NEGLIGENTLY INFLICTED EMOTIONAL SHOCK FROM WITNESSING THE DEATH OR INJURY OF ANOTHER

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A great emotional response is elicited by the picture of a mother who watches helplessly as her child is killed or injured as a result of another's negligence. Indeed, "[a]ll ordinary human feelings are in favor of her action against the negligent defendant."[1] Nevertheless, this reaction has not been reflected in judicial decisions as American courts have traditionally denied recovery for negligently inflicted emotional injury resulting in physical illness induced by witnessing the harm or peril of a third person.[2] Some have denied liability because of the absence of an "impact" or contemporaneous physical contact with the plaintiff;[3] others, because the plaintiff was not within the "zone-of-

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[1] W. PROSSER, LAW OF TORTS 353 (3d ed. 1964), [hereinafter cited as PROSSER.]

[2] Jennings v. United States, 178 F. Supp. 516 (D. Md. 1959); Maury v. United States, 139 F. Supp. 532 (N.D. Cal. 1956); Preece v. Baur, 143 F. Supp. 804 (E.D. Idaho 1956) (applying Utah law); Angst v. Great N. Ry., 131 F. Supp. 156 (D. Minn. 1955); Minkus v. Coca-Cola Bottling Co., 44 F. Supp. 10 (N.D. Cal. 1942); Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963), *overruled in* Dillon v. Legg, — Cal. 2d —, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); Reed v. Moore, 156 Cal. App. 2d 43, 319 P.2d 80 (1937); Strazza v. McKittrick, 146 Conn. 714, 156 A.2d 149 (1959); Lessard v. Tarca, 20 Conn. Supp. 295, 133 A.2d 149 (Super. Ct. 1959); Southern Ry. v. Jackson, 146 Ga. 243, 91 S.E. 28 (1916); Blanchard v. Reliable Transfer Co., 71 Ga. App. 843, 32 S.E.2d 420 (1944); Wyman v. Leavitt, 71 Me. 227, 36 Am. R. 303 (1880); Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (Ct. App. 1952); Sanderson v. Northern Pac. Ry., 88 Minn. 162, 92 N.W. 542 (1902); Keyes v. Minneapolis & St. L. Ry., 36 Minn. 290, 30 N.W. 888 (1886); Jelley v. Laflame, 238 A.2d 728 (N.H. 1968); Barber v. Pollock, 104 N.H. 379, 187 A.2d 788 (1963); Cote v. Litawa, 96 N.H. 174, 71 A.2d 792 (1950); Tobin v. Grossman, 30 App. Div. 2d 213, 291 N.Y.S.2d 227 (Sup. Ct. 1968); Lahann v. Cravotta, 228 N.Y.S.2d 371 (Sup. Ct. 1962); Berg v. Baum, 224 N.Y.S.2d 974 (Sup. Ct. 1962); Williamson v. Bennet, 251 N.C. 498, 112 S.E.2d 48 (1960); Van Hoy v. Oklahoma Coca-Cola Bottling Co., 205 Okla. 135, 235 P.2d 948 (1951); Knaub v. Gotwalt, 422 Pa. 267, 220 A.2d 646 (1966) (dictum); Nuckles v. Tennessee Elec. Power Co., 155 Tenn. 611, 299 S.W. 775 (1927); All v. John Gerber Co., 36 Tenn. App. 134, 252 S.W.2d 138 (1952); Carey v. Pure Distrib. Corp., 133 Tex. 31, 124 S.W.2d 847 (1939); Frazee v. Western Dairy Products, 182 Wash. 578, 47 P.2d 1037 (1935) (headnotes misleading); McMahon v. Bergson, 9 Wis. 2d 256, 101 N.W.2d 63 (1960); Klassa v. Milwaukee Gas Light Co., 273 Wis. 176, 77 N.W.2d 397 (1956).

[3] Mahoney v. Dankwart, 108 Iowa 321, 79 N.W. 134 (1899); Cleveland, C.C. & St. L. Ry. v. Stewart, 24 Ind. App. 374, 56 N.E. 917 (1900).

The requirement of "impact" is theoretically intended to guarantee the validity of a claim for emotional distress. *See* Hendren v. Arkansas City, 122 Kan. 361, 252 P. 218 (1927); Brownlee v. Pratt, 77 Ohio App. 533, 538, 68 N.E.2d 798, 801 (1946); Huston v. Borough of Freemansburg, 212 Pa. 548, 550, 61 A. 1022, 1023 (1905). *Cf.* Smith, *Relation of Emotions to Injury and Disease*, 30 VA. L. REV. 193, 207 (1944). However, the inconsistencies and illogical distinctions which have resulted from the application of the rule demonstrate its inadequacy as an effective means of determining liability. For example, the most trivial physical injury may fulfill the requirement of "impact" and recovery may be granted. *See* Bedenk v. St. Louis Pub. Serv. Co., 285 S.W.2d 609 (Mo. 1955) (bruise led to $8,000 verdict for physical and emotional distress); Sawyer v. Dougherty, 286 App. Div. 1061, 144 N.Y.S.2d 746 (Sup. Ct. 1955) (air blast, glass and wooden splinters); Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930) (smoke inhalation);

danger" created by the defendant's negligence.[4] Other limitations which have been utilized to deny liability[5] substantiate the general judicial reluctance to recognize claims for emotional distress.[6]

The theory underlying the "zone-of-danger" and "impact" rules is that no duty of due care is owed to the observer of an accident.[7] The leading case of *Waube v. Warrington*[8] demonstrates this reasoning. A mother in a frail state of health looked out a window of her home and watched helplessly while the defendant negligently struck and killed her infant daughter as she crossed the street. As a result, the mother suffered severe shock which ultimately led to her death. In considering the husband's wrongful death action, a unanimous court stated:

Clark Restaurant Co. v. Rau, 41 Ohio App. 23, 179 N.E. 196 (1931) ("any injury, no matter how slight"). On the other hand, a plaintiff may be literally frightened to death and recovery may be denied. *See* Barnett v. Sun Oil Co., 113 Ohio App. 449, 172 N.E.2d 734 (1961).

