



11-1-1990

California Continues to Struggle with Bystander Claims for the Negligent Infliction of Emotional Distress: *Thing v. La Chusa*

George W. VanDeWeghe Jr.

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

George W. VanDeWeghe Jr., *California Continues to Struggle with Bystander Claims for the Negligent Infliction of Emotional Distress: Thing v. La Chusa*, 24 Loy. L.A. L. Rev. 89 (1990).

Available at: <https://digitalcommons.lmu.edu/llr/vol24/iss1/4>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

**CALIFORNIA CONTINUES TO STRUGGLE
WITH BYSTANDER CLAIMS FOR THE
NEGLIGENT INFLICTION OF
EMOTIONAL DISTRESS:
*THING V. LA CHUSA***

*George W. VanDeWeghe, Jr.**

I. INTRODUCTION

One goal of tort law is to compensate victims who have been harmed by negligent and intentional acts of wrongdoers.¹ Historically, however, courts have been reluctant to award damages for intangible harms such as emotional distress, particularly when such harms have been caused by unintentional conduct.² Although courts have recognized a right to freedom from invasion of mental tranquility,³ they have been concerned with the fair and efficient administration of justice.⁴ Courts developed "bright line" standards to restrict both the number of potential plaintiffs and the degree of liability defendants were likely to face.⁵ These bright line stan-

* B.A., Princeton, 1983; J.D., William and Mary, 1990; member Klinedinst and Flieman, San Diego. I greatly appreciate Professor Paul A. LeBel's thoughtful assistance in preparing this Article.

1. W.P. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 1 (5th ed. 1984) [hereinafter PROSSER AND KEETON].

2. *Id.* § 54. The three principal reasons for limiting recovery for emotional distress are: (1) the problem of permitting legal redress for harm that is often temporary and relatively trivial; (2) the danger that claims of mental harm will be falsified or imagined; and (3) the perceived unfairness of imposing heavy and disproportionate financial burdens upon a defendant, whose conduct was only negligent, for consequences which appear remote from the "wrongful" act.

Id. § 54, at 360-61.

3. *See* State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952) (action for assault will lie on basis of threats of future violence where threats alone resulted in fear and vomiting); Lowry v. Standard Oil Co., 63 Cal. App. 2d 1, 7, 146 P.2d 57, 60 (1944) (chasing after person with unloaded gun and pulling trigger in threatening manner).

4. *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 310-13, 379 P.2d 513, 523-24, 29 Cal. Rptr. 33, 42-44 (1963) (overruled by *Dillon v. Legg*, 68 Cal. 2d 729, 441 P.2d 912, 69 Cal. Rptr. 72 (1968)).

5. *See, e.g., id.* at 315, 379 P.2d at 525, 29 Cal. Rptr. at 45 (no recovery for bystander who merely witnessed injury of another); *Espinosa v. Beverly Hosp.*, 114 Cal. App. 2d 232, 236, 249 P.2d 843, 845-46 (1952) (no recovery for mental disturbance caused by hospital giving mother wrong baby because there was no physical injury); *Comstock v. Wilson*, 257 N.Y. 231, 234, 177 N.E. 431, 434 (1931) (no recovery without physical impact). Each of these

dards were difficult to apply and produced inconsistent results.⁶

In an attempt to strike a balance between compensating victims and guaranteeing the validity of claims, the California Supreme Court, in *Dillon v. Legg*,⁷ established flexible guidelines to assist California courts in evaluating claims of negligent infliction of emotional distress (NIED).⁸ Cases over the past twenty years since *Dillon*, however, have demonstrated that even these flexible standards do not offer satisfactory relief for victims of NIED.⁹

In a 1989 case, *Thing v. La Chusa*,¹⁰ the California Supreme Court once again attempted to define the requirements for NIED.¹¹ This Article examines the soundness of the standards adopted in *Thing*. First, this Article traces the history of the NIED cause of action. The Article then analyzes the court's decision in *Thing* and discusses the potential problems the decision created. Next, the Article evaluates alternative ways of treating bystander NIED claims. Finally, the Article discusses the practical consequences of *Thing* and suggests strategies for both plaintiffs and defendants to consider when litigating NIED claims following *Thing*.

II. THE HISTORY OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIMS IN CALIFORNIA

A. Evolution of the NIED Cause of Action

1. Mental distress damages for victims of negligent conduct

California courts first awarded damages for emotional distress caused by negligent conduct when such distress was accompanied by a physical injury.¹² Emotional distress was not recognized as an independ-

limitations was established to provide a guarantee that the claim was genuine. See PROSSER AND KEETON, *supra* note 1, § 54, at 361-65.

6. See *infra* notes 57-64 and accompanying text.

7. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

8. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80. The guidelines specified were: (1) whether plaintiff was located near the scene of the accident; (2) whether plaintiff's shock resulted from a direct emotional impact due to sensory and contemporaneous observance of the accident; (3) whether plaintiff was closely related to the victim. *Id.*

9. See *infra* notes 40-56 and accompanying text.

10. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

11. See *id.* at 661-68, 771 P.2d at 825-30, 257 Cal. Rptr. at 876-87.

12. See *Webb v. Francis J. Lewald Coal Co.*, 214 Cal. 182, 184, 4 P.2d 532, 533 (1931); *Vanoni v. Western Airlines*, 247 Cal. App. 2d 793, 795, 56 Cal. Rptr. 115, 116 (1967).

The main distinction in the policy reasons for compensation of NIED claims and claims for intentional infliction of emotional distress (IIED) is that damages for IIED are designed to punish truly reckless behavior. See *State Rubbish Collectors Ass'n. v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952). Claims for NIED, on the other hand, are awarded to compensate inno-

ent tort, rather parasitic damages for emotional injuries were awarded in conjunction with damages for physical injuries caused by an established tort, such as assault or battery.¹³ Courts reasoned that the physical injury requirement would provide a sufficient guarantee that the alleged emotional suffering was not feigned.¹⁴

In a 1980 case, *Molien v. Kaiser Foundation Hospitals*,¹⁵ California recognized NIED as a separate cause of action, permitting recovery for emotional distress regardless of whether the plaintiff suffered physical impact or injury.¹⁶ The *Molien* court recognized that the question of compensation should be based on whether the injury was serious, and should not "turn on th[e] artificial and often arbitrary" distinction between physical and psychological injury.¹⁷

2. Mental distress damages for bystanders of negligent conduct

a. the pre-Dillon rule

Traditionally, courts had been even more reluctant to award damages to accident bystanders than to direct victims of negligent conduct.¹⁸ Prior to 1968, California courts permitted an accident bystander to bring a cause of action for negligent infliction of emotional distress only if the bystander was physically in the "zone of danger" of the negligent conduct and as a result, feared for his or her own physical safety.¹⁹ The

cent victims. See *Thing v. La Chusa*, 48 Cal. 3d 644, 667, 771 P.2d 814, 829, 257 Cal. Rptr. 865, 880 (1989). Further consideration of IIED is outside the scope of this Article. See generally Vold, *Tort Recovery for Intentional Infliction of Emotional Distress*, 18 NEB. L. BULL. 222 (1939).

13. PROSSER AND KEETON, *supra* note 1, § 54.

14. *Id.* § 54.

15. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

16. *Id.* at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

17. *Id.* at 929-30, 616 P.2d at 821, 167 Cal. Rptr. at 839. The *Molien* court reasoned that a prolonged mental disturbance would be compensated, whereas "transitory, nonrecurring physical phenomena, harmless in themselves, such as dizziness, vomiting and the like, does not make the actor liable." *Id.* at 929, 616 P.2d at 821, 167 Cal. Rptr. at 838-39.

18. PROSSER AND KEETON, *supra* note 1, § 54. The determination of whether a plaintiff is a bystander or a direct victim is not always clear. See *Thing*, 48 Cal. 3d at 659, 771 P.2d at 823, 257 Cal. Rptr. at 874; *Newton v. Kaiser Found. Hosps.*, 184 Cal. App. 3d 386, 391, 228 Cal. Rptr. 890, 893 (1986) (court called this distinction an "amorphous nether realm"); see also Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 515 (1982).

19. *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 305-06, 379 P.2d 513, 518-19, 29 Cal. Rptr. 33, 38-39 (1963). In *Amaya*, a pregnant mother witnessed the death of her 17-month old son who was struck by a negligently driven truck. *Id.* at 298, 379 P.2d at 514, 29 Cal. Rptr. at 34. The court denied recovery to the mother noting that "the type of harm allegedly suffered by plaintiff . . . [was] not reasonably foreseeable." *Id.* at 310, 379 P.2d at 522, 29 Cal. Rptr. at 42. The court also noted that the plaintiff was not herself in the path of

California Supreme Court adopted this standard due to its concern that permitting recovery for emotional distress experienced outside the zone of danger would lead to an unacceptably high degree of liability.²⁰ The court, citing traditional tort law concepts, reasoned that mental distress suffered by a mere bystander may not be reasonably foreseeable by the negligent wrongdoer.²¹ If emotional harm to the bystander could not be foreseen, then a duty to act with reasonable care toward that bystander should not arise.²² Consequently, such a bystander could not recover for any emotional harm suffered.²³

b. Dillon and the rule of foreseeability

The zone of danger limitation was overturned in *Dillon v. Legg*.²⁴ In *Dillon*, a mother and daughter witnessed the death of another daughter caused by a negligent motorist.²⁵ The mother was standing on the curb at a safe distance from the accident, but the other daughter was in the street near the accident.²⁶ If the "zone of danger" standard had been applied to the facts in *Dillon*, only the daughter who was not injured would have been entitled to bring a cause of action for NIED. This daughter arguably was within the "zone of danger" and therefore, reasonably could have feared for her own safety. The mother, however, was not in the "zone of danger,"²⁷ and her emotional distress did not result from fear for her personal safety. Therefore, under the zone of danger rule, the mother would have been denied any recovery for her mental suffering.

