Direct Actions for Emotional Harm: Is Compromise Possible?

Julie A. Davies
DIRECT ACTIONS FOR EMOTIONAL HARM: IS COMPROMISE POSSIBLE?

Julie A. Davies*

Abstract: While most courts and commentators acknowledge that emotional injury resulting from negligence may merit compensation, they share the conviction that some limits must be placed on such claims. They identify two basic policy rationales as the justifications for limiting claims for emotional harm: (1) the desire to ensure that a defendant's liability for negligence is not disproportionate to his or her fault, and (2) the desire to prevent litigation of trivial or fraudulent claims.

This Article argues that the two rules most frequently applied by courts to effectuate limitations on recovery—the "zone-of-danger" rule and the "foreseeability-plus-serious-injury" rule—suffer from serious deficiencies. The Article considers an approach suggested by the California Supreme Court's decision in Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc. There, the court utilized many of the same rules applicable in tort actions for personal injury and property damage, concluding that these rules struck an acceptable and logical balance between the conflicting goals of limitation and compensation. The Article evaluates the ramifications of such an approach and concludes that the duty rules identified by the court would provide a fair and workable framework for determining the class of plaintiffs permitted to sue for negligently inflicted emotional harm. The Article cautions, however, that even if the duty rules discussed are utilized, courts will continue to confront difficult policy questions in some types of cases.

I. INTRODUCTION .................................... 2
II. A PRIMER ON THE EXISTING LEGAL RULES .... 5
   A. "Direct" Actions ................................... 7
   B. "Bystander" Actions ............................... 12
   C. Injury-Related Requirements ..................... 13
III. EVALUATING THE VALIDITY AND EFFECTIVENESS OF RULES GOVERNING DIRECT ACTIONS ................................... 15
   A. A Preliminary Question: Should Duty Be Limited? ... 15
   B. Evaluating the Rules That Limit Recovery in Direct Actions ................................... 20
      1. The Zone-of-Danger Rule ......................... 20
      2. The Foreseeability Standard ..................... 24
      3. Genuine and Serious Injury or Physical Consequences ................................... 24

* Associate Professor of Law, University of the Pacific, McGeorge School of Law; B.A., University of California, Los Angeles, 1978; J.D., University of California, Los Angeles, 1981. I have benefitted immensely from the insights and suggestions of my colleague, Professor Lawrence C. Levine, and from the editorial assistance of Thomas A. Busch, Esq. I received devoted and attentive research assistance and editorial advice from the following McGeorge students: Kerry Sawyer, Anne Schmitz and Barbara Scramstad.
C. Evaluating Other Proposals for Change ............ 26

IV. IS THERE A BETTER WAY TO RESTRUCTURE THE RULES? ................................. 29
A. The Analysis Suggested by Marlene F. ............. 31
   1. Identifying the Duty Principles That Would Govern Direct Actions .................. 32
   2. Placing the Court's Opinion in Marlene F. Within the Context of Recognized Duty Principles .... 35
B. Prototypical Cases .................................. 37
   1. Would Damages for Emotional Distress Be Recoverable Any Time a Duty Can Be Found Under The Established Principles Articulated in Marlene F.? ............ 37
   2. Would Established Duty Rules Other Than Those Specifically Mentioned in Marlene F. Suffice to Create an Obligation Warranting Recognition of a Right to Recover Damages Stemming from Emotional Distress? .................. 42
C. Requiring Proof of Serious Injury ................... 48
D. An Assessment ................................... 49

V. CONCLUSION ........................................ 52

I. INTRODUCTION

Judges and lawyers have long been challenged by the task of selecting which of many potential plaintiffs may pursue claims for negligent infliction of emotional harm.¹ Although courts and legal scholars have dealt extensively with the question of whether a plaintiff may recover for emotional harm suffered as a result of viewing negligently inflicted injury to a loved one,² they have devoted far less attention to a much more commonly occurring issue—the actionability of claims brought by individuals contending that, as a result of a defendant's negligence, they have sustained damages arising from emotional harm.³ This Article focuses specifically on the long-ignored "direct"

¹. In this Article, the author uses the terms "harm" and "distress" interchangeably.
². See infra articles cited at note 95.
³. California refers to these types of actions as "direct" actions to contrast them with the cause of action that arises when one experiences emotional distress as a result of injury to another. California utilizes different rules to govern the two types of claims. See infra text accompanying notes 31–63. Some jurisdictions do not utilize this terminology, but the courts are
Direct Actions for Emotional Harm

actions for emotional harm, examining the question of whether, and to what extent, this type of claim should be recognized as a viable basis for recovery of damages.

Although courts and commentators acknowledge that injury sustained by emotional, rather than physical, impact may merit compensation, the intangible character of emotional harm reinforces a shared conviction that recovery must be limited. Rules adopted to impose these limits seek to effectuate two basic policy objectives. First, the rules attempt to ensure that a defendant’s liability for negligence will not extend to anyone and everyone emotionally affected by that negligence; in other words, that liability for negligence will not be “disproportionate to fault.” The concept of disproportionality is primarily a fairness concern, although courts clearly contemplate the burdens of unlimited litigation on themselves and on society as well. The second primary objective of legal rules imposing limitations on emotional distress claims is to prevent litigation of trivial and/or fraudulent cases. Questions of fairness and resource allocation pervade this goal as well.

Although the policy objectives and their rationales are fairly clear, the legal rules that courts have adopted to effectuate them do not always achieve a balance between an injured plaintiff’s claim for compensation and the societal and institutional objectives to be served by limiting claims. To illustrate this point, Section II of this Article undertakes a brief overview of the legal rules that govern claims for emotional distress in the majority of jurisdictions. Based on this foundation, Section III evaluates and critiques the operation and policy of the legal rules that currently dominate the determination of whether direct actions may proceed. Under the first of these rules, the zone-of-danger rule, persons who have been exposed to a threat of bodily harm and have suffered emotional harm as a result will be deemed to state a cause of action. Although this standard succeeds in imposing concrete limitations on the numbers of suits litigated, it is frequently applied in an extremely narrow fashion and, hence, is incapable of responding to cases in which the plaintiff is not within a concrete zone of physical harm. Another predominant rule provides that

4. See infra text accompanying notes 89–95.
5. See infra text accompanying notes 71–72.
6. See infra text accompanying notes 64–69.
7. See infra text accompanying notes 19–69.
8. See infra text accompanying notes 70–150.
9. See infra text accompanying notes 97–110.
in order to state a claim, a plaintiff must allege that harm is foreseeable and that the injury suffered is serious.\(^{10}\) This rule is imperfect for quite a different set of reasons. If courts take the rule at face value, foreseeability of harm provides virtually no limitation on the numbers and types of suits that will be permitted. If courts do not take the rule literally, they are left with no idea as to which subset of claims ought to proceed.\(^{11}\)

Despite their shortcomings, these two basic rules have been, and are, the mainstay of legal analysis pertaining to direct actions. In California, a jurisdiction that had adopted the foreseeability-plus-serious-injury rule,\(^{12}\) the courts have struggled with the borders between direct and "bystander" actions\(^{13}\) and have attempted to formulate clearer rules about which individuals would be entitled to sue as bystanders.\(^{14}\) These efforts have not included any comprehensive explanation of the principles that ought to be employed to determine the actionability of damages for emotional distress in the vast number of cases in which the claimant is, under the court's own rules, not a bystander.

In 1989, the California Supreme Court was finally forced to confront the confusion surrounding direct actions in *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*\(^{15}\) The court was presented with the claim of a mother who, along with her son, had consulted a therapist for family counseling. Marlene F. alleged that the therapist molested her son, and that she suffered emotional distress as a result.\(^{16}\)

---

10. The author refers to this as the "foreseeability-plus-serious-injury rule."
12. See infra text accompanying notes 38–39.
13. Bystander claims are understood by courts to consist of actions by individuals who have witnessed harm to another. Some courts preclude any recovery by a bystander unless the bystander was personally endangered by the defendant's negligence. Other jurisdictions permit a broader class of individuals to seek recovery. See infra text accompanying notes 55–63. Direct actions are non-percipient witness claims—claims that do not fit within the parameters of the legal rules courts have developed. These actions encompass an extremely broad range of factual circumstances and may in fact be integrally related to harm suffered by a loved one. The California Supreme Court in *Thing v. La Chusa*, 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989), acknowledges that "the subtleties in the distinction between the right to recover as a 'bystander' and as a 'direct victim' created what one Court of Appeal has described as 'an amorphous nether realm.'" *Thing*, 771 P.2d at 823, 257 Cal. Rptr. at 874 (citing *Newton v. Kaiser Found. Hosp.*, 184 Cal. App. 3d 386, 228 Cal. Rptr. 890, 893 (1986)).
16. Child molestation is clearly the type of conduct one would often associate with an intentional tort. However, because the law pertaining to intentional infliction of emotional harm has been narrowly construed, a person in Marlene F.'s position would have to have been present at the time of the molestation to state a cause of action. See *Restatement (Second) of Torts*
Direct Actions for Emotional Harm

In recognizing the validity of her claim, the court enumerated three bases for recognition of a legal duty and evinced a desire to reintegrate direct actions into the fold of ordinary negligence actions.\(^1\)

The court's short and sparing opinion in *Marlene F.* raises many more questions than it answers and may even have increased the confusion surrounding direct actions. Despite this confusion, the California court may also have embarked on a new path—one that has the potential to ameliorate some of the inadequacies of both the zone-of-danger and foreseeability-plus-serious-injury rules. Section IV of this Article examines at length the bases for duty enumerated by the California Supreme Court in *Marlene F.* in order to evaluate whether the court's approach represents a feasible alternative to the existing rules. The balance of the Article explores the parameters of this compromise position and evaluates its validity as compared to the prevailing legal rules and to other scholarly suggestions for reform.\(^2\) The Article's ultimate conclusion is that the rules pertaining to this type of claim can be made fairer and more concrete if courts draw on some of the duty rules that govern cases of physical injury or property damage as a starting point in their analyses. Many of these rules speak to the existence of relationships and specific interactions between plaintiffs and defendants that warrant accountability for damages arising from emotional harm.

II. A PRIMER ON THE EXISTING LEGAL RULES

A review of the development of the law pertaining to recovery of damages for emotional distress is a necessary prerequisite to any discussion of the theoretical and practical problems surrounding direct actions for emotional distress. In general, courts have manifested hostility toward claims for damages for mental distress for as long as those claims have been presented by litigants.\(^3\) Their antagonism toward allowing recovery in tort has been aimed at both intention-
ally and negligently inflicted mental distress. Numerous policy concerns have been expressed in support of the refusal to recognize a duty to avoid infliction of mental distress: the impossibility of measuring mental disturbance in terms of money, lack of "proximate cause," lack of precedent, the possibility of allowing recovery for fraudulent or trivial claims, significant increases in liability of defendants in amounts disproportionate to the level of culpability, and the inability of courts to formulate appropriate limits on the availability of claims due to the nature of the injury involved.


21. The argument is that because the injury suffered is intangible, money is not as useful as a means of redress as it is in the case of injury to body or property. See, e.g., Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 964, 182 Cal. Rptr. 337, 347 (1982) ("a monetary award . . . cannot in any meaningful sense compensate the plaintiff"); Borer, 563 P.2d at 850, 138 Cal. Rptr. at 304 (1977) ("loss of consortium is an intangible injury for which money damages do not afford an accurate measure or suitable recompense"); Howard v. Lecher, 42 N.Y.2d 109, 366 N.E.2d 64, 65, 397 N.Y.S.2d 363, 364 (1977) (recovery "is based on the legal fiction that money damages can compensate for a victim's injury"). For an argument that tort damages are unable to restore victims to the status quo before the accident regardless of the type of harm suffered, see Abel, A Critique of Torts, 37 UCLA L. Rev. 785, 802 (1990).

22. This argument consists of the contention that emotional distress suffered by the plaintiff as a result of the defendant's actions could not have been anticipated by the defendant as the "natural and probable consequences of his act." See Braun v. Craven, 174 Ill. 401, 51 N.E. 657, 659 (1898); Cleveland, C., C. and St. L. Ry. Co. v. Stewart, 24 Ind. App. 374, 56 N.E. 917, 919-21 (1900); Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354, 355 (1896), overruled by Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); Chittick v. Philadelphia Rapid Transit Co., 224 Pa. 13, 73 A. 4, 6 (1909) ("consequences . . . were of such an extraordinary character").


Direct Actions for Emotional Harm

Although courts have widely rejected "lack of proximate cause" and lack of precedent, the other policy concerns continue to influence judicial decisions. Nonetheless, not every policy concern arises in every class of case presenting a claim of mental distress. Courts, however, tend to view the policies supporting limitation of duty as a package—rejecting all or accepting all without truly focusing on whether, or to what extent, particular policies are implicated by various classes of claims. The remainder of Section II will familiarize the reader with the basic rules and their purported justifications. Subsequent sections will undertake an in-depth evaluation of their validity.

A. "Direct" Actions

Most jurisdictions recognize a cause of action for mental distress for persons who have suffered some type of "impact," or who were in the "zone of danger" of bodily harm, but who suffered only mental...


29. In addition to the policy rationales that courts suggest support their decisions, Professors Chamallas and Kerber argue that gender differentiation has played a large part in the development of the law pertaining to recovery for emotional distress and that this factor has not been included in contemporary case books and commentary. Chamallas & Kerber, Women, Mothers, and the Law of Fright: A History, 88 Mich. L. Rev. 814, 819 (1990).

30. Although direct actions for emotional harm are the focus of this Article, the rules governing bystander claims are also outlined in this subsection. The line between the two types of actions has been called into question in some jurisdictions. Hence, in analyzing and formulating rules regarding direct actions, it is helpful to understand the rules that govern bystander actions.

31. The impact rule requires some physical contact by defendant as a pre-requisite to permitting a plaintiff to recover for emotional harm. Impact thus serves as a surrogate for traditional personal injury, and the emotional component is deemed "parasitic." Chamallas & Kerber, supra note 29, at 819. In time, the impact requirement has become diluted in many jurisdictions. "Impact" has included a slight blow, a minor burn or electric shock, a slight jolt or jar, a forcible seating on the floor, dust in the eye, or inhalation of smoke. See, e.g., Sam Finley, Inc. v. Russell, 75 Ga. App. 112, 42 S.E.2d 452, 455 (1947); Porter v. Delaware, L. & W.R. Co., 73 N.J.L. 405, 63 A. 860, 860 (1906). The requirement for impact "has even been satisfied by a fall brought about by a faint after a collision or the plaintiff's own wrenching of her shoulder in reaction to fright." Prosser & Keeton, supra note 20, § 54; see also Howard v. Bloodworth, 137 Ga. App. 478, 224 S.E.2d 122, 123 (1976); Hatfield v. Max Rouse & Sons N.W., 100 Idaho 840, 606 F.2d 944, 955 (1980); Carlenville Nat'l Bank v. Rhoads, 63 Ill. App. 3d 502, 380 N.E.2d 63, 64 (1978), aff'd sub nom. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 457 N.E.2d 1 (1983); Little v. Williamson, 441 N.E.2d 974, 975 (Ind. Ct. App. 1982).
distress. Although impact is no longer required by most courts, both the impact rule and the zone-of-danger rule effectuate similar policy goals. First, both substantially restrict the number of potential plaintiffs. If close proximity to physical harm, whether or not accompanied by impact, determines the existence of a legal duty, the class of potential plaintiffs is quite circumscribed. The impact and zone-of-danger rules also purport to facilitate selection of the claims that are most likely to be genuine; the theory is that emotional harm inflicted in the setting of a “near miss” is more likely to be genuine and serious than harm to a person far-removed from the scene of an injury. Finally, because the impact and zone-of-danger rules are construed quite literally so as to require a concrete physical zone in

32. The zone-of-danger rule is, in a sense, a liberal relative of the impact rule. The nexus to a directly inflicted physical injury is satisfied by the plaintiff’s presence in a location where such an injury could have occurred. The drafters of the Restatement (Second) of Torts (1965) adopted the zone-of-danger rule. Section 436 (2) provides:

If the actor’s conduct is negligent as creating an unreasonable risk of bodily harm to another otherwise than by subjecting him to fright, shock, or other similar and immediate emotional disturbance, the fact that such harm results solely from the internal operation of fright or other emotional disturbance does not protect the actor from liability.