This paradox has prompted most states to abandon the test as a prerequisite to recovery for wrongfully caused emotional distress. *See* 64 A.L.R.2d 100, 143 (1959) indicating that twenty-four states have repudiated the doctrine. Since 1959, at least four other states have allowed recovery without the impact requirement: Robb v. Pennsylvania Ry., 210 A.2d 709 (Del. 1965); Lyons v. Zale Jewelry Co., 246 Miss. 139, 150 So. 2d 154 (1963); Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965); Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (Ct. App. 1961); *cf.* 8 ARIZ. L. REV. 181 (1966).

[4] Presence in the "zone-of-danger" was required in Strazza v. McKittrick, 146 Conn. 714, 156 A.2d 149 (1959); Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (Ct. App. 1952); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).

If the violation of an *independent* legal right which involves mental security can be established, recovery will be allowed without meeting the requirements of "impact" or presence in the "zone-of-danger." Thus, courts have traditionally allowed compensation for emotional distress as a form of "parasitic" damages in actions for personal injuries, false imprisonment, trespass and nuisance. *See generally* Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

[5] Some courts deny liability on the grounds that plaintiff was not present at the time of the original injury. *E.g.*, Cote v. Litawa, 96 N.H. 174, 71 A.2d 792 (1950), where a mother suffered shock and resulting illness from learning of her daughter's injury immediately after it occurred. *See also* Chester v. Waverly Corp., 62 Commw. L.R. 1 (Austl. 1939), where plaintiff suffered injuries from the shock of seeing the body of his son recovered after the son drowned in a negligently exposed ditch.

The limitation suggested by Kennedy, J. in Dulieu v. White & Sons, [1901] 2 K.B. 669, 675-76, that plaintiff must fear for *himself* rather than fear for another has found some application in the United States. *E.g.*, Reed v. Moore, 156 Cal. App. 2d 43, 319 P.2d 80 (1957); Southern Ry. v. Jackson, 146 Ga. 243, 91 S.E. 28 (1916) (dictum); Sanderson v. Northern Pac. Ry., 88 Minn. 162, 92 N.W. 542 (1902) (dictum); Nuckles v. Tennessee Elec. Power Co., 155 Tenn. 611, 299 S.W. 775 (1927). However, Kennedy's suggestion does not represent current English law since the dictum was repudiated in Hambrook v. Stokes Bros., [1925] 1 K.B. 141 (C.A.). *See also* Boardman v. Sanderson, [1964] 1 W.L.R. 1317 (C.A.); Chadwick v. British Rys. Bd., [1967] 1 W.L.R. 912 (Q.B.).

[6] *Cf.* 2 F. HARPER AND F. JAMES, LAW OF TORTS 1031-39 (1956); James, *Scope of Duty in Negligence Cases*, 47 NW. U.L. REV. 778, 789-96 (1953); Smith, *supra* note 3, at 193-212.

[7] Minkus v. Coca-Cola Bottling Co., 44 F. Supp. 10 (S.D. Cal. 1942); Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963), *overruled in* Dillon v. Legg, — Cal. 2d —, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); Cleveland C.C. & St. L. Ry. v. Stewart, 24 Ind. App. 374, 56 N.E. 917 (1900); Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Cote v. Litawa, 96 N.H. 174, 71 A.2d 792 (1950); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).

[8] 216 Wis. 603, 258 N.W. 497 (1935).

> The problem must be approached at the outset from the viewpoint of the duty of defendant and the right of plaintiff, and not from the viewpoint of proximate cause. The right of the mother to recover must be based, first, upon the establishment of a duty on the part of the defendant so to conduct herself with respect to the child as not to subject the mother to an unreasonable risk of shock or fright, and, second, upon the recognition of a legally protected right or interest on the part of the mother to be free from shock or fright occasioned by the peril of her child.[9]

In analyzing the problem of liability the court asserted that an answer

> cannot be reached solely by logic, nor is it clear that it can be entirely disposed of by a consideration of what the defendant ought reasonably to have anticipated as a consequence of his wrong. The answer must be reached by balancing the social interests involved . . . .[10]

The court denied relief, concluding that liability should not be extended to allow recovery for physical injuries sustained by one not threatened with physical harm but who suffers shock from witnessing another's danger.[11]

An entirely different result was reached in the English case of *Hambrook v. Stokes Brothers*,[12] a decision which has been accepted,

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[9] *Id.* at 605, 258 N.W. at 498.

According to the duty theory, a duty must be found owing to the particular plaintiff. Mr. Justice Cardozo clarified the matter when he observed that: "If the harm was not willful, he [plaintiff] must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended." Palsgraf v. Long Island R.R., 245 N.Y. 339, 345, 162 N.E. 99, 101 (1928).

Justice Andrews' dissent in *Palsgraf* summarized the existence of a duty under the *proximate cause* analysis when he stated:

> Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A. B. or C. alone . . . . Everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. There needs be duty due the one complaining, but this is not a duty to a particular individual because as to him harm might be expected. Harm to someone being the natural result of the act, not only that one alone, but all those in fact injured may complain. 248 N.Y. 339, 349-50, 162 N.E. 99, 102-03 (1928).

[10] 216 Wis. 603, 613, 258 N.W. 497, 501 (1935).

[11] The court felt that such consequences were too extraordinary when viewed in retrospect. In addition, the liability imposed would be totally disproportionate to the defendant's culpability, fraudulent claims would be encouraged, and the field once entered, would have no rational limits. That the court considered these factors in determining whether or not a duty was owed to the plaintiff indicates dissatisfaction with use of the "foreseeability of risk" approach as the sole determinant of the existence of a duty. As Professor Fleming notes: "The divergent judicial approach can be explained only on the basis that, far from foreseeability being the true determinant of duty, there are weighty policy considerations which, in the one case, militate in favour and, in the other, against the plaintiff's claim to legal protection." J. FLEMING, TORTS 179 (1957), *quoted with approval in* Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 310, 379 P.2d 513, 522, 29 Cal. Rptr. 33, 42 (1963).