The *Dillon* court considered this result, but concluded that it should not deny recovery to the mother merely because she was not close enough to the accident to fear for her own safety.²⁸ The court noted the "hopeless artificiality of the zone-of-danger rule" which would deny recovery to the mother but permit it to the sister standing only a few feet away.²⁹

the negligent motorist, nor was she in any other manner threatened with bodily harm. *Id.* at 306, 379 P.2d at 519, 29 Cal. Rptr. at 39.

20. *Id.* at 313-14, 379 P.2d at 524-25, 29 Cal. Rptr. at 44-45.

21. *Id.* at 310, 379 P.2d at 522, 29 Cal. Rptr. at 42.

22. *Id.*

23. *Id.* at 307-10, 379 P.2d at 520-22, 29 Cal. Rptr. at 40-42.

24. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

25. *Id.* at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74.

26. *Id.* at 732, 441 P.2d at 915, 69 Cal. Rptr. at 75.

27. *Id.* at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.

28. *Id.*

29. *Id.* The court stated: "We have, indeed, held that impact is not necessary for recovery. The zone-of-danger concept must, then, inevitably collapse because the only reason for the

Instead, the *Dillon* court adopted a case-by-case approach, which focused on the foreseeability of emotional injury to the bystander.³⁰ The court reasoned that absent a foreseeable injury, the tortfeasor should not owe a duty to a bystander.³¹ In addition, the court instructed that such foreseeability is based on an objective standard of "what the ordinary [person] under such circumstances would reasonably have foreseen."³² The *Dillon* court listed three factors to be used as guidelines to determine whether an injury was foreseeable: (1) the location of plaintiff at the time of the accident; (2) whether plaintiff's shock was the direct result of a sensory and contemporaneous observance of the accident, as opposed to learning of the accident after its occurrence; and (3) the relationship between the plaintiff and victim.³³

The court explained that "[t]he evaluation of these factors will indicate the degree of the defendant's foreseeability."³⁴ The court made clear that these guidelines did not constitute an exhaustive list of considerations, but rather provided examples of factors lower courts should consider when determining whether an emotional injury was foreseeable.³⁵ Applying these guidelines to the facts of *Dillon*, the court reasoned that "[s]urely the 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 *Dillon* court recognized that broadening the emotional distress cause of action may lead to fraudulent claims and unjust liability.³⁷ The court noted, however, that fear of fraudulent claims "does not justify an

requirement of presence in that zone lies in the fact that one within it will fear the danger of impact." *Id.*

30. *Id.* at 739-41, 441 P.2d at 919-21, 69 Cal. Rptr. at 79-80.

31. *Id.* at 739, 441 P.2d at 919-20, 69 Cal. Rptr. at 79-80.

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

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

34. *Id.* at 741, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81.

35. *Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80. "We cannot now predetermine defendant's obligation in every situation by a fixed category; no immutable rule can establish the extent of that obligation for every circumstance of the future. We can, however, define guidelines which will aid in the resolution of such an issue as the instant one." *Id.* A court subsequent to *Dillon* criticized the uncertainty created by *Dillon*, noting the unreasonableness of the *Dillon* court in avoiding a definition of duty "because the court would know it when it saw it." *Thing*, 48 Cal. 3d at 655, 771 P.2d at 821, 257 Cal. Rptr. at 872.

36. *Dillon*, 68 Cal. 2d at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81. The court noted that "when a child is endangered, it is not beyond contemplation that its mother will be somewhere in the vicinity, and will suffer serious shock." *Id.* at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81 (quoting PROSSER, THE LAW OF TORTS § 54 (3d ed. 1964)).

37. *Id.* at 736, 441 P.2d at 917-18, 69 Cal. Rptr. at 77-78. The court noted that it was up to "the efficacy of the judicial processes to ferret out the meritorious from the fraudulent in particular cases." *Id.* at 737, 441 P.2d at 918, 69 Cal. Rptr. at 78.

abdication of the judicial responsibility to award damages for sound claims'³⁸ The court reasoned that basing liability on the foreseeability of injury would satisfactorily limit liability in bystander claims for NIED.³⁹

B. *Inconsistency Following Dillon*

Despite the broad language used in *Dillon v. Legg*⁴⁰ to describe when bystander claims for NIED are appropriate, the NIED cases following *Dillon* did not significantly enhance the likelihood of recovery for emotional distress suffered by bystanders.⁴¹ Many courts remained skeptical of a case-by-case approach which they feared might lead to fraudulent claims and excessive liability.⁴²

The cases following *Dillon* created a myriad of inconsistent results which often limited claims for NIED by applying the flexible *Dillon* factors as strict requirements. Despite compelling facts in which emotional injury to the bystander seemed reasonably foreseeable, courts dismissed claims if they found that the plaintiff lacked any of the three *Dillon* guidelines—proximity to the accident, contemporaneous observation of

38. *Id.* at 737, 441 P.2d at 918, 69 Cal. Rptr. at 78 (quoting *Emery v. Emery*, 45 Cal. 2d 421, 431, 289 P.2d 218, 224 (1955)).

39. *Id.* at 742-43, 441 P.2d at 921-22, 69 Cal. Rptr. at 81-82. The court commented that basing negligent infliction of emotional distress on the foreseeability of injury was analogous to theories applied in products liability and other cases. *Id.* at 742, 441 P.2d at 922, 69 Cal. Rptr. at 81. The court noted that imposing tort liability for product liability claims potentially could encourage fraudulent claims; however, requiring foreseeability of injury adequately mitigates threats of overly burdensome liability. *Id.* at 743, 441 P.2d at 922, 69 Cal. Rptr. at 82. Similarly, mental pain and suffering incident to a physical injury, loss of consortium, loss of enjoyment of life, and several other damage claims may form the basis for a cause of action, even though they are difficult to estimate and may expose defendants to unlimited liability. See Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333, 355 (1984).

40. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

41. See, e.g., *Justus v. Atchinson*, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977) (no recovery where husband witnessed alleged negligent medical procedures during his wife's labor which led to death of fetus, since his alarm did not ripen into debilitating shock until he was later told of death); *Hathaway v. Superior Court*, 112 Cal. App. 3d 728, 169 Cal. Rptr. 435 (1980) (recovery denied where parents came upon scene of child's electrocution moments after child released source of charge); *Cortez v. Marcias*, 110 Cal. App. 3d 640, 167 Cal. Rptr. 905 (1980) (no recovery where mother witnessed child's death in hospital, but thought child was only falling asleep).

42. See, e.g., *Owens v. Childrens Memorial Hosp.*, 480 F.2d 465 (8th Cir. 1973); *Jansen v. Children's Hosp. Medical Center*, 31 Cal. App. 3d 22, 24, 106 Cal. Rptr. 883, 885 (1973); *Grimsby v. Sampson*, 85 Wash. 2d 52, 530 P.2d 291 (1975) ("even assuming there are cogent reasons for extending liability in favor of victims of shock resulting from injury to others, there appears to be no rational way to restrict the scope of liability even as attempted by *Dillon's* three limiting standards").

the accident, or relationship to the victim.⁴³ For instance, since *Dillon*, recovery has been denied to parents who arrived at the scene of an auto accident soon after their children were injured⁴⁴ and fathers who watched as doctors negligently caused their babies to be stillborn.⁴⁵ Courts have held that the facts of these cases do not satisfy the "sensory and contemporaneous observance of the accident" guideline from *Dillon*.⁴⁶ Likewise, claims were denied where the bystander-plaintiff was not related to the negligence victim by marriage or blood, despite any other evidence of an extended and close relationship supporting the claim for emotional distress.⁴⁷

The results in these cases did not reflect the flexible foreseeability-of-injury standard that had been endorsed by the *Dillon* court.⁴⁸ The victims in these cases were just as likely to suffer emotional distress as was the mother in *Dillon*. For instance, in one case a baby's negligent death and the resulting devastation of the father was sufficient to permit a

43. See, e.g., *Justus*, 19 Cal. 3d at 585, 565 P.2d at 136, 139 Cal. Rptr. at 111 (two fathers who witnessed negligently caused stillbirth of their babies did not fulfill contemporaneous sensory perception requirement); *Trapp v. Schuyler Constr.*, 149 Cal. App. 3d 1140, 1143, 197 Cal. Rptr. 411, 412 (1983) (cousins not close enough in relation to permit recovery); *Hathaway*, 112 Cal. App. 3d at 736-37, 169 Cal. Rptr. at 440 (finding child dying from electrocution did not fulfill contemporaneous sensory perception requirement); *Drew v. Drake*, 110 Cal. App. 3d 555, 558, 168 Cal. Rptr. 65, 66 (1980) (death of de facto spouse did not satisfy relationship requirement); *Parsons v. Superior Court*, 81 Cal. App. 3d 506, 512, 146 Cal. Rptr. 495, 498 (1978) (parents who arrived at scene seconds after their daughters died in accident failed to fulfill *Dillon* requirements); *Jansen*, 31 Cal. App. 3d at 75, 106 Cal. Rptr. at 885 (mother denied compensation after observing daughter's painful death due to negligent misdiagnosis because seeing result of negligence does not fulfill requirements); see also Bell, *supra* note 39, at 339-40; Diamond, *Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477, 478, 482-83 (1984); Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime,"* 1 U. HAW. L. REV. 1, 46 (1979) (discussing NIED in both Hawaii and California); Nolan & Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583, 589 (1982).

