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Molien v. Kaiser Foundation Hospitals: California Expands Liability for Negligently Inflicted Emotional Distress

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While mental tranquility is now recognized as an important interest, it historically received little legal protection.[1] Liability for mental injury expanded only slowly over the decades,[2] because courts, in their reluctance to allow recovery for mental injury,[3] conjured up numerous excuses for not protecting peace of mind.[4]

The most perplexing problem that courts now face in this area is determining the circumstances in which to allow recovery for negligently inflicted emotional distress. It is well settled that recovery for mental injury is possible when the defendant intentionally or recklessly engages in extreme and outrageous conduct that causes severe mental injury to the plaintiff.[5] Recovery is also possible when the defendant commits a "host" tort[6] that causes mental injury to the plaintiff.[7] No general agreement has been reached, however, about the circumstances

1. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12, at 49-50 (4th ed. 1971) [hereinafter cited as PROSSER]; Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936).

2. 1 J. DOOLEY, MODERN TORT LAW § 15.01 (1977) [hereinafter cited as DOOLEY]; PROSSER, *supra* note 1, § 54, at 327-35. For the development of California law, see 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW TORTS §§ 548-53 (8th ed. 1974).

3. The terms "mental distress," "mental injury," "emotional distress," and "emotional injury" are used interchangeably throughout this Note.

4. Early courts claimed that mental injury was too subtle and speculative, *see, e.g.*, Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896); that mental injury was not proximately caused by the allegedly negligent act, *see, e.g.*, Chittick v. Philadelphia Rapid Trans. Co., 224 Pa. 13, 73 A. 4 (1909); that mental injury, by its very nature, could be easily feigned and therefore fictitious claims would flood the courts, *see, e.g.*, Huston v. Borough of Freemansburg, 212 Pa. 548, 61 A. 1022 (1905); and that allowing recovery for mental injury would subject defendants to potentially unlimited liability, *see, e.g.*, Ward v. West Jersey & S.R.R., 65 N.J.L. 383, 47 A. 561 (1900).

5. *See, e.g.*, State Rubbish Collectors Ass'n v. Silizinoff, 38 Cal. 2d 330, 240 P.2d 282 (1952). *See generally* DOOLEY, *supra* note 2, § 15.03; PROSSER, *supra* note 1, § 12, at 49-62; RESTATEMENT (SECOND) OF TORTS § 46, comment j, at 78 (1965).

6. A "host" tort is a tort such as battery, slander, or false imprisonment, which gives rise to recovery for mental injury in the form of parasitic damages. Rodrigues v. State, 52 Hawaii 156, 170, 472 P.2d 509, 519 (1970); *see also* RESTATEMENT (SECOND) OF TORTS § 47, comment b, at 80 (1965).

7. T. COOLEY, LAW OF TORTS § 16 (student's ed. 1930); DOOLEY, *supra* note 2, § 15.02; PROSSER, *supra* note 1, § 12, at 52; RESTATEMENT (SECOND) OF TORTS § 47, comment b, at 80 (1965).

in which independent liability for negligently inflicted emotional distress should be recognized.

As courts began to recognize that the need to allow recovery for negligently inflicted emotional distress outweighed perceived risks,[8] rules were formulated to allow recovery in certain circumstances.[9] The complexity of the rules is baffling, however, and the factors given weight under the rules often seem to have been chosen arbitrarily.[10]

A small minority of jurisdictions has abandoned these rules and adopted a single rule applicable to all claims involving negligent infliction of emotional distress.[11] California appears to have joined this minority. In *Molien v. Kaiser Foundation Hospitals*,[12] the California Supreme Court held that a plaintiff could recover for serious emotional distress, despite an absence of physical injury,[13] if the circumstances of the case guarantee that the claim of emotional distress was genuine[14] and the plaintiff's injury was reasonably foreseeable to the defendant.[15]

The *Molien* rule creates new problems. It is not entirely clear whether *Molien* will be applied to all claims of negligent infliction of emotional distress. In addition, if *Molien* is applied generally, it must be determined under what facts recovery will be allowed. This Comment examines both issues. The Comment first explores the historical developments of the law of negligent infliction of emotional distress. The Comment then discusses the *Molien* holding, its scope, and its effect upon California law. Finally, the Comment examines each of the elements of the *Molien* rule—the guarantee of genuineness, serious mental injury, and foreseeability of the injury—in an attempt to determine the circumstances in which recovery will be allowed under the *Molien* rule.

8. Courts were concerned primarily with the possibility of exposing defendants to potentially unlimited liability, and of flooding the courts with fictitious claims. Spade v. Lynn & Boston R. R., 168 Mass. 285, 288, 47 N.E. 88, 89 (1897); Ward v. West Jersey & S.R.R., 65 N.J.L. 383, 47 A. 561 (1900); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896); Huston v. Borough of Freemansburg, 212 Pa. 548, 61 A. 1022 (1905).

9. See notes 22-56 & accompanying text *infra*.

10. In Dillon v. Legg, 68 Cal. 2d 728, 746, 441 P.2d 912, 924, 60 Cal. Rptr. 72, 84 (1968), the court observed: "In short, the history of the cases does not show the development of a logical rule but rather a series of changes and abandonments." *See also* Rodrigues v. State, 52 Hawaii 156, 171, 472 P.2d 509, 510 (1970).

11. Hawaii, Maine, and New York appear to have adopted such a rule. See notes 68, 90-96, 99-101 & accompanying text *infra*.

12. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

13. See text accompanying notes 22-23 *infra*.

14. 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

15. *Id.* at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.

History

The Distinction Between Physical Risk and Mental Risk Conduct

To avoid much of the confusion surrounding the law governing liability for negligently inflicted emotional distress,[16] two types of conduct must be distinguished. First, the defendant's conduct may create a risk of causing primarily physical harm to the plaintiff or a third person, and the plaintiff may consequently sustain mental injuries in the form of great fear, sadness, pain or anxiety.[17] This type of conduct, which may be characterized as "physical risk conduct," is exemplified by the situation in which a defendant operates an automobile carelessly, placing the plaintiff in great fear for his or her life,[18] or for the life of his or her child.[19]

A second type of conduct, which may be referred to as "mental risk conduct," occurs when the defendant's conduct creates a risk of causing primarily mental harm. In this situation, physical harm can result only when it flows from the mental injury. If, for example, the defendant negligently and erroneously informs the plaintiff that a close relative has passed away,[20] the plaintiff may sustain severe emotional distress in the form of sadness, grief, or anxiety. Obviously, in this situation, physical injury can result not from an impact upon the plaintiff's physical person, but only as a consequence of the emotional distress.

The distinction between physical risk conduct and mental risk conduct is important because the rules used to determine liability frequently apply only to physical risk conduct. Traditionally, recovery has been allowed more frequently when the defendant's conduct creates a risk of causing primarily physical injury than when it creates a risk of causing primarily mental injury.[21]

Recovery for Physical Risk Conduct

The Physical Injury Requirement

When courts finally recognized mental tranquility as a protectable interest, they insisted upon strong proof that claims for mental injury were genuine.[22] Physical injury, either resulting directly from the neg-

16. "The case law in the field . . . is in an almost unparalleled state of confusion." Annot., 64 A.L.R.2d 100, 103 (1959). T. COOLEY, LAW OF TORTS § 16 (student's ed. 1930).

17. Physical injuries may result either from a force set in motion by the defendant's conduct, or as a consequence of the mental injuries.