[12] [1925] 1 K.B. 141 (C.A.).

rejected, and distinguished by the various courts and authorities who have considered the question. The defendants' servant left a lorry unattended and improperly secured at the top of a narrow incline. Plaintiff's wife accompanied her three children part way up the hill, at which point they proceeded without her and disappeared around a curve. Although the record is somewhat unclear,[13] the mother apparently was in no danger of being injured. However, when she observed the descending vehicle crash into a house above her, she feared for her children's safety, and the resulting nervous shock ultimately led to her death.[14] The court, in allowing recovery, approached the problem from the standpoint of *proximate cause*[15] and concluded that the shock sustained by a mother fearing for her child should not be distinguished from that sustained because of fear for her own safety.[16]

The judicial variance illustrated by these two cases represents a serious conflict between fundamental legal and philosophical concepts.

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[13] *E.g.*, 14 BUFF. L. REV. 332, 336 (1965); 73 U. PA. L. REV. 280, 282 (1925), suggesting that her own bodily security may have been in danger.

[14] Someone in the crowd which had collected around the vehicle told her that a little girl with glasses had been taken away. Evidence indicated that when the mother, who was four months pregnant, subsequently found her daughter in the hospital, she became greatly disturbed. Her condition deteriorated; two months later she underwent an operation during which a dead fetus was removed. She died shortly thereafter.

[15] Waube v. Warrington, 216 Wis. 603, 610, 258 N.W. 497, 500 (1935); Comment, *The Doctrine of Hambrook v. Stokes Re-examined*, 26 GEO. L.J. 144, 145 (1937).

The proximate cause approach may have been justified if one considers that only four years prior to the *Hambrook* decision, it was held that the unforeseeability of a result did not enter into the question of causation in English negligence cases. *In re* Polemis and Furness, Withy & Co., [1921] 3 K.B. 560. It should be noted that in 1961 the Privy Council overruled *Polemis* and adopted foreseeability of risk as a limitation on the defendant's liability. Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd., [1961] A.C. 388 (P.C.). Dean Prosser describes the result as a "logical aftermath of Cardozo's position in the Palsgraf Case." PROSSER 305.

Subsequent American decisions have cited *Hambrook* as authority to allow recovery for negligently caused shock from witnessing another's harm. *E.g.*, Dillon v. Legg, — Cal. 2d —, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); Haight v. McEwen, 43 Misc. 2d 582, 251 N.Y.S.2d 839 (Sup. Ct. 1964). However, it seems unrealistic to approach the problem of recovery by relying on a result which was reached under the *Polemis* doctrine with little regard to the extent of a defendant's liability, particularly when one considers that since *Palsgraf*, limitation of liability has become a crucial issue in American negligence cases.

[16] It should be noted that the *Hambrook* doctrine has been somewhat, if not entirely, emasculated by two subsequent English decisions: Bourhill v. Young, [1943] A.C. 92; King v. Phillips, [1952] 1 Q.B. 429.

In *Bourhill*, plaintiff *heard* a collision between a negligently driven motorcycle and an automobile and suffered severe emotional shock which later resulted in a miscarriage. The House of Lords held that the motorcyclist owed no duty to avoid inducing injury by shock in the plaintiff since she was not within the zone of danger. Although no definite conclusion was reached, the differing opinions indicate that the soundness of the *Hambrook* doctrine was clearly questioned. *Phillips* held that no duty of care existed when the driver of a taxi cab could not have reasonably foreseen that "if he backed his taxi without looking where he was going [thereby endangering plaintiff's child], he might cause injury by shock . . . to a woman in a house some seventy or eighty yards away." [1952] 1 Q.B. 429, 431. Certainly *Phillips* and *Bourhill* indicate the English concern for the limits of a negligent defendant's liability and constitute sound authority although contrary to *Hambrook*.

An emotionally desirable result is certainly reached when a mother who witnesses the negligent killing of her child and suffers attendant emotional trauma with physical manifestations is allowed to recover.[17] Yet, an equally forceful argument may be advanced that recovery should be denied, since the resulting shock is not within the risk created by the defendant's negligent conduct.[18] Courts confronted with this dilemma have necessarily addressed themselves to certain important questions: Should policy considerations preclude the existence of a legally protectible interest, *i.e.*, to be free from emotionally caused shock? Realistically, can there be a legal remedy for every alleged wrong? Should effective judicial administration be the most important long term goal of the courts?

Two recent cases, illustrating a striking legal turnabout, offer an excellent opportunity to examine these conflicts and evaluate one court's difficulty in resolving the question of liability for negligently caused shock from witnessing the death or injury of another.[19]

Amaya

In *Amaya v. Home Ice, Fuel & Supply Company*,[20] plaintiff saw the defendant's negligently driven truck strike and run over her seventeen month old son. In an action for mental distress and consequent physical illness, the lower court sustained the defendant's demurrer on the ground that no cause of action was stated. When plaintiff refused to amend her complaint to allege that she feared for her own safety, a judgment of dismissal was entered. On appeal, the Supreme Court of California affirmed the judgment in a 4-3 decision and held that the defendants owed no duty to avoid inducing emotionally caused injury in the plaintiff who was situated outside the zone of danger.[21] The

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[17] *Cf.* PROSSER 353.

[18] *Cf.* RESTATEMENT (SECOND) OF TORTS § 281, comment f (1965).