See, e.g., James v. Harris, 729 P.2d 980 (Colo. App. 1986) (Colorado law recognizes zone-of-danger rule as set forth by the Restatement (Second) of Torts § 436(2)); Williams v. Baker, 572 A.2d 1062 (D.C. 1990) (District of Columbia adopts zone-of-danger rule for direct victims and declines to recognize bystander recovery); Tibbetts v. Crossroads, Inc., 411 N.W.2d 535, 538 (Minn. Ct. App. 1987) (“[A] plaintiff may not recover damages for negligent infliction of emotional distress unless the plaintiff shows that the defendant’s action resulted in either physical injury or physical danger to the plaintiff.”).


35. Both rules reduce the likelihood that certain “collateral” plaintiffs will be permitted to sue. Professor Rabin noted in the context of his article on pure economic harm that “perimeter” cases involve victims who cannot be identified in advance with much confidence, as well as persons to whom the consequences of negligence seem distinctly collateral as compared to the harm suffered by others. Rabin, Tort Recovery for Negligently Inflicted Economic Loss, 37 STAN. L. REV. 1513, 1521 (1985). The same types of cases arise in the context of actions for damages that stem from pure emotional harm. With regard to these types of harm, foreseeability is of limited use as a “guide to liability.” Id. The zone-of-danger and impact rules deter collateral plaintiffs from bringing suit because the physical contact or presence within the zone of danger tends to indicate that the plaintiff is the focus of the defendant’s negligence.

which bodily harm would have been possible, they are relatively easy to apply. Hence, they are responsive to courts’ concerns that rules be administratively feasible.\footnote{37}

Some jurisdictions, notably California and Hawaii, recognize a duty to avoid negligent infliction of mental distress even where bodily harm is not threatened. California seemingly threw caution to the wind in \textit{Molien v. Kaiser Foundation Hospitals},\footnote{38} in which the California Supreme Court recognized a husband’s right to sue for emotional distress suffered as a result of a doctor’s erroneous communication that the plaintiff’s wife had been diagnosed with a venereal disease. Although the husband was clearly not within a tangible “zone of danger,” the court classified him as a “direct victim” of the doctor’s negligence and allowed him to sue on the basis that injury to him was “foreseeable” and that he had suffered serious and genuine injury.\footnote{39} Hawaii had reached a similar result nearly a decade before in \textit{Rodrigues v. State},\footnote{40} in which a couple was permitted to sue when their home was negligently damaged by flooding water. These cases reflected an optimism that courts and juries could distinguish the trivial and fraudulent from the severe and the genuine without the artifices of geographically-based duty limitations. The spectre of liability disproportionate to the culpability of a defendant,\footnote{41} a concern often articulated by the courts, did not outweigh the interests of the plaintiffs in compensation.\footnote{42}


38. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).


40. 52 Haw. 156, 472 P.2d 509 (1970). The Hawaii Supreme Court held that:

[T]he question of whether the defendant is liable to the plaintiff in any particular case will be solved most justly by the application of general tort principles . . . [A] further limitation on the right of recovery, as in all negligence cases, is that the defendant’s obligation to refrain from particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous. \textit{Rodrigues}, 472 P.2d at 520–21 (citations omitted).

41. See \textit{infra} text accompanying notes 97–109 for a discussion of what this concept may mean in the context of actions for damages stemming from emotional distress.

42. \textit{Molien} was a case that presented a potential for widespread liability in future cases. By widespread liability, I refer to situations in which a large number of potential claims arise as a consequence of a single tortious act. As Professor Rabin clearly explains, these situations must be distinguished from cases in which a course of conduct, such as production of a drug, gives rise to multiple claims. Rabin, supra note 35, at 1515 n.6. In \textit{Molien}, recognition of the husband’s claim created the possibility that other “collateral” plaintiffs would seek to bring suit when a physician’s negligence in treating one person caused them to suffer severe emotional distress. In \textit{Rodrigues}, the threat was not so much that “collateral” plaintiffs would bring suit as that persons
Subsequently, both California and Hawaii have restricted, in varying degrees, the duty rules enunciated in Molien and Rodrigues. California’s restrictions are most dramatic. In Ochoa v. Superior Court, the California Supreme Court held that parents who had witnessed their young son fall ill and die an excruciating death from a sickness that went undiagnosed and untreated by doctors and medical staff at a youth facility could recover only as bystanders. The court stated:

Plaintiffs here have not stated a cause of action as direct victims of defendants’ negligence. In Molien defendant’s misdiagnosis was, by its very nature directed at both the wife and the husband. The wife was asked to tell her husband of the diagnosis and the husband was required to submit to tests. By contrast, here the defendants’ negligence in the instant case was directed primarily at the decedent, with Mrs. Ochoa looking on as a helpless bystander as the tragedy of her son’s demise unfolded before her.

Apart from this illustration of the factual contrast between Molien and Ochoa, the court did not elaborate as to how lower courts should determine which plaintiffs were entitled to bring suit as “direct” victims.

In a recent decision, Marlene F. v. Affiliated Medical Clinic, Inc., the California Supreme Court emphasized that it did not consider simple “foreseeability” of harm to the plaintiff to be the raison d’être of its decision in Molien and stressed that it had not intended to create a generalized cause of action for negligent infliction of emotional distress. However, the court recognized a cause of action in favor of a mother who had enlisted the help of a therapist for both herself and her son to assist them in dealing with family problems. During the course of sessions with the son, the therapist had molested the boy. In acknowledging that the mother stated a cause of action for negligent infliction of emotional distress, the court emphasized that a duty arose suffering emotional distress as a result of property damage would bring suit. Thus, a whole new class of claims for emotional distress became cognizable.

43. 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985).
44. Specific rules govern plaintiffs’ ability to proceed on a theory that their emotional harm resulted from concern for the safety of another. Courts refer to these claims as “bystander” actions. See infra text accompanying notes 54–63.
45. Ochoa, 703 P.2d at 10, 216 Cal. Rptr. at 670.
46. In her dissent, Chief Justice Bird argued that the Molien “direct victim” test was “nothing more than reasonable foreseeability in disguise.” Id. at 20, 216 Cal. Rptr. at 680 (Bird, J., dissenting). Despite her assertion, it seems clear that the majority was attempting to apply a narrower standard. There can be no dispute that a mother witnessing the slow and agonizing death of her son is a reasonably foreseeable victim of emotional distress.
47. 48 Cal. 3d 583, 770 P.2d 278, 257 Cal. Rptr. 98 (1989).
because of the mother's therapeutic relationship with the therapist. The court stated:

Damages for severe emotional distress . . . are recoverable in a negligence action when they result from the breach of a duty owed the plaintiff that is assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two.49

In Marlene F., the court found that duty arose because of the doctor-patient relationship between the plaintiff and the defendant.50 While appearing at first glance to be an expansion of duty in direct actions,51 Marlene F. actually reflects a renewed emphasis in California on a perceived need to limit liability of defendants for damages arising solely from emotional harm. However, as Part III of this Article illustrates, the boundaries delineated by the case are far from clear.

Hawaii has imposed less stringent limitations on actions for emotional distress than has California. Hawaii limited its decision in Rodrigues by requiring that the plaintiff be "located within a reasonable distance from the scene of the accident."52 In addition, the Hawaii legislature abolished causes of action based on emotional distress caused by damage to material objects unless such distress is accompanied by "physical injury to or mental illness of the person who suffers the emotional distress or disturbance."53 Thus, Hawaii has attempted to restrict the class of plaintiffs bringing suit for emotional distress arising from property damage by imposing more exacting requirements for proof of injury.

49. Id. at 282, 257 Cal. Rptr. at 102.

50. Id. The court acknowledged that the children's mothers might have proceeded "solely on the theory that the therapist's acts constituted professional negligence to them in their own position as his patients." Id. at 283 n.6, 257 Cal. Rptr. at 103 n.6.

51. See Note, Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.: Negligent Infliction of Emotional Distress Bounces Out of Bounds, 22 PAC. L.J. 189, 211-12 (1990) (arguing that Marlene F. "opened the door to unlimited liability to all foreseeable plaintiffs who may suffer emotional distress").

52. Kelley v. Kokua Sales & Supply, Ltd., 56 Haw. 204, 532 P.2d 673, 676 (1975). In Kelley, the court denied recovery where a grandfather living in California suffered a fatal heart attack when informed by telephone that his daughter and granddaughter had been killed and another granddaughter seriously injured as a result of an automobile accident in Hawaii. The court held that the defendants could not reasonably foresee the consequences to the grandfather because his location was "too remote." Id. However, in the later case of Campbell v. Animal Quarantine Station, 63 Haw. 557, 632 P.2d 1066 (1981), the court upheld an award of damages for emotional distress suffered when the plaintiff's dog died as a result of defendants' negligence in transporting the dog to a veterinary hospital. Plaintiffs were informed of the dog's death by telephone the following day.

B. "Bystander" Actions

Just as most jurisdictions recognize the viability of "direct" actions for negligent infliction of emotional distress in some circumstances, most jurisdictions now recognize a "bystander" cause of action when one suffers fright or shock from witnessing negligently inflicted harm to a member of one's family. California became the first jurisdiction to recognize a claim on this basis in the landmark case of *Dillon v. Legg.*\(^5\) There, the California Supreme Court allowed recovery for a mother who, though in no danger of physical harm to herself, suffered emotional harm on seeing her daughter run over by a car. Emphasizing that the chief element in determining whether a defendant owes a duty is the foreseeability of risk, the *Dillon* court identified three factors that courts should take into account in determining foreseeability: (1) whether the plaintiff was located near the scene of the accident as contrasted with a plaintiff who was a distance away from it; (2) whether shock resulted from the sensory and contemporaneous observance of the accident as contrasted with learning of the accident from others after its occurrence; and (3) whether the plaintiff and the victim were closely related, as contrasted with the absence of any relationship or the presence of only a distant relationship.\(^5\) Despite the court's expansive opinion, the *Dillon* rule has a restrictive dimension.\(^6\) The guidelines requiring contemporaneous viewing of the negligent act and presence at the scene of the accident limit recovery because, although many people experience distress because of an injury to a family member, very few actually view such injuries occurring.

Passage of time and a vast array of "bystander"-type actions have made the California Supreme Court much more concerned about limiting the number of potential plaintiffs than it purported to be when *Dillon* was decided. In the recent case of *Thing v. La Chusa,*\(^7\) the California Supreme Court denied a cause of action to a woman who, from her home, heard another person shout her son's name and who then found her son lying injured in the street moments after he had been hit by a car. The court insisted that the *Dillon* factors were to be applied strictly and even arbitrarily.\(^8\) The court reasoned that when applied loosely, the factors had led to distressingly inconsistent results, and that the public would be better served by tough and consistent

---

54. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
55. *Dillon*, 441 P.2d at 920, 69 Cal. Rptr. at 80.
56. Rabin, supra note 35, at 1526.
application of the factors, even if such application is arbitrary.\textsuperscript{59} Thus, California now requires that a plaintiff seeking to recover for emotional distress suffered as a percipient witness plead and prove that the plaintiff is closely related to the injury victim, is present at the scene of the injury-producing event at the time it occurs, and is then aware that it is causing injury to the victim. The plaintiff must also show that as a result, he or she suffered serious emotional distress—a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances.\textsuperscript{60}

While most jurisdictions have followed California's lead in recognizing the right of bystanders to sue for negligent infliction of emotional distress, the majority of courts has opted to confine bystander actions to situations in which the bystander is within the zone of danger.\textsuperscript{61} New York, for example, requires the bystander to plead both the existence of a familial relationship with the primary victim and the location of the bystander within the zone of physical danger.\textsuperscript{62} Despite these jurisdictions' requirement that the bystander be within the zone of physical danger, the emotional distress compensated occurs as a result of witnessing injury to another.\textsuperscript{63}

\textbf{C. Injury-Related Requirements}

In addition to the rules just discussed, most jurisdictions require the plaintiff in either a bystander or a direct action to plead and prove some physical injury as a manifestation of the emotional distress inflicted.\textsuperscript{64} Although requiring some manifestation of physical injury

\bibitem{59} Id.

\bibitem{60} Id. at 829, 257 Cal. Rptr. at 880.

\bibitem{61} This rule thus emphasized the physical location of the plaintiff. Chamallas & Kerber, supra note 29, at 821. For a discussion of the policy basis for this choice, see infra text accompanying notes 97–110.


\bibitem{63} Thus, in jurisdictions like New York, a plaintiff could presumably sue both for injuries sustained as a direct victim (by reason of the plaintiff's presence within the zone of danger) and for injuries sustained by witnessing negligence to another while present within the zone of danger. If presence within the zone of danger is required for both, it is not clear why there should be any distinction between bystander claims and direct claims. It seems doubtful that plaintiffs can establish which damages arose from fear for themselves and which arose as a result of fear for family members. See Bovsun, 461 N.E.2d at 848 n.10, 473 N.Y.S.2d at 362 n.10 (1984) (alluding to the practical difficulties juries face in seeking to separate the emotional distress suffered by a plaintiff attributable to his own physical injuries from the plaintiff's emotional distress in consequence of observing an injured or dying family member).

\bibitem{64} PROSSER & KEETON, supra note 20, § 54. This rule is also embodied by the Restatement (Second) of Torts § 436A, which provides as follows: "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another,
does not ensure genuineness of a claim, courts tend to agree that it helps. This view is based on the belief that serious emotional distress is likely to manifest itself in physical symptoms. Some jurisdictions have recognized a limited exception to this requirement in certain narrow factual situations which they deem so likely to cause emotional harm that concerns about genuineness are alleviated. Typically these exceptions are limited to negligent mishandling of a corpse, or negligent transmission of a message announcing death of a relative or other news equally likely to cause emotional harm. Other jurisdictions, including California and Hawaii, have departed from the requirement that the plaintiff allege physical injury, requiring instead that the plaintiff allege emotional harm so severe that it would cause injury in a reasonable person similarly situated. Thus, these jurisdictions rely primarily on juries to ascertain which claims are trivial or fraudulent.

and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.”

65. Prosser & Keeton, supra note 20, § 54.

66. See, e.g., Western Union Tel. Co. v. Crumpton, 138 Ala. 632, 36 So. 517 (1913) (negligent transmission of a message); Western Union Tel. Co. v. Redding, 100 Fla. 495, 129 So. 743, 749 (1930) (same); Russ v. Western Union Tel. Co., 222 N.C. 504, 23 S.E.2d 681, 683 (1943) (same); see also Spomer v. City of Grand Junction, 144 Colo. 207, 355 P.2d 960, 963 (1960) (negligent mishandling of a corpse); Papieves v. Lawrence, 437 Pa. 373, 263 A.2d 118, 121 (1970) (same); Whitehair v. Highland Memory Gardens, Inc., 327 S.E.2d 438, 443 (W. Va. 1985) (same); see also Prosser & Keeton, supra note 20, § 54.