18. *See, e.g.*, Cook v. Maier, 33 Cal. App. 2d 581, 92 P.2d 434 (1957).

19. *See, e.g.*, Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 60 Cal. Rptr. 72 (1968).

20. *See, e.g.*, Johnson v. State, 37 N.Y.2d 378, 334 N.E.2d 590 (1975).

21. See notes 22-56 & accompanying text *infra*.

22. *See* Huston v. Borough of Freemansburg, 212 Pa. 548, 61 A. 1022 (1905). "In the last half century, the ingenuity of counsel . . . has expanded the action of negligence until it overtops all others in frequency and importance; but it is only in the very end of that period

ligent act or stemming from the emotional distress, was considered strong proof of mental injury; indeed, physical injury was deemed an essential element of a claim for mental injury in virtually all jurisdictions.[23]

The Impact Rule

Under early tort law, physical injury was not sufficient to support a claim of negligent infliction of emotional distress. In addition to physical injury, many jurisdictions required that the defendant's conduct set in motion a force that ultimately impacted upon the plaintiff's person.[24] Recovery for mental injury in these jurisdictions was allowed, for example, when the defendant negligently operated a vehicle that actually collided with the plaintiff,[25] but was denied when the defendant's vehicle barely missed the plaintiff.[26]

The requirement of impact is apparently justified on the theory that the plaintiff's claim is more likely to be legitimate when impact occurs than when it does not.[27] When the impact is substantial, this theory is defensible. Courts, however, have not restricted recovery to situations in which the impact is substantial, but have found impact

that it has been stretched to the effort to cover so intangible, so untrustworthy, so illusory, and so speculative a cause of action as mere mental disturbance. It requires but a brief judicial experience to be convinced of the large proportion of exaggeration, and even actual fraud, in the ordinary action for physical injuries from negligence; and if we opened the door to this new invention the result would be great danger, if not disaster, to the cause of practical justice.").

23. 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1031-33 (1956); PROSSER, *supra* note 1, § 54, at 328-29; RESTATEMENT (SECOND) OF TORTS § 436A (1965). There was no requirement, however, of serious physical injury. *See, e.g.*, Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928) holding that when circus horse owned by defendant evacuated bowels in plaintiff's lap during circus performance, physical injury sufficient to support action for mental injury resulted).

In California, the physical injury requirement was particularly entrenched in the case law. *See, e.g.*, Leasman v. Beech Aircraft Corp., 48 Cal. App. 3d 376, 121 Cal. Rptr. 768 (1975); Hair v. County of Monterey, 45 Cal. App. 3d 538, 119 Cal. Rptr. 720 (1975); Vanoni v. Western Airlines, 247 Cal. App. 2d 793, 56 Cal. Rptr. 115 (1967). *Cf.* CALIFORNIA JURY INSTRUCTIONS—CIVIL (BAJI) No. 12.80 (6th ed. 1977) ("There can be no recovery of damages for emotional distress unaccompanied by physical injury where such emotional distress arises only from negligent conduct.").

Molien eliminated the physical injury requirement in California. Hawaii, New York, and Maine also have allowed recovery in the absence of physical injury. See notes 68, 90-96, 99-101 & accompanying text *infra*.

24. DOOLEY, *supra* note 2, § 15.05; PROSSER, *supra* note 1, § 54, at 330-33; Annot., 64 A.L.R.2d 100, 134-43 (1959). California refused to adopt the impact rule. See note 33 *infra*.

25. Lambertson v. Consolidated Traction Co., 59 N.J.L. 297, 36 A. 100 (1897).

26. Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896).

27. PROSSER, *supra* note 1, § 54, at 331.

when the plaintiff received a slight blow,[28] got dust in the eye,[29] or inhaled smoke.[30] In these circumstances, there is little more guarantee of the genuineness of the emotional injury than if there had been no impact. Many courts, recognizing this fact, rejected the impact rule.[31]

The Zone of Danger Rule

With the demise of the impact rule, the "zone of danger" rule gained support in a majority of jurisdictions,[32] including California.[33] Under this rule, liability for negligently inflicted emotional distress is expanded to include situations in which the defendant's negligent conduct places the plaintiff in "fear of immediate personal injury," and the plaintiff sustains both mental and physical injuries.[34] The zone of danger rule recognizes that one may sustain serious emotional distress caused by fear for one's own safety even in the absence of "impact," and therefore it is clearly an improvement over the impact rule.

The zone of danger rule, however, can also give rise to anomalous results. Thus, although the mental distress resulting from injury to a close relative might be as great as that resulting from fear for one's own safety, under the zone of danger rule, recovery is allowed only for emotional distress resulting from fear for one's own safety.[35] Until 1968, no American jurisdiction[36] was willing to extend a negligent defendant's liability to include mental injury caused by witnessing an injury to a third person;[37] fear of fictitious claims and of exposing the defendant to unlimited liability prevented such an extension.[38]

28. Homans v. Boston Elev. R.R., 180 Mass. 456, 62 N.E. 737 (1902); Spade v. Lynn & Boston R.R., 172 Mass. 488, 52 N.E. 747 (1898).

29. Porter v. Delaware, L. & W. R.R., 73 N.J.L. 405, 63 A. 860 (1906).

30. Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930).

31. *See* Robb v. Pennsylvania R.R., 58 Del. 454, 210 A.2d 709 (1965); First Nat'l Bank v. Langley, 314 So. 2d 324 (Miss. S. Ct. 1975); Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965); Batalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961), *overruling* Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896); Savard v. Cody Chevrolet, Inc., 126 Vt. 405, 234 A.2d 656 (1967).

32. *See, e.g.*, Purcell v. St. Paul City R.R., 48 Minn. 134, 50 N.W. 1034 (1892); Salmi v. Columbia & N. River R.R., 75 Or. 200, 146 P. 819 (1915). *See generally* Annot., 64 A.L.R.2d 100, 143-50 (1959); DOOLEY, *supra* note 2, at § 15.06.

33. Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963); Cook v. Maier, 33 Cal. App. 2d 581, 92 P.2d 434 (1939).

34. *Id.*

35. *See* Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

36. England first expanded liability beyond the zone of danger. Hambrook v. Stokes Bros. [1925] 1 K.B. 141.

37. California was the first American jurisdiction to extend liability to the mental injuries of a witness. Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 60 Cal. Rptr. 72 (1968).

38. See note 35 *supra*. *See also* Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969); Guilmette v. Alexander, 128 Vt. 116, 259 A.2d 12 (1969).