44. See, e.g., *Parsons*, 81 Cal. App. 3d at 512, 146 Cal. Rptr. at 498; *Arauz v. Gerhardt*, 68 Cal. App. 3d 937, 949, 137 Cal. Rptr. 619, 627 (1977).

45. See, e.g., *Justus*, 19 Cal. 3d at 585, 565 P.2d at 136, 139 Cal. Rptr. at 111.

46. See *Dillon*, 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80. The degree of foreseeability of the third person's injury is far greater in the case of his contemporaneous observance of the accident than that in which he subsequently learns of it. *Id.* at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81. However, a defendant is more likely to foresee that shock to the nearby witnessing mother will cause physical harm than to anticipate that someone distant from the accident will suffer more than a temporary emotional reaction.

47. *Elden v. Sheldon*, 46 Cal. 3d 267, 277, 758 P.2d 582, 586, 250 Cal. Rptr. 254, 260 (1988); *Coon v. Joseph*, 192 Cal. App. 3d 1269, 1274-77, 237 Cal. Rptr. 873, 875-78 (1987); *Drew*, 110 Cal. App. 3d at 558, 168 Cal. Rptr. at 66.

48. See *Dillon*, 68 Cal. 2d at 740-42, 441 P.2d at 920-22, 69 Cal. Rptr. at 80-82.

claim.⁴⁹ Yet, in another case in which the father unquestionably experienced tremendous suffering as a direct result of a doctor's negligence, recovery was denied.⁵⁰ Similarly, parents in one case arrived seconds after a fatal accident involving their children and were denied recovery,⁵¹ while, in another case a mother who arrived at an accident thirty seconds after her son was injured was permitted to recover.⁵² In each case it was reasonable to expect that close family members would suffer severe emotional trauma as a result of the defendant's negligence. Some of the claims, however, were denied because the *Dillon* guidelines were mechanically applied rather than treated as indicators of what should be considered foreseeable.⁵³

In summary, post-*Dillon* courts have not followed the ad hoc foreseeability analysis described in that decision.⁵⁴ By either mechanically applying the *Dillon* factors or using alternative reasons for imposing liability,⁵⁵ California courts often succeeded in limiting the conditions

49. *Austin v. Regents of Univ. of Cal.*, 89 Cal. App. 3d 354, 357, 152 Cal. Rptr. 420, 421 (1979).

50. *Justus*, 19 Cal. 3d at 585, 565 P.2d at 136, 139 Cal. Rptr. at 111. Compare *Austin*, 89 Cal. App. 3d at 357, 152 Cal. Rptr. at 421 (father could feel baby's heartbeat stop when he placed hand on already deceased mother's body) with *Justus*, 19 Cal. 3d at 584, 565 P.2d at 135, 139 Cal. Rptr. at 110 (fathers did not have physical proximity to incidents but did have almost simultaneous knowledge that babies were dead). In each case the fathers watched as doctors negligently delivered stillborn babies. The fathers in *Justus* were undoubtedly just as traumatized by the stillbirths as the father in *Austin*. Thus, it makes no sense that the *Austin* court permitted recovery and the *Justus* court did not.

51. *Parsons*, 81 Cal. App. 3d at 512, 146 Cal. Rptr. at 498 (parents arrived at scene only seconds after automobile accident in which their daughters were killed).

52. *Archibald v. Braverman*, 275 Cal. App. 2d 253, 256-57, 79 Cal. Rptr. 723, 725 (1969) (mother arrived at scene only moments after explosion in which her son was injured and saw its grisly results).

One distinction which could explain why recovery was permitted in *Archibald* and not *Parsons* is that explosions are far more rare than car accidents. For that reason, permitting recovery would not expand either the class or liability of defendants greatly. Pearson, *supra* note 18, at 506-07.

53. See, e.g., *Justus*, 19 Cal. 3d at 585, 565 P.2d at 136, 139 Cal. Rptr. at 111; *Parsons*, 81 Cal. App. 3d at 512, 146 Cal. Rptr. at 498.

54. See *Dillon*, 68 Cal. 2d at 740-42, 441 P.2d at 920-22, 69 Cal. Rptr. at 80-82.

55. In addition to relying on the three *Dillon* guidelines to find liability, courts avoided traditional foreseeability analysis by using other theories for recovery. These three theories provided grounds for NIED claims that did not require courts to wrestle with the standards discussed in *Dillon* or try to reconcile the cases that followed it. For cases utilizing breach of contract see *Newton v. Kaiser Found. Hosps.*, 184 Cal. App. 3d 386, 228 Cal. Rptr. 890 (1986); *Andalon v. Superior Court*, 162 Cal. App. 3d 600, 208 Cal. Rptr. 899 (1984); *Kately v. Wilkinson*, 148 Cal. App. 3d 576, 195 Cal. Rptr. 902 (1983). For cases applying breach of fiduciary duty see *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*, 48 Cal. 3d 583, 770 P.2d 278, 257 Cal. Rptr. 98 (1989); *Hedlund v. Superior Court*, 34 Cal. 3d 695, 669 P.2d 41, 194 Cal. Rptr. 805 (1983); *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980); *Richard H. v. Larry D.*, 198 Cal. App. 3d 591, 243 Cal. Rptr. 807

under which an emotional injury would be considered foreseeable.⁵⁶ Thus, courts avoided the potential danger of numerous, fraudulent claims without justifying the rejection of more traditional, and previously accepted, foreseeability-of-injury analysis.

III. *THING v. LA CHUSA*: CALIFORNIA ADOPTS BRIGHT LINES AND HARSH RULES

The inconsistent decisions following *Dillon v. Legg*⁵⁷ showed that the California courts, because they were uncomfortable with the concept of using an ad hoc foreseeability-of-injury analysis for NIED claims, had failed to state a rule which would better govern future cases. The California Supreme Court attempted to rectify this situation in 1989, when it decided *Thing v. La Chusa*.⁵⁸

A. *Factual Background and Lower Court Opinions*

In *Thing v. La Chusa*,⁵⁹ the plaintiff, Mrs. Thing, neither saw nor heard the automobile accident in which her son was injured.⁶⁰ Mrs. Thing rushed to the scene shortly after the accident occurred and found her son lying in the street bloody and unconscious. While Mrs. Thing may have suffered "great emotional disturbance, shock, and injury to her nervous system as a result of these . . . events,"⁶¹ the trial court held that she did not specifically satisfy the proximity and sensory perception guidelines listed in *Dillon v. Legg*.⁶²

The court of appeal, however, reversed the trial court, citing another California Supreme Court decision which concluded that "contemporaneous awareness of a sudden occurrence causing injury to her child was not a prerequisite to recovery under *Dillon*."⁶³ The appellate court explained that a claim could be based on an injury resulting from an ex-

(1988). For a case relying also on "direct victim" status, see *Molien*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

56. See *supra* notes 40-56 and accompanying text.

57. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

58. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

59. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

60. *Id.* at 647, 771 P.2d at 815, 257 Cal. Rptr. at 866.

61. *Id.* at 647-48, 771 P.2d at 815, 257 Cal. Rptr. at 866.

62. *Id.* at 669, 771 P.2d at 830, 257 Cal. Rptr. at 881; see *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). See *supra* notes 24-39 and accompanying text for a discussion of the *Dillon* guidelines.

63. *Thing*, 48 Cal. 3d at 648, 771 P.2d at 816, 257 Cal. Rptr. at 866-67 (citing *Ochoa v. Superior Court*, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985) (mother permitted recovery after witnessing slow, painful death of her son caused by denial of treatment while kept in correctional institution)); see *Dillon*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72.

tended course of conduct as long as the bystander-plaintiff observed the defendant's conduct, the injury, and the connection between them.⁶⁴ This difference between the trial and appellate courts' interpretation of *Dillon* highlighted the widely varying analyses of bystander NIED claims.

