Champion v. Gray, 420 So. 2d 348 (Fla. 5th DCA 1982)

David Richard Lenox
Tort Law—Negligent Infliction of Emotional Distress—Should the Florida Supreme Court Replace the Impact Rule with a Foreseeability Analysis? Champion v. Gray, 420 So. 2d 348 (Fla. 5th DCA 1982)

Karen Champion, the child of Joyce and Walton Champion, was struck and killed by the defendant’s automobile as she walked next to a roadway. The defendant was intoxicated at the time he lost control of his auto. Shortly following the accident, Joyce Champion arrived at the scene and discovered the body of her daughter. Overwhelmed by grief and shock at her tragic discovery, Joyce collapsed and subsequently died. Walton Champion filed suit against the defendant driver and the defendant insurance companies alleging that the deaths of his daughter and wife were directly and proximately caused by the negligence of the defendant.

The lawsuit filed on behalf of the deceased daughter was allowed by the trial court. In keeping with the requirements of Florida’s impact rule, however, the wife’s suit for negligent infliction of emotional distress was dismissed. The trial court found that because the defendant’s negligent act resulted in no physical contact upon Mrs. Champion, the impact rule mandated a denial of recovery. On appeal, the Fifth District Court of Appeal reluctantly affirmed the decision of the trial court in form but not in spirit.

Dissatisfied with the injustice which resulted from the application of the impact rule to this case, the court certified to the Florida Supreme Court the question of whether Florida should abrogate the impact rule. The court found it sensible and logical that Florida align itself with the majority of jurisdictions which have abandoned the impact rule inasmuch as many of the underlying justifications for the rule have been repeatedly refuted. After examining the experiences of other jurisdictions, the court stated that the elimination of the impact rule would not lead to an inun-

1. Champion v. Gray, 420 So. 2d 348, 349 (Fla. 5th DCA 1982).
2. See infra notes 49-56 and accompanying text.
3. Champion, 420 So. 2d at 349.
4. Id.
5. Id.
6. Id. at 354.
7. Id. at 350. See id. at 349 n.1 for the court’s delineation of jurisdictions which have abrogated the impact rule.
8. Id. at 350-51.
dation of fraudulent claims of negligently inflicted mental distress, and that the reasons supporting the rule are shallow and insufficient to justify the arbitrary denial of meritorious claims based upon the fear that fictitious ones will slip past judicial scrutiny. The court concluded that such an expansive prohibition of recovery to legitimate claims “does not comport with the justice required by [Florida’s] constitution.”

The court was careful to distinguish between recovery for a direct victim who had suffered physical injuries due to negligently inflicted mental distress, absent impact, and the recovery it proposed to extend to a “bystander.” In the former case, the court stated simply that a direct victim should be able to maintain an action for his mental distress without having to allege impact. The court clearly rejected both the impact rule and the zone of danger test as artificial impediments to meritorious claims. These rules illogically presume that many fraudulent claims will result if the defendant’s liability is extended beyond impact or the zone of danger to include the mental distress suffered by parents who have the misfortune of observing their child’s violent death from a safe distance.

The court suggested that the old-fashioned tort concepts of negligence and reasonable foreseeability be substituted for the anachronistic impact rule. Specifically, it adopted the Dillon v. Legg enunciation of the foreseeability analysis and the application of the Dillon three-part test to the bystander setting. The court stated that under the foreseeability approach, Mrs. Champion might have recovered because it was foreseeable that if one negligently operates a vehicle so as to injure someone, there would be other individuals emotionally attached to the injured person who would thereby be affected. Additionally, the court recognized that the

9. Id. at 350.
10. Id.
11. Id. at 351.
12. Id. In the bystander setting, the plaintiff experiences no impact or fear for his safety but suffers emotionally induced physical injuries at the sight of injury to a third person. Id.
13. See infra notes 80-87 and accompanying text.
14. Id. at 350-52.
15. Id. at 350.
16. Id. at 352.
17. 69 Cal. Rptr. 72 (Cal. 1968).
18. Champion, 420 So. 2d at 353. For a statement of the Dillon test, see infra text accompanying note 95.
19. Id. at 352 (citing Dziokonski v. Babineau, 380 N.E.2d 1295, 1302 (Mass. 1978)).
emotional harm must manifest itself in a physical injury. 20

The purpose of this note is to explore the following issues: (1) Should the Florida Supreme Court abrogate the impact rule? (2) Under the facts of Champion, is the Dillon foreseeability approach the most appropriate substitute for the impact rule? (3) Finally, should Florida retain the physical injury requirement to prevent the unlimited expansion of liability?

I. NEGLIGENT INFLICTION OF MENTAL DISTRESS

The recognition of negligent infliction of mental distress as a cause of action is a recent development in tort law. 21 Traditionally, the fear of fictitious claims and the problems of medical proof are two of a litany of reasons fervently chanted each time the question of creating an independent tort for negligent infliction of emotional distress is raised. 22 Initially, the courts allowed recovery for emotional distress arising as parasitic damages from the breach of an independent common law duty. 23 Because the defendant owes a primary duty not to unreasonably violate the physical integrity of the plaintiff, any injuries suffered by the plaintiff due to a breach of that duty provide a parasitic basis for recovering damages for mental distress. 24 While the rule of no recovery generally persisted, the courts extended protection to mental distress when the dangers of limitless liability and fictitious claims were outweighed by the guarantee that the plaintiff's claim was genuine. 25 The courts fashioned the traditional tests of impact and zone of danger, so that if the plaintiff could show that he fell within the boundaries of these tests, he could recover for his mental distress. The tests allowed the courts to distinguish between legitimate and illegitimate claims and to prevent the imposition of liability on the negligent tortfeasor disproportionate to the degree of his culpability. Some jurisdictions found these tests to be poor measures of the defendant's liability and actively harmful by denying meritorious claims