68. See Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). The court noted that “the general standard of proof required to support a claim of mental distress is some guarantee of genuineness in the circumstances of the case.” Molien, 616 P.2d at 821, 167 Cal. Rptr. at 839 (quoting Rodrigues v. State, 52 Haw. 156, 472 P.2d 509, 520 (1970)). The Rodrigues court was somewhat more explicit than the quote from Molien reveals, having defined the standard as follows: “[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.” Rodrigues, 472 P.2d at 520.

Professors Chamallas and Kerber argue that courts have long viewed women as hypersensitive, and, hence, have deemed their distress unworthy of recovery. Chamallas and Kerber contend that courts were comparing women to male, and therefore, non-pregnant individuals. Chamallas & Kerber, supra note 29, at 827–34. The Molien and Rodrigues standards might be viewed as institutionalizing courts’ inclinations to compare the harm suffered with that likely to be felt by the reasonable man and therefore minimizing certain types of mental distress. Chamallas and Kerber applaud the “feminization” of tort law, in which the notion of physical harm is expanded to encompass “a woman’s experience in the physical and social experience of pregnancy and in the socially constructed experience of motherhood.” Id. at 862.

69. However, in Thing v. La Chusa, 48 Cal. 3d 644, 771 P.2d 814, 830, 257 Cal. Rptr. 865, 881 (1989), the California Supreme Court placed the requirement of proof of serious injury (“a
III. EVALUATING THE VALIDITY AND EFFECTIVENESS OF RULES GOVERNING DIRECT ACTIONS

Section II identified the legal framework courts utilize to decide whether claims for damages arising from negligently inflicted emotional distress should be actionable. Having established this foundation, this section scrutinizes the law pertaining to direct actions for emotional distress by evaluating the validity and effectiveness of the dominant legal rules. The work of numerous legal scholars is considered in this context. Their writings serve both as sources of insight into the existing rules, and as founts of ideas regarding the direction the law should take.

A. A Preliminary Question: Should Duty Be Limited?

This subsection examines the validity of the position that duty limitations on recovery of damages for emotional distress are warranted. As noted in section II, many policy rationales have traditionally been
invoked to justify denial of recovery for damages caused by negligent infliction of emotional distress. While many of these have been discredited, two have withstood the test of time. First, courts have continually expressed their fears that unlimited access to the legal system in emotional distress cases would increase exponentially the liability of negligent defendants to an extent far outweighing the defendants' culpability and society's ability to pay. Second, although most courts do not believe the possibility of fraudulent or trivial claims is grave enough to merit outright rejection of all claims for negligent infliction of emotional distress, they perceive that firm limits on actionability are necessary to forestall the bulk of such claims. Apart from these two predominant justifications for limits on recovery, courts have expressed concern that the rules chosen must allow the judiciary to resolve cases in what is perceived, by judges and the public, as a fair manner. Fairness in this context must not only encompass a sense of consistency in the treatment of like claims, but in addition, the rules that promote consistency must themselves reflect meaningful choices. Concern for the administrative feasibility of formulating rules and the fairness of the rules selected has militated in favor of limiting recovery, or even denying recovery altogether.

Notwithstanding judicial caution, some scholars have challenged the assumption that abandonment of rigid duty limitations would result in major increases in the liability of negligent defendants in an amount disproportionate to fault. Professors Nolan and Ursin, for example, urge adoption of the Molien/Rodrigues standard of foreseeability plus seriousness of injury as a single standard to be utilized in all emotional distress cases. They assert that foreseeability as a screening device in cases of physical injury is well-accepted, and that there is no convincing evidence that actions for negligent infliction of emotional distress require more stringent screening rules. However,
to the extent that some additional protection against an onslaught of
claims is required, Nolan and Ursin believe that a showing of serious-
ness of injury would suffice.\textsuperscript{79}

Approaching the issue from the standpoint of economic efficiency
coupled with fairness concerns, Professor Bell goes even farther, argu-
ing that a full recovery rule—one that allows recovery for all psychic
injury foreseeably caused by defendant's conduct—is desirable and
should be adopted.\textsuperscript{80} In an article that addresses virtually every possi-
ble objection to full recovery, Professor Bell examines the effects of a
full recovery rule on accident costs.\textsuperscript{81} In Bell's view, the strongest
argument favoring full recovery for psychic injury is that any other
rule results in inadequate deterrence of tortious activity because a
defendant's conduct does not take into account the full costs of the
tortious activity engaged in.\textsuperscript{82} In addition, Professor Bell believes that
psychiatric and psychological examining techniques have reduced the
possibility that a plaintiff could feign injury, and hence rules that are
gearied toward prevention of fraudulent claims are outdated.\textsuperscript{83} Uncer-
tainty of the damages suffered, a concern to some courts, is likewise
not a problem because damages for psychic injury are no more indefi-
nite than other damages.\textsuperscript{84}

Professor Bell rejects fears of unlimited liability, leading either to
bankruptcy or unavailability of insurance, as a justification for limits

\textsuperscript{79} Id. at 611. The authors recognize that tangible loss is more deserving of compensation
than intangible loss, but believe that the seriousness criterion is a better guide to emotional
distress actions that will involve tangible loss than a physical injury requirement would be. Id. at
614. Referring to the Molien/Rodrigues discussions of the issue, the authors state that the
seriousness criterion "refers to severe and debilitating emotional injury with its attendant painful
mental suffering and anguish—jury of grave intensity and duration, as opposed to injury of a
trivial and transient nature." Id. at 615.

\textsuperscript{80} Bell, supra note 70, at 335.

\textsuperscript{81} Professor Bell utilizes the analytical structure articulated by Professor Guido Calabresi,
taking into account primary, secondary and tertiary accident costs. Professor Calabresi
described accident costs resulting directly from the injury as primary accident costs. Secondary
accident costs are the costs to society if an injury occurs. Tertiary costs are the transaction costs

\textsuperscript{82} Bell, supra note 70, at 349.

\textsuperscript{83} Id. at 351.

\textsuperscript{84} Even damages that do not appear to be intangible, such as future lost earning capacity,
involve many intangible characteristics. A jury must divine the probable working life of the
plaintiff, as well as the career pattern the plaintiff would have experienced absent the injury. Id.
at 362. Hence, in Bell's view, any contention that the damages for emotional distress cannot be
calculated is unfounded. But see Pearson, Response to Professor Bell, supra note 70, at 423–26.
Professor Pearson, in responding to Professor Bell's article, argues that although there are
various forms of intangible injury, there are enough differences between them to merit
distinctions between them. Id.
on liability because such fears are not based on any empirical proof.\footnote{Bell, supra note 70, at 362–65.} In addition, Bell rejects fears of a flood of litigation on the ground that the legal system should focus on the types of cases it permits and the societal benefits that accrue from those cases rather than on the sheer number of cases entering the system.\footnote{Id. at 377–79. Professor Bell foresees no difficulty for attorneys or juries in utilizing the proposed rule. Id. at 386–88.} Professor Bell’s only real reservation about a full recovery rule is that it encourages trivial claims to be brought.\footnote{He defines trivial claims as those involving injuries so insignificant that the costs of resolving them may outweigh the benefits of allowing compensation. Id. at 384–85.} His ultimate conclusion is that rules designed to weed out small claims create their own transaction costs, and that it may be more cost-efficient to permit recovery in trivial cases.\footnote{Id. at 386–88.}

In contrast to Professor Bell, most scholars concur with the judiciary in recognizing the necessity of limits on liability.\footnote{See, e.g., Pearson, Liability to Bystanders, supra note 70. Professor Pearson believes that strong arguments can be made in favor of a no recovery rule, but ultimately finds justifications for a limited cause of action. Id. at 502–05. See also text accompanying notes 121–45 for the proposals of Professors Miller, Diamond and Ingber.} Several important points emerge from their analyses. First, while the sheer volume of cases likely to be filed in court should not be a concern, the reality of recognizing an unlimited right to recover for negligent infliction of emotional distress is that the ultimate liability of individual defendants will increase substantially.\footnote{See, e.g., Pearson, Liability to Bystanders, supra note 70, at 506.} Virtually every negligent act has the potential to cause emotional distress to someone. For example, in cases in which medical malpractice is committed upon a child, it is clear that parents, siblings, grandparents, and possibly friends, will suffer emotional distress of some sort. Where severe injury to the child is involved, the distress suffered by a family is likely to be profound. The ultimate result of recognizing a cause of action in every case in which emotional harm is suffered, or even in those cases in which serious harm is suffered, would be a dramatic increase in the liability of defendants. Our society would have to be prepared to absorb the costs of this increased liability, for these costs would be passed along in the form of higher insurance premiums as well as increased prices for products and services. The need for monetary recovery in all cases of negligently caused emotional distress is not sufficiently compelling to justify assumption of these costs.\footnote{Professor Pearson contends that in cases of negligently inflicted harm, as in negligence cases generally, compensation rather than vindication is the primary goal. His belief is that the} Second, judges, and members of society generally, have every right to be con-
cerned about screening and preventing recovery for trivial claims. The costs of processing and settling such claims directly impact the public at large. Also, there is no particularly compelling reason why psychic trauma of any type or magnitude should be compensated in a world where many types of tangible harm are not. In a society of scarce resources, it is fair to assume that minor emotional injuries will heal in time and that it is therefore best to attempt to designate the claims most likely to result in severe trauma.

To the extent that limits on recovery are desirable, the rules adopted ought to reflect sound policy judgments regarding the selection of claims allowed to proceed to trial. This concern militates in favor of utilizing duty rules as a first hurdle to recovery rather than allowing juries to compensate as they see fit. Jurors simply lack the perspective to make policy decisions about what kinds of claims ought to be actionable.

In light of the considerations noted above, the consensus among most scholars and the overwhelming majority of courts is that neither a full recovery rule, nor a limited duty rule based on foreseeability of harm plus serious injury presents a workable solution. However, a flat "no recovery" rule seems equally unfair. Some emotional injuries, though intangible, may be as painful and as "real" as some physical injuries. Further, despite the theoretical and practical challenges that intangible injuries pose, lawyers and juries already work with these types of cases in numerous contexts. The challenge, then, is to

typical claim for emotional distress is trivial and this is why courts have been reluctant to allow recovery. Id. at 507.

92. See, e.g., Ingber, supra note 70, at 776-77 (pointing out that the element of proximate cause is used to restrict liability on some very tangible types of harm, such as economic losses); Rabin, supra note 35, at 1518-21 (discussing duty limitations on certain types of cases involving pure economic loss).

93. Green, The Duty Problem in Negligence Cases, 28 COLUM. L. REV. 1014 (1928) (in which the author identifies administrative, ethical or moral, economic, prophylactic, and justice factors as the most important determinants of recognition of duty). But see Abel, supra note 21, at 826 (arguing that duty as an element in tort is an incoherent element and should be eliminated).

94. Professor Abel argues, however, that even if emotional injuries are real, payments for disruption of relationships or for pain and suffering commodify and dehumanize the emotions. See Abel, supra note 21, at 804-06. He argues that intangible harm should not be compensated. Id. at 823. He would, however, make compensation for personal injury available regardless of fault. Under his proposal, the state would provide income compensation and medical care. Id.

95. The most commonly compensated type of intangible injury is pain and suffering, which is really another form of emotional distress that is deemed "parasitic" to some direct physical injury. PROSSER & KEETON, supra note 20, § 54. Numerous commentators have asserted that pain and suffering should not be a compensable injury in tort. See, e.g., Jaffe, Damages for Personal Injury: The Impact of Insurance, 18 LAW & CONT. PROB. 219, 235 (1953) (arguing that with the widespread existence of insurance, there must be "a reconsideration of the kinds of interests which are compensated and the degrees of compensation" and predicting that
determine which types of claims for emotional harm deserve compensation and to develop rules that maximize the policies society seeks to further while still allowing adequate recovery for negligent infliction of emotional distress.

**B. Evaluating the Rules That Limit Recovery in Direct Actions**

This subsection is based on the assumption that limits on recovery are needed and evaluates the extent to which the rules utilized in direct actions effectuate the basic policy concerns associated with emotional distress claims. In terms of imposing limits on the class of plaintiffs permitted to bring suit, the zone-of-danger rule has proven to be effective. A pure foreseeability-plus-serious-injury rule, such as that articulated by the *Molien* and *Rodrigues* cases, does not impose tangible limits at the duty stage. Yet, while limiting the number of claims is a significant concern, the validity of the lines drawn by the rules is of greater importance. This section demonstrates that the rules utilized in direct actions do not fulfill fundamental policy goals to the extent that they should.

1. **The Zone-of-Danger Rule**

Although the zone-of-danger rule has been attacked by some as arbitrary and completely without foundation, in reality its merits are worthy of serious consideration. There is no question that the rule limits claims and does so in a relatively concrete and consistent manner.

---

96. Although clearcut lines between plaintiffs are inevitable in a system that limits those permitted to sue, limitations are not necessarily arbitrary. As Professor Pearson argues, arbitrariness may occur when a rule is broader or narrower than its underlying policy suggests it should be. Pearson, *Liability to Bystanders, supra* note 70, at 480. A rule may also be said to be arbitrary when it is "stated so vaguely as to provide insufficient guidance to those whose function it is to apply and enforce the rule." *Id.* at 483.

ner. The basic premise of the rule is that the parameters of the duty to avoid negligent infliction of emotional harm ought to be commensurate with the duty to avoid creation of unreasonable risks of physical harm. In jurisdictions that utilize the zone-of-danger rule to determine which plaintiffs may pursue recovery for emotional distress, a defendant’s liability costs will increase due to the recognition of emotional harm as a compensable injury. Courts utilizing the rule view the increase in liability costs as one that is proportionate to fault. This perception of proportionality stems from the fact that a duty will not extend to an unlimited chain of people affected by the defendant’s negligence, but instead, will extend only to persons to whom the defendant already owes a duty to avoid negligent infliction of physical harm. While proportionality is a relative and subjective concept, the zone-of-danger rule provides a rational basis for distinguishing among potential plaintiffs. In situations in which the defendant unreasonably creates a risk of bodily harm to the plaintiff, the defendant engages in a type of conduct that is both culpable and tangible. In a sense, the threat of the harm caused distinguishes the relationship between the plaintiff and the defendant from a relationship a defend-

98. But see Justice Kaye’s dissent in Bovsun v. Sanperi, 61 N.Y.2d 219, 461 N.E.2d 843, 854, 473 N.Y.S.2d 357, 368 n.2 (arguing that the limitations the rule imposes will most often pose jury questions that preclude dismissal of a case prior to trial).

99. See supra text accompanying notes 31–36.

100. This increase in liability costs is an obvious result of any rule permitting recovery of damages caused by negligently inflicted emotional harm.

101. As the court stated in Bovsun, in the context of a bystander action:
Recognition of this right to recover for emotional distress attributable to observation of injuries suffered by a member of the immediate family involves a broadening of the duty concept but—unlike the Dillon approach—not the creation of a duty to a plaintiff to whom the defendant is not already recognized as owing a duty to avoid bodily harm. In so doing it permits recovery for an element of damages not heretofore allowed. Use of the zone-of-danger rule thus mitigates the possibility of unlimited recovery . . . .