B. *The California Supreme Court's Majority Opinion*

In view of prior inconsistent decisions, the California Supreme Court considered the *Thing v. La Chusa*⁶⁵ case to be a good "opportunity to meet its obligation to create a clear rule under which liability [for NIED] may be determined."⁶⁶ After acknowledging the confusion in cases and commentary following *Dillon v. Legg*,⁶⁷ the California Supreme Court's analysis of NIED recovery focused on the alternatives that were at the core of the debate: (1) permit bystander recovery for NIED based on an ad hoc assessment of whether such distress was reasonably foreseeable, or (2) make the *Dillon* "guidelines" required elements for a bystander-plaintiff to state a claim for NIED.⁶⁸ The court evaluated these two choices and determined that an ad hoc foreseeability analysis was an inadequate basis upon which to find liability for intangible injuries.⁶⁹ The court reasoned that such an analysis was unpredictable and could lead to excessive liability.⁷⁰

The court stated that "[i]n order to avoid limitless liability out of all proportion to the degree of a defendant's negligence, and against which it is impossible to insure without imposing unacceptable costs on those among whom the risk is spread, the right to recover for negligently caused emotional distress must be limited."⁷¹ In concluding that imposing a duty based on an ad hoc foreseeability-of-injury analysis would unjustifiably burden defendants, the court stated that "a bright line in this

64. *Thing*, 48 Cal. 3d at 661, 771 P.2d at 825, 257 Cal. Rptr. at 876.

65. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

66. *Id.* at 664, 771 P.2d at 827, 257 Cal. Rptr. at 878.

67. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

68. *Thing*, 48 Cal. 3d at 661-63, 771 P.2d at 825-26, 257 Cal. Rptr. at 876-77.

69. *Id.* at 667, 771 P.2d at 829, 257 Cal. Rptr. at 880.

70. *Id.* at 664, 771 P.2d at 826, 257 Cal. Rptr. at 877-78. California is not the only state to conclude that foreseeability is an inadequate test to limit liability. New York, Florida, Georgia, New Mexico, Pennsylvania, Vermont, and Washington, among others, are on record as disapproving the expanded liability envisioned in *Dillon*. See Note, *Tort Law — Negligent Infliction of Emotional Distress in Accident Cases—The Expanding Definition of Liability*, Dziokonski v. Babineau, 1 W. NEW ENG. L. REV. 795, 801 n.34 (1979).

71. *Thing*, 48 Cal. 3d at 664, 771 P.2d at 826-27, 257 Cal. Rptr. at 877-78.

area of law is essential.'"⁷² It then adopted the three factors set forth in *Dillon*⁷³ as requirements, each of which must be satisfied for a plaintiff to recover for NIED injuries.⁷⁴ The court reasoned that the contemporaneous sensory perception, proximity and relationship conditions would define the defendant's duty to the bystander-plaintiff while also limiting the defendant's liability.⁷⁵

The California Supreme Court was not taking what it considered a dramatic step in redefining a bystander's cause of action.⁷⁶ The *Dillon* court had recognized the need to avoid infinite liability by imposing "restrictions that would somehow narrow the class of potential plaintiffs."⁷⁷ Unfortunately, courts subsequent to *Dillon* had failed to determine liability in a consistent manner.⁷⁸ The erratic decisions following *Dillon* had done little to aid plaintiffs, defendants or the courts in the administration of this volatile cause of action.⁷⁹

In *Thing*, the California Supreme Court recognized that although strict rules eased the adjudication of cases, they were not free from problems. For instance, some plaintiffs with substantial injuries inevitably would be excluded from recovery.⁸⁰ The court in *Thing* reasoned,

72. *Id.* at 664, 771 P.2d at 827, 257 Cal. Rptr. at 878 (quoting *Elden v. Sheldon*, 46 Cal. 3d 267, 277, 758 P.2d 582, 588, 250 Cal. Rptr. 254, 260 (1988)).

73. For a discussion of the *Dillon* case see *supra* notes 24-39 and accompanying text.

74. *Thing*, 48 Cal. 3d at 667-68, 771 P.2d at 829-30, 257 Cal. Rptr. at 880-81.

75. *Id.* at 667, 771 P.2d at 829, 257 Cal. Rptr. at 880.

76. *Id.* at 668, 771 P.2d at 830, 257 Cal. Rptr. at 881. The court concluded, "Experience has shown that, contrary to the expectation of the *Dillon* majority, and with apology to Bernard Witkin, there are clear judicial days on which a court can see forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury." *Id.*

77. *Id.* at 654, 771 P.2d at 819, 257 Cal. Rptr. at 870 (citing *Dillon v. Legg*, 68 Cal. 2d 728, 739, 441 P.2d 912, 919, 69 Cal. Rptr. 72, 79 (1968)).

78. See, e.g., *Krouse v. Graham*, 19 Cal. 3d 59, 76, 562 P.2d 1022, 1031, 137 Cal. Rptr. 863, 872 (1977) (NIED plaintiff, as "perceptible witness," need not visually perceive accident in order to recover); *Archibald v. Braverman*, 275 Cal. App. 2d 253, 255, 79 Cal. Rptr. 723, 724 (1969) (NIED plaintiff need not be present at the accident scene in order to recover). But see, e.g., *Molien v. Kaiser Found. Hosp.*, 27 Cal. 3d 916, 922, 616 P.2d 813, 816, 167 Cal. Rptr. 831, 834 (1985) (NIED plaintiff who is "direct victim" need not prove physical harm and accident or sudden occurrence); *Hoyem v. Manhattan Beach City School Dist.*, 22 Cal. 3d 508, 523, 585 P.2d 851, 859-60, 150 Cal. Rptr. 1, 10 (1978) (NIED plaintiff must meet *Dillon* requirement of "sensory and contemporaneous observance of the accident"); *Nazaroff v. Superior Court*, 80 Cal. App. 3d 553, 566, 145 Cal. Rptr. 657, 664-65 (1978) (NIED plaintiff need not perceive the accident if she suffered physical harm from "contemporaneous observation"). "The *Dillon* court anticipated and accepted uncertainty in the short term in application of its holding, but was confident that the boundaries of this [NIED] action could be drawn in future cases." *Thing*, 48 Cal. 3d at 655, 771 P.2d at 821, 257 Cal. Rptr. at 872.

79. See *supra* notes 40-56 and accompanying text for a discussion of those cases.

80. See *Thing*, 48 Cal. 3d at 666, 771 P.2d at 827-28, 257 Cal. Rptr. at 878-79. The fact that the rules in *Dillon* would not adequately address every situation was admitted by the

however, that "[w]hen the right to recover is limited in this manner, the liability bears a reasonable relationship to the culpability of the negligent defendant."⁸¹ Although the court noted the arbitrariness of the rules which may exclude recovery for some injured plaintiffs, it believed these shortcomings were offset by the value of the rules which limit liability.⁸²

C. Justice Kaufman's Concurrence

In his concurrence, Justice Kaufman urged that the *Dillon v. Legg*⁸³ guidelines did not go far enough to limit NIED.⁸⁴ He urged that if certainty and consistency were truly desired, then the court should return to the "zone of danger" rule.⁸⁵ He also expressed his view that bystander recovery should be eliminated because "[t]he interest in freedom from emotional distress caused by negligent injury to a third party is simply not . . . an interest which the law can or should protect."⁸⁶ Justice Kaufman's concurrence expressed concern for the public interest which would not be served by adopting the arbitrary *Dillon* standards as strict requirements.⁸⁷ According to Justice Kaufman, the newly adopted rules would not relate rationally to the goal of compensation and would lead to unjust

Dillon court itself, which stated that "we cannot now predetermine defendant's obligation in every situation by a fixed category; no immutable rule can establish the extent of that obligation for every circumstance of the future." *Dillon*, 68 Cal. 3d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80. Moreover, the California Supreme Court had made similarly difficult choices with respect to other causes of action involving intangible injuries, where strict limitations were imposed for policy reasons that the *Thing* court applied with equal force to limit bystander NIED claims. *Thing*, 48 Cal. 3d at 664-65, 771 P.2d at 827-28, 257 Cal. Rptr. at 878-79. Adoption of rules that would limit the potential class of plaintiffs was supported by "the intangible nature of the loss, the inadequacy of monetary damages to make whole the loss, the difficulty in measuring the damage, and the societal cost of attempting to compensate the plaintiff." *Id.* at 664-65, 771 P.2d at 827-28, 257 Cal. Rptr. at 878-79.

81. *Thing*, 48 Cal. 3d at 667, 771 P.2d at 829, 257 Cal. Rptr. at 880.

82. *Id.* at 666-67, 771 P.2d at 828-29, 257 Cal. Rptr. at 879-80.

83. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

84. *Thing v. La Chusa*, 48 Cal. 3d 644, 675, 771 P.2d 814, 834-35, 257 Cal. Rptr. 865, 886 (1989) (Kaufman, J., concurring).

85. *Id.* at 669, 675-76, 771 P.2d at 885, 887, 257 Cal. Rptr. at 834, 836 (Kaufman, J., concurring) (citing with approval *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963)).

86. *Id.* at 676, 771 P.2d at 835, 257 Cal. Rptr. at 886 (Kaufman, J., concurring).

87. *Id.* at 674-75, 771 P.2d at 834, 257 Cal. Rptr. at 885 (Kaufman, J., concurring). Justice Kaufman expressed concern that:

By what humane and principled standard might a court decide, as a matter of law, that witnessing the bloody and chaotic aftermath of an accident involving a loved one is compensable if viewed within 1 minute of impact but noncompensable after 15? or 30? Is the shock of standing by while others undertake frantic efforts to save the life of one's child any less real or foreseeable when it occurs in an ambulance or emergency room rather than at the "scene"?