[19] Both cases deal with the mother-child relationship — a situation suggested to be sufficiently unique to warrant consideration in a separate category. *See* Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 315, 379 P.2d 513, 526, 29 Cal. Rptr. 33, 46 (1963) (dissenting opinion). However, the potential ramifications involved in granting recovery even to a mother who suffers shock from witnessing her child's negligently caused death or injury demonstrate the importance of considering the cases not in a special category, but as a part of the entire area concerning actions for negligently inflicted fear for a third person. *See generally* Brody, *Negligently Inflicted Psychic Injuries: A Return to Reason*, 7 VILL. L. REV. 232 (1962); Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922); Green, *Fright Cases*, 27 ILL. L. REV. 761 (1933); Hallen, *Damages for Physical Injuries Resulting from Fright or Shock*, 19 VA. L. REV. 253 (1933); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Smith, *supra* note 3; Smith & Solomon, *Traumatic Neuroses in Court*, 30 VA. L. REV. 87 (1943); Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260 (1921).

[20] 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

[21] *Id.* The majority opinion was written by Mr. Justice Schauer with Justices Traynor, McComb and White concurring. Mr. Justice White was appointed to hear the case in the place of Mr. Justice Tobriner who disqualified himself because he had written the district court of appeals opinion, in which recovery had been allowed. *See* Amaya v. Home Ice, Fuel & Supply Co., 205 Adv. Cal. App. 468, 23 Cal. Rptr. 131 (1962).

court stated that the question of a duty owed by the defendant to the plaintiff was to be determined by a balancing of interests and not solely by the forseeability of harm. The majority argued that the importance of protecting plaintiff's interest in her physical security was outweighed by problems of judicial administration; *i.e.*, the casual relationship between trauma and physical harm could not satisfactorily be proved at trial, and no *rational* limits on the defendant's liability could be developed judicially. Furthermore, the court reasoned that if it were to recognize a duty, socially useful conduct would be deterred and greater expenditures by the public for insurance would be required.[22] In addition, if plaintiff were permitted to recover, the defendants would be subjected to liability disproportionate to their degree of culpability.[23]

The dissenting opinion urged that liability should attach, emphasizing the relationship between plaintiff and her son and contending that the difficulty in drawing the limits of liability in such a situation did not justify a denial of liability.[24] Mr. Justice Peters quoted extensively from the opinion of the intermediate appellate court, which had allowed recovery, and concluded that since harm "to the parent whose emotional distress issues from the exposure of his child to injury"[25] is foreseeable, a duty should be owed to the plaintiff which would allow her to recover. Faced with the problem of "delineating the area of liability," the minority adopted the limits suggested by Dean Prosser. First, the injury threatened to the third party must be serious enough to cause severe shock to the plaintiff which results in actual physical harm; second, the action should be confined "to members of the imme-

[22] Although ostensibly convincing, the argument that liability would involve a psychologically deterrent effect on social conduct and an increase in insurance costs may be contrary to practical experience. For example, imposition of liability may motivate careful driving rather than discourage the act itself. Also, since shock from witnessing the injury or death of another is relatively rare, any increase in insurance costs would be nominal. *See* Havard, *Reasonable Foresight of Nervous Shock*, 19 MOD. L. REV. 478, 482-83 (1956); Smith, *supra* note 3, at 286-87.

[23] In denying recovery, the California Supreme Court reached the same result as nearly every American jurisdiction which has considered the question. *See* note 2 *supra*. The American rule of non-liability is illustrated by the RESTATEMENT (SECOND) OF TORTS § 313 (1965) and comment d thereafter. The original RESTATEMENT OF TORTS § 313 (1934) contained the following *caveat*:

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

The RESTATEMENT (SECOND) has eliminated the *caveat* in accordance with the heavy weight of authority, despite the feeling of a number of those present at the institute meeting, that the situation of a mother who sees her child negligently killed before her eyes is one in which recovery would be justified. RESTATEMENT (SECOND) OF TORTS APPENDIX § 313 (1965).

See also RESTATEMENT (SECOND) OF TORTS § 436 (1965); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1040 (1936).

[24] Mr. Justice Peek and Mr. Chief Justice Gibson concurred in Mr. Justice Peters' dissent.

[25] 59 Cal. 2d 295, 331, 379 P.2d 513, 536, 29 Cal. Rptr. 33, 56 (1963).

diate family of the one endangered, or perhaps to husband, wife, parent or child, to the exclusion of mere bystanders and remote relatives;"[26] and third, plaintiff must be present at the time of the accident, or at least suffer shock "fairly contemporaneous with it, rather than follow when the plaintiff is informed of the whole matter at a later date."[27]

Dillon

Five years later, in July 1968, the California Supreme Court overruled *Amaya* in *Dillon v. Legg*,[28] another 4-3 decision, and allowed a mother to recover for physical injury resulting from emotional trauma suffered from witnessing the death of her infant daughter. The second count of plaintiff's wrongful death action alleged that she "sustained great emotional disturbance and shock and injury"[29] as a result of witnessing the accident which was caused by the negligent operation of defendant's vehicle. In a third count she alleged that her other daughter, who was "in close proximity" to the collision, suffered similar emotional shock which also had physical manifestations. The lower court dismissed plaintiff's second count, since she was not in any danger, but denied defendant's motion for summary judgment as to the third "because of the possibility that she [the other daughter] was within such zone of danger or feared for her own safety."[30] Plaintiff appealed from the dismissal of her second cause of action and the Supreme Court of California reversed, finding that a prima facie case was stated when the mother alleged she suffered emotional trauma and physical injury as a result of witnessing the negligently caused death of her child.

Mr. Justice Tobriner, writing for the majority,[31] abolished the "zone-of-danger" test and determined that liability for negligently inflicted shock should turn on the questions of foreseeability and duty. The court indicated that the traditional denial of liability through a negation of duty "emanates from the twin fears that courts will be flooded with an onslaught of (1) fraudulent and (2) indefinable claims."[32] The court then proceeded to show why these fears where unfounded, concluding that courts should rely on the efficacy of the judicial process to separate the meritorious from the fraudulent and that difficulties in

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[26] PROSSER 354.

[27] *Id.* Dean Prosser himself recognizes that these "restrictions are quite arbitrary" and "have no reason in themselves."

[28] ——Cal. 2d ——, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

[29] *Id.* at 74, 441 P.2d at 914.