The Dillon Rule

California was the first American jurisdiction to extend liability beyond the "zone of danger."[39] In *Dillon v. Legg*,[40] a mother who was not placed in fear for her own safety was allowed to recover for emotional distress and resulting physical injury[41] when she observed her daughter killed as a result of the defendant's negligence.[42]

The California Supreme Court stated that the impact and zone of danger rules were merely artificial abstractions, which bar recovery contrary to the general rules of negligence.[43] The court reasoned that problems inherent in allowing recovery for negligently inflicted emotional distress should be resolved by applying tort principles, not by creating exceptions to them: "Legal history shows that the artificial islands of exceptions, created from fear that the legal process will not work, usually do not withstand the waves of reality and, in time, descend into oblivion."[44]

The court first applied general tort principles, noting that to limit otherwise potentially infinite liability, a defendant is liable in negligence only for reasonably foreseeable injuries,[45] and that foreseeability of risk is of primary importance in establishing the critical element of duty.[46] Second, the court cautioned that, because duty is "inherently intertwined with foreseeability," the extent of the defendant's duty could not be established by a fixed rule, but could only be determined

39. See note 37 *supra*. Other jurisdictions followed California's lead: Connecticut (D'Amicol v. Alverez Shipping Co., 31 Conn. Supp. 164, 32 A.2d 129 (1973)); Hawaii (Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 728 (1974)); Massachusetts (Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978)); Michigan (Toms v. McConnell, 45 Mich. App. 647, 207 N.W.2d 140 (1973)); New Hampshire (Corso v. Merrill, 119 N.H. 647, 406 A.2d 300 (1979)); Pennsylvania (Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979)); Rhode Island (D'Ambra v. United States, 114 R.I. 643, 338 A.2d 524 (1975)); Texas (Landreth v. Reed, 570 S.W.2d 486 (Tex. Civ. App. 1978)); Virginia (Hughes v. Moore, 214 Va. 27, 197 S.E.2d 214 (1973)); Washington (Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976)). *See generally* Lambert, *Tort Liability for Psychic Injuries: Overview and Update*, 37 AM. TRIAL LAW. L.J. 1, 11-31 (1978).

40. 68 Cal. 2d 728, 441 P.2d 912, 60 Cal. Rptr. 72 (1968).

41. *Dillon* was expressly limited to the situation in which the bystander manifests physical injury as a result of the emotional distress. *Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80. Subsequent cases have refused to permit recovery under *Dillon* in the absence of physical injury. *See, e.g.*, Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977).

42. Events of this sort have been referred to as "bystander" actions. *See* Molien v. Kaiser Foundation Hosps., 27 Cal. 3d 916, 923, 616 P.2d 813, 816, 167 Cal. Rptr. 831, 834 (1980). This Note uses the term "bystander" to refer to anyone who sustains mental injury as a result of witnessing, or learning about, an injury to another.

43. 68 Cal. 2d at 746-47, 441 P.2d at 925, 69 Cal. Rptr. at 84-85.

44. *Id.*

45. *Id.* at 739, 441 P.2d at 919, 69 Cal. Rptr. at 79.

46. *Id.*

on a case-by-case basis.[47] Finally, the court identified three factors to be considered in determining whether a plaintiff's injury was reasonably foreseeable: (1) whether the plaintiff was located near the scene of the accident; (2) whether the shock to the plaintiff resulted from the sensory and contemporaneous observation of the accident; and (3) whether the plaintiff and the victim were closely related.[48]

The court concluded that the plaintiff's injuries were reasonably foreseeable, but declined to decide whether it would conclude in the absence or reduced weight of these factors that the accident was not reasonably foreseeable.[49]

Despite the *Dillon* court's warning that duty must be determined on a case-by-case basis, later decisions generally have denied recovery in the absence of any of the *Dillon* factors.[50]

Recovery for Mental Risk Conduct

The impact, zone of danger, and *Dillon* rules were designed to reach just results in situations involving physical risk conduct: conduct that creates a risk of causing primarily physical harm to the plaintiff or a third person. On the other hand, these rules should not be applied in situations involving mental risk conduct—conduct that creates a risk of causing primarily mental injury—because the factors given weight under these rules have no bearing upon the question of whether the plaintiff suffered mental injuries.

While some courts have applied these rules mechanically in mental risk contexts,[51] most courts have simply denied recovery when the defendant's conduct created a risk of causing primarily mental injury.[52] Prior to *Molien*, however, two exceptions to this approach were created and both have gained considerable support. First, several juris-

47. *Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

48. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

49. *Id.* at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.

50. *See* Hoyem v. Manhattan Beach City School District, 22 Cal. 3d 508, 585 P.2d 851, 150 Cal. Rptr. 1 (1978); Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); Arauz v. Gerhardt, 68 Cal. App. 3d 937, 137 Cal. Rptr. 619 (1977); Hair v. County of Monterey, 45 Cal. App. 3d 538, 119 Cal. Rptr. 639 (1975); Powers v. Sissoev, 39 Cal. App. 3d 865, 14 Cal. Rptr. 868 (1974). *But cf.* Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969) (mother who saw injured son moments after accident occurred allowed to recover).

The mechanical application of *Dillon* by California courts eliminates the flexibility of the rule and may lead to unjust results. See notes 124-33 & accompanying text *infra*.

51. *See, e.g.*, Molien v. Kaiser Foundation Hospitals, 158 Cal. Rptr. 107 (1979), *rev'd*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 813 (1980). Justice Poche, in dissent, argued that *Dillon* should not apply when the defendant's conduct creates only a risk of mental injury: "The tests of nearness in time and place to the 'accident' simply do not aid analysis of the fact situation presented by the case before us." 158 Cal. Rptr. at 115.

52. *See* PROSSER, *supra* note 1, § 54, at 328-30; Annot., 64 A.L.R.2d 100, 115-19 (1959).

dictions allow the plaintiff to recover in tort when a telegraph company negligently and erroneously transmits a message of death.[53] Second, some courts allow the plaintiff to recover against an undertaker who negligently handles a relative's corpse.[54] In both exceptions, there is "an especial likelihood of genuineness and serious mental distress, arising from the special circumstances, which serve as a guarantee that the claim is not spurious."[55] Perhaps because of this special likelihood of genuineness, many courts have not required the presence of physical injury, which is a firmly established requirement in physical risk circumstances.[56]

Thus, the plaintiff could recover in mental risk circumstances only when the facts of the case fit within one of the two exceptions to the general rule disallowing recovery, or when the plaintiff could convince the court to apply the impact, zone of danger or *Dillon* rules in a favorable manner.

Molien v. Kaiser Foundation Hospitals

In *Molien v. Kaiser Foundation Hospitals*,[57] a staff doctor negligently and erroneously informed Mrs. Molien, the plaintiff's wife, that she had contracted infectious syphilis and advised her to inform her husband. She was treated for syphilis, and the plaintiff was given blood tests to determine whether he had contracted the disease; the blood tests established that the plaintiff did not have the disease.

The plaintiff's wife became distraught because she suspected that the plaintiff had engaged in extramarital sexual relations; tension and hostility mounted, leading to the couple's separation, and, eventually, to divorce proceedings.[58] The plaintiff, upon discovering the misdiagnosis, sued the hospital, alleging that he suffered "extreme mental distress"[59] as a consequence of the defendant's negligence.[60]

53. See notes 85-89 & accompanying text *infra*.

54. See notes 77-84 & accompanying text *infra*.

55. PROSSER, *supra* note 1, § 54, at 329-30.

56. See notes 22-23 & accompanying text *supra*.

57. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

58. In commenting upon the condition of his marriage prior to the misdiagnosis, Molien, a Daly City plumber, said, "I had a storybook marriage, and all of a sudden . . . this beautiful marriage was severed through no fault of our own." San Francisco Examiner, Aug. 26, 1980, at 1, col. 4.