Id. at 675, 771 P.2d at 834, 257 Cal. Rptr. at 885-86 (Kaufman, J., concurring).

results.⁸⁸

D. *The Dissenting Opinions*

The dissenting justices disagreed with adopting the *Dillon v. Legg*⁸⁹ guidelines as strict rules because they felt such adoption would operate to limit the class of injured plaintiffs.⁹⁰ In his dissent, Justice Broussard concluded that the ad hoc determination of bystander NIED claims based on *Dillon*'s foreseeability analysis should be followed.⁹¹

"[T]he problem [of NIED] should be solved by the application of the principles of tort, not by the creation of exceptions to them. Legal history shows that 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."⁹²

Justice Broussard argued that injustice would result from not compensating bystanders injured by a defendant's negligence.⁹³ He was not persuaded that an analysis which focuses on the reasonable foreseeability of the injury would be unworkable to limit liability in a rational fashion.⁹⁴ Justice Broussard argued that bystander NIED claims are no more uncertain than several other areas of tort law which are served by foreseeability determinations.⁹⁵

88. *Id.* at 674-75, 771 P.2d at 834, 257 Cal. Rptr. at 885-86 (Kaufman, J., concurring). In *Arauz v. Gerhardt*, for example, the court denied recovery to a mother who arrived at the scene of a car accident involving her child within five minutes of the event. 68 Cal. App. 3d 937, 949, 137 Cal. Rptr. 619, 627 (1977). The court noted that the plaintiff was "not at the scene of the accident at the time of the impact and [was] not near enough to the scene to have any sensory perception of the impact . . ." *Id.* Justice Kaufman in *Thing* queried whether there was any rational basis to infer that Mrs. Arauz was any less traumatized than Mrs. Dillon because she first saw her bloody infant five minutes after being struck by defendant's car. *Thing*, 148 Cal. 3d at 647, 771 P.2d at 834, 257 Cal. Rptr. at 885 (Kaufman, J., concurring). 89. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

90. *Thing v. La Chusa*, 48 Cal. 3d 644, 677, 682, 771 P.2d 814, 836, 839, 257 Cal. Rptr. 865, 887, 890 (1989) (Mosk, J. & Broussard, J., dissenting); see *Dillon*, 68 Cal. 2d at 740-41, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81.

91. *Thing*, 48 Cal. 3d at 677-89, 771 P.2d at 836-44, 257 Cal. Rptr. at 887-90 (Mosk, J. & Broussard, J., dissenting). Justice Mosk focused on the authority upon which the majority relied and agreed with Justice Broussard's arguments. *Id.* at 677, 771 P.2d at 836, 257 Cal. Rptr. at 887 (Mosk, J., dissenting).

92. *Id.* at 682, 771 P.2d at 839, 257 Cal. Rptr. at 890 (Broussard, J., dissenting) (quoting *Dillon v. Legg*, 68 Cal. 2d 728, 747, 441 P.2d 912, 925, 69 Cal. Rptr. 72, 85 (1968)).

93. *Id.* at 684, 771 P.2d at 841, 257 Cal. Rptr. at 892 (Broussard, J., dissenting).

94. *Id.* at 686, 771 P.2d at 842, 257 Cal. Rptr. at 893 (Broussard, J., dissenting).

95. *Id.* at 685, 771 P.2d at 841, 257 Cal. Rptr. at 893 (Broussard, J., dissenting). The *Dillon* court had cited several examples of tort actions that are effectively handled using foreseeability to establish a duty as the basis of a claim. See *Dillon*, 68 Cal. 2d at 742-43, 441 P.2d at 921-22, 69 Cal. Rptr. at 81-82.

Perhaps the most persuasive point in Justice Broussard's dissent was his observation that no conclusive proof was provided that "*Dillon* has significantly contributed to any substantial increase in litigation and insurance premiums."⁹⁶ Increases in uncertainty and the costs of liability were supposedly the motivating forces behind the *Thing* majority's decision to adopt strict rules.⁹⁷ If the detrimental effects had not occurred, then the majority's rationale disappears.

In a separate dissent, Justice Mosk noted that the authority cited by the *Thing* majority to support its reasoning did not in fact condemn the case-by-case approach articulated in *Dillon*.⁹⁸ Additionally, Justice Mosk noted that several commentators favored the expansive use of *Dillon*'s foreseeability analysis rather than the artificial rules that the *Thing* majority adopted.⁹⁹

Neither the majority nor the dissenting opinions contributed anything new to the debate that had occupied law review articles and decisions since the *Dillon* case. Concerns over unlimited liability and unsettled standards had been balanced repeatedly against the need to compensate injured plaintiffs.¹⁰⁰ Rather than settling the issue with authoritative guidance, the majority in *Thing* unfortunately set the stage for further debate about how bystander NIED claims should be handled.

The ability of courts to limit liability predicated on tests largely based on foreseeability is well illustrated by the "open car" cases. The prototype case is the suit against the owner of a vehicle for damage caused plaintiff by a third party who can commandeer the vehicle because of the owner's carelessness in leaving the keys inside. In *Richardson v. Ham*, we posited liability on the owner of a bulldozer because of a "foreseeable risk of intermeddling," noting especially the great danger the bulldozer created and the special temptation it presented to third parties.

Id. at 742, 441 P.2d at 921, 69 Cal. Rptr. at 81 (citation omitted).

Applying the foreseeability test, the courts have held that the mere act of leaving a key in an automobile, although it may possibly raise a foreseeable risk that the car will be stolen, does not increase the risk of injury to other property and hence does not warrant liability. *Id.* at 742, 441 P.2d at 921-22, 69 Cal. Rptr. at 81-82; *see, e.g., Richards v. Stanley*, 43 Cal. 2d 60, 66, 271 P.2d 23, 27 (1954) ("even if she should have foreseen the theft, she had no reason to believe that the thief would be an incompetent driver").

96. *Thing*, 48 Cal. 3d at 688, 771 P.2d at 843, 257 Cal. Rptr. at 894 (Broussard, J., dissenting); *see Dillon*, 68 Cal. 2d at 742-46, 441 P.2d at 921-24, 69 Cal. Rptr. at 81-84.

97. *Thing*, 48 Cal. 3d at 683-86, 771 P.2d at 840-42, 257 Cal. Rptr. at 891-93 (Broussard, J., dissenting).

98. *Id.* at 677-80, 771 P.2d at 836-38, 257 Cal. Rptr. at 887-89 (Mosk, J., dissenting); *see Dillon*, 68 Cal. 2d at 741, 41 P.2d at 921, 69 Cal. Rptr. at 81.

99. *Thing*, 48 Cal. 3d at 681, 771 P.2d at 839, 257 Cal. Rptr. at 890 (Mosk, J., dissenting); *see, e.g., Bell, supra* note 39, at 409-10; *Diamond, supra* note 43, at 504; *Miller, supra* note 43, at 47; *Nolan & Ursin, supra* note 43, at 609.

100. *See, e.g., Bell, supra* note 39, at 354; *Diamond, supra* note 43, at 478; *Miller, supra* note 43, at 14; *Nolan & Ursin, supra* note 43, at 610.

IV. "BRIGHT LINES" WILL NOT SOLVE THE CONFUSION OVER BYSTANDER CLAIMS FOR NIED

The decision to adopt strict rules limiting the class of plaintiffs eligible to recover for NIED was more a choice of the lesser of two evils than principled decision-making. The majority in *Thing v. La Chusa*¹⁰¹ recognized that adopting "arbitrary" rules would foreclose compensation to some injured plaintiffs.¹⁰² The court, however, was unsympathetic to NIED claims because, the court reasoned, emotional distress is "experienced by most persons, even absent negligence, at some time during their lives."¹⁰³ The court distinguished damages for intentionally inflicted emotional distress, which are punitive, from those for negligently inflicted emotional distress.¹⁰⁴ Damages for NIED are not punitive, but rather reflect society's belief that a negligent defendant should bear some responsibility for the effects of the negligent conduct.¹⁰⁵ By limiting the class of potential plaintiffs in NIED actions, the court reasoned that liability will bear a more reasonable relationship to the culpability of the negligent defendant.¹⁰⁶ The court balanced the potential of expansive liability and growing uncertainty against denying recovery to some injured plaintiffs.¹⁰⁷ In the court's opinion, expansive liability and growing uncertainty posed the greater problem and justified the use of bright line distinctions.¹⁰⁸

The decision to turn the *Dillon* guidelines into requirements was based on two assumptions: (1) that defendant liability and insurance costs are significant enough to warrant limiting the cause of action, and (2) that trial courts would be incapable of adjudicating bystander NIED claims without strict requirements on which they could rely.¹⁰⁹ A review of the precedent and scholarly criticism shows that neither of these assumptions was correct.

101. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

102. *Id.* at 666, 771 P.2d at 828, 257 Cal. Rptr. at 879.

103. *Id.* at 666, 771 P.2d at 828-29, 257 Cal. Rptr. at 880. The court commented:

The emotional distress for which monetary damages may be recovered, however, ought not to be that form of acute emotional distress or the transient emotional reaction to the occasional gruesome or horrible incident to which every person may potentially be exposed in an industrial and sometimes violent society. . . . The overwhelming majority of "emotional distress" which we endure, therefore, is not compensable.

Id. at 666-67, 771 P.2d at 829, 257 Cal. Rptr. at 880.