[30] *Id.* at 75, 441 P.2d at 915. At the trial, the evidence was conflicting: Mrs. Dillon testified in her deposition that her other daughter (Cheryl) was on the curb; however, Cheryl's deposition contradicts such a possibility.

[31] Justices Peters, Mosk and Sullivan concurred. Note that Mr. Justice Tobriner wrote the district court of appeals opinion in *Amaya* and was an active member of the *Amaya* court when the case was decided but had to disqualify himself. *See* note 19 *supra*. The change in the court's composition in five years was obviously a decisive factor in shifting the judicial balance to allow the plaintiff to recover under a practically identical fact situation.

[32] —— Cal. 2d ——, 441 P.2d 912, 918, 69 Cal. Rptr. 72, 77 (1968).

adjudication should not frustrate the principle that there should be a remedy for every substantial wrong.[33] In order to demonstrate that claims would not necessarily be indefinable, the court enunciated certain "guidelines" to assist in determining whether a particular plaintiff's injury would be foreseeable and whether a duty would be owing.[34] In determining the degree of foreseeability, the court felt consideration should be given to:

> (1) [w]hether plaintiff was located near the scene of the accident; . . . (2) [w]hether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observances of the accident; . . . [and] (3) [w]hether plaintiff and defendant were closely related . . . .[35]

The court concluded that a "negligent driver who causes the death of a young child may reasonably expect that the mother will not be far distant and will upon witnessing the accident suffer emotional trauma.[36] The defendant therefore owed a duty of care to the plaintiff to avoid inflicting negligently caused fear for her child.

Chief Justice Traynor wrote a brief dissenting opinion in which he concluded that the reasoning in *Amaya* sufficiently disposed of the question of liability. Justice Burke, in a second dissenting opinion,[37] chided the majority for reasserting arguments which had been rejected in *Amaya* and noted that not one *appellate* court had departed from the general rule of non-liability.[38]

Thus, the two cases reach different results under substantially the same set of facts. In one case, recovery was denied because of the absence of a duty to the plaintiff — determined after a consideration of various policy factors. In the second case, in spite of administrative difficulties and possible disproportionate liability, recovery was granted, since a duty was owed because the injury was foreseeable and liability

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[33] The *Dillon* court's analysis that liability has been denied because of the fear of "fraudulent and indefinable claims" blatantly ignores other policy considerations utilized to justify non-liability. Prominent among the omissions is the so-called "administrative factor," embodying the philosophy that justice exists only if the law is effectively administered. The possibility of disproportionate liability was also unconsidered.

[34] The court then discussed several English cases allowing recovery to illustrate the effect of such a cause of action: Hambrook v. Stokes Bros., [1925] 1 K.B. 141 (C.A.); Chadwick v. British Rys. Bd., [1967] 1 W.L.R. 912 (Q.B.); Boardman v. Sanderson, [1964] 1 W.L.R. 1317 (C.A.). The dissenting opinion sharply rebukes the majority for relying primarily on English precedent since the American rule of non-liability is so well established. *See* notes 12-16 *supra*, and accompanying text.

[35] —— Cal. 2d ——, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968).

[36] *Id.* at 81, 441 P.2d at 921.

[37] Mr. Justice Burke wrote the longer opinion in which Mr. Justice McComb concurred. *Id.* at 85, 441 P.2d at 925.

[38] *But see* Haight v. McEwen, 43 Misc. 2d 582, 251 N.Y.S.2d 839 (Sup. Ct. 1964), which was a *lower* court case where a motion to dismiss for failure to state a claim was denied. The court held that a pleading of negligent infliction of severe mental distress with physical manifestations, by a mother who witnessed the negligent killing of her son, states a cause of action even though the plaintiff was not placed in danger by defendant's act.

could be determined through the prudent application of certain "guidelines."

In view of the emotionalism involved, and the respective approaches taken by each court, it seems clear that neither result is immune from criticism. However, an analytical examination of each court's application of the concept of duty and a consideration of certain fundamental long term judicial goals, results in the conclusion that *Amaya* is the sounder and more carefully considered decision.

DUTY

The notion of duty in negligence law is by no means an easily understood concept, and was quite unknown until the latter half of the nineteenth century.[39] Ever since the concept appeared, efforts have been made to reduce widely divergent decisions to an all inclusive and systematic formula to determine its existence.[40] The most influential, perhaps because of the eminence of its author, was Lord Atkin's famous generalization in *Donoghue v. Stevenson*,[41] equating duty with foreseeability. The subtlety of this formula, however refined, does not cover the spectrum of factors that must be considered to determine whether a duty exists under particular circumstances. Its inadequacy is apparent in view of the following observation:

> None too lively an imagination is really needed to summon from the multitude of varied human experience all manner of foreseeable detriment that we could make short shrift to reject as candidates for legal redress. Who would not be disposed, for example, to rule out as altogether extravagant a claim by an adulterine bastard against his natural father for having foreseeably exposed him to the handicaps of irremediable illegitimacy, or on a homelier level, a widow's complaint against a butter manufacturer for having accelerated her husband's death as a result of the admittedly normal cholesterol content of his product foreseeably hardening his arteries?[42]

Many factors are involved in the decision of whether or not a duty

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[39] See Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41 (1934) for a historical treatment of the evolution of the concept.

[40] *E.g.*, PROSSER 331-34; Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41, 58-59 (1934).

[41] [1932] A.C. 562, 580.