59. "Molien said he cannot begin to tell the suffering he, his wife and family went through because of the misdiagnosis." *Id.*

60. At the appellate level, the trial court's ruling in favor of Kaiser was affirmed on two grounds: (1) the plaintiff did not sustain physical injury, and (2) the *Dillon* rule was not met. 158 Cal. Rptr. at 110-11. The plaintiff had challenged the first ground by contending that the blood test he received satisfied the physical injury requirement, but the court was unpersuaded. The court reasoned that when the "actionable negligence" results in physical impact, recovery is possible for any corresponding mental injury, but when the actionable

In deciding *Molien*, the California Supreme Court adopted a general rule for determining liability for negligently inflicted emotional distress. The court allowed the plaintiff to recover for severe emotional distress, despite absence of physical injury, because the circumstances of the plaintiff's claim guaranteed its genuineness and because the plaintiff's injuries were reasonably foreseeable to the defendant.[61]

The court first distinguished *Dillon v. Legg*, reasoning that the *Dillon* rule applies only when the "plaintiff [seeks] recovery of damages . . . suffered as a percipient witness to the injury of a third person," whereas Molien was "himself a direct victim of the assertedly negligent act."[62]

The court stated, however, that although *Dillon* did not control the instant case the duty approach employed in *Dillon* was instructive. The court approved of the *Dillon* definition of duty as essentially a function of foreseeability, and agreed that there is a duty to refrain from the negligent infliction of mental, as well as physical, injury.[63] The court concluded that the doctor's misdiagnosis of Mrs. Molien, coupled with his recommendation that she inform her husband that she had contracted syphilis, could be foreseen to produce marital discord and resulting emotional distress to both the plaintiff and his wife, and thus the defendant owed the plaintiff a duty to exercise due care in diagnosing Mrs. Molien's physical condition.[64]

The court next determined whether the absence of physical injury barred the plaintiff's claim. Observing that the physical injury requirement's apparent purpose is to minimize the risk of feigned injuries and false claims,[65] the court stated that the requirement's main problem is that it is both overinclusive and underinclusive. The requirement is

negligence does not produce impact, recovery must be denied unless physical injury flows from the mental injury sustained. Using this standard, the court determined that the actionable negligence was the misdiagnosis, not the blood test, and hence, "impact" did not occur. Thus, because the blood test did not arise from the plaintiff's mental injuries, the court denied recovery. *Id.* at 110.

The court also applied the *Dillon* rule. Observing that the plaintiff was not present when the misdiagnosis occurred and that therefore sensory and contemporaneous observation was impossible, the court held that no duty arose. *Id.* at 111.

The appellate court's reasoning was erroneous in that the court attempted to apply physical risk rules to mental risk conduct. Recovery could have been denied simply on the ground that current case law would not support the plaintiff's recovery.

61. 27 Cal. 3d at 930-31, 616 P.2d at 821, 167 Cal. Rptr. at 839.

62. *Id.* at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834. The court could have found *Dillon* inapplicable on the ground that *Dillon* can rationally apply only to physical risk conduct. *Cf.* Johnson v. State, 37 N.Y.2d 378, 383, 334 N.E.2d 590, 593 (1975) (distinction between direct and indirect results made in order to avoid the New York rule disallowing recovery under *Dillon* circumstances).

63. 27 Cal. 3d at 922, 616 P.2d at 816, 167 Cal. Rptr. at 834.

64. *Id.* at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.

65. *Id.* at 925, 616 P.2d at 818, 167 Cal. Rptr. at 836.

overinclusive because it permits recovery whenever the suffering is accompanied by physical injury, no matter how trivial the injury; the requirement is underinclusive because it mechanically denies access to claims that may be valid and could be proved if plaintiffs were permitted to go to trial.[66] For these reasons, the court concluded that the physical injury requirement was no longer justified.[67]

After eliminating the physical injury requirement, the court needed to declare a new standard that would adequately protect against potentially unlimited liability and a flood of spurious mental injury suits. Relying heavily upon the decision of the Hawaii Supreme Court in *Rodrigues v. State*,[68] the California Supreme Court adopted the general rule that, in cases other than those in which proof of emotional distress is of a medically significant nature, the general standard of proof required is that the circumstances of the case present some guarantee that the plaintiff sustained serious mental injury.[69] Thus, recovery for negligently inflicted emotional distress was made to turn upon proof of serious injury, rather than upon satisfaction of the physical injury, impact, zone of danger, or *Dillon* tests.

The *Molien* court reasoned that the negligent examination of Mrs. Molien and the conduct flowing from the examination were objectively verifiable actions that foreseeably caused serious emotional responses in the plaintiff, and thus served as a guarantee of the claim's genuineness.[70] Finally, because it concluded that absence of physical injury was no longer fatal to a claim for mental injury, the supreme court held that the trial court had erred in sustaining a demurrer to the plaintiff's cause of action.[71]

Thus, after *Molien*, recovery for negligently inflicted emotional

66. *Id.* at 928-29, 616 P.2d at 820, 167 Cal. Rptr. at 838.

67. Other defects were discovered. The physical injury requirement was found to encourage extravagant pleading and distorted testimony as plaintiffs attempted to circumvent the requirement by exaggerating physical symptoms, and to cloud the real issue of whether the plaintiff suffered a serious injury that should be compensated. *Id.* at 929-30, 616 P.2d at 820-21, 167 Cal. Rptr. at 838-39.

68. 52 Hawaii 156, 472 P.2d 509 (1970). In *Rodrigues*, the plaintiffs brought an action against the state for flood damage to their home and mental suffering resulting from the state's negligence. The Hawaii Supreme Court held that there is a duty to refrain from causing serious mental distress, which it defined as distress with which a reasonable person would be unable to cope adequately. Limiting recovery to situations in which serious emotional distress exists, the *Rodrigues* court suggested, would protect against fictitious claims and extravagant testimony. The court further held that, in the absence of proof of emotional distress of a "medically significant nature," a plaintiff must establish that the circumstances of the case guarantee the genuineness of the claim of mental injury. *See also* Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974); Kelley v. Kokua Sales and Supply, Ltd., 56 Hawaii 204, 532 P.2d 673 (1975).

69. 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

70. *Id.* at 930-31, 616 P.2d at 821, 167 Cal. Rptr. at 839.

71. *Id.* " 'I'm glad it [the case] resulted in the creation of new law,' Molien said . . . in

distress is possible despite an absence of physical injury if: (1) the mental injury to the plaintiff was reasonably foreseeable to the defendant and therefore the defendant had a duty to refrain from the hazardous conduct; (2) the plaintiff sustained serious emotional distress—emotional distress with which a reasonable person would be unable to cope adequately—that was proximately caused by the defendant's conduct; and (3) the plaintiff can establish a guarantee of genuineness in the circumstances of the case, or can introduce "medically significant" evidence of serious emotional distress.

Scope of the Molien Rule

One question remaining after the decision in *Molien* is whether the rule adopted in that case applies only to conduct that creates a risk of causing primarily mental injury or whether it also applies to conduct that creates a risk of causing primarily physical injury. The decision is ambiguous in that it appears to adopt a general scheme governing liability for negligently inflicted emotional distress, while leaving the *Dillon* rule intact.[72] The court may have intended to limit the *Molien* rule to situations in which the defendant creates a risk of only mental injury. If so, a plaintiff would be required to establish physical injury and either impact, presence within the zone of danger, or satisfaction of the *Dillon* rule to recover against a defendant who creates a risk of causing primarily physical harm.[73]

Although the California Supreme Court may have intended to limit the *Molien* rule to situations in which the defendant creates a risk of causing primarily mental injury, the rule should be extended to include all claims for negligent infliction of emotional distress. Thus, under the *Molien* rule, recovery should be allowed when the defendant creates a risk of causing primarily physical injury as long as the plaintiff establishes serious emotional distress, a guarantee of genuiness, and foreseeability of the injury. This approach avoids the unfairness of limiting *Molien* to mental risk cases and creates a more just system of

a phone interview, 'so no hospital or doctor can do this kind of damage ever again.'" San Francisco Examiner, Aug. 26, 1980, at 1, col. 4.