104. *Id.* at 667, 771 P.2d at 829, 257 Cal. Rptr. at 880.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 664-66, 771 P.2d at 827-30, 257 Cal. Rptr. at 878-80.

109. *Id.*

A. *There Is No Evidence of the Need to Abandon Traditional Foreseeability Analysis*

The majority in *Thing v. La Chusa*¹¹⁰ provided no proof to support its conclusion that "unlimited liability" of NIED claims posed a significant public problem.¹¹¹ Despite the inconsistent decisions resulting after *Dillon v. Legg*,¹¹² there was no evidence that defendants had been so unforeseeably or unreasonably burdened that a need to limit the cause of action existed. The *Thing* court's analysis focused more on the fact that no fixed manner to predict and limit liability existed than on an examination of whether any abuses had actually occurred.¹¹³

Professor Bell, one of the commentators cited by the *Thing* majority, had concluded that the threat of unlimited liability did not pose a threat sufficient to justify a limitation on plaintiff recovery like the one the *Thing* court imposed.¹¹⁴ In his article, Professor Bell pointed out that "[d]espite the importance of the unlimited liability concern to opponents of full recovery for psychic injury to bystanders, no one has satisfactorily articulated why unlimited liability is such a major concern."¹¹⁵ He criticized decisions which provided no reason to limit liability other than a perceived social need to do so.¹¹⁶

110. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

111. Uncertainty rather than a reliance on facts appears to have formed the basis of the court's conclusions. See *id.* at 656, 771 P.2d at 821, 257 Cal. Rptr. at 872. Prior to 1989, critics had noted the initial reluctance of courts to expand a cause of action in a manner that could lead to greater liability. Bell, *supra* note 39, at 362-63; Nolan & Ursin, *supra* note 43, at 607-08. As Professor Bell pointed out, however, "[t]he threat of those supposedly undesirable effects is not likely to materialize." Bell, *supra* note 39, at 364-67.

112. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). See *supra* notes 40-56 and accompanying text for a discussion of post-*Dillon* decisions.

113. See *Thing*, 48 Cal. 3d at 656-61, 771 P.2d at 821-25, 257 Cal. Rptr. at 872-76; see also Miller, *supra* note 43, at 17-18 (discussing influence that fears of unlimited liability had in decision-making when tort rules were expanded).

114. Bell, *supra* note 39, at 364-67.

115. *Id.* at 363 (footnotes omitted).

116. See *id.* at 362-63; see also James, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43, 48-49 (1972).

The court in *Dillon* pointed out that "the argument that 'there is no point at which to stop liability' is no more plausible today than when it was advanced in *Winterbottom v. Wright*." *Dillon*, 68 Cal. 2d at 743, 441 P.2d at 922, 69 Cal. Rptr. at 82 (quoting *Winterbottom v. Wright*, 152 Eng. Rep. 402 (1842)). In *Winterbottom*, a passenger of a mail coach was injured when the coach collapsed. The court held that the coach owner owed no duty to the plaintiff since the plaintiff was not in privity of contract with the coach owner. *Winterbottom v. Wright*, 152 Eng. Rep. 402, 403 (1842). The court deemed that imposing the privity of contract requirement would limit liability. *Id.*

In support of its conclusion that liability would not become overly burdensome, the *Dillon* court cited products liability as an example of tort law that proved its critics wrong. *Dillon*, 68 Cal. 2d at 743, 441 P.2d at 922, 69 Cal. Rptr. at 82. "In taking another giant step forward, in

Commentators following *Dillon* had also concluded that the fear of expanded liability for a tort cause of action did not justify placing limits on reasonable foreseeability.¹¹⁷ These commentators reasoned that, in other contexts, the uncertainty feared almost always failed to materialize.¹¹⁸ If unlimited liability were truly a problem, as the *Thing* majority stated,¹¹⁹ its effect should have been easy to identify during the twenty years following *Dillon*.¹²⁰ In fact, history indicated "that the effect of expanded bystander recovery for psychic injury on California liability insurance rates [was] negligible."¹²¹

B. Foreseeability Is a Workable Principle for Analyzing and Controlling Bystander NIED Claims

If society is not overly burdened by bystander claims for NIED, the majority's conclusion in *Thing v. La Chusa*¹²² that it is necessary to adopt strict rules loses its force. The only other compelling argument that can be made for the adoption of strict requirements is that without such requirements courts lack a rational framework for deciding NIED claims. The *Thing* court accepted this premise¹²³ and concluded "that reliance on foreseeability of injury alone in finding a . . . right to recover,

imposing product liability in tort, we were not halted by the specter of an inability to pre-judge every future case. The setting of boundaries upon that doctrine makes the problem of fixing lines of limitation here appear, by comparison, almost minuscule." *Id.*

117. See Bell, *supra* note 39, at 364; Miller, *supra* note 43, at 34 ("Fears of fraudulent claims and opening the floodgates to litigation are today rejected as valid reasons for denying claims even by courts that refuse to extend liability to cases in which the distress produces physical injury . . .").

118. Bell, *supra* note 39, at 366; Miller, *supra* note 43, at 34.

119. See *Thing*, 48 Cal. 3d at 664, 771 P.2d at 826, 257 Cal. Rptr. at 877.

120. See *supra* notes 40-56, which discuss whether the post-*Dillon* cases resulted in an increase in liability.

121. Bell, *supra* note 39, at 366. Arguably, society as a whole may benefit from increased liability because the actual cost of conduct producing injuries would be paid to plaintiffs. See Miller, *supra* note 43, at 21-27. Although he would permit recovery, Professor Miller would place a limit on the amounts so that the liability would not outweigh the benefit it produces. *Id.* at 38. See also Bell, *supra* note 39, at 347-99 for a thorough cost/benefit analysis that favors permitting bystander NIED claims. If claims for NIED are prevented by overly restrictive rules, such as those adopted in *Thing*, then victims will be forced to bear the costs of rehabilitation, lost wages and similar expenses. *Id.* at 376.

Deterrence of negligent behavior which causes emotional distress could also be accomplished by permitting all reasonably foreseeable victims to bring bystander NIED claims. Actors may reconsider their activities if they faced the possibility of large NIED claims. See Miller, *supra* note 43, at 23-25. This deterrence theory has been applied in other tort actions. *Id.* at 24.

122. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

123. *Id.* at 663, 771 P.2d at 826, 257 Cal. Rptr. at 877.

is not adequate when the damages sought are for an intangible injury."¹²⁴

Judges and juries can decide when compensation is appropriate based on their own experience and the evidence presented.¹²⁵ When used as guidelines rather than rules, the three factors listed in *Dillon* help focus the trier of fact on those elements that appear most related to foreseeability. Moreover, judges can determine when juries have made an award out of proportion to the defendant's culpability.¹²⁶ Advances in psychological examining techniques provide a further check on potentially fraudulent claims and exaggerated damages.¹²⁷ Given these mechanisms, the fear of expanded liability should not preclude otherwise valid claims¹²⁸—especially when the application of effective tort law principles will likely prevent that fear from becoming a reality.¹²⁹

The *Thing* court's conclusion that reasonable foreseeability is not a rational analytical tool makes little sense. There is no reason to think that harsh rules will lead to better judicial determinations. The tendency since *Dillon* to treat the guidelines set forth in that case as strict rules has led to inconsistent, unprincipled results. These results will become compounded now that *Thing* mandates such strict rules.¹³⁰ With its history of problematic precedent, it is hard to justify choosing the strict requirements over reasonable foreseeability as a rational basis for decision-making. Like other courts faced with a problematic new cause of action,¹³¹

124. *Id.* at 664, 771 P.2d at 826, 257 Cal. Rptr. at 877. The court compared NIED with loss of consortium, another intangible claim. *Id.* at 665-66, 771 P.2d at 828, 257 Cal. Rptr. at 878-79. In addressing the difficulty in measuring damages for an intangible injury, the *Thing* majority noted "[t]he intangible character of the loss, which can never really be compensated by money damages; the difficulty of measuring damages; the dangers of double recovery or multiple claims and of extensive liability—all these considerations apply similarly to both [loss of consortium and NIED] cases." *Id.* at 666 n.8, 771 P.2d at 828 n.8, 257 Cal. Rptr. at 879 n.8 (quoting *Baxter v. Superior Court*, 19 Cal. 3d 461, 464, 563 P.2d 871, 873, 138 Cal. Rptr. 315, 317 (1977)). *But see* Bell, *supra* note 39, at 351-91; Miller, *supra* note 43, at 17; Nolan & Ursin, *supra* note 43, at 620.

125. *See* Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 930, 616 P.2d 813, 821, 167 Cal. Rptr. 831, 839 (1980); *see also* Bell, *supra* note 39, at 354-56; Note, *Limiting Liability for the Negligent Infliction of Emotional Distress: The "Bystander Recovery" Cases*, 54 S. CAL. L. REV. 847, 854-55 (1981).

126. Bell, *supra* note 39, at 356.

127. *See* Molien, 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839; Miller, *supra* note 43, at 34.

128. *See* Bell, *supra* note 39, at 370; Miller, *supra* note 43, at 34.

129. Besides failing to recognize that courts can function in the absence of strict, mechanical rules, the court in *Thing* engaged in judicial activism in an area that appears better suited for legislative regulation. *See* Bell, *supra* note 39, at 369; Miller, *supra* note 43, at 18. Unless statistics and studies are provided, there is no way to be sure that the interests of insurers and the public have been properly balanced.