20. Id. at 353.
24. 2 HARPER & JAMES, supra note 23, § 18.4, at 1032.
25. PROSSER, supra note 21, § 54, at 328.
that failed to meet their arbitrary requirements. These courts recognized that a defendant has a duty to avoid the negligent infliction of mental distress and that a defendant's liability would be measured by the general tort concept of foreseeability.26

A. The Impact Rule

A century ago, the courts in England began to recognize the need to provide compensation for physical injuries resulting from the infliction of mental distress. Confronted with such problems as the primitive medical knowledge existing in the field of mental health and the possibility of fraudulent claims, the first courts developed a formula for measuring the limits of liability based on an artificial barrier. Today, that formula is commonly known as the impact rule,27 characterized by the requirement "that absent physical impact upon the plaintiff, damages may not be recovered for mental anguish or physical injury resulting from emotional stress caused by the negligence of another."28

The impact rule is a product of English law, and was first recognized in Victorian Railways Commissioners v. Coultas.29 The rule's precedential value was undermined only a few years later, however, when the court opted for a zone of danger analysis rather than the impact rule.30 Ultimately dissatisfied with both of these tests, the King's Bench rejected them and molded a foreseeability analysis to measure the boundaries of liability in mental distress cases.31

27. To define impact as "physical impact" merely begs the question. Jurisdictions following the rule generally mean that the defendant's negligent act must result in a physical "contact" with the plaintiff. See Arcia v. Altagracia Corp., 264 So. 2d 865 (Fla. 3d DCA 1972) (plaintiff denied recovery because no impact occurred when falling plaster narrowly missed her). But see Hoitt v. Lee's Propane Gas Service, Inc., 182 So. 2d 58 (Fla. 2d DCA 1966), cert. denied, 188 So. 2d 816 (Fla. 1966) (plaintiff granted recovery where gas tank explosion had no impact on plaintiff but caused her to collide with another employee as she fled from the scene). Thus, Florida courts will grant recovery if the impact directly causes the plaintiff's injury or creates a situation in which injury is a foreseeable consequence of an impact-generated series of events.
28. Champion, 420 So. 2d at 349.
29. 13 App. Cas. 405 (P.C. 1888).
31. Hambrook v. Stokes Brothers, 1 K.B. 141 (1925). In Hambrook, plaintiff's wife saw an unattended lorry rushing around a bend in the road towards the spot where she had left her children. In fear for her children's safety, she rushed to the accident sight finding her daughter seriously injured. The mother, pregnant at the time, lost her unborn child and died from the shock resulting from the accident.
New York became the first jurisdiction in the United States to adopt the impact rule. Following the New York example, a number of other jurisdictions adopted the rule. As its shortcomings became more evident, however, the majority of states employed other standards for measuring liability. The reasons justifying the rule are varied and they reflect a general reluctance by the courts to expansively define the limits of liability.

One major rationale supporting the impact rule is the fear that fraudulent claims will succeed because of the inability of medical science to measure emotional injuries. It was thought that these problems in medical diagnosis and causation might be avoided by requiring impact as a guarantee of the genuineness of the emotional distress. This rationale is a product of the nineteenth century and fails to take into account the significant progress medical science has made in the area of diagnosing the causal connection between physical injuries and emotional injury. It also fails to consider that emotional distress can result in illnesses comparable in severity to physical injuries.

Justice Roberts of the Pennsylvania Supreme Court rejected the traditional position that the uncertainty of medical proof of emotional distress militates against recovery when he wrote:

It appears completely inconsistent to argue that the medical profession is absolutely unable to establish a causal connection in the case where there is no impact at all but the slightest impact... suddenly bestows upon our medical colleagues the knowledge and facility to diagnose the causal connection between emotional


34. Spade v. Lynn & Boston R.R., 47 N.E. 88, 89 (Mass. 1897); Huston v. Freemansborough, 61 A. 1022, 1023 (Pa. 1905) (plaintiff's husband received shock from nearby explosion of dynamite while recovering from typhoid fever and died two weeks later—recovery denied as fright caused by explosion not connected with physical injury).


36. See Green, Injuries From Fright Without Contact, 15 Clev.-Mar. L. Rev. 331, 335 (1966); Smith, Relation of Emotion to Injury and Disease: Legal Liability for Psychic Stimuli, 30 Va. L. Rev. 193 (1944).

states and physical injuries. 38

Jurisdictions which have abandoned the impact rule are confident in their ability to detect fraudulent claims of mental distress. Some courts have determined that fraud in a "no-impact" jurisdiction should be no more prevalent than in an "impact" jurisdiction as evidence of "slight" impact can be readily manufactured. 39 Other courts have shown that the inherent integrity of the court system, based on sound rules of evidence, the concern of juries and the knowledge of expert witnesses, acts to discover and discourage fraudulent claims. 40 If the courts are satisfied that fraud can be detected in cases of trivial impact, it seems logical that the same judicial and medical competence can be applied to separate the fraudulent from the meritorious claims in non-impact cases.