72. The California Supreme Court distinguished *Dillon*. 27 Cal. 3d at 921-23, 616 P.2d at 815-17, 167 Cal. Rptr. at 833-35.

73. Interpreting *Molien*, the California Court of Appeal held in Hathaway v. Superior Court, 112 Cal. App. 3d 728, 169 Cal. Rptr. 435 (1980), that the *Dillon* three factor rule still applies in bystander situations, and denied recovery to the parents of a young boy who was electrocuted as a result of another's negligence, on the ground that the parents did not observe the injury-causing event. The court apparently interpreted *Molien* as abolishing the physical injury requirement in all claims for negligently inflicted emotional distress. *See also* Cortez v. Macias, 110 Cal. App. 3d 640, 167 Cal. Rptr. 905 (1980). This Note disapproves of the continued mechanical application of *Dillon*. See notes 124-33 & accompanying text *infra*.

limiting liability, because its focus is on whether the plaintiff actually sustained a serious injury that should be compensated, and whether the public policy against potentially infinite liability would be defeated if the defendant were held liable. Moreover, application of a single general rule would reduce the complexity and confusion that the old rules created.

Operation of the Molien Rule

The Guarantee of Genuineness

The California Supreme Court in *Molien* adopted a standard of proof that is manifestly imprecise: "some guarantee of genuineness in the circumstances of the case."[74] While insisting that this standard is not as difficult to apply as it seems,[75] the *Molien* court failed to indicate how to apply it. An examination of the cases decided prior to *Molien*,[76] and their treatment of the guarantee of genuineness, may suggest the manner in which the *Molien* standard will be applied.

Guarantees of Genuineness: Mental Risk Conduct

Mishandling of Corpse Cases

Many jurisdictions have allowed recovery for mental injuries when a mortician negligently handles, embalms, or transports the corpse of a plaintiff's deceased relative.[77] While early decisions allowed recovery on a quasi-property theory,[78] it later became apparent that no property damage was involved, but only the infliction of mental injury. Under earlier decisions, recovery for mere negligence was denied in the absence of aggravating circumstances.[79] Many jurisdic-

74. 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839. In allowing recovery for mental injury, the *Molien* court adopted language used by the Hawaii Supreme Court in Rodrigues v. State, 52 Hawaii 156, 172, 472 P.2d 509, 520 (1970): "In cases other than where proof of mental distress is of a medically significant nature, the general standard of proof required to support a claim of mental distress is some guarantee of genuineness in the circumstances of the case."

75. 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

76. See notes 77-84 & accompanying text *infra*, mishandling of corpse cases; see notes 85-89 & accompanying text *infra*, negligent transmission of death message cases; see notes 90-96 & accompanying text *infra*, physician-patient relationship cases; see notes 97-101 & accompanying text *infra*, beverage cases; see notes 102-05 & accompanying text *infra*, bank-customer relationship case.

77. *See, e.g.*, Carey v. Lima, Salmon & Tully Mortuary, 168 Cal. App. 2d 42, 335 P.2d 181 (1959); Torres v. State, 34 Misc. 2d 488, 228 N.Y.S.2d 1005 (1962); Morrow v. Southern Ry., 213 N.C. 127, 195 S.E. 383 (1938).

78. *E.g.*, Darcy v. Presbyterian Hosp., 202 N.Y. 259, 262, 95 N.E. 695, 696 (1911). *See generally* Annot., 17 A.L.R.2d 770-80 (1951).

79. *E.g.*, Dunahoo v. Bess, 146 Fla. 182, 200 So. 541 (1941) (aggravating circumstances include physical injury); Beaulieu v. Great N. Ry., 103 Minn. 47, 114 N.W. 353 (1907) (aggravating circumstances include wilful and malicious misconduct); Nichols v. Central V.

tions, however, have allowed recovery for mere negligence in the absence of aggravating circumstances and physical injury.[80]

California adopted this approach prior to *Molien*. In *Allen v. Jones*,[81] the court held that, when the plaintiff sustained mental but not physical injury upon learning that the cremated remains of his brother had been lost in transit, the plaintiff had pleaded a valid cause of action in tort as well as in contract against the defendant who had agreed to ship the remains.[82] While the court agreed with Dean Prosser that there is a guarantee of genuineness under the special circumstances of this type of case,[83] it also reasoned that public policy required that mortuaries be held to a high standard of care because of the likelihood of causing mental injury to the decedent's family. Imposition of such liability, it concluded, is a "useful and necessary means" of maintaining the standards of the profession.[84]

Negligent Transmission of Death Message Cases

A large minority of jurisdictions have allowed recovery for mental distress despite absence of physical injury when a telegraph company misdelivers a message announcing death or illness of a friend or relative.[85] Typically, recovery has been allowed in these jurisdictions when the message was not delivered on time, resulting in a plaintiff's failure to attend a funeral[86] or to visit a dying relative.[87] The rule has been justified on the theory that the message is especially likely to result in mental injury if misdelivered,[88] and on the theory that the telegraph company assumes a special responsibility to the public.[89]

Ry., 94 Vt. 14, 109 A. 905 (1919) (aggravating circumstances include physical injury and willful misconduct); Kneass v. Cremation Soc'y, 103 Wash. 521, 175 P. 172 (1918) (aggravating circumstances include physical injury and pecuniary loss).

80. *E.g.*, Jefferson County Burial Soc'y v. Scott, 226 Ala. 556, 147 So. 634 (1933); Brown Funeral Homes & Ins. Co. v. Baughn, 226 Ala. 661, 148 So. 154 (1933); Wright v. Beardsley, 46 Wash. 16, 89 P. 172 (1907). *See generally* Annot., 17 A.L.R.2d 770 (1951).

81. 104 Cal. App. 3d 207, 163 Cal. Rptr. 445 (1980).

82. *Id.* at 213, 163 Cal. Rptr. at 449.

83. *See* PROSSER, *supra* note 1, § 54, at 329-30.

84. 104 Cal. App. 3d at 214, 163 Cal. Rptr. at 450.

85. Russ v. Western Union Tel. Co., 222 N.C. 504, 23 S.E.2d 681 (1943); Western Union Tel. Co. v. Potts, 120 Tenn. 37, 113 S.W. 789 (1908); Western Union Tel. Co. v. Lane, 152 S.W.2d 780 (Tex. Civ. App. 1941). *See generally* T. COOLEY, LAW OF TORTS § 17 (student's ed. 1930); PROSSER, *supra* note 1, § 54, at 329; RESTATEMENT (SECOND) OF TORTS, App. § 436A, at 171-72 (1965). The federal rule that controls interstate messages denies recovery in the absence of physical injury. Western Union Tel. Co. v. Speight, 254 U.S. 17 (1920).

86. *See, e.g.*, Russ v. Western Union Tel. Co., 222 N.C. 504, 23 S.E.2d 681 (1943).

87. *See, e.g.*, Western Union Tel. Co. v. Lane, 152 S.W.2d 780 (Tex. Civ. App. 1941).

88. *See* PROSSER, *supra* note 1, § 54, at 330.