130. *See supra* notes 57-82 and accompanying text.

131. *See supra* notes 65-82 and accompanying text.

the justices in *Thing* succumbed to the fear that unless "bright lines" were drawn, society would be harmed by unbridled liability.¹³²

V. CONVENTIONAL TORT LAW LIMITATIONS ON LIABILITY PROVIDE A BETTER ALTERNATIVE THAN HARSH RULES

A. Alternatives

Several alternatives to adopting the *Dillon v. Legg*¹³³ guidelines as strict rules for stating a claim for bystander NIED exist.¹³⁴ Not all of these alternatives would work better than the rules adopted in *Thing v. La Chusa*,¹³⁵ but at least they offer some reasonable bases for retaining a more liberal injury foreseeability analysis.

One possibility is to reject freedom from emotional distress as a legally protectable interest, abandon *Dillon* altogether and return to the "zone of danger" rule.¹³⁶ In order to do this, courts must accept the notion that third-party NIED claims are not something that tort law "can, or should protect."¹³⁷ Restricting the scope of bystander claims in this manner limits the risk of feigned injuries.¹³⁸ Moreover, refusing to recognize NIED as an independent cause of action would avoid repeating the confusion that followed *Dillon*. The problem with this approach, however, is that some emotionally injured plaintiffs would not be compensated.

A second possible approach for dealing with NIED claims, offered by a post-*Dillon* commentator, is to base recovery on the plaintiff's "emotional preparedness."¹³⁹ This rule would limit bystander recovery

132. *Thing*, 48 Cal. 3d at 664, 771 P.2d at 827, 257 Cal. Rptr. at 866.

133. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

134. See generally Diamond, *supra* note 43, at 501-04; Miller, *supra* note 43, at 39; Nolan & Ursin, *supra* note 43, at 69; Note, *supra* note 70, at 801-03.

135. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 879 (1989).

136. See *supra* notes 18-23 and accompanying text for a discussion of this rule. Justice Kaufman supported this alternative in his concurrence. *Thing*, 48 Cal. 3d at 676, 771 P.2d at 836, 257 Cal. Rptr. at 887 (Kaufman, J., concurring). He pointed out that the "zone of danger" rule is less arbitrary than the *Dillon* factors and would avoid the institutionalized capriciousness that undermines courts forced to reach unjust results. *Id.* at 675, 771 P.2d at 834-35, 257 Cal. Rptr. at 885-86 (Kaufman, J., concurring).

137. *Thing*, 48 Cal. 3d at 676, 771 P.2d at 835, 257 Cal. Rptr. at 886 (Kaufman, J., concurring).

138. See *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 310-15, 379 P.2d 513, 522-25, 29 Cal. Rptr. 33, 42-45 (1963) (overruled by *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968)). As additional support for its refusal to recognize freedom from emotional distress as a protected interest, the *Amaya* court cited the elimination of the threat of liability which may be disproportionate to culpability, and the impossibility of establishing a "sensible or just stopping point." *Id.*

139. See Note, *supra* note 125, at 867.

to those emotional harms that society decides people should not be expected to absorb. . . . Courts would administer this standard by limiting recovery to cases of emotional distress that most people *do not face with sufficient certainty* to anticipate, to prepare for, and thus to absorb without suffering severe or permanent emotional damage.¹⁴⁰

For instance, a mother would not be expected to be prepared to witness seeing her child killed by a negligent automobile driver and, therefore, could state a cause of action.¹⁴¹

Unfortunately, this "emotional preparedness" approach contains the same uncertainty and requires the same exercise of judicial discretion that the majority in *Thing* criticized.¹⁴² How will courts know what to consider a normal part of life experience? Contrary to the beliefs of proponents of this approach, the emotional preparedness rule does not promise to resolve the uncertainty and unlimited liability that concerned the majority in *Thing*—for example, would inherently risky but ordinary situations, like childbirth, always preclude recovery? Courts following this approach would be forced to make determinations of preparedness that could prove to be as arbitrary as the *Dillon* guidelines had been in practice.¹⁴³

A third possibility is to consider both the foreseeability of emotional harm and its seriousness.¹⁴⁴ This approach would give courts latitude to accept claims that do not seem foreseeable, if the resulting emotional injury were sufficiently serious.¹⁴⁵ By focusing on both foreseeability and seriousness, courts should be able to "protect against fraud, multiple claims, and unlimited liability without encountering the problems associated with their attempts to adapt *Dillon's* physical injury requirement and guidelines to this purpose."¹⁴⁶

In practice, however, this proposal would do little more than em-

140. *Id.* at 868.

141. *Id.* at 869. This approach is similar to the prior physical injury rule which rejected NIED as a cause of action, but allowed recovery under certain extreme circumstances—such as the negligent mishandling of corpses and the negligent transmission of a "death telegram." See, e.g., *Russ v. Western Union Tel. Co.*, 222 N.C. 504, 23 S.E.2d 681 (1943) (death telegram); *Chisum v. Behrens*, 283 N.W.2d 235 (S.D. 1979) (mishandling of corpse).

142. See *Thing*, 48 Cal. 3d at 655, 771 P.2d at 821, 257 Cal. Rptr. at 872.

143. See *supra* notes 40-56 and accompanying text for a discussion of the inconsistent results reached by courts after *Dillon*.

144. See *Nolan & Ursin, supra* note 43, at 609. This approach is an adoption of Judge Learned Hand's famous exposition of liability. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

145. *Nolan & Ursin, supra* note 43, at 609-11.

146. *Id.* at 610.

phasize elements and principles already implicit in the language of *Dillon*.¹⁴⁷ The *Dillon* court noted that the purpose of "evaluation of the factors [was to] indicate the degree of defendant's foreseeability."¹⁴⁸ Similarly, this approach tries to link the degree of foreseeability to the degree of culpability. That being so, this approach would be subject to the same objections that the majority in *Thing* raised when it rejected foreseeability of injury and opted for strict guidelines.¹⁴⁹

All three of these alternatives have flaws which make them susceptible to the same overly restrictive or overly broad criticisms with which the majority in *Thing* struggled. One consistent theme in each proposal, however, is that the *Dillon* guidelines alone do not provide a rational framework for determining liability.

B. A Better Approach

A superior approach to bystander NIED claims would be to evaluate claims using reasonable foreseeability as the standard, but limit the amount of the claim to tangible, economic losses suffered by the plaintiff. Whether emotional harm was reasonably foreseeable would be a question of fact and should not be restrained to a consideration of the arbitrary *Dillon v. Legg*¹⁵⁰ factors.¹⁵¹ Under this theory, compensable economic losses would include psychiatric bills and compensation for work days missed due to emotional harm, but would exclude intangible harm such as "feeling scared." This approach was rejected by the majority in *Thing v. La Chusa* because it feared that liability would be uncertain and potentially burdensome.¹⁵²

The *Thing* court acknowledged that the "recovery by individual victims [would] be less,"¹⁵³ but was troubled that a plaintiff's ability to recover "would turn on fortuitous circumstances wholly unrelated to the culpability of the defendant."¹⁵⁴ The majority's reasoning, however, ig-

147. Nolan & Ursin, *supra* note 43, at 613.

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

149. *See Thing*, 48 Cal. 3d at 663-64, 771 P.2d at 826-27, 257 Cal. Rptr. at 877-78.

150. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

151. *See Diamond*, *supra* note 43, at 501-02; Miller, *supra* note 43, at 39. The *Thing* majority rejected Professor Miller's proposal because:

permitting recovery of economic damages by all foreseeable plaintiffs would expose defendants to risks no less arbitrary and unacceptable than those presently existing. While the recovery by individual victims might be less, the number of potential plaintiffs traumatized by reason of defendant's negligent conduct toward another, would turn on fortuitous circumstances wholly unrelated to the culpability of the defendant.

Thing v. La Chusa, 48 Cal. 3d 644, 663, 771 P.2d 814, 826, 257 Cal. Rptr. 865, 877 (1989).

152. *Thing*, 48 Cal. 3d at 663, 771 P.2d at 826, 257 Cal. Rptr. at 877.

153. *Id.*

154. *Id.*

nores the trial court's ability to dismiss a claim when the trial court finds that the requirement of reasonable foreseeability has not been met. Additionally, reducing damage awards supports the majority's policy of linking liability to the defendant's culpability.¹⁵⁵ With this in mind, limiting recovery to tangible losses seems an adequate method to appease the liability concerns which troubled the majority in *Thing*.

The *Thing* majority appears to have misinterpreted the commentators it cited who endorsed limiting recovery to tangible or economic losses. Foreseeability analysis only poses a danger of overly burdensome liability if plaintiffs are permitted to recover large damage awards for unverifiable harms.¹⁵⁶ Utilizing a foreseeability analysis to determine whether a duty is owed, coupled with a limitation on recovery, provides sufficient limitations to safeguard against abuse without sacrificing valid claims which may be dismissed under *Dillon* guidelines.¹⁵⁷

Unfortunately, the California Supreme Court chose a scheme with which it was comfortable because, the court felt, it advanced certainty, rather than a scheme designed to compensate all bona fide plaintiffs.

