For example, a plaintiff under the impact or zone of danger tests currently may recover for mental distress if he can show either physical contact with his person or presence within a zone of danger, regardless of whether there was causation between the defendant's negligent act and his emotional harm.[43] Standard negligence theory would eliminate recovery in these circumstances because it requires that the plaintiff establish the causal relationship between his injury and the defendant's negligent act.[44]

39. RESTATEMENT (SECOND) OF TORTS § 281 (1965).

40. *See* notes 17-18 and accompanying text *supra*.

41. *See, e.g.*, Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928) (evacuation of horse's bowels onto plaintiff's lap held to be sufficient impact); Porter v. Delaware, L. & W.R.R., 73 N.J. 405, 63 A. 860 (1906) (dust in eyes sufficient impact); Clark Restaurant Co. v. Rau, 41 Ohio App. 23, 179 N.E. 196, 197 (1931) ("any injury no matter how slight").

42. *See, e.g.*, Lindley v. Knowlton, 179 Cal. 298, 176 P. 440 (1918). Plaintiff's wife was frightened and subsequently suffered physical harm when an escaped chimpanzee entered her house and attacked her children. Even though she was within the zone of danger, her complaint alleged that her injury was the result of fear for her children. The court based recovery on the fact that she was within the zone of danger.

43. *See, e.g.*, Brody, *Negligently Inflicted Psychic Injuries: A Return to Reason*, 7 VILL. L. REV. 232 (1961); Comment, *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases*, 35 U. CHI. L. REV. 512 (1968).

44. *See* note 39 and accompanying text *supra*.

Traditional negligence theory would limit liability in one other respect. The impact and zone of danger rules fail to discriminate between acts causing serious emotional harm in the medically normal person, and those acts causing emotional harm only in the particularly vulnerable person. As previously noted, traditional negligence theory allows recovery only where the defendant's act would have harmed a normal person, thereby limiting a defendant's potential liability.[45] Thus, rather than creating unlimited liability, standard negligence theory actually would restrict liability in circumstances where the zone of danger rule presently allows recovery.

CONCLUSION

Schurk v. Christensen presented the court with the opportunity to re-examine the rule prohibiting recovery for the negligent infliction of emotional harm in the absence of physical trauma or a reasonable fear of it. While the court indicated that such a re-examination was needed, it concluded that *Schurk* was not the proper case in which to make a change.[46] This decision was based primarily on the court's conclusion that the plaintiff in the instant case did not meet the *Dillon* criteria, which the court viewed as the logical alternative to the zone of danger rule.

Instead of looking at the *Dillon* test as the only alternative, the court should have allowed recovery to be based on traditional negligence theory. The *Dillon* and zone of danger rules are unjustifiable both in terms of evidentiary requirements and equity, and hence should have been rejected. Instead, courts should apply general principles of tort liability, determining recovery upon whether the plaintiff can establish a prima facie case of negligence.

J.R.R.

45. *See* notes 26-27 and accompanying text *supra*. *See generally* Comment: *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases*, 35 U. CHI. L. REV. 512 (1968).
46. 80 Wn. 2d at 657, 497 P.2d at 940.