Bovsun, 61 N.Y.2d at 229, 461 N.E.2d at 847, 473 N.Y.S.2d at 361. The same rationale applies to use of the zone-of-danger rule to determine when an individual may bring suit in a direct action for emotional distress.

102. Certainly there is no magic formula that indicates the point at which liability becomes disproportionate to fault. While many courts are concerned with ensuring that liability will remain proportionate to fault, few articulate how they gauge that proportionality. In the context of intangible injury such as emotional distress, Professor Rabin’s thoughts regarding recovery of damages by “collateral” plaintiffs seem most applicable. In many cases, emotional distress may be suffered by persons who seem “collateral” in some sense to the defendant’s negligence. See supra note 35.

103. This tangibility of the contact between plaintiff and defendant is an important aspect of both the zone-of-danger and the impact rules. The thought is that absent some substantial event alerting the defendant to the danger posed to the plaintiff, the defendant may have no occasion to recollect the injury or even realize that the plaintiff was injured. Hence, defense of the action would be virtually impossible. See Prosser & Keeton, supra note 20, § 54.
ant may have with other persons who might be affected emotionally by defendant's conduct.\textsuperscript{104} Considering the issue from the standpoint of fairness to the defendant, payment of damages to plaintiffs who were in danger of immediate physical harm as a result of negligence seems fair.\textsuperscript{105} By making damages for emotional distress actionable, courts merely recognize a broader and more realistic spectrum of potential injury.

Much of the criticism of the zone-of-danger rule stems from the exclusion of persons who suffer distress as a result of negligence without a threat of physical harm. In many cases, harm to individuals outside a zone of physical danger is utterly foreseeable. As Professors Harper, James and Gray aptly state, "The zone of psychic danger is more extensive than the zone of the foreseeable hazard of physical impact."\textsuperscript{106} If courts were principally concerned with creating a legal framework to compensate foreseeable victims of negligence who happen to suffer emotional harm, the zone-of-danger rule would clearly be suspect, because it subdivides a single group of foreseeable plaintiffs based on a distinction that may seem unrelated to the injury suf-

\textsuperscript{104} For example, suppose a negligent driver nearly kills a pedestrian who is crossing the street. The circumstances forge a link between driver and pedestrian that results from the threat of harm to the pedestrian. The threat of harm isolates driver and pedestrian in a relationship that is very different from the driver's relationship to other pedestrians who witness the near-miss and who suffer emotional harm as a result.

\textsuperscript{105} In such cases, it is fortuitous that physical injury did not occur as an immediate result of the negligent act. Given the defendant's obligation to utilize reasonable care to prevent such harm, it seems fair to recognize the obligation to compensate a seriously injured plaintiff for emotional distress that occurred instead. See Restatement (Second) of Torts § 436 comment f (1965) (adopting the reasoning that a failure to impose liability would result in insulating a defendant from liability simply because the harm was brought about in an unusual manner).

In addition, the plaintiff's presence within the zone of physical danger puts the defendant on notice of the need for precautions with regard to the plaintiff's safety. An underlying premise of the fault system is that it is unfair to impose liability when the defendant could not have undertaken precautions. Although foreseeability of harm to the plaintiff is a good indicator of the need for precautions in cases involving tangible physical injury, it is a poor indicator when intangible injury is concerned. With respect to intangible injury like emotional distress, a defendant would be required to anticipate innumerable injuries. The uncertainty of estimating what injuries are possible would make any assessment of precautions difficult, and would add only marginal deterrence against endangering conduct. See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

fered. Assuming limits are to be imposed, however, foreseeability cannot serve as the basis for imposition of those limits. The ultimate question remains whether, despite its drawbacks, the zone-of-danger rule suggests a sensible means of identifying the instances in which a defendant may fairly be called to answer for emotional distress damages.

The greatest problem with the zone-of-danger rule is that courts apply it more narrowly than its underlying rationale justifies. If the zone-of-danger rule is intended to make emotional distress damages cognizable in cases in which there is some pre-existing obligation between the plaintiff and the defendant (other than sheer foreseeability of harm), there is little reason to confine application of the rule to cases in which plaintiff is placed at physical risk merely in a literal and geographic sense. A wide range of relationships between a plaintiff and defendant may make it fair to impose liability for damages arising from emotional distress despite the fact that bodily harm is not threatened in a literal sense.

Finally, it is appropriate to distinguish use of the zone-of-danger rule in direct actions from its use in bystander actions. Much of the validity of the rule in the context of direct actions stems from the perceived fairness of the limitation imposed. That is, the plaintiffs permitted to bring suit are those to whom a defendant clearly owes a legal obligation to refrain from imposing unreasonable risks of physical harm. If a jurisdiction embraces the notion that emotional harm suffered by viewing a negligent act to another should be compensable, there seems little reason, other than sheer limitation of the number of actions brought, to require that the percipient witnesses be present in the zone of physical danger themselves.

107. I disagree with this criticism because, as noted above, the rationale of the zone-of-danger rule extends beyond the issue of creation of a risk of physical harm. Creation of a risk of physical harm is relevant because it indicates the degree of relationship between the plaintiff and the defendant.

108. See infra text accompanying notes 113–14.

109. Consider, for example, the case of parents who assert a medical malpractice action against a doctor for failure to advise them that the child the wife is carrying will be born with Down's Syndrome. In Bovsun v. Sanperi, 61 N.Y.2d 226, 461 N.E.2d 843, 849, 473 N.Y.S.2d 357, 363 (1984), the court characterized this scenario (presented by the actual case of Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 814, 413 N.Y.S.2d 895, 902 (1978)) as one in which the existence of duty was properly denied because plaintiffs were not exposed to bodily harm. I believe the rationale of the zone-of-danger rule adequately supports the actionability of such a claim.

110. One might question why a zone-of-danger jurisdiction would choose to focus on the availability of damages to percipient witnesses if each percipient witness has his or her own independent action based on a threat of bodily harm as well. Indeed, some jurisdictions adhering to the zone-of-danger rule do not purport to recognize percipient witness claims. See, e.g., James
2. The Foreseeability Standard

Although Professors Nolan and Ursin and other scholars have sung the praises of rules based on foreseeability accompanied by serious harm, a foreseeability rule is subject to criticism on various grounds. Taken literally, foreseeability is a “non-standard,” because some emotional harm is virtually always foreseeable. If foreseeability is the determining factor in selecting the plaintiffs permitted to sue, no legitimate limitation on the number of plaintiffs can be made. Each negligent act may give rise to any number of claims. Moreover, the number of claims arising out of any one negligent act or omission may bear no particular relation to the culpability of the defendant.

In addition, a foreseeability rule relies on the jury to set limits on recovery for emotional harm, while providing the jury with absolutely no understanding of the spectrum of cases that arise or the impact on society as a whole. To the extent that judges attempt to pre-screen cases on the basis of “foreseeability,” they too lack guidelines to ensure consistency among potential plaintiffs. The rule does not invite courts or juries to consider any of the policy reasons for limiting duty in determining who should be entitled to recover.

3. Genuine and Serious Injury or Physical Consequences

Rules pertaining to the magnitude of the injury a plaintiff seeking to recover for emotional harm must suffer are designed to serve as a barrier to fraudulent and trivial claims. The physical consequences rule, adhered to by most courts, has been criticized on the ground that

v. Harris, 729 P.2d 986 (Colo. App. 1986). Other zone-of-danger jurisdictions distinguish percipient witness claims even though all emotional distress cases are based on the zone-of-danger rule. See, e.g., Bossun, 461 N.E.2d at 843, 473 N.Y.S.2d at 357. Although it would appear impossible to establish which damages were caused by fear to oneself and which were caused by reason of viewing injury to a loved one, courts may believe that in some cases, juries would attribute the majority of the plaintiff’s damages to the plaintiff's status as a percipient witness and hence, in the absence of a duty to bystanders, damage would be perceived as much less significant.

111. See Nolan & Ursin, supra note 70, at 609-11.
113. See, e.g., Rabin, supra note 35, at 1526 (arguing that foreseeability provides no limit on liability for nonphysical harm).
114. This problem is exacerbated in jurisdictions like California, where the open-endedness of the foreseeability rule led to confusion about which plaintiffs should sue as bystanders and which should sue as direct victims. Pearson, Liability to Bystanders, supra note 70, at 515.
115. See supra text accompanying notes 64-69.
Direct Actions for Emotional Harm

it has no obvious relation to emotional harm.\textsuperscript{116} Hence, while the physical consequences rule may limit claims, it may also allow claims in which the emotional harm suffered is not genuine, and exclude claims in which the harm suffered is real.\textsuperscript{117} Numerous commentators and courts have observed that developments in science enable experts to adequately distinguish between trivial and non-trivial emotional distress without reliance on physical consequences of harm.\textsuperscript{118} These criticisms have led many courts to reject the requirement that emotional harm be substantiated by physical manifestations.\textsuperscript{119}

The alternative to the physical injury rule is to require pleading and proof of serious and genuine injury. However, because a serious and genuine injury rule would permit the admission of evidence that is "intangible" in the sense that it may not be tied to some physical ailment, it is possible that trivial or fraudulent injuries are more likely to be submitted to the jury and to be compensated either through settlement or jury verdicts. Some jurisdictions require that the harm suf-

\textsuperscript{116} See Comment, Fear for Another: Psychological Theory and the Right to Recovery, 1969 Law & Soc. Ord. 420. The author argues that although courts have required proof of a physical injury as a way to limit fraudulent claims, given the present sophistication of psychological testing and research and the availability of expert testimony to weed out fictitious or exaggerated claims, plaintiffs should be allowed to pursue actions for mental distress unaccompanied by physical injury. Further, the author argues that genuine emotional distress is no less serious an injury than a physical disorder and should be compensable.

\textsuperscript{117} See supra note 116.


ferred be more than an ordinary person could bear, on the theory that this hurdle will forestall litigation of marginal or fraudulent claims.120

C. Evaluating Other Proposals for Change

The commentators discussed above have developed their arguments concerning the appropriate scope of liability for damages caused by emotional distress by building on the foundation of the predominant rules. Professor Bell, for example, bases his proposal for a full recovery rule on the principle of foreseeability, but contemplates such a broad application that claims would virtually never be limited by a court on a motion to dismiss.121 Other scholars have departed from any connection to the rules most courts utilize in cases involving emotional distress and have instead proposed a rule that would limit recovery by restricting the available damages.122 While these suggestions are responsive to much of the criticism aimed at the current rules, they possess their own flaws.

The provocative theory of damage limitation endorsed and explained in articles by Professors Miller,123 Diamond,124 and Ingber,125 would limit recovery for damages caused by negligently inflicted emotional harm to past and future out-of-pocket economic loss.126 One strength of this approach is that it would remove the arbitrary barriers to liability posed by the existing duty rules127 and reduce litigation over the scope of those rules. In theory, many more victims of emotional distress would be allowed to recover because access to the courts would be almost unlimited so long as a plaintiff could prove economic loss.128 The tradeoff for this liberality in permitting suits is that awards would tend to be much lower than those now available.129

120. See supra text accompanying notes 68–69.
121. Bell, supra note 70, at 335. Professor Bell’s approach was derived from Paugh v. Hanks, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983), where the court seemed to equate reasonable foreseeability with proximate cause.
122. See infra text accompanying notes 123–25.
123. Miller, supra note 70.
124. Diamond, supra note 70.
125. Ingber, supra note 70.
126. Professor Miller suggests that intermediate means of limiting damages, such as imposing dollar limits on total awards or upon amounts recoverable for pain and suffering, or limiting awards for pain and suffering to a percentage of tangible economic losses, would be inappropriate for judicial adoption. This is because all would involve drawing arbitrary lines involving dollar figures or percentages. Miller, supra note 70, at 39.
127. Professor Diamond suggests that foreseeability would be the standard for determining liability. Diamond, supra note 70, at 502.
128. Miller, supra note 70, at 40.
129. Id.
Direct Actions for Emotional Harm

The proposal contemplates that persons who have suffered emotional distress without incurring out-of-pocket loss would recover nothing.\(^\text{130}\)

One obvious objection to this proposal is that allowing an action for an intangible injury like mental distress and at the same time restricting damages to economic loss is completely inconsistent.\(^\text{131}\) Professor Miller meets this objection, arguing that both reason and policy support his view. He believes that many traumatic neuroses would result in out-of-pocket losses, if only in the sense of psychiatric care.\(^\text{132}\) The proposal’s exclusion of persons who have not incurred economic loss is not distressing to its proponents because they recognize that complete protection from all mental stress is infeasible.\(^\text{133}\)

Professor Ingber further bolsters the argument in favor of limiting emotional distress claims through restricting damages by observing that because first-party insurance\(^\text{134}\) is neither available nor in demand for emotional distress or pain and suffering, the public does not view these damages as essential to just compensation.\(^\text{135}\) In addition, Professor Ingber argues that, from the standpoint of restitutive justice,\(^\text{136}\) awards of non-pecuniary losses are not a necessity. Given the predominance of loss distribution by insurance, restitutive justice in tort law consists mostly of “marking the tortfeasor as a wrongdoer.” According to Ingber, this can be accomplished fully, at least in cases of simple negligence, by limiting the tortfeasor’s liability to pecuniary costs.\(^\text{137}\) Both Professors Miller and Ingber would allow general damages to

\(^{130}\) Professor Diamond would extend this thesis to causes of action for loss of consortium and parent-and-child society claims as well. Diamond, supra note 70, at 480.

\(^{131}\) Emotional injury does not manifest itself in the same way as a physical wound, which can often require medical attention and impair the ability of the plaintiff to attend work. While persons suffering from severe emotional distress may benefit from medical attention, they may not seek it. They may attend work as usual, though functioning at a lower level than normal. Despite an ability to earn money, their lives may become dominated by the severe emotional distress they have suffered. If these individuals recover only for pecuniary loss, the law will be ignoring the most substantial portion of their injury. For a discussion of the types of injuries that may result from debilitating emotional distress, see Nolan & Ursin, supra note 70, at 615–19.

\(^{132}\) Miller, supra note 70, at 40.

\(^{133}\) Id.

\(^{134}\) First party insurance is insurance purchased by an insured to protect the insured’s own property or person. M. Franklin & R. Rabin, supra note 67, at 638.

\(^{135}\) Ingber, supra note 70, at 785.

\(^{136}\) Restitutive justice is used as a synonym for corrective justice, and focuses on “the relative distributional positions of wrongdoer and victim before and after a breach of societally fostered expectations or entitlements.” Id. at 789 n.82; see also Fried, Is Liberty Possible?, in 3 The Tanner Lectures on Human Values 91, 120–21 (S. McMurrin ed. 1982).