Proponents of the impact rule usually rely on the outmoded fear that its abolition will open the flood gates of litigation. 41 This fear simply has not been realized in those states which have abrogated the rule; indeed, the greatest volume of litigation on emotional distress claims continues to be in those jurisdictions requiring impact. 42 It is not surprising that litigation and fraud would be more prevalent in impact jurisdictions. The plaintiffs in these cases have every incentive to perjure themselves "in constant attempts to fit within [the impact rule]" or to litigate in order to alter the impact rule. 43

Stare decisis has been offered as another reason for retaining the impact rule, 44 but this argument overlooks the fact that stare decisis is necessarily limited in the field of torts. 45 Tort law is constantly evolving as it attempts to measure the duties members of society owe each other and the liabilities they will incur for the breach of these duties. The courts should not allow stare decisis to

40. Robb v. Pennsylvania R.R., 210 A.2d 709, 714 (Del. 1965) (woman fled from her car to avoid being hit by a train—recovery allowed despite lack of impact); Falzone v. Busch, 214 A.2d 12, 16 (N.J. 1965) (plaintiff allowed to recover for injuries resulting from defendants negligent handling of an automobile causing her to fear for her safety).
41. Mitchell, 45 N.E. at 354.
44. Huston v. Freemansborough, 61 A. at 1023.
45. Falzone, 214 A.2d at 17.
EMOTIONAL DISTRESS

inscribe formalistic and eternal commandments in the tablets of the common law when the needs of justice mandate a change. 46

The ultimate failure of the impact rule is that, as an artificial barrier to undue liability, its mechanical application creates harsh and unjust results. 47 Plaintiffs who are physically endangered by a defendant’s negligence or who witness an emotionally disturbing accident cannot recover for their mental distress unless they can prove the requisite “impact.” Sensitive to the considerable injustice the application of the rule generates, those jurisdictions retaining the rule have gone to great lengths to find impact from “the most trivial contact.” 48 But not even refining the nature of the impact requirement to include trivial contacts is sufficient to save the rule. Including trivial impacts within the rule arguably only serves to undermine its purpose; to guarantee the genuineness of the plaintiffs’ claims of mental distress. Trivial impacts make the fraudulent manufacture of evidence to support the plaintiffs’ claims much simpler.

B. The Impact Rule in Florida

In International Ocean Telegraph v. Saunders, 49 the Florida Supreme Court apparently adopted an early version of the impact rule. The plaintiff in that case sued the defendant for mental anguish caused by the defendant’s failure to promptly forward a telegram describing the fatal condition of the plaintiff’s wife. 50 Despite the trend to allow recovery, absent impact, for mental distress resulting from the negligent handling of telegrams, 51 the court

47. As one Florida district court asked: “What therefore is so magical about ‘impact’ that makes its presence a guarantee of the authenticity of mental disturbances but makes its absence a supposed spawning ground for fakery?” Stewart v. Gilliam, 271 So. 2d 466, 473, rev’d, 291 So. 2d 593 (Fla. 1974). E.g. Carey v. Pure Distrib. Co., 124 S.W.2d 847 (Tex. 1939).
49. 14 So. 148 (Fla. 1893).
50. Id.
51. Western Union Tel. Co. v. Cleveland, 53 So. 80 (Ala. 1910); Cumberland Tel. & Tel. Co. v. Quigley, 112 S.W. 897 (Ky. 1906); Russ v. Western Union Tel. Co., 23 S.E.2d 681 (N.C. 1943); Connelly v. Western Union Co., 40 S.E. 618 (Va. 1902).
reasoned that mental distress posed “an insurmountable difficulty to measure” and denied recovery because of the impossibility of compensation.\textsuperscript{52}

Although several district courts of appeal have challenged the rule,\textsuperscript{53} Florida continues to adhere to it. The impact rule was reaffirmed in \textit{Gilliam v. Stewart},\textsuperscript{54} where the defendants were negligently driving their cars when the automobile collided on the street near the plaintiff’s home. The force of the accident propelled their cars onto the plaintiff’s front lawn, causing one car to strike a tree and the other to strike the plaintiff’s house. Plaintiff was lying in bed when she heard the accident and the thud of the car striking the house. Shortly following the accident, she experienced chest pains for which she was hospitalized. Approximately a month later plaintiff died from the heart attack caused by the excitement of the accident. In reversing the decision of the lower court granting recovery, the Florida Supreme Court gave little attention to Judge Mager’s convincing opinion in the district court of appeal for the abolishment of the impact rule.\textsuperscript{55} The court did state, however, given the right case, that “if this Court should reach the conclusion that such rule was inequitable, impractical or no longer necessary, it may be, judicially, altered or abolished.”\textsuperscript{56}

More recently, one district court has indicated that even the impact itself must be sufficiently substantial before the plaintiff can recover.\textsuperscript{57} In \textit{Davis v. Sun First National Bank}, the court denied recovery to a bank teller in her suit against the bank for negligent infliction of mental distress, holding that the act of a robber in handing her a holdup note did not constitute physical impact.\textsuperscript{58}

Under more compelling facts, the application of the impact rule in Florida has resulted in grossly unfair and unjust results. In 1979, the First District Court of Appeal reluctantly applied the impact rule to deny recovery to relatives suffering emotional distress on observing the decedent’s casket fall apart while being transported

\begin{itemize}
  \item \textsuperscript{52} Saunderson, 14 So. at 151. The court reasoned: “The resultant injury is one that soars so exclusively within the realms of spirit land that it is beyond the reach of the courts to deal with, or to compensate by any of the known standards of value.” \textit{Id.} at 152.
  \item \textsuperscript{53} Champion, 420 So. 2d 348 (Fla. 5th DCA 1982); Johnson v. Herlong Aviation, Inc., 271 So. 2d 226 (Fla. 2d DCA 1972); Stewart, 271 So. 2d 466 (Fla. 4th DCA 1972).
  \item \textsuperscript{54} 291 So. 2d 593 (Fla. 1974).
  \item \textsuperscript{55} \textit{Id.} at 595.
  \item \textsuperscript{56} \textit{Id.}
  \item \textsuperscript{57} Davis v. Sun First Nat’l Bank, 408 So. 2d 608 (Fla. 5th DCA 1981).
  \item \textsuperscript{58} \textit{Id.} at 609-610.
\end{itemize}
from the hearse to the grave. Given this factual setting, the impact rule goes far beyond its goal of ensuring genuine claims and acts as a total bar to all cases involving the negligent handling of corpses where the plaintiffs have the misfortune of not being struck by the body as it falls from the defectively manufactured casket. Harvey Garod illustrates the consequences of the application of the rule here:

The impact rule brings about peculiar results. It must be assumed that none of Mrs. Harper's relatives were pallbearers. Had they been, the collapsing coffin or descending body inside would have provided sufficient impact upon the pallbearers to allow them to bring an action for any mental disturbance they might have suffered. Nonrelatives could sue, but the decedent's next of kin, who merely had to watch this macabre event, could not. A more egregious result occurred in Woodman v. Dever. The plaintiff child, her sister and her mother were staying in the defendant's motel when an intruder entered the room. As the child watched, the intruder proceeded to rob and rape the mother. The court denied recovery to the child for her emotional distress. In applying the impact rule, the court found that the defendant had not acted with malice, entire lack of care or great indifference for the plaintiff's person which are the traditional Florida exceptions to the rule.

Florida courts have recognized the inapplicability of the impact rule in two major areas. The rule has been suspended in cases where the injury has resulted from an intentional infliction of mental distress or in which the defendant acted maliciously. The district court of appeal in Way v. Tampa Coca Cola Bottling

61. 367 So. 2d 1061 (Fla. 1st DCA 1979).
62. Id. at 1063.
63. Kirksey v. Jernigan, 45 So. 2d 188 (Fla. 1950). In Kirksey, the defendant transported the plaintiff's decedent child to the defendant's funeral home without the plaintiff's authorization. The defendant refused to return the body until the plaintiff paid an embalming fee. Given the outrageous conduct of the defendant, the court permitted recovery. But see Estate of Harper v. Orlando Funeral Home Inc., 366 So. 2d 126 (Fla. 1st DCA 1979), where recovery was denied for the negligent handling of the plaintiff's decedent mother because the plaintiff failed to allege impact.
Co.\(^6\) appears to have abandoned the 'impact requirement for mental distress caused by the consumption of defectively packaged foodstuffs. In Way, the plaintiff became severely nauseated when he discovered an object resembling a hairless rat in the bottle of Coca Cola he was drinking.\(^6\) In granting the plaintiff a recovery, the court chose to follow Maine's lead\(^6\) by adopting a foreseeability standard\(^6\) in cases of mental distress stemming from this kind of products liability.

Our courts have given comparatively little attention to the effect of the impact rule in bystander cases such as Champion.\(^6\) The view of the district court opinions dealing with bystander situations has been to deny recovery to the mentally distressed bystander. In City Stores v. Langer,\(^7\) for example, the plaintiff sought relief for the pain, embarrassment and humiliation he suffered on learning that his daughter had been arrested for shoplifting.\(^7\) While not referring to the impact rule the court stated: "the rule has been recognized that there can be no recovery by a parent in action for injuries to his minor child, for the suffering, pain, embarrassment and/or humiliation caused the parent by the injuries of the child."\(^7\)

By 1981, one district court had applied the impact rule to deny recovery in a bystander case. In Selfe v. Smith,\(^7\) the plaintiff and her infant child were injured when the defendant's vehicle struck the pickup truck in which they were riding.\(^7\) The plaintiff experienced mental distress on seeing the permanent facial injuries her son suffered.\(^7\) The court found the source of the emotional distress to be the sight of the child's injuries and stated:

But satisfying the "impact rule"—which is defended as verifying otherwise problematic injuries, or as drawing a needed if somewhat arbitrary line between compensable injuries and those that

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65. 260 So. 2d 288 (Fla. 2d DCA 1972).
66. Id.
68. Way, 260 So. 2d at 290.
69. Champion, 420 So. 2d at 351.
70. 308 So. 2d 621 (Fla. 3d DCA 1975).
71. Id. at 622.
72. Id.
73. 397 So. 2d 348 (Fla. 1st DCA 1981).
74. Id. at 349.
75. Id.
society requires be borne unrecompensed—until now has gained plaintiff damages for only that mental distress which is due to plaintiff's own injury, or to the traumatic event considered in relation to plaintiff alone.\textsuperscript{76}

The impact rule, however, has not served as an absolute bar to recovery in "bystander" cases. In \textit{National Car Rental v. Bostic},\textsuperscript{77} the court creatively distinguished the \textit{Selfe} decision to allow recovery for the mental distress the plaintiff experienced at watching his mother die slowly following a traffic accident. The car in which the plaintiff and his mother were riding was struck by the defendant's negligently driven vehicle. Because of the injuries he received, the plaintiff was unable to comfort his mother in her final moments.\textsuperscript{76} The court granted recovery stating:

The evidence showed that Bostic's emotional problem was caused by his inability to render aid and comfort to his mother because of the injuries and impact suffered by Bostic which had rendered him physically unable to come to her aid. Therefore, we find no error in permitting into evidence testimony of Bostic's mental pain and suffering caused by his being present when his mother was killed.\textsuperscript{79}

Neither \textit{Selfe} nor \textit{National Car Rental} provide grounds for Mrs. Champion to recover for the mental distress she experienced on seeing the body of her child. Under these cases, the bystander must be a direct victim of the impact to recover. The injustice of the rule is clear.