> There must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances . . . . The rule that you are to love your neighbor becomes in law, you must not injure your neighbor; and the lawyer's question, Who is my neighbor? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably forsee would be likely to injure your neighbor. Who, then, in law is my neighbor? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

[42] J. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS 40 (1967).

exists: historical trends, economic and moral ideals, convenience of administration, and contemporary feelings about distribution of loss.[43] To illustrate the depth of the concept, it has been characterized as an "expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection."[44]

It seems apparent that the sole determinant of duty is not foreseeability. The *Amaya*[45] and *Waube*[46] opinions recognized this, and asserted that, notwithstanding the existence of a foreseeable risk of harm, the determination of whether a duty arises[47] must be made by balancing the social interests involved.[48] On the other hand, the *Dillon* court after giving mere lip service to the idea that duty is a multi-faceted concept,[49] proceeded to find a duty only because they concluded that shock from witnessing another's danger is foreseeable.[50] Primary reliance on the foreseeability formula when determining the existence of duty seems to be indefensible in view of several important policy considerations which *Dillon* somewhat conclusively disregards.[51]

Although the court refuted the validity of the fraudulent claim argument,[52] nowhere did they squarely face the closely related problem of the administrative difficulties involved in allowing such a cause of action. First, there is a serious problem regarding proof of actual

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[43] Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928). Professor Green believes that certain factors are of prime importance in influencing the determination of duties: "1. The administrative factor. 2. The ethical or moral factor. 3. The economic factor. 4. The prophylactic factor. 5. The justice factor." *Id.* at 1034.

[44] PROSSER 333. Professor Fleming notes that "far from foreseeability being the true determinant of duty, there are weighty policy considerations which, in the one case militate in favour and, in the other, against the plaintiff's claim to legal protection." J. FLEMING, TORTS 179 (1957), *quoted with approval in* Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 310, 379 P.2d 513, 522, 29 Cal. Rptr. 33, 42 (1963).

[45] 59 Cal. 2d 295, 379 P.2d 513 29 Cal. Rptr. 33 (1963).

[46] 216 Wis. 603, 258 N.W. 497 (1935).

[47] Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 295, 310, 379 P.2d 513, 522, 29 Cal. Rptr. 33, 42 (1963).

[48] Waube v. Warrington, 216 Wis. 603, 613, 258 N.W. 497, 501 (1935).

[49] Dillon v. Legg, —— Cal. 2d ——, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968), *quoting from* PROSSER 333; *see* note 41 *supra*.

[50] —— Cal. 2d ——, 441 P.2d 912, 921, 69 Cal. Rptr. 72, 81 (1968). The weight of judicial authority indicates that the injury is actually *unforeseeable*. *See* cases cited in note 2 *supra*. However, the issue of the foreseeability of shock seems to be "largely semantic, and any such debate tends to sterility." Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 310, 379 P.2d 513, 522, 29 Cal. Rptr. 33, 42 (1963).

[51] Generally, the *Dillon* opinion did not address itself to the arguments asserted in *Amaya* but was concerned primarily with explaining why the traditional fears of fraudulent and undefinable claims were inadequate as a basis for denying liability.

[52] This argument was expressed in *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935), and embodies the idea that to protect a person from negligently caused shock would "open the way to fraudulent claims" since any resultant physical injury could be easily feigned. The traditional argument against this position is that the competence of the judiciary must be relied upon to separate fraudulent from meritorious claims.

causation — a prerequisite both to proximate cause and legal damage.[53] In Dr. H. W. Smith's exhaustive study of 301 cases involving injuries allegedly caused by psychic stimuli,[54] the author concluded, *inter alia,* (1) that actual causation was satisfactorily proved in only 55 of the cases,[55] (2) that a majority of plaintiffs possessed sub-normal resistance to psychic stimuli,[56] and (3) that between 1880 and 1944 the ends of justice would have been better served had "redress been denied in all cases of alleged injury from psychic stimuli."[57] Further, although the argument has been disparaged,[58] it cannot be denied that if an action is allowed there will be problems in (1) proving that the shock is the proximate cause of the resulting physical injuries,[59] and (2) attempting to reconcile the divergent views of medical experts.[60] Also, problems of proof may be compounded by a plaintiff's pre-existing idiosyncrasy or impairment.[61] A comparison of an individual's psychic reactions to certain stimuli with those of the reasonable man under the same or similar circumstances may involve great medico-legal problems.[62] Fur-

[53] Note that "[t]he facts of a particular case may justify, or even require, refusal of the court to recognize *actual causation,* especially if the stimulus is trivial and the symptom-free time and interval long." Smith, *supra* note 3, at 288 n.260.

[54] *Id.* at 193.

[55] *Id.* at 284.

[56] From direct evidence of plaintiff's condition and justifiable inferences regarding his resistance, we found plaintiff had a pre-existing vulnerability in 216 of the 301 cases of a nature which probably made him more susceptible to injury of the type alleged than an average person would have been. *Id.* at 282.

[57] *Id.* at 303.

[58] *See* 15 STAN. L. REV. 740, 746; Battalla v. State, 10 N.Y.2d 237, 242, 176 N.E.2d 729, 731, 219 N.Y.S.2d 34, 38 (Ct. App. 1961) where the court stated that "the question of proof in individual situations should not be the arbitrary basis upon which to bar all actions . . . ."

[59] A comment in State Rubbish Ass'n v. Siliznoff, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952) is particularly relevant in pointing out the difficulty of proof:

> The jury is ordinarily in a better position, however, to determine whether outrageous conduct results in mental distress than whether that distress in turn results in physical injury. From their own experience, jurors are aware of the extent and character of the disagreeable emotions that may result from the defendant's conduct, but a difficult medical question is presented when it is determined if emotional distress resulted in physical injury.

Quoted in Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 311, 379 P.2d 513, 523, 29 Cal. Rptr. 33, 43 (1963). *See* Smith, *supra* note 3, at 303-06.

The possibility of independent intervening causes also must be carefully considered. Plaintiff may have sustained his injury from an independent cause either before or after witnessing the negligently caused accident. In addition, the possibility of a malingering plaintiff compounds the causation difficulties. *See* Smith & Solomon, *Traumatic Neuroses in Court,* 30 VA. L. REV. 87, 154-59 (1943).

[60] *See* Goodrich, *Emotional Disturbance as Legal Damage,* 20 MICH. L. REV. 497, 507-08 (1922); McNiece, *Psychic Injury and Tort Liability in New York,* 24 ST. JOHN'S L. REV. 1, 74 (1949); Note, *Judicial Authority to Call Expert Witnesses,* 12 RUTGERS L. REV. 375, 375-76 (1957).