89. RESTATEMENT (SECOND) OF TORTS, App. § 436A, at 171-72 (1965).

Physician-Patient Relationship Cases

As *Molien* aptly demonstrates, the physician-patient relationship provides fertile ground for controversies involving the "guarantee of genuineness," as patients place their well-being and lives in the hands of their doctors.

New York has recognized the need to protect a patient's mental tranquility from a doctor's negligence. In *Ferrara v. Galluchio*,[90] the New York Court of Appeals proclaimed that "[f]reedom from mental disturbance is now a protected interest in this State,"[91] and allowed the plaintiff to recover for mental injury in a malpractice suit brought against her doctor. The plaintiff in *Ferrara* sustained skin burns as a result of her doctor's excessive application of X-ray treatments. At the advice of her attorney, she was examined by a dermatologist, who warned that the injury could become cancerous. The plaintiff developed "cancerphobia" as a result of this warning and brought a medical malpractice action against her original doctor seeking, *inter alia*, compensation for mental injury.

The court reasoned that, because it is common knowledge that wounds that do not heal frequently become cancerous and because the plaintiff's dermatologist warned her of this possibility, it was "entirely plausible . . . that plaintiff would undergo exceptional mental suffering over the possibility of developing cancer."[92] Concluding that the plaintiff had established a sufficient "guarantee of genuineness in the circumstances of the case,"[93] the court affirmed the trial court's verdict for the plaintiff.[94]

The New York Court of Appeals recognized a guarantee of genuineness in a case involving a "death message" sent by a hospital to a patient's daughter. In *Johnson v. State*,[95] the plaintiff's mother was a

90. 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958).

91. *Id.* at 21, 152 N.E.2d at 252, 176 N.Y.S.2d at 999.

92. *Id.* at 22, 152 N.E.2d at 253, 176 N.Y.S.2d at 1000.

93. *Id.* at 21, 152 N.E.2d at 252, 176 N.Y.S.2d at 999-1000.

94. *Id.* at 22, 152 N.E.2d at 253, 176 N.Y.S.2d at 1000. The court, however, did not decide whether recovery was possible for mental injury alone. It acknowleged that, under New York law, "a wrongdoer is liable for the ultimate result, though the mistake or negligence of the physician who treated the injury may have increased the damage which would otherwise have followed from the original wrong." *Id.* at 20, 152 N.E.2d at 251, 176 N.Y.S.2d at 998. The court, through its guarantee of genuineness analysis, merely concluded that there was no basis for distinguishing the situation in which the physician aggravates a physical injury from that in which the physician only increases the mental injury attendant upon a physical injury. *Id.* at 20-21, 152 N.E.2d at 252, 176 N.Y.S.2d at 999.

See also Nieman v. Upper Queens Medical Group, 220 N.Y.S.2d 129 (1961) (when defendant negligently and erroneously diagnosed plaintiff as sterile, failure of plaintiff to allege physical injury did not bar plaintiff's claim for mental injury).

95. 37 N.Y.2d 378, 334 N.E.2d 590 (1975). *See generally* Annot., 77 A.L.R.3d 501 (1977).

patient in the defendant-hospital. When a patient with a name similar to that of the plaintiff's mother, passed away, the hospital sent a telegram to the plaintiff erroneously advising her of her mother's death. The plaintiff viewed the corpse and became hysterical upon discovering that the corpse was not her mother's. The New York Court of Appeals held that, like the mishandling of corpse and death message cases, the plaintiff's situation provided a guarantee that her claim was not spurious. Therefore, as "recovery for emotional harm . . . may not be disallowed so long as the evidence is sufficient to show causation and substantiality of the harm suffered, together with a 'guarantee of genuineness,' " recovery was allowed for the plaintiff's mental injury.[96]

Beverage Cases

Many plaintiffs have attempted to recover for emotional injury incurred as a result of finding noxious foreign objects in beverages they had consumed.[97] While these claims have had varying degrees of success,[98] a guarantee of genuineness can be found in some claims of this sort.

The plaintiff in *Wallace v. Coca-Cola Bottling Plants, Inc.*,[99] drank a soft drink containing an unpackaged prophylactic. The Supreme Judicial Court of Maine held that recovery for mental injury was possible despite absence of physical injury: "[W]e adopt the rule that in those cases where it is established by a fair preponderance of the evidence [that] there is a proximate cause relationship between an act of negligence and reasonably foreseeable mental and emotional suffering by a reasonably foreseeable plaintiff, such proven damages are compensable even though there is no discernible trauma from external causes."[100] The court cautioned, however, that the mental suffering must be sub-

96. 37 N.Y.2d at 383-84, 334 N.E.2d at 593. *Cf.* Morgan v. Aetna Cas. & Surety Co., 185 F. Supp. 20 (1960) (doctor's inability to detect fetus's heartbeat and subsequent advice that plaintiff's baby was dead would constitute malpractice, for which plaintiff could recover for emotional distress, but recovery denied as evidence did not support conclusion that doctor had so advised plaintiff).

97. *See, e.g.*, Minkus v. Coca-Cola Bottling Co., 44 F. Supp. 10 (N.D. Cal. 1942); Martin v. Waycross Coca-Cola Bottling Co., 18 Ga. App. 226, 89 S.E. 495 (1916); Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970); Cushing Coca-Cola Bottling Co. v. Francis, 206 Okla. 553, 245 P.2d 84 (1952).

98. *See* Paul v. Rodgers Bottling Co., 183 Cal. App. 2d 680, 6 Cal. Rptr. 867 (1960) (plaintiff entitled to recover for pain and suffering resulting from physical consequences of his shock caused by drinking soft drink containing mouse); Medieros v. Coca-Cola Bottling Co., 57 Cal. App. 2d 707, 135 P.2d 676 (1943) (cause of action stated when plaintiff became violently ill upon drinking soft drink containing what he believed was a spider); Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970) (plaintiff entitled to recover for shock caused upon finding foreign object in partially consumed beverage even in absence of physical injury).

99. 269 A.2d 117 (Me. 1970).

100. *Id.* at 121.

stantial and manifested by objective symptoms before recovery could be allowed.[101]

Bank-Customer Relationship Cases

The relationship between a bank and its customer has also given rise to an examination of the guarantee of genuineness. In *First National Bank v. Langley*,[102] the plaintiff, a store manager of A & P Tea Company, deposited a large sum of money in the defendant-bank's night depository pursuant to his normal duties; the deposit, however, became lodged behind the depository mechanism, where it remained for several weeks. A & P, suspecting that the plaintiff had misappropriated the store funds, took precautionary and investigatory measures: the plaintiff was requested to take a vacation; in his absence, the store locks were changed, the books were audited, and the merchandise was inventoried. Finally, upon his return, the plaintiff was demoted and transferred to another store.

The effect of these actions upon the plaintiff's health was dramatic.[103] He sued the bank for physical and mental injuries, loss of income, and medical expenses resulting from the bank's alleged negligence in failing to ascertain the location of the deposit.

The court affirmed the judgment for the plaintiff, finding that his injuries were foreseeable and that the defendant-bank owed the plaintiff, as employee of its customer, a duty to account for the deposit.[104] Therefore, as the bank failed to make a prompt and careful inspection, the plaintiff was allowed to recover for his economic losses, as well as for his mental and physical injuries.[105]

Characterization of the Mental Risk Guarantee

The cases summarized in the foregoing discussion have several common aspects. For example, in every instance the defendant's conduct created a risk of causing primarily mental injury to the plaintiff,

101. *Id.*

102. 314 So. 2d 324 (Miss. 1975).