\textbf{C. The Zone of Danger Test}

The arbitrariness of the impact rule spurred some jurisdictions to supplant it with the zone of danger test.\textsuperscript{80} This new creation required only that the plaintiff be within the zone of peril of physical injury in order to recover for his mental distress.\textsuperscript{81} It was hailed to be a significant improvement over the impact rule because it did not preclude recovery in bystander cases in which the plaintiff alleges mental distress from witnessing injury or peril to a third per-

\textsuperscript{76} Id. at 350 (footnote omitted).
\textsuperscript{77} 423 So. 2d 915 (Fla. 3d DCA 1982).
\textsuperscript{78} Id. at 916.
\textsuperscript{79} Id. at 917.
\textsuperscript{81} Waube v. Warrington, 258 N.W.497, 500-01 (Wis. 1935).
son. Furthermore, it was believed the test would ensure the genu-
ininess of the plaintiff's claim as it is reasonably foreseeable that a
bystander plaintiff would suffer emotional distress if he feared for
his well-being.82

The zone of danger test, which has been adopted by the Restate-
ment (Second) of Torts,83 has achieved wide spread popularity84 in
part because it seems to present a sensible solution to the problem
of unlimited liability. But this "sensible solution" has been re-
jected by some jurisdictions as a "hopeless artificiality"85 because
it denies recovery just as arbitrarily as the impact rule.86 Liability
under the test is not predicated on the consequences of the defen-
dant's negligence; rather, the test focuses on a geographic analysis
of the zone of danger in each case. Two bystanders may suffer
equally devastating emotional distress but only one may be able to
recover because of the mere fortuity of being several feet closer to
the accident and therefore within the zone of danger. Unjust con-
sequences inevitably result. While a relative could recover for the
negligent handling of a corpse, a mother who watched a nurse drop
her newborn baby to the floor was denied recovery for her mental
distress simply because she was outside the zone of danger.87

Dissenting in Stewart v. Gilliam,88 Justice Adkins urged the
Florida Supreme Court to adopt the zone of danger test. Justice
Adkins traced the origin and evolution of the impact rule and its
ultimate demise in other jurisdictions. He pointed out that even in
Florida there has been a gradual erosion of the "strict requirement
of impact."89 Because the reasons underlying the rule lack the
force or logic of justice, he concluded that the zone of danger test
provides an equitable alternative to the rule.90 While Mrs. Stewart
could recover for her fright under the zone of danger test, it is

82. Bowman v. Williams, 165 A. 182, 184 (Md. 1933); Guilmette v. Alexander, 259 A.2d
12 (Vt. 1969).
83. RESTATEMENT (SECOND) OF TORTS § 313 (2) (1965). For an interesting discussion of
the zone of danger test, see Pearson, Liability to Bystanders for Negligently Inflicted Emo-
84. 2 HARPER & JAMES, supra note 23, § 18.4, at 1037 (1956). There is a split among
those jurisdictions retaining the zone of danger test. Some jurisdictions, as in Tobin, require
the plaintiff to have feared for his own safety. Others, as in Bowman, permit recovery for
plaintiffs within the zone of danger who feared for the well-being of another.
85. Dillon, 69 Cal. Rptr. at 75.
87. Whetham v. Bismarck Hospital, 197 N.W.2d 678 (N.D. 1972).
88. 291 So. 2d at 596.
89. Id. at 601.
90. Id. at 602.
equally clear that such a test would deny recovery to Mrs. Champion because she was never within the area of physical risk. This result defies explanation. What possible policy considerations can justify compensation for Mrs. Stewart’s injury and yet deny recovery to Mrs. Champion who died from the grief of seeing the body of her negligently killed daughter?

D. Foreseeability

Concerned over the inequities resulting from the mechanical application of the traditional tests, the California Supreme Court rejected the zone of danger test in *Dillon v. Legg* in favor of a foreseeability approach. The facts of *Dillon* were compelling. The defendant killed a child with his car while the child’s sister and mother watched. By a distance of only a few feet, the sister was found to be within the zone of danger but the mother was not.

The court permitted recovery for the mother because the dual fears of fraud and unascertainable claims were not involved in this factual setting. Fraud was minimized because there could be no “doubt that a mother who sees her child killed will suffer physical injury from shock.” Additionally, the court reasoned that the mere possibility of fraud should not be used to strike down meritorious claims or to abandon the general tort principles of foreseeability and proximate cause. The court was satisfied that traditional tort principles would impose acceptable boundaries to liability. It held that a defendant would be liable for injuries to others if these injuries were reasonably foreseeable to the defendant at the time of the negligent act. In determining if the defendant should reasonably foresee an injury to the plaintiff, the court established three major “guidelines:”

1. Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it.
2. Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence.
3. Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of

91. 69 Cal. Rptr. 72, 80-81 (Cal. 1968).
92. *Id.* at 77.
93. *Id.* at 78.
94. *Id.* at 79.
only a distant relationship.\textsuperscript{95}

The \textit{Champion} court advocated a verbatim acceptance of the \textit{Dillon} test.\textsuperscript{96} The most obvious difficulty with this position is that the Florida court accepted California's law as of 1968 without considering subsequent decisions of that state's courts interpreting the \textit{Dillon} guidelines. In fact, the general trend in California has been to transform the flexible \textit{Dillon} foreseeability guidelines into immutable requirements, from which the slightest variation have results in a denial of recovery. A number of cases which have devoted considerable analysis to the \textit{Dillon} guideline of contemporaneous sensory perception of the injury-inducing event have concluded that it is an absolute prerequisite to recovery, and that plaintiffs who failed to prove this element are to be denied recovery.\textsuperscript{97}