\(^{137}\) Ingber, supra note 70, at 791.
promote deterrence or to encourage primary cost avoidance when the wrongdoer acts willfully.\textsuperscript{138}

Finally, evaluating the proposal from the standpoint of tertiary cost avoidance,\textsuperscript{139} Professor Ingber considers whether substantial elimination of general damages\textsuperscript{140} would impair the financial ability of injured parties to sue and the willingness of insurance companies to settle claims fairly. One of his conclusions is that unavailability of general damages would adversely impair plaintiffs’ recoveries because the general damages would no longer be available to pay attorneys’ fees.\textsuperscript{141} Professor Ingber urges re-examination of the American reluctance to award fees as a means of overcoming this shortcoming in the proposal.\textsuperscript{142} With regard to settlement incentives, Professor Ingber’s conclusion is that where liability is clear, insurance companies will not hesitate to settle with plaintiffs and that plaintiffs need not accept a settlement offer for less than their pecuniary loss.\textsuperscript{143} However, when liability is unclear or plaintiffs need are pressing, an insurer may refuse to pay pecuniary losses or attempt to discount them by the probability of success.\textsuperscript{144} Professor Ingber therefore recommends the institution of a fixed surcharge above awarded damages if the defendant had previously rejected a settlement offer equal to or less than the judgment rendered at trial.\textsuperscript{145}

Courts have not been enthusiastic in embracing these types of remedial limitations. Although courts have adopted remedial limitations in the context of actions for wrongful birth\textsuperscript{146} and, to a limited extent, in the area of defamation,\textsuperscript{147} the concept has not gained adherents in the

\textsuperscript{138} Miller, supra note 70, at 23–27; Ingber, supra note 70, at 809.
\textsuperscript{139} Tertiary costs are the transaction costs of redressing accidents. See supra note 81.
\textsuperscript{140} By general damages, Professor Ingber refers to money awarded by the jury to compensate for the intangible injury of emotional distress. Ingber, supra note 70, at 811.
\textsuperscript{141} Id.
\textsuperscript{142} Id. at 811–12.
\textsuperscript{143} Id. at 813. This would not hold true, he acknowledges, if the plaintiffs require immediate compensation, which may be true in the case of individuals who are severely injured. Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 646 P.2d 483 (1983). In \textit{Turpin}, the claim in issue was that of a child who was born deaf. She sought general and special damages for both the costs associated with her disability and the pain and suffering of being born deaf and of having to live with the disability. The court viewed the intangibility of the general damages claim, as well as the social policy issues involved in measuring pain and suffering of a person whose only other alternative was never to have been born, as requiring a limitation of damages. \textit{Turpin}, 643 P.2d at 961–64, 182 Cal. Rptr. at 344–47.
\textsuperscript{147} See Gertz v. Robert Welch Inc., 418 U.S. 323 (1974). The Court held that a private plaintiff who can prove only that the defendant acted negligently with regard to truth or falsity of
context of claims for pain and suffering, mental distress, or loss of consortium. The proposal's sweeping dimensions, and its dependence on modification of well-ingrained settlement and attorneys' fees practices would certainly lead judges to question the propriety of non-legislative adoption of this solution to the problems posed by negligent infliction of emotional distress actions. This is the most important barrier to its adoption. In addition, while the proposal offers a welcome respite from the fractured duty decisions attorneys have been forced to deal with, it nonetheless seems rather ironic to condition recovery for an admittedly intangible injury on proof of economic loss.\(^{148}\) Despite the assertion that serious traumatic stress will often result in a plaintiff incurring pecuniary losses, there is little reason to think that this is always true; given the stigma still attached to treatment of mental disorders, many individuals may be reluctant to seek substantial medical treatment. Further, if plaintiffs seek restitutive justice by bringing lawsuits, they will have incentives to run up medical bills in order to gain leverage in the litigation process.\(^{149}\) In this regard, the solution is no better than the current state of affairs, and would, at least hypothetically, encompass many more claimants.\(^{150}\)

The wide range of proposals for change discussed above reveals both that the rules governing actionability of direct actions for emotional harm have provoked serious criticism, and that effectuating positive change is not easy. Section IV of this Article develops a potential compromise suggested by the California Supreme Court in *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*\(^{151}\)

**IV. IS THERE A BETTER WAY TO RESTRUCTURE THE RULES?**

This Article suggests that while the basic policy rationales supporting recognition of a limited duty to avoid negligent infliction of emo-
tional distress are valid, the legal rules adopted to implement these goals are not particularly effective. In the context of “direct” actions in particular, use of a “pure foreseeability” standard provides no assurance that liability will retain any sense of proportion to fault. Furthermore, the concept of “foreseeability” provides judges with no guidance as to which claims ought to be deemed actionable. The zone-of-danger rule, in contrast, limits claims rigidly and consistently, but does so in a manner that mechanically excludes certain claims that stand on equal footing with those for which recovery is permitted.

This section considers whether it would be possible to determine the appropriate class of plaintiffs in a “direct” action by utilizing some of the same duty principles that would apply in cases presenting tangible injury to persons and property. This approach was suggested by the California Supreme Court in Marlene F as an apparent compromise between application of the zone-of-danger rule and a foreseeability-plus-serious-injury standard. The California Supreme Court apparently believes that by requiring a plaintiff to establish duty under certain specific and concrete rules, the cases that are recognized as actionable will establish both predictable limits and proportionality between fault and liability in a way that a “pure foreseeability” standard cannot. If the court’s analysis in Marlene F indeed constitutes a compromise between the two predominant legal rules, it should be relevant to courts in zone-of-danger jurisdictions as well. This relevance stems from the fact that the court in Marlene F appeared to rely heavily on the philosophy underlying the zone-of-danger rule while at the same time expanding the scope of liability so as to eliminate the rigidity and arbitrariness that characterize the zone-of-danger rule.

Subsection A explains the origins of this potential compromise by examining at greater length the California Supreme Court’s decision in Marlene F and identifies the duty principles that courts would utilize.

152. See supra text accompanying notes 96–114.
153. Indeed, it is virtually impossible to even contemplate the concept of proportionality of fault unless one considers some criterion other than foreseeability of harm. See supra text accompanying notes 113–14.
155. Justice Grodin considered (without endorsing) this possibility in his concurrence to Ochoa v. Superior Court, 39 Cal. 3d 159, 703 P.2d 1, 14, 216 Cal. Rptr. 661, 674 (1985). Under Justice Grodin’s statement of this approach, the plaintiff would need to establish negligence, foreseeability and proximate cause. Id. As this section reveals, it would be possible to premise the existence of duty on much narrower criteria than foreseeability, while still giving credence to many of the accepted bases for finding a duty to exist in cases presenting tangible personal injury or property damage.
156. See infra text accompanying notes 176–89.
in place of the current rules. Subsection B demonstrates how this approach would apply in some prototypical cases. Subsection C evaluates whether there would be a need for proof of serious and genuine injury or physical manifestations of harm if direct actions are treated like negligence claims based on personal injury or property damage. Subsection D assesses the benefits and shortcomings of such an analysis.

A. The Analysis Suggested by Marlene F.

In Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., the California Supreme Court was presented with the case of a mother who had sought counseling for herself and for her son. When the therapist molested the boy, Marlene F. sought to recover damages arising from her emotional distress. Despite the purely emotional character of Marlene F.'s harm, the court stated that because negligent infliction of emotional distress is a part of the fabric of all negligence law and not an independent tort theory, the “traditional elements” of the cause of action for negligence apply. This statement was a rather remarkable departure from the framework most courts and scholars have come to visualize in cases involving pure emotional harm. Although courts clearly recognize the kinship between cases involving pure emotional harm and “ordinary” negligence cases in which the damage incurred consists of personal injury or property damage, they consistently utilize a separate and more limiting set of rules in cases presenting pure emotional harm because they believe that any other course would lead to unlimited liability.

The California Supreme Court is not the only court to suggest that emotional distress cases might be decided based on the rules applicable in tort actions involving personal injury or property damage. Yet most often, courts consider foreseeability of harm to the plaintiff to be the unifying standard. The California Supreme Court’s opinion in

159. The rules discussed in Section II of this Article exemplify the special rules that have evolved for the specific purpose of governing cases in which damages result from emotional harm. Similarly, a subset of rules has evolved to govern cases involving pure economic harm, at least where the negligent acts in issue pose a danger of widespread liability. See generally Rabin, supra note 35. Most textbooks on tort law place cases involving pure emotional and pure economic harm in discrete sections of the casebook, reflecting the notion that the cases present unique policy. See, e.g., D. Dobbs, Torts and Compensation, Personal Accountability and Social Responsibility for Injury 366–94, 830–906 (1985); M. Franklin & R. Rabin, supra note 67, at 284–370.
160. See, e.g., Ochoa v. Superior Court, 39 Cal. 2d 196, 703 P.2d 1, 27, 216 Cal. Rptr. 661, 687 (Bird, J., concurring and dissenting); Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970),
Marlene F. identifies foreseeability as a threshold requirement, but states that the existence of duty would depend on far more specific criteria—relationships justifying the imposition of duty, assumption of duty by a defendant, or legally imposed duties. The following subsection examines the Marlene F. opinion in more detail as a means of identifying the duty rules a court could utilize to re-integrate direct actions for emotional distress into the structure of negligence law generally.

1. Identifying the Duty Principles That Would Govern Direct Actions

The majority opinion in Marlene F. is particularly notable both because the court moves away from a legal analysis that focuses on cases involving pure emotional harm as a separate species of claim and also because the court appears to disavow the broad foreseeability language of its decision in Molien. The substantive portion of the opinion begins with the assertion that “[t]he negligent causing of emotional distress is not an independent tort but the tort of negligence.” The court then stated that, in general, the existence of a duty in tort depends upon the foreseeability of the risk and upon a weighing of policy considerations for and against imposition of liability. Viewing the landmark cases of Dillon and Molien in this context, the court stressed that in each, foreseeability of the injury was “but the threshold element.” The court explained that the key to Dillon was not foreseeability, but the identification of a number of factors designed to “exclud[e] the remote and unexpected.” The Molien opinion, despite its repeated references to foreseeability, “did not . . . purport to create a cause of action for the negligent infliction of emotional distress based solely upon the foreseeability that serious emotional distress might result.”

Drawing on traditional common law principles, the court asserted that “[d]amages for severe emotional distress . . . are recoverable in a

and subsequent Hawaii cases, supra note 52; McLoughlin v. O'Brien, 2 All E.R. 298 (1982) (holding that in bystander cases a defendant's duty must depend on reasonable foreseeability).

161. Marlene F., 770 P.2d at 280-82, 257 Cal. Rptr. at 100-02.

162. Id. at 281, 257 Cal. Rptr. at 101 (emphasis in original) (quoting 6 WITKIN, SUMMARY OF CALIFORNIA LAW § 838 (9th ed. 1988)). The text of the passage cited indicates that Witkin meant that the same duty and causation issues apply. Numerous other legal issues are also shared, including analysis of breach and defenses.


164. Id.

165. Id.

166. Id. at 281, 257 Cal. Rptr. at 102.
negligence action when they result from the breach of a duty owed the plaintiff that is assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two. In the majority's view, the court's opinion in *Molien* acknowledged these rules as the basis for the duty recognized by emphasizing the fact that the doctor who negligently misdiagnosed Mrs. Molien as having a sexually transmitted disease assumed a duty to convey accurate information to Mr. Molien. This assumption of duty arose from the doctor's direction that the husband be told of a diagnosis "that foreseeably would disrupt the marital relationship and require the husband to be physically examined." Viewing the claim of Marlene F. in this context, the majority found the allegations in the complaint sufficient because they asserted that the defendant "undertook to treat both [mother and son] for their intra-family difficulties by providing psychotherapy to both." In other words, the majority found that the therapist's abuse of the therapeutic relationship and molestation of the boy could be considered a breach of his duty of care to the mother as well as to the son.

Although the majority's analysis was premised on the existence of the doctor/patient relationship with the mother of the molested child, the majority noted that it was also foreseeable that a mother who consults a therapist "for the purpose of stabilizing and improving her relationship with her son, and who commits herself and her son to the therapist's care, would feel betrayed and suffer emotional distress upon learning that the therapist had, during the course of the treatment,"

---

167. *Id.* The court's reference to duty imposed by law appears to refer to the court's willingness to recognize the existence of a duty even to persons who may seem "collateral" if other decisions indicate that this course is correct as a matter of social policy. For example, in Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), the California Supreme Court recognized the duty of a psychotherapist treating a patient who was predicted to injure a third party to warn the potential victim of the danger. Subsequent case law has recognized a legal entitlement on the part of the potential victim that would extend even to emotional harm. See Hedlund v. Superior Court, 34 Cal. 3d 695, 669 P.2d 41, 194 Cal. Rptr. 805 (1983). Statutes may be interpreted as imposing the duty as well. See Pintor v. Ong, 211 Cal. App. 3d 837, 259 Cal. Rptr. 577 (1989) (Civil Code § 2941 permits homeowner, upon satisfaction of the obligation secured by deed of trust, to recover damages for emotional distress based on defendants' failure to reconvey); Young v. Bank of America Nat'l Trust & Sav. Ass'n, 141 Cal. App. 3d 108, 190 Cal. Rptr. 122 (1983) (credit issuer's willful violation of Civil Code § 1747 et seq. entitles credit cardholder to compensation of emotional distress damages).

168. Marlene F., 770 P.2d at 282, 257 Cal. Rptr. at 102. The court also suggested that a duty might have been imposed by law even if the doctor had not assumed it. *Id.* at n.5. The court was referring to well-established rules that impose liability on a doctor to persons infected by his patient if he fails to diagnose a contagious disease or, having diagnosed the disease, fails to warn members of the patient's family. *Id.*

169. *Id.* at 282, 257 Cal. Rptr. at 102.

170. *Id.*
sexually molested her son." The majority's observation about foreseeability of harm to the plaintiff appears almost as an afterthought, leaving the reader to wonder about its significance as a determinant of duty.

A concurring opinion, joined by two justices, accused the majority of perpetuating the misperception that negligent infliction of emotional distress is a separate cause of action. The concurring justices believed that Marlene F.'s claim was one of professional malpractice and that the duty element was easily satisfied by the facts establishing the doctor/patient relationship. Accordingly, the concurring justices saw Molien as completely irrelevant to the pending action.

The majority and concurring opinions in Marlene F. create many more questions than they answer. If both groups of justices viewed the existence of a doctor/patient relationship as the basis for recognition of a duty in tort, it is difficult to ascertain any substantive differences between their opinions. Also, both opinions mention foreseeability without any explicit explanation of what role it plays. In addition, neither opinion considers any of the ramifications of its decision; the opinions provide no clue as to whether the justices viewed the recovery of mental distress at issue in Marlene F. as a limited occurrence based on the peculiar risk of emotional harm created by the psychotherapeutic relationship, or whether the justices would be willing to consider emotional harm as a cognizable injury in any case in which a relationship exists creating a legal duty. The following sub-sections explore the significance of these unanswered questions.