VI. THE FUTURE OF NIED IN CALIFORNIA

The cases that followed *Dillon v. Legg*¹⁵⁸ are good examples of the way in which the strict rules adopted in *Thing v. La Chusa*¹⁵⁹ will be applied to bystander NIED claims in the future.¹⁶⁰ The California Supreme Court's decision in *Thing* will not significantly change the deliberation process in courts that already treated the three *Dillon* factors as requirements for plaintiffs to bring a cause of action.¹⁶¹ Despite the clear statement of the rule, hard cases will continue to challenge any barriers preventing compensation.¹⁶²

155. See *supra* notes 80-82 and accompanying text.

156. See *Thing*, 48 Cal. 3d at 662-63, 771 P.2d at 826, 257 Cal. Rptr. at 821.

157. See *Diamond*, *supra* note 43, at 501-04; *Miller*, *supra* note 43, at 38-43.

158. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

159. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

160. See *supra* notes 40-56 and accompanying text.

161. See *supra* notes 40-56 and accompanying text for a discussion of those courts' decisions.

162. Cases where recovery was denied, like those discussed in the first section of this Article, challenge any technical limitation that would prevent recovery. Professor Bell pointed out that in addition to the theoretical inconsistencies to which strict rules lead, "the cost of erecting such a barrier may be greater than its benefit." Bell, *supra* note 39, at 386. Professor Bell discussed the costs and benefits of using foreseeability analysis to permit compensation in sections IV and V of his article.

A. Plaintiff Strategies

Plaintiffs face the difficult task of persuading a court either to overturn *Thing v. La Chusa*,¹⁶³ or to find some unique exception to the three requirements to justify recovery. Rather than claiming that the defendant owed the plaintiff a duty based on the plaintiff's relationship to the victim and the plaintiff's proximity to and sensory perception of the event, plaintiffs should stress alternative grounds for establishing a duty, such as products liability,¹⁶⁴ "direct victim" status,¹⁶⁵ or some independent fiduciary duty.¹⁶⁶ Each of these alternative grounds for permitting recovery has been successful in the past in circumstances which indicated that relief should be granted.¹⁶⁷

For example, will hearing the blast that injures a family member still satisfy the contemporaneous sensory perception requirement?¹⁶⁸ Can a mother successfully claim damages when she witnesses only the gradual death of a child?¹⁶⁹ In the wake of decisions like *Marvin v. Marvin*,¹⁷⁰ in which non-marital relationships gained legal recognition, can the courts continue to deny recovery for emotional injury to common-law spouses?¹⁷¹

163. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

164. See, e.g., *Kately v. Wilkinson*, 148 Cal. App. 3d 576, 195 Cal. Rptr. 902 (1983).

165. See, e.g., *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

166. See, e.g., *Hedlund v. Superior Court*, 34 Cal. 3d 695, 669 P.2d 41, 194 Cal. Rptr. 805 (1983); *Andalon v. Superior Court*, 162 Cal. App. 3d 600, 208 Cal. Rptr. 899 (1984).

167. See *supra* notes 164-66 and accompanying text.

168. See *Archibald v. Braverman*, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969).

169. See *Ochoa v. Superior Court*, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985).

170. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). Recognizing the legal significance of a nonmarital relationship, the court in *Marvin* stated that:

The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many. . . . We conclude that the judicial barriers that may stand in the way of a policy based upon the fulfillment of the reasonable expectations of the parties to a nonmarital relationship should be removed.

Id. at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831. This language suggests that cohabitants should have some right to bring bystander NIED claims because the court legally recognizes their relationship and its similarity to a marriage.

171. Recent decisions show, however, that courts have not extended the reasoning in *Marvin* to NIED causes of action. See *Elden v. Sheldon*, 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988); *Coon v. Joseph*, 192 Cal. App. 3d 1269, 237 Cal. Rptr. 873 (1987); *Drew v. Drake*, 110 Cal. App. 3d 555, 168 Cal. Rptr. 65 (1980); see also Comment, *A New Tort in California: Negligent Infliction of Emotional Distress (For Married Couples Only)*, 41 *HASTINGS L.J.* 447 (1990).

B. Defendant Strategies

In answering NIED claims, defendants in California should argue that the limitations set forth in *Thing v. La Chusa*¹⁷² exclude recovery for such claims. Prior to *Thing*, when the *Dillon v. Legg*¹⁷³ guidelines were not mandatory, courts often prevented recovery.¹⁷⁴ Now that the same guidelines are mandatory, defendants should have no problem citing pre-*Thing* cases to argue that courts should deny recovery.¹⁷⁵ Defendants can also argue unlimited liability if the three conditions¹⁷⁶ are not met—reasoning that had been very persuasive with courts in the past.¹⁷⁷ As a final argument, defendants can argue that the injury was completely unforeseeable in any event.

If denial of the existence of a claim fails, defendants can try to limit their losses by asserting a comparative negligence¹⁷⁸ or assumption of risk defense.¹⁷⁹ Whether their defenses apply in emotional distress cases remain unsettled areas of the law, but the California Supreme Court addressed a somewhat analogous theory in *Justus v. Atchison*.¹⁸⁰ In *Justus*, the court concluded that volunteering to witness an inherently dangerous and traumatic event such as childbirth precluded bystander NIED recovery in this case.¹⁸¹

172. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

173. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

174. See *supra* notes 40-56 and accompanying text.

175. For example, a defendant's argument could be articulated as follows: One appellate court found that arriving at the scene of the accident five minutes after it occurred precluded recovery because the "contemporaneous observation" guideline was not satisfied. See *Arauz v. Gerhardt*, 68 Cal. App. 3d 937, 940-49, 137 Cal. Rptr. 619, 621-27 (1977). Now that satisfaction of the same guideline is mandated, five minutes again precludes recovery.

176. 68 Cal. 2d 728, 740-41, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968).

177. See *supra* notes 40-56 and accompanying text.

178. In *Chambers v. United States*, a father of a boy who was struck by a postal vehicle was awarded damages for a NIED claim. However, the court reduced his recovery by twenty percent due to his contributory negligence in his failure to supervise the child. 656 F. Supp. 1447, 1457-59 (S.D. Tex. 1987).

179. In *Herman v. Welland Chemical Ltd.*, the defendant urged the dismissal of a NIED claim based on the so-called "fireman's rule," which is predicated on the doctrine of assumption of risk. 580 F.Supp. 823, 830-33 (M.D. Pa. 1984). Under the fireman's rule a person whose ordinary negligence causes a fireman to be present at the scene of an emergency is not liable to the fireman injured in the course of his duties. *Id.* at 830. The court acknowledged the existence of this defense, but denied its use in this case since the firemen, whose wives asserted the NIED claim, were volunteers. *Id.* at 832. The claims for emotional distress were dismissed on other grounds. *Id.* at 833-36.

180. 19 Cal. 3d 564, 585, 565 P.2d 122, 136, 139 Cal. Rptr. 97, 111 (1977). Although the court did not go so far as to invoke the assumption of risk doctrine, the court stated, "the ever-present possibility of emotional distress dissuades us from extending the *Dillon* rule into the operating amphitheater in these circumstances." *Id.*

181. *Id.* at 585, 565 P.2d at 136, 139 Cal. Rptr. at 111.

The "direct victim," products liability and fiduciary duty arguments pose difficult problems for defendants to overcome because such arguments circumvent the three *Dillon/Thing* requirements.¹⁸² Defendants under these circumstances should persuade courts to utilize the analysis in *Thing* rather than extend the cause of action in a manner that defeats the limited liability upon which defendants rely.

Precedent is sufficiently inconsistent to provide favorable grounds for both sides. Many courts were operating under rules similar to the guidelines set forth in *Thing* prior to 1989, but still managed to reach inconsistent results.¹⁸³ *Stare decisis* will not operate conclusively in favor of either side. Indecision over when recovery is appropriate will continue despite what the majority in *Thing* would have us believe.

VII. CONCLUSION

The decision reached by the California Supreme Court in *Thing v. La Chusa*¹⁸⁴ reflects the issues and confusion that have plagued bystander NIED claims since 1968. The court met its stated obligation to "create a clear rule under which liability may be determined,"¹⁸⁵ but it failed to provide a workable standard. The inherent flaws of strict rules for limiting this type of tort action continue to go unaddressed. Courts have shown already that following the rules mandated in *Thing* will lead to inconsistent, unprincipled results. Ironically, *Dillon v. Legg*,¹⁸⁶ the decision which sought to expand recovery for bystander NIED by doing away with artificial and arbitrary rules, is now being used as the model for restricting the cause of action. Reasonable foreseeability of injury, upon which the *Dillon* court strongly relied, was rejected in *Thing* as not providing sufficient limitations of defendant liability.

The *Thing* majority offered no proof of the need for hard rules or the inherent inadequacy of reasonable foreseeability as a check on fraudulent claims. Despite the alternatives offered by thoughtful commentators, the California Supreme Court chose to follow an extremely restrictive course of action that is filled with loopholes. Rather than easing uncertainty and confusion, the court has ensured that inconsistency will continue to plague this cause of action.

182. See *supra* notes 164-66 and accompanying text.

183. See *supra* notes 40-56 and accompanying text.

184. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

185. *Id.* at 664, 771 P.2d at 827, 257 Cal. Rptr. at 878.

186. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