103. The plaintiff suffered from anxiety neurosis with depression and paranoia, causing excessive breathing, muscular tension, shaking, sweating, and acute sensitivity to sudden noises. In addition, he suffered severe swelling of the lips and tongue, necessitating emergency treatment at one point as he was unable to breathe properly. *Id.* at 328.

104. *Id.* at 329.

105. Instead of adopting a rule similar to the *Molien* rule, the *Langley* court only abolished the impact rule. *Id.* at 339. The court did make some reference to genuineness, however: "We are of the opinion that the facts in the instant case establish a *genuine* claim which was subject to the determination of the jury and that the judgment of the trial court based on the verdict of the jury should be affirmed." *Id.* at 339 (emphasis added). The court had no opportunity to address the physical injury issue because there was ample evidence of physical injury.

and the court held that the plaintiff had stated a cause of action for negligently inflicted emotional distress.

Further similarities may be discerned. First, in each case, the defendant's conduct was extremely likely to cause great sadness, disgust, or anxiety in a reasonable person. This characteristic is nothing more than Dean Prosser's "guarantee of genuineness," which exists when there is a special likelihood of genuine and serious mental distress arising from the particular circumstances of the case.[106]

Second, a special relationship, or what may be referred to as "privity," existed between the parties. In all cases, the plaintiff relied upon and confided in the defendant, who had accepted certain responsibilities for the plaintiff's benefit.[107] This characteristic serves to increase the probability that the plaintiff suffered severe mental injury. The defendant was invariably engaged in the business of serving the public, and, because the plaintiff justifiably expected that the defendant would act competently, the plaintiff was highly vulnerable to the defendant's failure to exercise reasonable care.

Although courts have been unwilling to allow recovery in the absence of a special relationship between the plaintiff and the defendant,[108] none have specifically required privity. Moreover, *Molien* cannot be interpreted as requiring privity. In assessing the potential for recovery under *Molien*, however, one would be well advised to consider whether a special relationship exists; as a practical matter, its presence or absence may control the guarantee of genuineness issue.

Guarantees of Genuineness: Physical Risk Conduct

Traditionally, when the defendant's conduct has created a risk of causing primarily physical harm, the plaintiff was required to establish, in addition to physical injury, either impact, presence within the zone of danger, or presence of the *Dillon* factors in order to establish a cause of action.[109] The question after *Molien*, therefore, is whether these traditional "guarantees of genuineness" remain essential to the plaintiff's recovery.[110] The logical answer to this question, in light of *Molien*, is that the court must look not merely at the presence of one or

106. PROSSER, *supra* note 1, § 54, at 330.

107. The cases previously discussed involved the following relationships: (1) mortician and relative of the deceased, see notes 77-84 & accompanying text *supra*; (2) telegraph company and telegraph recipient, see notes 85-89 & accompanying text *supra*; (3) physician and patient or patient's relative, see notes 90-96 & accompanying text *supra*; (4) beverage company and consumer, see notes 97-101 & accomapnying text *supra*; and (5) bank and customer's employee, see notes 102-05 & accompanying text *supra*.

108. *Id.*

109. See notes 16-50 & accompanying text *supra*.

110. It is reasonably clear that the physical injury requirement has been abolished by *Molien*. *Molien* has been interpreted, however, as leaving *Dillon* intact. See note 73 *supra*.

two factors in determining whether liability should be imposed, but at all the circumstances in order to decide whether they present any guarantee of genuineness.

An example illustrates the distinction between this approach and the traditional rule. If a father's daughter is killed as a result of another's negligent operation of an automobile, and the father sustains a fatal heart attack immediately upon learning of the event by telephone,[111] it is clear that the driver's conduct caused severe emotional distress to the father: the heart attack guarantees the genuineness of the claim for emotional distress. Even so, recovery would be precluded under a mechanical application of the *Dillon* rule because the father's representative would not be able to establish that the father contemporaneously observed the accident. Yet under the *Molien* rule, the father's estate could recover if foreseeability of the injury could be established.[112]

While satisfaction of the impact, zone of danger, or *Dillon* tests will, in many circumstances, guarantee the genuineness of the plaintiff's claim, the critical inquiry should be whether any facts guarantee the genuineness of the claim. Under this approach, recovery turns upon whether the defendant's conduct resulted in serious emotional distress and whether such injury was foreseeable, rather than upon the presence of traditional guarantees of genuineness.

The Requirement of Serious Emotional Distress

Under *Molien*, a cause of action may be stated only for the negligent infliction of *serious* emotional distress.[113] On the other hand, it is not clear whether the degree of emotional distress sustained should be measured by applying both objective and subjective standards.

Molien indicates that an objective standard should be employed: "serious 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."[114] The requirement of serious emotional distress, thus interpreted, parallels the guar-

111. Kelley v. Kokua Sales and Supply, Ltd., 56 Hawaii 204, 532 P.2d 673 (1975). In *Kelley*, the daughter's accident occurred in Hawaii, and the deceased sustained the fatal heart attack in California. In denying recovery, the Hawaii Supreme Court held that only those located "within a reasonable distance from the scene of the accident" can recover for severe emotional distress. *Id.* at 209, 532 P.2d at 676. For a review of the major Hawaii decisions in this area, see Comment, *Kelley v. Kokua Sales and Supply, Ltd.: Redefining the Limits to Recovery for Negligently Inflicted Mental Distress*, 11 TULSA L.J. 587 (1976).

112. It may be undesirable to find that the plaintiff's injuries were reasonably foreseeable in these circumstances. See notes 124-33 & accompanying text *infra*.

113. 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

114. *Id.* at 928, 616 P.2d at 819-20, 167 Cal. Rptr. at 837-38 (quoting Rodrigues v. State, 52 Hawaii 156, 173, 472 P.2d 509, 520 (1970)).

antee of genuineness element, which, in the absence of proof of a medically significant nature, must be established.

It may be argued that the objective seriousness and guarantee of genuineness elements are equivalent. If so, then the guarantee of genuineness element would be required in all circumstances, because the objective serious emotional distress requirement is absolute. The *Molien* court implied, however, that the guarantee of genuineness is not required when the plaintiff can establish proof of a medically significant nature,[115] thus suggesting a distinction between the two.

The distinction may be one of degree. To establish a guarantee of genuineness, the circumstances of the case must reveal an "especial likelihood" that serious mental distress would result. On the other hand, the objectively serious mental injury requirement might be satisfied if a reasonable person more likely than not would sustain severe mental injuries, even though there is less than an "especial likelihood" that serious injury would result.

If proof of a medically significant nature is established, the probability that the plaintiff suffered severe mental injury is increased, and, therefore, there is less need for extreme circumstances that guarantee the genuineness of the plaintiff's claim. A conclusion that a reasonable person probably would sustain severe mental injury should be adequate in the presence of medical proof of mental suffering. In the absence of such proof, however, only an extreme set of circumstances can assure that the plaintiff's claim is bona fide.