---

171. Id. at 283, 257 Cal. Rptr. at 103.
172. The concurring opinion I refer to was written by Justice Eagleson and joined by Justices Lucas and Panelli. Id. at 288-89, 257 Cal. Rptr. at 108-09. Another concurring opinion, written by Justice Arguelles, argues in favor of a limited expansion of the tort of intentional infliction of emotional distress and is not directly relevant to the points being discussed here.
173. Id. at 288, 257 Cal. Rptr. at 103. Justice Eagleson states that although the majority had purported to deny the existence of a separate cause of action for negligent infliction of emotional distress, the majority's reliance on Molien perpetuates the misperception.
174. Id.
175. The majority opinion focuses on foreseeability of harm to the plaintiff, whereas the concurring justices seem to emphasize the foreseeability that the therapist's misconduct would inhibit successful treatment of the plaintiff. Id. at 287, 289, 257 Cal. Rptr. at 107, 109 (Arguelles, J., & Eagleson, J., concurring). The significance of this distinction is somewhat unclear. The concurring justices, viewing the case as one of professional malpractice, may be utilizing foreseeability of emotional distress to the plaintiff to satisfy a proximate cause requirement.
2. **Placing the Court's Opinion in Marlene F. Within the Context of Recognized Duty Principles**

As the court in *Marlene F.* acknowledged, all duty rules are merely an expression of some underlying policy determination that a defendant is under a legal obligation to a plaintiff. As duty rules have developed, courts have come to recognize a nearly universal duty to avoid creation of an unreasonable risk of tangible personal injury or property damage to others. More specific rules are often articulated as well. For example, duty has also been found to exist when a defendant voluntarily undertakes an obligation to a plaintiff by affirmative conduct. Even when a defendant has neither undertaken to act nor created a risk of harm, a duty may exist by virtue of a relationship between plaintiff and defendant. Recognition of a special relationship between plaintiff and defendant has resulted in requiring a defendant to aid, warn and protect a plaintiff from third persons. Courts consider special relationships as important indicia of the fairness of recognizing the existence of a duty even in cases that do not raise the traditional nonfeasance issues.

In addition to these long-standing duty rules, some courts have developed an approach to duty questions that entails the balancing of

---

176. *Id.* at 281, 257 Cal. Rptr. at 101. See Prosser & Keeton, *supra* note 20, § 53 (general discussion of duty as an element of negligence). The contrary view is expressed by Professor Abel, who asserts that duty is an incoherent doctrine and should be eliminated except in the context of determining obligations to help those at risk. *Abel, supra* note 21, at 826.

177. The element of duty emerged as the law of negligence developed. As courts began to view negligence as a failure to perform a legal duty, they began to focus as well on the existence of the antecedent obligation. *Harper & James, supra* note 106, § 18.1.

178. *Id.* § 18.2. However, even where a defendant by affirmative acts has injured a plaintiff, the prevailing view is that duty is limited to a class of persons threatened by the defendant's conduct. *See id.* ("The obligation to refrain from that particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous.").

179. This ground for recognition of duty emerged early in the development of the concept of negligence. *Id.* § 18.1; *see also* *Restatement (Second) of Torts* § 323 (1985) (Negligent Performance of Undertaking to Render Services).

180. Special relationships are recognized as powerful ties between individuals that require a defendant to act even when the defendant has not created any risk of harm to the plaintiff. *Restatement (Second) of Torts* § 314A (1985).


182. Nonfeasance is the general rule of the common law that one person owes another no duty to take affirmative steps for another's protection. *Restatement (Second) of Torts* § 314 (1985) illustrates this rule. Under the *Restatement*, the existence of a special relationship between the defendant and the plaintiff triggers a duty to take affirmative steps to protect another. The common law has always recognized the obligation to exercise care when one creates a risk of harm to another, or engages in "misfeasance." The court in *Marlene F.* emphasized the relationship between the plaintiff and the defendant notwithstanding the fact that duty could be found to exist because of an undertaking to act.
various policy considerations. For example, California courts utilize a balancing approach in a wide variety of situations, encompassing such diverse areas as landowner and occupier liability\(^{183}\) and liability for infliction of pure economic harm.\(^{184}\) Although several appellate decisions in California have attempted to utilize this balancing approach in cases involving negligent infliction of emotional harm, balancing has not been embraced in that context.\(^{185}\)

The majority's reliance on concrete duty rules in \textit{Marlene F.} clearly embodies a judgment that special relationships and undertakings to act may give rise to tort liability for emotional distress damages. The specificity of these rules minimizes the possibility that one negligent act will result in liability to a long chain of plaintiffs, each of whom is foreseeably affected by the negligent act in some manner.\(^{186}\) Utilized as the basis for a finding of duty in cases involving pure emotional harm, these rules respond to concerns about proportionality between fault and damages by imposing concrete limitations on the class of plaintiffs permitted to bring suit.

Although the specific duty rules described above embody a societal judgment that tort liability may be warranted if negligence can be shown and also constrain liability so as to impose some proportionality, these rules do not address the related policy issues that would arise in cases involving pure emotional harm. While it is arguable that proportionality between fault and damages and the imposition of some damage-related requirement\(^{187}\) should satisfy any qualms courts might have about the actionability of claims for emotional distress, the courts' experience with these claims suggests that subsidiary issues will arise.\(^{188}\) For example, despite the existence of a special relationship between an attorney and a client, most courts do not recognize any right on the part of a client to recover for emotional distress arising from an attorney's negligence.\(^{189}\) If the existence of a special relation-

\(\text{184. Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958).}\)
\(\text{185. See infra text accompanying notes 209–26.}\)
\(\text{186. There may be instances in which a defendant's negligence gives rise to a cause of action for two or more individuals, as was true in \textit{Molien}. Yet suits by plaintiffs who are collateral to the negligent act will be greatly reduced because each plaintiff must demonstrate the existence of a special relationship, an undertaking to act, or a duty otherwise imposed by law.}\)
\(\text{187. See infra text accompanying notes 227–33.}\)
\(\text{188. These subsidiary issues consist of discrete policy questions that pertain to a particular type of case, such as medical or legal malpractice. These policy issues persist despite resolution of the traditionally-held objections to recovery of damages for emotional distress. See infra text accompanying notes 197–202.}\)
ship and proof of serious injury are all that is required to entitle a plaintiff to state a claim for damages for emotional distress, courts will need to re-examine their denial of these damages in the context of legal malpractice in order to determine whether there is some unique policy reason demanding that result. Accordingly, the analysis set forth in Marlene F. may be only the first step in the process of deciding whether to permit claims for emotional harm. Other policy issues will continue to require resolution at the duty stage, as will be illustrated through the following analysis of prototypical cases.

B. Prototypical Cases

As discussed above, the compromise position articulated by the California Supreme Court in Marlene F. requires that the plaintiff seeking recovery for pure emotional harm allege, in addition to some form of foreseeability, (1) the existence of a relationship between plaintiff and defendant, or (2) an undertaking to act, or (3) that a duty has been imposed by law. Because the opinion does not demonstrate how this rule would apply in some of the more problematic emotional distress cases that arise, this subsection will examine and evaluate several prototypical cases. For purposes of clarity, I have prefaced each prototypical case with a statement of the major issue raised.

I. Would Damages for Emotional Distress Be Recoverable Any Time a Duty Can Be Found Under The Established Principles Articulated in Marlene F.?

Although the California Supreme Court seemed inclined to narrow the scope of liability in direct actions for emotional distress when it decided Marlene F., the rules announced may have in fact expanded potential recovery. Consider a case in which a physician deviates...
from professional custom in the course of performing a particular procedure, such as amniocentesis. The patient suffers a miscarriage that is accompanied by severe emotional pain. However, she suffers no physical harm as a result of the amniocentesis.\textsuperscript{191}

Most courts faced with the scenario described above would not recognize a right of the plaintiff to sue the defendant for negligence. One reason courts refuse to recognize a right of the plaintiff to proceed is the plaintiff's lack of physical manifestation of emotional distress.\textsuperscript{192} However, as more jurisdictions relax the requirement that a plaintiff prove that she has sustained physical manifestation of injury, the traditional rationale is considerably weaker, forcing courts to re-evaluate the reasons that they refuse to recognize the right of the plaintiff to proceed. Some courts justify their refusal to allow the mother to bring such a suit on the ground that she was not within "the zone of physical danger."\textsuperscript{193} Other courts might assert that the plaintiff must fulfill the elements of a bystander cause of action, under either the zone-of-

\textsuperscript{191} These facts are derived from Tebbutt v. Virostek, 65 N.Y.2d 931, 483 N.E.2d 1142, 493 N.Y.S.2d 1010 (1985).

\textsuperscript{192} M. McCafferty & S. Meyer, Medical Malpractice, Bases of Liability § 2.46 (1985) (stating that the majority rule is that mental distress must be accompanied by physical injury).

\textsuperscript{193} See, e.g., Tebbutt, 483 N.E.2d at 1143, 493 N.Y.S.2d at 1011. The plaintiff brought suit to recover for emotional harm suffered upon the stillbirth of her child, allegedly caused by physician's negligence. The court held that defendant owed no duty because 1) plaintiff was not in the zone of danger in that she did not witness the conduct causing the injury or death, and 2) plaintiff did not fall within the parameters of the duty established by Johnson v. State, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975); see also Villamil v. Elmhurst Memorial Hosp., 529 N.E.2d 1181 (Ill. App. 1988) (a mother had no cause of action when newly delivered baby fell off delivery table, sustaining severe injuries which led to death, on grounds that the mother was not in the zone of physical danger); cf. Green v. Leibowitz, 118 A.D.2d 756, 500 N.Y.S.2d 146 (1986) (rejecting a legal malpractice claim on the ground that even where physical injury is not a necessary element, the plaintiff must establish that the defendant's breach of duty unreasonably endangered the plaintiff's physical safety). \textit{But see} Martinez v. Long Island Jewish Hillside Medical Center, 70 N.Y.2d 697, 512 N.E.2d 538, 518 N.Y.S.2d 955 (1987) (permitting woman who underwent abortion on the erroneous advice of doctors that baby would be born with anencephaly to bring an action for her emotional distress); Ferrara v. Galluchio, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958) (recognizing right of plaintiff to recover for fear of cancer); Martell v. St. Charles Hosp., 137 Misc. 2d 980, 523 N.Y.S.2d 342 (1987) (recognizing right of patient who alleged that she had sustained emotional injury as a result of physician's erroneous diagnosis to sue for emotional distress despite fact that physician's actions did not place her in physical danger).
danger or Dillon-type rules.\textsuperscript{194} Given courts' general reluctance to recognize a right to recover for emotional distress resulting from medical malpractice, the California Supreme Court's reliance on the existence of a special relationship as a basis for finding duty to exist may signal a widespread recognition of a right to bring medical malpractice actions when severe emotional distress is suffered. For that matter, if special relationships open the courthouse doors, many other emotional distress cases may be brought as well, so long as they arise out of relationships of trust and dependence. It is possible, of course, to read Marlene F. more narrowly, limiting the court's holding to cases in which a patient undergoes treatment that places her at a peculiar risk of emotional harm.\textsuperscript{195} Such an interpretation would lead to damages awards in cases in which traditional physical injury is not a possibility, as would be the case with any psychological, psychiatric or spiritual counseling.\textsuperscript{196}

Despite the possibility that Marlene F. could be interpreted narrowly, the majority's heavy reliance on special relationships, undertakings to act, and duties imposed by law seems to indicate that the holding was intended to affect all direct actions for emotional distress. The California Supreme Court seems to suggest that use of the specific and concrete principles enumerated—the very same rules applied in

\textsuperscript{194} This approach was criticized by a California appellate court in Johnson v. Superior Court, 123 Cal. App. 3d 1002, 177 Cal. Rptr. 63 (1981). In recognizing a mother's right to recover for emotional distress suffered as a result of the stillbirth of a child, the court stated:

\textit{The solution to the problem lies not in contorting Dillon to cover a situation which it was not designed to fit, but in recognizing that the emotional distress arising from the sensory impact of the death of the child is compensable as part of the mother's cause of action for malpractice to herself.}

\textit{Johnson, 177 Cal. Rptr. at 65; see also Sesma v. Cueto, 129 Cal. App. 3d 108, 181 Cal. Rptr. 12 (1982). In Sesma, the appellate court reversed the trial court's grant of summary judgment for the defendant in a case in which the plaintiff suffered distress stemming from medical malpractice that resulted in the stillbirth of her baby. The trial court had held that Mrs. Sesma failed to meet the Dillon requirements, but the appellate court reversed, stating that Mrs. Sesma could sustain an action in her own right, based on the emotional distress she suffered as a result of medical neglect during labor.}

\textsuperscript{195} Justice Eagleson's concurring opinion raises the possibility of this narrow interpretation. He states, "When a professional relationship involves counseling or therapy for the purpose of treating an emotional or psychiatric condition, the right to recover for malpractice which worsens that condition and in so doing causes severe emotional distress is clear." Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc., 48 Cal. 3d 583, 770 P.2d 278, 289, 257 Cal. Rptr. 98, 109 (1989).

\textsuperscript{196} It stands to reason that in cases in which one's psyche is being treated, the emotional aspect of one's being is placed at risk when a professional is negligent. Unless recovery for emotional distress is made available, there will be little deterrence of negligent acts, and no compensation for most injuries. Even psychiatrists, however, prefer to deal with emotional harm in the context of physical injury. See Selzer, Psychic Disabilities Following Trauma, LEGAL MED. ANN. 389 (C. Wecht ed. 1970).
cases involving traditional injuries—will achieve the proper balance between compensation of injuries and proportionate liability. If the California Supreme Court has indeed embraced this reasoning, the result in the negligent amniocentesis case described above ought to be that the plaintiff will be permitted to proceed with a negligence action. The relationship between the plaintiff and the defendant provides a sensible and tangible basis for recognition of a duty and the scope of the defendant's liability will be subject to finite limits despite the emotional character of the injury.

Nonetheless, it is difficult to imagine most courts endorsing free availability of emotional distress damages in all cases in which a special relationship exists, even if the injury is severe. Even if courts are not concerned about disproportionality between fault and liability or fraudulent claims, various types of cases will present additional policy considerations. For example, in the prototypical case of medical malpractice, courts might consider whether recognition of a right to recover damages caused by emotional distress would seriously impair the delivery of services by raising insurance costs. In the context of

197. This has been the case in which plaintiffs have sought recovery for “cancerphobia,” a fear of contracting cancer in the future due to negligently caused present exposure to cancer-causing substances. Although New York recognized the validity of a cancerphobia claim in Ferrara v. Galluchio, 5 N.Y.2d 16, 152 N.E.2d 249, 170 N.Y.S.2d 996 (1958), there is wide disagreement over the compensability of this type of emotional injury. While courts have been inclined to allow recovery when the claim is parasitic to some condition they can identify as an existing injury, see Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988), certain courts are extremely hesitant when physical harm is absent, see Payton v. Abbott Labs, 386 Mass. 540, 437 N.E.2d 171 (1982) (rejecting claims of DES daughters in the absence of evidence of physical harm).

Thus, even if a relationship between the plaintiff and the defendant affords a guarantee of proportionality and the plaintiff alleges severe injury, courts may still be hesitant because they view the injury as contingent. For example, in Khan v. Shiley Inc., 217 Cal. App. 3d 848, 266 Cal. Rptr. 106 (1990), a California appellate court affirmed the granting of summary judgment for the defendant where the plaintiff alleged emotional distress as a result of implantation of an artificial heart valve known to be subject to recall due to a propensity to fracture. Although the court conceded that emotional injuries might be recoverable as part of a products liability claim, it refused to acknowledge the validity of a products claim until the valve ceased functioning. In essence, the court believed that the emotional distress the plaintiff alleged did not constitute a present injury. But see Potter v. Firestone Tire & Rubber Co., 225 Cal. App. 3d 213, 274 Cal. Rptr. 885 (1990) (recognizing negligent infliction of emotional distress action based on plaintiff's exposure to negligently dumped toxics, despite the absence of any present symptoms of cancer).