Shortly after the \textit{Dillon} decision, a California court of appeals seemed to retreat from the contemporaneous sensory perception requirement. In \textit{Archibald v. Braverman},\textsuperscript{98} plaintiff's son suffered injuries requiring amputation after gunpowder unlawfully sold to him by the defendant exploded. Within moments of the explosion, the plaintiff arrived and suffered such severe shock at the sight of her son's injuries that she had to be institutionalized.\textsuperscript{99} The court allowed the plaintiff to recover for her mental distress because her observation was sufficiently "contemporaneous" with the accident.\textsuperscript{100} It interpreted the \textit{Dillon} guideline to require that the plaintiff actually witness the accident or, as in \textit{Archibald}, that the shock be "fairly contemporaneous with the accident."\textsuperscript{101}

\textit{Archibald} was distinguished in \textit{Arauz v. Gerhardt},\textsuperscript{102} in which although Mrs. Arauz arrived at the scene within five minutes of the accident that injured her son, the court denied recovery.\textsuperscript{103} A closer reading of the \textit{Dillon} guideline, the court said, would reveal that "some type of sensory perception of the impact contemporaneous

\begin{footnotesize}
\begin{enumerate}
\item[95.] Id. at 80.
\item[96.] \textit{Champion}, 420 So. 2d at 353.
\item[97.] For a broad overview of the evolution of \textit{Dillon} since its inception, see Nolan & Ursin, \textit{Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos}, 33 Hastings L.J. 582 (1982).
\item[99.] Id. at 724.
\item[100.] Id. at 725.
\item[101.] Id.
\item[102.] 137 Cal. Rptr. 619 (Cal. Ct. App. 1977).
\item[103.] Id. at 627.
\end{enumerate}
\end{footnotesize}
with the accident is necessary to meet the *Dillon* requirement."  

This perception was absent in *Arauz* but existed in *Archibald* because the results of the explosion were so shocking that the plaintiff could "mentally reconstruct" the scene of the accident.

If the particular facts of a case failed to convince the court that the plaintiff could have mentally visualized the accident, recovery was denied regardless of how quickly the plaintiff arrived on the scene of the injury. While the lapse of thirty to sixty minutes between the injury producing event and the plaintiff's discovery of it was clearly beyond the *Dillon* guideline, the passage of even a moment or two has been held insufficient to justify recovery.

The *Archibald* analysis surfaced later in *Nazaroff v. Superior Court*. The plaintiff's infant son fell into a neighbor's pool as she searched the neighborhood for him. Plaintiff heard the neighbor cry, "it's Danny," and as she ran to the pool area she visualized that Danny had injured himself in the pool. She arrived to see Danny being pulled from the pool and subsequently suffered mental distress. Holding that a contemporaneous sensory observation was a question of fact, the court permitted recovery because the plaintiff's visualization of the accident qualified as a *Dillon* perception. Further, because death by drowning is not instantaneous, it was possible that the boy was still experiencing his injuries at the time the plaintiff entered the pool area. Similarly, in *Krouse v. Graham*, the plaintiff was sitting in the driver's seat of his car as his wife unloaded groceries from a rear door. The defendant, driving negligently, struck the plaintiff's car from the rear killing plaintiff's wife. Although plaintiff did not see his wife die, he did see the defendant's car approach and realized that his wife must have been injured. The court granted recovery, characterizing the plaintiff as a percipient witness and noting that *Dillon* does not demand actual visual observance of the event.

The California courts, however, have been unwilling to liberalize

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104. *Id.*
105. *Id.* at 626.
109. *Id.* at 659.
110. *Id.* at 664.
111. *Id.*
112. 137 Cal. Rptr. 863 (Cal. 1977).
113. *Id.* at 872.
the Dillon standard to grant recovery to meritorious claims when it is unclear whether the plaintiff had sensorily perceived the accident. In Jansen v. Children's Hospital Medical Center,114 defendant's physician negligently diagnosed and treated the plaintiff's daughter, resulting in a slow death for the child.115 Even though the plaintiff observed her daughter's death, she was denied recovery.116 Dillon, the court reasoned, does not extend to a case involving the failure to diagnose or to negligently diagnose.117 Dillon requires the injury inducing event, not the results of negligence, to be capable of sensory perception and a mere "failure of diagnosis . . . is not an event which can itself be perceived by the layman."118 The court factually distinguished Archibald, by stating that the plaintiff there had heard the explosion and therefore sensorily perceived it.119 Four years later the Jansen reasoning was reflected in Justus v. Atchison.120 In Justus, the plaintiff was present in a hospital delivery room while the defendant physician negligently tried to save the baby of plaintiff's wife.121 The court found that mere presence was insufficient, and the plaintiff must have a sensory perception of the injury.122 Justus was not followed in the factually similar case of Mobaldi v. Board of Regents of the University of California.123 In Mobaldi a physician negligently injected plaintiff's son with a powerful glucose solution and plaintiff witnessed her son suffer severe convulsions resulting in brain damage.124 The court overturned the trial court demurrer despite the fact that the plaintiff was unaware that defendant's negligence injured her son.125

The irony of these subsequent California decisions is that they have molded Dillon's contemporaneous sensory observance standard into a barrier as arbitrary and artificial as the tests it was meant to replace. Temporal and geographic proximity are promoted again to be the prime determiners of liability, and those

115. Id. at 884.
116. Id. at 885.
117. Id.
118. Id.
119. Id.
120. 139 Cal. Rptr. 97 (Cal. 1977).
121. Id. at 99-100.
122. Id. at 110-11.
124. Id. at 723.
125. Id. at 728.
plaintiffs who fail to meet this requirement are denied recovery. These results seem to violate the spirit and the intent of Dillon. If the Florida Supreme Court adopts an unaltered version of Dillon, as suggested by the district court, our courts may well be plunged into the same quagmire in which the California courts find themselves. For Mrs. Champion, there still would be no recovery under the contemporaneous sensory observance requirement.