[61] *Cf.* Smith, *supra* note 3, at 282.

[62] If a stimulus would not evoke a similar response from an average person, then the excessively frail plaintiff should be denied relief. Yet if defendant's conduct would have injured a person of normal constitution or constituted an independent tort which permits "parasitic damages" to attach, the plaintiff's excessive frailty is irrelevant and the defendant "takes his victim as he finds him." *See* note 4, *supra.*

thermore, certain intangible factors, such as the dramatic appeal of the mother's plight at losing her child, exert a powerful influence on the trier of fact.[63] Certainly these difficulties in themselves would not warrant denying liability to further "administrative convenience."[64] However, it is submitted that when they are considered with the other policy factors, the judicial scales tip in favor of denying the existence of a duty.

Another major policy consideration which the court did not examine is the disparity between the culpability of a negligent tortfeasor and the potential extent of liability which may be imposed if recovery is permitted.[65] Mr. Justice Burke, dissenting in *Dillon*, predicted the potential consequences: "to permit recovery for every person who might adversely feel some lingering effect of the defendant's conduct would throw us into the 'fantastic realm of infinite liability.' "[66]

In omitting discussion of policy factors which militate against the imposition of a duty, and insisting upon the use of foreseeability as the determining factor, the *Dillon* opinion reinforces the notion that its reasoning supports a pre-conceived result, *viz.*, liability.

The *Amaya* court, on the other hand, employed an investigative approach to the concept of duty and balanced the plaintiff's interest in her physical security against the previously considered policy factors concluding that under the circumstances the interest could not be legally protected.[67]

It should be noted that the simplicity of these general rules is misleading, since problems of proof pervade the entire area.

[63] Smith & Solomon, *Traumatic Neuroses in Court*, 30 VA. L. REV. 87, 114 (1943). The author's study revealed that males were awarded verdicts averaging $7,198.23 for injuries allegedly caused by psychic stimuli while female plaintiffs were granted verdicts averaging $8,801.09. *Id.* at 115 n.37.

[64] — Cal. 2d —, 441 P.2d 912, 918, 69 Cal. Rptr. 72, 78 (1968).

[65] *See* Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 315, 379 P.2d 513, 525, 29 Cal. Rptr. 33, 45 (1963); Jelley v. Laflame, 238 A.2d 728, 730 (N.H. 1968); Waube v. Warrington, 216 Wis. 603, 613, 258 N.W. 497, 501 (1935). *Cf.* Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. PA. L. REV. 586 (1933); Smith, *supra* note 3, at 269-71.

[66] — Cal. 2d —, 441 P.2d 912, 928, 69 Cal. Rptr. 72, 86 (1968). This is clearly an exaggeration for effect but does emphasize the possibility that once the mother's interest in freedom from fear for another is judicially recognized, it may only be a matter of time until the protection is extended to more remote relationships. Consider, for example, a young woman who suffers emotional shock and resulting physical illness from witnessing the negligently caused death of her fiancé. Is her injury any less intense than that suffered by a mother who sees her child in danger? Should she be denied recovery merely because there was no family relationship involved? Such an illustration reveals the fallacy of the arbitrary limits outlined in *Dillon*. *See also* note 72 *infra*.

[67] Although *Amaya* used the mechanical zone of danger test in determining non-liability, the opinion extensively examined all facets of the issue of recovery. For criticisms of the mechanical rules of liability *see* 2 F. HARPER AND F. JAMES, THE LAW OF TORTS 1039 (1956); Brody, *Negligently Inflicted Psychic Injuries: A Return to Reason*, 7 VILL. L. REV. 232, 238-39, 241-47, 256-61 (1962); Throckmorton, *Damages For Fright*, 34 HARV. L. REV. 260, 277 (1921).

GOALS

The court in *Amaya,* in addition to using a more analytical approach to the duty problem, impliedly furthered certain judicial goals by recognizing the difficulty of maintaining stability in lower court resolutions of similar disputes:

> we cannot fashion a rule for the case at bench without reflecting on the fact that there will be other such cases, other plaintiffs. When, as here, a wholly new type of liability is envisioned, our responsibility extends far beyond the particular plaintiff before us, and touches society at large.[68]

The *Dillon* court was also aware of this problem and enumerated certain "guidelines" in an effort to facilitate lower court disposition of similar cases.[69] However, as the *Amaya* majority[70] and the *Dillon* minority[71] accurately observe, the ambiguous nature of such "guidelines" tends to obscure rather than clarify the determination of duty in a particular case.[72] If one function of the state's highest court is to set down *workable* rules with which the lower courts can effectively administer judicial business, it certainly follows that the enunciation of an *uncertain* rule will afford trial courts a great deal of difficulty.

Both courts considered the goal of judicial certainty by examining the oft-debated "where-will-it-all-stop argument." The fear of inability to establish rational limits to the cause of action has been expressed

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[68] 59 Cal. 2d 295, 313, 379 P.2d 513, 524, 29 Cal. Rptr. 33, 44 (1963).

[69] The "guidelines" set forth in *Dillon* are intended to be used as an aid in determining if any injury to a particular plaintiff is foreseeable under the circumstances. The court indicated that

> [i]n light of these factors the court will determine whether the accident and harm was *reasonably* foreseeable. Such reasonable foreseeability . . . contemplates that courts . . . will decide what the ordinary man under such circumstances should reasonably have foreseen. — Cal. 2d —, 441 P.2d 912, 921, 69 Cal. Rptr. 72, 81 (1968) (emphasis original).

[70] 59 Cal. 2d 295, 312-13, 379 P.2d 513, 523-24, 29 Cal. Rptr. 33, 43-44 (1963).

[71] 69 Cal. Rptr. 72, 86, 441 P.2d 912, 926 (1968).