198. Medical malpractice reforms have led to legislative restrictions on pain and suffering in medical malpractice cases. It is possible that where a state has placed tight limits on recovery for pain and suffering, courts might infer that state policy would be against recovery of damages for emotional distress. One would not think this determination would be made without substantial evidence that it reflects state policy, and it seems unlikely that damages caps ought to lead a court to infer that no actions for emotional distress will be permitted. Most states that have attempted to address the rising costs of health care caused by medical malpractice liability have resorted only to limits on intangible damages. See, e.g., CAL. CIV. PRO. CODE § 3333.2 (1991)
actions for legal malpractice, where the only injury is emotional or the emotional component is so dominant that it cannot be recognized as parasitic to some sort of property damage, courts must determine whether the existence of a special relationship and an undertaking to act should suffice to make the emotional distress damages cognizable. Another policy issue that might be taken into account is whether the existence of a duty in a particular type of case is inconsistent with treatment of a related injury in a slightly different context. For example, in the negligent amniocentesis case from which the example utilized above is drawn, both the majority and the dissenting judges recognized the need to ascertain the relationship between the rule pertaining to negligent infliction of emotional distress and actions for wrongful death of an unborn fetus. The majority found that the case law reflected a broad rule precluding parental recovery for emotional distress stemming from injuries occurring to a fetus in utero, and found this concern also reflected in a rule that no action for wrongful death could be maintained by the representative of a stillborn fetus. The dissent argued that, under precedent and logic, the New York rule prohibiting actions for wrongful death did not in any sense preclude actions for a mother’s emotional distress.

In sum, it is possible that even the concrete rules referred to by the Court in *Marlene F.* will lead to an increase in the number of suits brought for damages arising from emotional distress. However, even if the traditional policy concerns regarding actions for emotional distress are satisfied, courts will likely address other policy reasons that may militate against liability for these damages in particular contexts.

---

199. Such a determination would change the nature of legal malpractice recovery. Mallen and Smith, in their treatise on legal malpractice, state that in most instances, emotional damages are viewed as consequential to other damages caused by an attorney’s malpractice and, hence, are not recoverable. R. MALLEN & J. SMITH, supra note 189, § 16.11. Thus, these cases often are not perceived as pure emotional harm cases, even though they are treated the same as if emotional harm were the only injury. The question of whether legal malpractice cases are so unique that emotional distress damages should not be cognizable is beyond the scope of this Article. The point is that if relationships and undertakings to act make these damages cognizable, courts should articulate some policy justification if they are not to be recoverable in legal malpractice cases. Mallen and Smith assert that treatment of these injuries “should comport with the jurisdictional rules applicable to ordinary tort actions.” *Id.*


202. *Id.* at 1145-49, 493 N.Y.S.2d at 1012-17.
2. Would Established Duty Rules Other Than Those Specifically Mentioned in Marlene F. Suffice to Create an Obligation Warranting Recognition of a Right to Recover Damages Stemming from Emotional Distress?

Suppose that the plaintiffs in a given case are passengers in an aerial tram. A large piece of machinery part falls through the glass roof, immobilizing the vehicle and severely traumatizing the plaintiffs. One passenger is killed. The plaintiffs seek recovery for serious emotional distress suffered because of their fears for their own safety. In another case, a negligent driver narrowly misses hitting the plaintiff pedestrian, causing serious resulting injuries stemming from emotional shock.

In both of these cases, recovery for emotional distress would be available to the plaintiff in zone-of-danger jurisdictions. The facts embody the geographic proximity and threat of physical harm that are the essence of the zone-of-danger rule. In California, prior to Marlene F., the basis for recovery appears uncertain. Certainly California had recognized the existence of a legal duty in early cases, but in the years following Dillon and Molien, appellate decisions did not reflect much thought about whether this kind of case constituted a "direct action."

The California Supreme Court's limited references to the accepted bases for duty in Marlene F. raise a legitimate question about whether recovery will be permitted when a plaintiff is within the zone of physical danger. Certainly one could argue, in keeping with Marlene F., that exposure of a plaintiff to a risk of physical harm in a tram owned by the defendant constitutes an assumption of duty, or that a special relationship exists. However, one intermediate appellate court characterized the defendant's conduct as creation of a risk of physical harm to the plaintiffs and concluded that duty would exist under the zone-

203. This example is based on the facts in Ballinger v. Palm Springs Aerial Tramway, 220 Cal. App. 3d 581, 269 Cal. Rptr. 583 (1989).

204. California law appeared to allow recovery if fright resulted in physical injury or illness. See B. Witkin, 6 SUMMARY OF CALIFORNIA LAW § 839 (9th ed. 1987) (citing Medeiros v. Coca-Cola Bottling Co., 57 Cal. App. 2d 707, 135 P.2d 676 (1943) (nausea and sickness resulting from discovery of disgusting object in bottled beverage) and Cook v. Maier, 33 Cal. App. 2d 581, 92 P.2d 434 (1939) (auto collision on plaintiff's land caused her to fear for her own safety)).

205. The major cases addressing tort liability on "direct victim" theory, such as Molien, have addressed the more difficult factual questions of when plaintiffs who were in some sense collateral to an injury negligently inflicted on another person could recover.
of-danger rule. In the case of a negligent automobile driver, the most logical basis for finding the existence of a duty is the defendant's creation of a risk of physical harm to the plaintiff. There is arguably no special relationship or assumption of a duty.

It seems likely that even if no special relationship or assumption of duty can be found, California courts applying Marlene F. would likely find that a duty exists. Any other result would indicate that California’s rules are more restrictive than those in zone-of-danger jurisdictions, an unlikely result given the court’s silence on the issue. If recovery may be premised on presence within a zone of physical risk, California’s compromise position may recognize the availability of damages for emotional harm in virtually any situation in which some well-established duty rule other than general foreseeability would indicate the existence of a legal obligation between the plaintiff and the defendant. Certainly presence within the zone of physical danger would constitute a concrete and well-established basis for recovery.

3. Would Damages for Emotional Distress Be Recoverable in Cases Where No Established Duty Rules Apply?

The last prototypical case presents the most difficult issues posed thus far. A child is terribly injured as a result of medical malpractice. While the child may bring his or her own action for damages, the child's parents seek to recover for the emotional trauma they will suffer as a result of confronting and accepting the injury. In this type of case, a duty to the parents would not exist by virtue of a special relationship, an undertaking to act, creation of a risk of bodily harm or

---

206. See, e.g., Ballinger, 269 Cal. Rptr. at 588 (1990). In Ballinger, the court recognized the long-standing rule that one who is within the zone of danger and who suffers emotional trauma out of fear for their own safety may pursue an action against the defendant, and stated that rejection of the zone-of-danger rule in the context of bystander recovery did not affect actions that are not based on the theory that a percipient witness of negligence to another ought to be permitted to recover for emotional distress suffered. Confusingly, the court then attempted, in the alternative, to justify the existence of a duty on the “direct victim” language of Molien, arguing that there can be “no question that defendants' negligence which resulted in a piece of the tramway system crashing through the glass roof of the tram car was ‘by its very nature directed at’ all passengers in the tram.” Id. at 589.

207. This type of damage appears virtually indistinguishable from the type of damages often sought in actions for loss of a child's companionship. Although at common law a father was entitled to recover for loss of services or earning capacity of a child, this recovery did not traditionally include intangible losses of consortium. Today, few jurisdictions recognize the validity of actions for loss of a child's companionship. PROSSER & KEETON, supra note 20, § 125. However, in 1975, Wisconsin allowed parents of a newborn infant who was allegedly blinded as a result of medical malpractice to state a cause of action for loss of society, on the condition that their cause of action be brought in combination with that of the child for personal injury. Shockley v. Prier, 66 Wis. 2d 394, 225 N.W.2d 495 (1975); see also Love, Tortious
any other established duty rule. Nonetheless, plaintiffs urge that, based on a balancing of various policy considerations, courts should recognize the existence of a duty. As noted above,\textsuperscript{208} the overt balancing of policy considerations is well-recognized as a process for determining the existence of duty in some jurisdictions, particularly California. Most courts, however, have refrained from a balancing analysis in cases seeking recovery for emotional distress.

Two California appellate decisions, however, have utilized policy-balancing to determine the existence of a duty to avoid infliction of emotional harm, and are therefore useful to demonstrate potential pitfalls.\textsuperscript{209} In \textit{Andalon v. Superior Court},\textsuperscript{210} the parents of a child afflicted with Down's Syndrome brought an action for negligent infliction of emotional harm against the doctor who had provided pre-natal care to the mother and had failed to advise her of the risk of Down's Syndrome. The major issue on appeal was whether the parents should be allowed to recover for emotional distress under the \textit{Molien} direct victim theory. Dissatisfied with the amorphous foreseeability standard, two out of the three judges on the panel argued that the action ought to be viewed simply as one involving medical malpractice\textsuperscript{211} and that duty ought to be determined by the well-known policy calculus of \textit{Biakanja v. Irving}.\textsuperscript{212} In \textit{Biakanja}, a case involving the negligent infliction of pure economic harm, the court emphasized consideration of the extent to which the defendant's conduct was intended to affect the plaintiff.\textsuperscript{213} Weighing this criterion heavily, the \textit{Andalon} court found that because of the contractual relationship between the

\textsuperscript{208} See supra text accompanying notes 183–85.

\textsuperscript{209} The California Supreme Court in \textit{Marlene F.} did not consider the validity of the theories advanced by the appellate decisions discussed here. The court did not see a need to reach the issues raised. \textit{Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc.}, 48 Cal. 3d 583, 770 P.2d 278, 283, 257 Cal. Rptr. 98, 103 (1989).

\textsuperscript{210} 162 Cal. App. 3d 600, 208 Cal. Rptr. 899 (1984).

\textsuperscript{211} \textit{Andalon}, 208 Cal. Rptr. at 904–05.

\textsuperscript{212} 49 Cal. 2d 647, 320 P.2d 16 (1958). In \textit{Biakanja}, the issue was whether a defendant would be liable for negligently inflicted economic loss to an injured third party not in privity of contract with the defendant. The court found a duty to the plaintiff on policy grounds by balancing various factors, among them the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm. \textit{Biakanja}, 320 P.2d at 19.

\textsuperscript{213} Id.
Direct Actions for Emotional Harm

mother and the doctor, the doctor’s actions were clearly intended to affect the mother, and hence, duty existed. The father was also held to be entitled to sue because his interests were the “end and aim” of the contractual relationship with the doctor.

A subsequent case, *Newton v. Kaiser Hospital*, involved facts that presented more difficult duty issues. Parents of a baby who suffered injury during delivery brought suit against the doctor who delivered the baby for their emotional harm. On the basis of *Andalon*, the court recognized the existence of a duty to both parents. As in *Andalon*, the court placed great emphasis on the existence of a doctor-patient relationship, and from that relationship, argued that the contract for services was clearly intended to benefit both parents.

Taken together, *Andalon* and *Newton* suggest that the existence of a contractual relationship between the plaintiff and the defendant may suffice to create a duty to avoid negligent infliction of emotional harm. The two cases also suggest that a doctor-patient relationship is intended to benefit non-patients, at least insofar as those non-patients are in contractual privity with the doctor. If other courts similarly balance the issues, many negligence actions that now involve only one plaintiff may give rise to two or more additional claims. Slight variations in balancing could lead to even more extensive liability.

Because policy-balancing makes the determination of the duty element inherently more open-ended, it poses unique challenges in the context of intangible injuries. If courts choose to reintegrate direct victim actions for emotional distress into the fabric of ordinary duty issues, they must decide how they will treat policy-balancing and when they will use it. One option would be to reject policy-balancing as a basis for finding duty in cases in which the harm suffered is purely emotional. The majority in *Marlene F.*, for example, described the bases for finding duty very narrowly, without including policy-balancing. However, if policy-balancing is well-accepted as a means of determining duty in a particular jurisdiction, as is the case in California, courts may prefer simply to provide firm guidance for use of this means of determining the existence of duty. In the context of actions for negligently inflicted economic harm, an area in which concern regarding disproportionality of fault and liability is equally pervasive,

---

215. *Id*.
217. *Newton*, 228 Cal. Rptr. at 894.
218. In essence, it combines an open-ended manner of analysis with a type of harm that in some instances poses a risk of widespread liability.
courts continue to use policy-balancing as a means of determining the existence of duty.\textsuperscript{219}

Perhaps the best resolution of this dilemma is to make policy-balancing available, but to use it sparingly. In general, the rules governing duty in actions involving traditional personal injury or property damage will identify cases in which recovery for pure emotional harm poses no danger of disproportionality between liability and fault. In a case like \textit{Andalon}, for example, the existence of a doctor-patient relationship between the doctor and the parents for the purpose of genetic counseling suggests the fairness of recognition of the parents’ claim. The doctor agreed to assist the parents with genetic counseling and, as a result of the professional relationship, the parents relied and depended upon his expertise. Policy-balancing should not be necessary as a basis for determining the existence of duty in such cases. In cases like \textit{Newton}, involving parental distress during delivery of an infant, recognition of a duty to avoid emotional distress would signal inclusion of collateral plaintiffs and cause courts to perceive a risk of disproportionate liability.\textsuperscript{220}

Courts dealing with these cases should evaluate them closely in this regard. In some instances, they may find that duty can be recognized without resort to policy-balancing and without posing any risk of unfairness to the defendant by disproportionality between fault and liability. For example, courts may find a duty exists to the mother of a child injured at delivery because care of a baby prior to, during, and shortly after birth may equate to care of the mother.\textsuperscript{221} While difficult lines remain to be drawn,\textsuperscript{222} resolution of cases like the prototypical

\begin{thebibliography}{9}
\bibitem{219} See, e.g., \textit{J'Aire Corp. v. Gregory}, 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979). Professor Rabin argues that courts are inconsistent in their treatment of negligently inflicted economic loss. In cases in which the economic loss is suffered in conjunction with physical damage, courts may attribute no significance to the character of the loss. Hence, the balancing approach originated in \textit{Biakanja v. Irving}, 49 Cal. 2d 647, 320 P.2d 16 (1958), is not uniformly applied. Rabin, \textit{supra} note 35, at 1514–21.
\bibitem{220} Courts may fear that if recovery is permitted, all parents and family members will bring suit every time a relative is injured as a result of medical malpractice.
\bibitem{221} This point is acknowledged by some courts. See, e.g., \textit{Ramos v. Valley Vista Hosp.}, 189 Cal. App. 3d 985, 234 Cal. Rptr. 608, 611 n.4 (1987) (“In any case, delivery, the separation of the child from the mother, cannot be accomplished without rendering care and treatment to the mother. The mother is the direct victim of negligent prenatal care or delivery.”). The court in \textit{Ramos} believed that duty extended to the father as a direct beneficiary of the doctor-patient relationship between the mother and the physician. \textit{Id}.
\bibitem{222} There will still be cases in which the courts are forced to draw the line between care of child and care of the mother. See, e.g., \textit{Johnson v. Jamaica Hosp.}, 62 N.Y.2d 523, 467 N.E.2d 502, 478 N.Y.S.2d 838 (1984). In \textit{Johnson}, a newborn child whose mother had been discharged, was kidnapped from a hospital eight days after birth. The court held that there was no direct duty to the parents and that the parents had not pleaded they were in the zone of danger. See
\end{thebibliography}
case presented will be much more concrete and will stand on firm analytical ground.