In other jurisdictions Dillon has not been met with universal acclaim. Some jurisdictions flatly reject the foreseeability analysis. Expressing misgivings about the Dillon approach, New York opted to retain the zone of danger test in Tobin v. Grossman. In that case, the plaintiff suffered mental distress after arriving on the scene of the child's injury. The court admitted that mental distress was foreseeable to the defendant but it rejected the Dillon standards as inadequate measures to limit liability.

Since Dillon the guidelines have evolved from flexible parameters of liability to carefully refined requirements, as other jurisdictions have interpreted those guidelines to provide better guidance to the courts. The Iowa Supreme Court recently accepted Dillon foreseeability as the appropriate test in bystander cases, but not without altering the Dillon test. In Barnhill v. Davis, the court's most dramatic change was to reduce Dillon's mandated but vague "close relationship" between the bystander and the plaintiff to that of "husband and wife or related within the second degree of consanguinity or affinity." As another guarantee of the genuineness of the claim, the court required that the plaintiff bystander actually fear that the victim would be seriously injured or killed and that a reasonable person in the plaintiff's position would also believe so. Finally, the bystander's emotional distress must be "serious." The court clarified that term by requiring the distress to be accompanied by physical symptoms. New Jersey closely parallels Barnhill in its requirements of a familial relationship except that the death or serious injury must be to the person viewing the injury producing event.

128. Id. at 560-61.
130. Id. at 108.
131. Id.
132. Id. at 107-08.
In a factual setting strikingly similar to *Dillon*, the Supreme Court of Pennsylvania in *Sinn v. Burd* 134 forcefully rejected the reasoning of the New York court and overruled its own formulation of the zone of danger test enunciated in *Niederman v. Brodsky*. 135 Foreseeability, the court reasoned, produced more equitable results than the zone of danger test in bystander cases and it reasonably circumscribed the area of liability. 136 The *Sinn* court also emphasized the importance of a familial relationship between the victim and plaintiff and granted recovery in that case because the victim was the plaintiff's child. The court chose not to decide, however, if recovery would be granted for a more remote relationship. 137

New Hampshire has also rejected both the impact rule and the zone of danger test in favor of the traditional tort concept of foreseeability. 138 In *Corso v. Merrill*, the plaintiff parents were granted recovery for the mental distress they suffered upon seeing the body of their daughter immediately after she was struck by a car. 139 The court applied the *Dillon* guidelines closely to the facts before it and found that the parents had contemporaneously perceived the accident. 140 The court varied little from the guidelines except to require the plaintiff's emotional harm to be serious and "accompanied by objective physical symptoms." 141

With some variation, most jurisdictions adopting *Dillon* require close compliance with that decision's guidelines, 142 but for Massachusetts, *Dillon* was clearly inadequate. In *Dziokonski v. Babineau*, 143 the plaintiff died as a result of the shock she suffered after arriving at the scene of her child's accident. 144 The court refused to adopt either the impact rule or zone of danger test, 145 stating that reasonable foreseeability was the only appropriate method

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134. 404 A.2d 672 (Pa. 1979).
137. *Id.* at 686 n.21.
139. *Id.* at 302.
140. *Id.* at 307.
141. *Id.* at 308.
144. *Id.* at 1296.
145. *Id.* at 1300.
of measuring liability in bystander cases. Of the several factors to determine foreseeability, the court held that the plaintiff may recover without alleging the contemporaneous sensory observance mandated in Dillon. Although the court specifically declined to follow that Dillon requirement, it did require a plaintiff to arrive on the scene of the accident while the injured person is there.

The district court in Champion curiously includes both the Dillon test and the key Dziokonski language abrogating the contemporaneous sensory observation requirement. One interpretation of this combination suggests that perhaps the Dziokonski language was meant to modify and add substance to the Dillon guidelines. But any attempt to synthesize the Dillon and Dziokonski language leads to confusion and uncertainty.

Dillon asserts that it is much more foreseeable that a plaintiff located near the scene of an accident will suffer mental distress than one located a distance away. Conversely, Dziokonski is oblivious to this "near-far" analysis and allows recovery for both a plaintiff at the scene and one arriving "soon" after the accident, regardless of the distance he had to travel. Furthermore, Dziokonski directly collides with Dillon's contemporaneous sensory observance requirement. While the Champion court may have meant to modify the Dillon "contemporaneous observances" standard to include observations made shortly after the accident, it is clear that in California "soon comes on the scene" does not mean "contemporaneous." Dillon also requires a sensory observance of the accident which Dziokonski specifically excuses by allowing recovery to plaintiffs who arrive too late to sensorially perceive the accident. It seems the only reconcilable similarity between the two decisions is the consideration of the degree of relationship between the victim and plaintiff.