[72] Mr. Justice Burke's dissenting opinion restating the observations made in *Amaya* deserves mention:

> As we asked in *Amaya*: What if the plaintiff was honestly mistaken in believing the third person to be in danger or to be seriously injured? What if the third person had assumed the risk involved? How "close" must the relationship be between the plaintiff and the third person? I.e., what if the third person was plaintiff's beloved niece or nephew, grandparent, fiancé, or lifelong friend, more dear to the plaintiff than her immediate family? Next, how "near" must the plaintiff have been to the scene of the accident, and how "soon" must shock have been felt? Indeed, what is the magic in the plaintiff's being actually present? Is the shock any less real if the mother does not know of the accident until her injured child is brought into her home? On the other hand, is it any less real if the mother is physically present at the scene but is nevertheless unaware of the danger or injury to her child until after the accident has occurred? No answers to these questions are to be found in today's majority opinion. *Our trial courts, however, will not so easily escape the burden of distinguishing between liability on the basis of such artificial and unpredictable distinctions.* — Cal. 2d —, 441 P.2d 912, 926, 69 Cal. Rptr. 72, 86 (1968) (emphasis added).

by many courts which have denied liability.[73] The *Dillon* court felt that liability could be judicially limited through the application of certain "guidelines."[74] However, due to the potential ambiguity involved, this may not be a workable solution. On the other hand, the *Amaya* opinion observed that limitations such as those suggested in *Dillon* involve arbitrary and illogical distinctions and concluded that "the quest [for rational limits] may be an inherently fruitless one,"[75] — an observation which may best describe the situation.

Both opinions by implication also examined the problem of attempting to maintain equilibrium between developments in the law and advancements in society. The *Dillon* court felt that the time was ripe to recognize that illness sustained by a mother who witnesses the negligently caused death or injury of her child is indeed a real one entitled to legal redress. The *Amaya* court felt that constraining considerations of administrative difficulties and socio-economic and moral factors prevented a finding of liability.[76] *Amaya's* awareness of realistic problems, in this regard, appears to be sound.

Conclusion

Claims for physical illness due to emotional shock from witnessing the injury or peril of another should not be decided by the application of arbitrary and mechanical rules such as the "impact" and "zone-of-danger" doctrines.[77] Courts should approach such problems by considering fundamental principles of negligence — the most essential of which is the existence of a duty of care owed by the defendant to the plaintiff.[78] Many policy factors must be considered in determining whether a duty exists in a particular case.[79] Foreseeability of harm is only a part of that determination.[80]

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[73] *E.g.*, Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Jelley v. Laflame, 238 A.2d 728 (N.H. 1968); Tobin v. Grossman, 30 App. Div. 2d 213, 291 N.Y.S.2d 227 (Sup. Ct. 1968); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).

[74] *See* note 35 *supra* and accompanying text.

[75] 59 Cal. 2d 295, 313, 379 P.2d 513, 524, 29 Cal. Rptr. 33, 44 (1963). If logic were the only consideration, it would be "difficult to explain why the duty was confined to the case of parent or guardian and child, and did not extend to other relations in life also involving intimate associations; and why it did not eventually extend to bystanders." Atkin, L.J. in Hambrook v. Stokes Bros., [1925] 1 K.B. 141, 158-59 (C.A.).

[76] 59 Cal. 2d 295, 310-15, 379 P.2d 522-35, 29 Cal. Rptr. 33, 42-45 (1963).

[77] *See* notes 3, 4 and 67 *supra.*

[78] *See generally* Restatement (Second) of Torts § 281(a) (1965) indicating that the interest which is invaded must be one which is legally protected against unintentional invasion. Also, the negligent conduct must be directed to the plaintiff individually or to a class of persons within which he is included. Restatement (Second) of Torts § 281(b) (1965).

One half of the central question remains — whether or not there is a legally protectible interest in freedom from fear for another. The other half consists of a determination of whether or not a duty of due care should be found owing to the plaintiff.

[79] Notes 43, 44 *supra* and accompanying text.

[80] See Professor Fleming's remarks about the inadequacy of the foreseeability test as the sole determinant of duty, note 42 *supra.*

When the countervailing policy considerations favoring and opposing the imposition of liability are compared, two principal reasons emerge for denying the existence of a duty and therefore refusing recovery: (1) to allow recovery may impose liability disproportionate to the culpability of the defendant;[81] (2) manifold difficulties inherent in this type of litigation, including problems in proof of causation[82] and the potential inability of lower courts to deal with vague "guidelines,"[83] may inhibit the effective administration of justice. It is submitted that at the present time the most important policy consideration, labelled the "administrative factor,"[84] is sufficient to form a rational basis for denying liability to one who seeks to recover for negligently inflicted fear for another.[85]

> If we keep in mind that justice exists only when it is effectively administered, we may be more comfortable in admitting that it is impossible to provide a remedy for every wrong.[86]

[81] *See* notes 65, 66 *supra* and accompanying text. *Cf.* Brody, *Negligently Inflicted Psychic Injuries: A Return to Reason*, 7 VILL. L. REV. 232, 259-60 (1962).

[82] *See* notes 58, 59 *supra* and accompanying text; *cf.* Smith, *supra* note 8, at 212: "eagerness to be progressive may cause extravagant credulity and injury to scientific standards of proof."

[83] See notes 69-72 *supra* and accompanying text.

[84] Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 310-12, 379 P.2d 513, 522-24, 29 Cal. Rptr. 33, 42-44 (1963); Green, *The Duty Problem In Negligence Cases*, 28 COLUM. L. REV. 1014, 1035-45 (1928).

[85] These difficulties in administration are always of great significance in any new development of the law . . . . Duties must await the court's finding a workable method by which they can be given meaning; morals, justice, business and purification of the social stream by prophylactic treatment, must all abide the time when the court has adjusted its scheme of things to the exigencies of its internal affairs. Green, *The Duty Problem In Negligence Cases*, 28 COLUM. L. REV. 1014, 1044-45 (1928).

[86] Proehl, *Anguish of Mind*, 56 NW. U.L. REV. 477, 495 (1961).