In cases in which none of the duty principles discussed would indicate the existence of a duty in tort,\textsuperscript{223} balancing is inevitable if courts wish to retain the flexibility to find that a duty exists in unique circumstances. Courts must then consider seriously the criteria upon which they rely to establish the existence of a duty in tort and the weight afforded each consideration. Whereas foreseeability of harm to the plaintiff may be important in landowner/occupier cases, it should not be weighted heavily in cases in which the type of harm suffered poses a danger of disproportionate liability.\textsuperscript{224} Further, contractual relationships as indicators of the validity of a duty in tort should not be given the emphasis they were accorded in \textit{Andalon} and \textit{Newton}.\textsuperscript{225} Finally, if courts decide to engage in policy-balancing, they must survey the policy considerations surrounding other related causes of action, such as bystander claims, loss of consortium or wrongful birth claims, as well as actions for wrongful death.\textsuperscript{226} By doing so, they can work to achieve a cohesive policy regarding the desirability of recovery for certain types of intangible loss instead of a patch-work of rulings on individual causes of action.

\textit{also} Kalina v. General Hosp., 13 N.Y.2d 1023, 195 N.E.2d 309, 245 N.Y.S.2d 599 (1963) (no duty was owed to parents who suffered emotional distress when their newborn son was circumcised by a doctor in violation of clear instructions that he was to be circumcised in accordance with their religion).

\textsuperscript{223} See, e.g., Budavari v. Barry, 176 Cal. App. 3d 849, 222 Cal. Rptr. 446 (1986). A wife brought an action against both the physicians and the hospital for emotional distress suffered as a result of the physicians' alleged negligent failure to inform her husband of a possible lesion on his lung. The court held that no duty was owed, because the wife was neither a bystander nor a direct victim. The court's analysis of the direct victim issue is quite unsatisfactory, however, in that it relies on a distinction between incorrect communication of a diagnosis to a family member (which presumably would give rise to a cause of action for emotional distress), and failure to diagnose, which would not. \textit{Budavari}, 222 Cal. Rptr. at 449.

\textsuperscript{224} See Rabin, \textit{supra} note 35, at 1522–27 (explaining that foreseeability provides virtually no meaningful limits on liability for intangible injuries such as pure emotional harm).

\textsuperscript{225} PROSSER \& KEETON, \textit{supra} note 20, § 54 (“Tort obligations are in general obligations that are imposed by law—apart from and independent of promises made and therefore apart from the manifested intention of the parties—to avoid injury to others.”). While duty in tort is independent of contract, the existence of contractual privity may be a factor indicative of a relationship between the parties which, together with other policy considerations, might suggest that a duty in tort be recognized. M. FRANKLIN \& R. RABIN, \textit{supra} note 67, at 139 n.5.

\textsuperscript{226} For example, in Budavari v. Barry, 176 Cal. App. 3d 849, 222 Cal. Rptr. 446, 449 (1986), the court viewed the spouse's claim for emotional distress as essentially a claim for grief and sorrow precluded by California's action for wrongful death.
C. Requiring Proof of Serious Injury

Prior sections of this Article have described and evaluated the requirement that emotional distress manifest itself through “serious and genuine injury” or “physical manifestations.” Courts impose these requirements because of a desire to reduce the likelihood of fraudulent or trivial claims. This subsection addresses the question of whether these injury-related requirements should be maintained if direct actions for emotional distress are evaluated under the duty rules governing ordinary personal injury and property damage.

The strongest argument in favor of maintaining some injury-related requirement is that pure emotional distress damages are intangible enough that some additional safeguard against trivial or fraudulent claims will always be required, regardless of the duty rules that apply. The duty rules discussed in Marlene F.—special relationships, undertakings to act, and obligations imposed by law—as well as the other duty principles identified, can impose meaningful limitations on recovery of damages for pure emotional distress because such rules represent rational and fair choices regarding accountability for negligence and minimize inclusion of collateral plaintiffs.

Despite these virtues, however, none of the Marlene F. duty rules would have an impact, positive or negative, on the goal of preventing litigation of trivial or fraudulent claims. Suppose, for example, that a doctor negligently overschedules surgery, necessitating postponement of plaintiff’s elective surgery. Plaintiff is agitated, disappointed, inconvenienced, and desires to bring an action for damages. While the existence of a doctor/patient relationship may explain the fairness of holding a defendant accountable for negligence and ensure that liability will not extend to innumerable plaintiffs collateral to the defendant, the relationship does not enhance the genuineness or magnitude of the claim. While it is true that a plaintiff who suffered some minor personal injury during the course of surgery would be permitted to sue based on the mere allegation of a relationship with the doctor, there is a legitimate question whether pure emotional distress damages ought to be actionable on the same basis.

Emotional distress is sufficiently intangible that trivial or fraudulent claims will remain a legitimate concern. Thus, even if direct actions

---

228. See supra text accompanying notes 64–65 and note 120.
229. See supra text accompanying notes 157–89.
230. Weighing the costs and benefits of permitting such claims, I believe the costs far outweigh the benefits. The costs of adjudicating and settling trivial claims of all types already require a significant commitment of societal resources.
Direct Actions for Emotional Harm

are reintegrated into the body of tort law, the requirement of pleading some threshold level of injury is appropriate.\textsuperscript{231} Although neither the serious and genuine injury nor the physical manifestations rule is perfect,\textsuperscript{232} both rules provide some check on the inclination of potential plaintiffs to convert minor emotional blows into lawsuits.\textsuperscript{233}

D. An Assessment

This subsection evaluates whether the change in approach suggested by the California Supreme Court's analysis in \textit{Marlene F.} constitutes an improvement over either the foreseeability-plus-serious-injury or the zone-of-danger rules. Prior sections of this Article have evaluated the existing rules in light of several criteria, including administrative feasibility as well as propriety, or fairness, of limits imposed.\textsuperscript{234} This subsection evaluates the approach suggested by \textit{Marlene F.} in light of these criteria and other important issues of tort policy.

The two primary policy issues motivating courts to limit recovery for damages caused by negligently inflicted emotional distress are fear that liability will be "disproportionate" to fault and that trivial or fraudulent claims will be encouraged.\textsuperscript{235} A pure foreseeability rule is unresponsive to the first concern because it will extend duty infinitely if applied literally. If not applied literally, a pure foreseeability rule is incapable of providing principled guidelines. The duty rules utilized by the California Supreme Court in \textit{Marlene F.}, even if supplemented by other rules discussed above,\textsuperscript{236} virtually eliminate disproportionate liability because they limit actions by plaintiffs who suffer in some collateral way from a defendant's negligence.\textsuperscript{237} Once this threat of liability to every person affected by a defendant's negligence is removed, direct actions can be reintegrated with tort duty issues.\textsuperscript{238}

\begin{itemize}
\item \textsuperscript{231}The question of whether similar requirements ought to be imposed in other instances where recovery is sought for intangible injury, such as pain and suffering, is beyond the scope of this Article.
\item \textsuperscript{232}See supra notes 115–20.
\item \textsuperscript{233}For reasons discussed more fully in prior sections, I would favor adoption of a serious and genuine injury requirement. This rule seems highly unlikely to discourage legitimate claims, but, at the same time, useful in giving judges a basis for pre-screening the injuries presented in complaints. For a general discussion of the two rules, see supra text accompanying notes 64–68 and notes 115–20.
\item \textsuperscript{234}See supra text accompanying notes 97–114.
\item \textsuperscript{235}See supra text accompanying notes 72–79.
\item \textsuperscript{236}See supra text accompanying notes 203–26.
\item \textsuperscript{237}See supra text accompanying notes 186–89.
\item \textsuperscript{238}To some extent, this reintegration will be incomplete if there is a requirement that the plaintiff be able to plead serious injury. In ordinary negligence actions, a plaintiff must prove that he or she suffered some personal injury or property damage. Nominal damages are not
\end{itemize}
By basing duty on criteria other than, or in addition to, general foreseeability of harm to the plaintiffs, the Marlene F. approach does leave certain persons who may foreseeably suffer emotional harm without a negligence claim. For example, it is quite clear that parents foreseeably affected by a doctor's malpractice on a child would not be permitted to bring suit. This non-recovery, of course, is hardly unique to the actions for emotional distress, but nonetheless poses the toughest challenge to fairness of any limited duty approach. At least in this particular context, however, there is no way to maintain some proportionality of liability and at the same time allow all foreseeable plaintiffs to recovery. Therefore, making decisions about actionability based on the fairness of holding the defendant accountable is sensible.

The zone-of-danger rule, of course, also limits lawsuits by collateral plaintiffs. In addition, the rigidity of the rule makes it fairly easy for courts to apply. The approach suggested by Marlene F., although based on concrete rules that are also generally easy to apply, includes room for ambiguity, particularly if a court accepts policy-balancing as a basis for determining duty in some cases. Even if the approach outlined by the California Supreme Court in Marlene F. is slightly more difficult to apply than the zone-of-danger rule, it merits serious consideration because the basis for recognizing duty is more fair and more meaningful than bare reliance on presence in a zone of physical danger. This is not to suggest that the zone of danger rule, by requiring presence in the zone of physical harm as a pre-requisite to recovery of damages for emotional distress, is unfair. Rather, it is underinclusive, and hence appears unfair in excluding claims grounded on other legitimate bases. By accepting the actionability of emotional distress damages in a broader range of situations—including special relationships and undertakings to act—courts can more fully recognize that many types of interactions between plaintiffs and defendants are equally suit-

239. A recent California appellate case applying Marlene F. reaches this conclusion. Schwarz v. Regents of Univ. of Cal., 226 Cal. App. 3d 149, 276 Cal. Rptr. 470 (1990) (father who participated in meetings with child's therapist, agreed to participate in individual therapy with another therapist, and paid for child's therapy held not to be a direct victim under Marlene F.).

240. Indeed, the whole purpose of duty rules is to select the cases that ought to be permitted to go forward. See supra text accompanying notes 176-85. Many commentators have urged the replacement of the tort system with a social compensation system. See, e.g., Sugarmen, Doing Away with Tort Law, 73 CAL. L. REV. 558 (1985); Pierce, Encouraging Safety: The Limits of Tort Law and Government Regulation, 33 VAND. L. REV. 1281 (1980). Even where one adopts a no-fault system, however, choices must be made about what types of injuries to compensate. See Abel, supra note 21, at 822-25.
able for awards of emotional distress damages. This expansion of the bases for recovery of damages can be achieved without triggering potentially limitless liability, and hence is not unfair to defendants.

Having focused on the ways by which the approach suggested by Marlene F. compares with the other competing rules, it is appropriate to consider other policy issues raised by the approach. One drawback of both the prevailing rules and the Marlene F. approach is that duty decisions entail litigation. Thus, even if the rules are relatively concrete, societal resources of all types will be channeled into testing the actionability of particular cases. This is obviously more labor- and litigation-intensive than the Miller/Ingber/Diamond proposal, which would obviate all litigation over duty and, in the process, deter claims where out-of-pocket loss is not large enough to merit litigation.241 As noted above, there is much to commend these scholars’ ideas, but their ideas should be effectuated only in the context of a comprehensive legislative revision of tort law.242 Pending such a reassessment of society’s needs, the Marlene F. approach arguably promotes both fairness and tangibility.

Another potentially disturbing aspect of the approach suggested by Marlene F. is that reliance on concrete and structured duty rules makes the law static and unlikely to be responsive. In part, the California Supreme Court may have intended these characteristics, at least in the sense that the rules are less open-ended than a pure foreseeability rule. On the other hand, there is clearly immense latitude in what constitutes a special relationship or undertaking to act. In addition, courts may choose to expand the bases for duty as tort law evolves.243

Ultimately, changing values and the pressures of new factual scenarios will push courts to confront the policy issues that continue to arise in cases involving negligent infliction of emotional distress. If courts’ concerns regarding disproportionate liability and the presentation of trivial or fraudulent claims are assuaged by use of the concrete rules suggested by Marlene F., it is possible that they will be willing to address other policy issues more openly.

One further objection to the California Supreme Court’s approach in Marlene F. is that it purports to reintegrate direct actions into ordinary negligence actions in most respects, but does not address the sta-

241. See supra text accompanying notes 123–50.
242. See supra text accompanying notes 146–50.
243. See RESTATEMENT (SECOND) OF TORTS § 314A comment b (1985) (the special relationships enumerated as giving rise to a duty to aid or rescue not intended to be exclusive); see also Farwell v. Keaton, 396 Mich. 281, 240 N.W.2d 217 (1976) (special relationship between companions on social ventures).
tus of bystander claims. This ambiguity is particularly distressing in light of the confusion that courts have experienced in distinguishing between direct and bystander actions.\textsuperscript{244} The tenor of the \textit{Marlene F.} opinion and the specificity and narrowness of the duty rules utilized indicate that if all emotional distress claims were viewed as ordinary negligence actions, bystander claims as they exist today would virtually disappear. In the typical bystander case, where, for example, a parent witnesses injury to a child, there is rarely any basis for suggesting that the defendant owed a duty, as defined by the court, to the parent.\textsuperscript{245}

Given the difficulty of synthesizing bystander recovery with the rules articulated in \textit{Marlene F.}, the likely result is that courts that believe in the justice of recognizing some percipient witness claims will continue to do so, even if they cannot be analyzed as ordinary negligence claims. While the existence of these islands of bystander claims requiring special rules is analytically unsatisfying, it will not be particularly problematic to the attorneys and judges utilizing the rules. Because the decision in \textit{Marlene F.} provides a clear rationale for selecting which claims for damage resulting from emotional harm are actionable, courts choosing to distinguish between direct and bystander claims should have less difficulty in doing so.

V. CONCLUSION

Negligence actions for damages arising from emotional harm consistently have challenged the legal system. Neither the pure foreseeability-plus-serious-injury rule nor the zone-of-danger rule has achieved a completely satisfactory balance between competing policy considerations. The pure foreseeability-plus-serious-injury rule, if applied literally, is incapable of placing any limits on the number of lawsuits that a defendant's negligence may engender. If not applied literally, the rule provides no principled guidelines regarding selection

\textsuperscript{244} See \textit{supra} text accompanying notes 38–51.

\textsuperscript{245} There might be such a basis as, for example, the parent's own presence in the zone of danger, but this is often not the case. Special relationships and undertakings to act appear even more rare in the bystander scenario. However, Professors Chamallas and Kerber suggest that the parental relationship often existing between a bystander parent and an injured child constitutes a relational interest entitled to great weight. They contend that de-emphasis of this relationship evidences a world view that excludes the physical and social experiences of motherhood. Chamallas \& Kerber, \textit{supra} note 29, at 858–64. While most courts would probably agree that the emotional attachment between parent and child is an extraordinarily strong bond, it is doubtful that they would recognize this relationship alone as the basis for finding a legal duty to the bystander parent. To do so would be to recognize the viability of parental claims in all instances when a child has been injured as a result of a defendant's negligence.
of the class of plaintiffs permitted to bring suit. The zone-of-danger rule, while imposing firm limitations on lawsuits, is often applied more narrowly and rigidly than its underlying policy justifications suggest, thereby resulting in a denial of compensation in cases in which recovery could and should be permitted.

The California Supreme Court’s opinion in *Marlene F.*, while not a panacea for the problems presented by intangible injury, suggests that an intermediate approach may be feasible. By expanding the criteria that allow for an actionable claim for damages beyond creation of a risk of physical harm, California and other state courts may recognize that many types of interactions between defendants and plaintiffs are equally legitimate bases for awards of damages that stem from emotional harm. At the same time, by reducing the role of foreseeability as a determinant of duty, courts will be assured that the intangible character of the injury will not produce unlimited liability on the part of defendants—a fairness concern that has long dominated judicial opinions.