In addition to establishing that a reasonable person in the plaintiff's position would sustain serious emotional distress, it seems likely that, under *Molien*, the plaintiff must show that he or she actually sustained serious emotional distress. Requiring the plaintiff to establish that he or she actually sustained serious emotional distress would prevent an abnormally insensitive plaintiff from seeking damages in situations in which a reasonable person would have suffered severe mental injuries, but in which he or she in fact suffered no injuries.[116]

Foreseeability

To determine whether the defendant owed a duty to exercise reasonable care for the protection of the plaintiff, the risks of injury apparent to the defendant when he or she committed the assertedly negligent act must be assessed.[117] The critical question with respect to duty is

115. 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

116. *Cf.* PROSSER, *supra* note 1, § 12, at 59 (plaintiff must actually sustain severe emotional distress, *and* circumstances must be such that a reasonable person would sustain such injury—unless defendant has knowledge of plaintiff's susceptibility—before plaintiff may recover for *intentional* infliction of emotional distress).

117. Molien v. Kaiser Foundation Hosps., 27 Cal. 3d at 922, 616 P.2d at 816, 167 Cal.

whether a reasonable person in the defendant's position would have foreseen the plaintiff's injury.[118]

Even if a reasonable person would have foreseen injury, however, California courts may not find that the defendant owed the plaintiff a duty.[119] California courts consider the public policy in limiting the defendant's liability when determining what degree of foreseeability should be deemed "reasonable."[120] The requirement of reasonable foreseeability thus emerges as a function of both the hypothetical reasonable person's foresight and the need to maintain practical limitations upon tort liability.[121]

Foreseeability in Mental Risk Circumstances

When the defendant's conduct creates a risk of causing primarily mental injury, courts generally have allowed the plaintiff to recover only if "privity" existed between the parties.[122] If this trend continues, there will be little risk of potentially unlimited liability in mental risk circumstances because the special relationship will serve to limit the defendant's liability. If privity exists, liability should be imposed whenever a reasonable person would have foreseen the plaintiff's injuries and the plaintiff can establish the other elements of the *Molien* rule.[123]

Foreseeability in Physical Risk Circumstances

When the defendant's conduct creates a risk of causing primarily physical harm to the plaintiff and a reasonable person would have foreseen the plaintiff's injuries, liability should be imposed. The degree of foreseeability required to support recovery for emotional distress

Rptr. at 834; Dillon v. Legg, 68 Cal. 2d at 739, 441 P.2d at 919-20, 69 Cal. Rptr. at 79-80. *See generally* PROSSER, *supra* note 1, § 31, at 145-49.

118. *Id. But see* Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 19 (1953): "Foreseeability of risk . . . carries only an illusion of certainty in defining the consequences for which the defendant will be liable."

119. *See, e.g.*, Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977). See notes 124-33 & accompanying text *infra*.

120. *See* Mobaldi v. Regents of University of California, 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976); Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 60 Cal. Rptr. 72 (1968).

121. *See* Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); Note, *Negligent Infliction of Mental Distress: Reaction to Dillon v. Legg in California and Other States*, 25 HASTINGS L.J. 1248 (1974).

122. See notes 107-08 & accompanying text *supra*.

123. If subsequent decisions extend liability for mental risk conduct to situations in which no privity exists, potentially unlimited liability may present difficulties in bystander actions. However, it will be rare when a defendant creates a risk of causing primarily mental injury to one person, and the plaintiff sustains *serious* mental injury upon learning of the other's mental injuries. In any event, liability may be limited by requiring a high degree of foreseeability.

should be greater, however, when the defendant's conduct creates a risk of causing physical harm to a person other than the plaintiff, but the plaintiff sustains mental injury. To contain liability within practical bounds in this context, the degree of foreseeability necessary to support a cause of action should be set high enough to prevent every bystander, every friend, and every remote relative of the injured third party from maintaining an action for emotional distress against the defendant.

The California Supreme Court, in *Dillon v. Legg*,[124] adopted this reasoning by setting forth a duty rule that focuses upon the degree of foreseeability.[125] Recent courts, however, have interpreted *Dillon* as setting forth a mechanical three factor test and have allowed recovery only when all three factors are present.[126] This interpretation of *Dillon* is incorrect, because *Dillon* contemplated that the critical inquiry would be whether the injuries sustained were reasonably foreseeable to the defendant, and not whether the particular *Dillon* factors were present.[127] Although the Dillon factors may be relevant to foreseeability,[128] their presence or absence should not control the finding of duty.[129]

Thus, if a man observes a caesarian operation on his wife, and, as a result of the doctor's negligence, the baby dies,[130] it is clear that severe mental injury to the father is highly probable. Recovery would be denied, however, under a strict application of the *Dillon* rule because the shock to the father would result from learning of the death from the doctors, not from contemporaneously observing the operation.[131] Presumably, recovery would be denied even if the doctor was aware at the time of the operation that the plaintiff's wife had lost a baby on a prior occasion and that the plaintiff consequently underwent psychiatric treatment. If the doctor had this knowledge, however, recovery should be granted under *Molien* because the injury would be reasonably foreseeable.

Conversely, recovery may be allowed under a mechanical application of *Dillon* when mental injury is actually unforeseeable. Thus, if the defendant reasonably but erroneously believed that a child was an

124. 68 Cal. 2d at 741, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81.

125. See notes 39-50 & accompanying text *supra*.

126. See note 50 & accompanying text *supra*.

127. See notes 45-48 & accompanying text *supra*.

128. The *Dillon* factors have been criticized on the ground that they bear no logical relationship to the foreseeability of the plaintiff's presence at the accident. Note, *Negligent Infliction of Mental Distress: Reaction to Dillon v. Legg in California and Other States*, 25 HASTINGS L.J. 1248, 1263-64 (1974). *See also* Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

129. Other factors that bear upon foreseeability might include the defendant's knowledge of the plaintiff's presence, the time of day in which the accident occurred, the type of neighborhood in which it occurred, and the defendant's knowledge of the neighborhood.

130. *See* Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977).

131. *Id.* at 585, 565 P.2d at 135-36, 139 Cal. Rptr. at 110-11.

orphan and, as a result of the defendant's carelessness, the child was killed, the child's mother could recover under a mechanical application of the *Dillon* rule if she observed the accident. A reasonable person under these circumstances, however, might not have foreseen the mother's injury and therefore recovery might be unwarranted under *Molien*.[132]

While bystanders may suffer serious emotional distress, the risk of potentially unlimited liability may be too great to allow recovery whenever a reasonable person would have foreseen the bystander's injury. Thus, although *Dillon* presents an adequate solution[133] to this problem by allowing recovery only when the injury is highly foreseeable, the mechanical application of the *Dillon* three-factor rule fails to take into consideration other factors that may be relevant to the determination of foreseeability. For this reason, a general foreseeability test should be applied, and the practice of mechanically applying the *Dillon* rule should be abandoned.

Conclusion

The *Molien* rule involves nothing more than a return to basic tort principles. The former rules governing liability for negligently inflicted emotional distress emphasized the presence of certain factors: physical injury, impact, presence within the zone of danger, and the *Dillon* factors. *Molien* addresses the real issues by simply asking whether the plaintiff has suffered an injury that ought to be compensated, whether the defendant's conduct is culpable, and whether unlimited liability will result if other plaintiffs are allowed to recover in similar circumstances. Applied to all claims for negligently inflicted emotional distress, the *Molien* rule will lead to just results.

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132. It may be argued that it is foreseeable that *someone* would be distressed upon learning of the victim's injuries, and that, therefore, when someone was injured, liability should be imposed. However, by requiring a high degree of foreseeability, liability could be denied on these facts.

133. See notes 128-29 *supra*.

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