Faced with the confusion Champion engenders, the supreme

146. Id. at 1302.
147. The court required: 1) substantial injury and proof of causation between the injury and defendant's negligence; 2) "where, when and how" the plaintiff learned of the injury should be considered; 3) the degree of relationship between the injured party and plaintiff is relevant. Id.
148. Id.
149. Id. But see Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690 (Mass. 1980), which goes beyond Dziokonski to allow recovery even where plaintiff first sees the victim's injury in a hospital.
150. Champion, 420 So. 2d at 353-54.
151. Dillon, 69 Cal. Rptr. at 80.
152. Dziokonski, 380 N.E.2d at 1302.
court must choose between the Dillon and Dziokonski standards if it adopts the foreseeability analysis. As the Dillon guidelines tend to deny recovery under factual settings similar to Champion, and merely replace one arbitrary standard with another, the better choice is Dziokonski.

E. Physical Injury

Regardless of the applicable standard for measuring liability, the Restatement and most jurisdictions, including Florida, require that the emotional distress manifest itself in some type of physical injury before recovery can be granted.153 The physical injury requirement satisfies two concerns of the courts. First, in reasoning reminiscent of decisions based on the impact rule, physical injury "serves as a screening device to minimize a presumed risk of feigned injuries and false claims."154 Secondly, physical injury also acts to limit the scope of the defendant’s potential liability.155 A fundamental problem with the physical injury approach is the difficulty of distinguishing between physical and mental injuries.156 If the injury is characterized as mental, then recovery is denied. The uncertain nature of some injuries has resulted in considerable confusion as to how they should be categorized.157

Generally, if the physical manifestation of the injury can be medically verified, it may be classified as a physical injury. Gradually, courts granted recovery for a variety of emotional disturbances and disorders by classifying them as physical injuries.158 Other “physical” injuries have included such uniquely emotional disorders as neurosis and shock.159


155. Restatement (Second) of Torts § 436A, comment b (1965).


EMOTIONAL DISTRESS

To date, only a handful of jurisdictions have rejected the physical injury requirement. The courts permitting recovery for purely emotional injury claims recognize that the distinction between emotional and physical injuries is artificial and is contradicted by the results of medical research in the field of emotional injuries. Medical experts agree that mental and physical injuries are not distinct types of harm, in that physical symptoms may be manifestations of mental distress.

Hawaii was the first jurisdiction to abandon the physical injury requirement. In Rodrigues v. State, the state road department negligently failed to clear drainage culverts causing storm waters to flood the plaintiff's home. Although the plaintiff did not witness the negligent event, the court granted recovery for the shock the plaintiffs experienced on finding their home flooded. More importantly, the court allowed recovery despite an absence of any physically manifested injury. The Rodrigues court held that a duty exists to refrain from the negligent infliction of serious emotional distress and that an individual's interests in freedom from this type of harm is entitled to independent legal protection. The court found that the duty extends to those individuals who are threatened by one's negligent conduct but "only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous." Recovery for serious mental distress is permitted "where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." Rodrigues is admittedly distinguishable from the usual mental distress case in that the mental injury arose from damage to property. However, a few years later,


161. See Wasmuth, Medical Evaluation of Mental Pain and Suffering, 6 CLEV.-MAR. L. REV. 7, 11-13 (1957).


164. Id. at 513.

165. Id. at 518 (emphasis in original).

166. Id. at 520.

167. Id. at 520.
Hawaii explicitly abolished the physical injury requirement where a plaintiff suffered shock without physical manifestation when he saw his grandmother killed by the defendant's car. The court in Leong v. Takasaki\(^{168}\) adopted the Rodrigues reasonable man standard and held that damages for emotional distress are recoverable without physical impact or physical injuries.\(^{168}\)

California has also demonstrated a willingness to dispense with the physical injury requirement.\(^{170}\) In Molien v. Kaiser Foundation Hospitals,\(^{171}\) the plaintiff's wife was negligently misdiagnosed as suffering from infectious syphilis. The defendants instructed her to inform the plaintiff of the diagnosis and to seek treatment. The wife erroneously suspected the plaintiff of having engaged in an extramarital sexual relationship and her hostility toward him destroyed their marriage. The California Supreme Court found the Dillon test to be "apposite, but not controlling."

In granting recovery, the court characterized the plaintiff as a "direct victim" of the negligence.\(^{172}\) While foreseeability would still be the applicable standard in "direct victim" cases, the formal Dillon guidelines are relevant only in third-party bystander settings where the plaintiff suffers mental distress at the sight of injury to another.\(^{174}\)

The Molien court was highly critical of the physical injury requirement. It is illogical, the court reasoned, to presume that emotional distress is less debilitating than physical injury and, therefore, less deserving of compensation.\(^{175}\) It also ridiculed the recognized distinction between physical and mental injury.\(^{176}\) By its very operation, the physical injury requirement defeats its own purpose of screening fraudulent claims. The rule is overinclusive, as the most trivial physical injury permits recovery. Similarly, it is underinclusive in that legitimate mental distress which fails to

\(^{168}\) 520 P.2d 758 (Hawaii 1974).

\(^{169}\) Id. at 765.


\(^{171}\) 167 Cal. Rptr. 831 (Cal. 1980).

\(^{172}\) Id. at 833.

\(^{173}\) Id. at 834.

\(^{174}\) Id.

\(^{175}\) Id. at 838.

\(^{176}\) The court stated: "the attempted distinction between physical and psychological injury merely clouds the issue. The essential question is one of proof; whether the plaintiff has suffered a serious and compensable injury should not turn on this artificial and often arbitrary classification scheme." Id. at 839.
EMOTIONAL DISTRESS

manifest itself physically will be dismissed promptly.\textsuperscript{177}

Problems of proof militate against wider rejection of the physical injury requirement. California and Hawaii courts are satisfied with this vague proof formulation: "[T]he general standard of proof required to support a claim of mental distress is some guarantee of genuineness in the circumstances of the case."\textsuperscript{178} The plaintiff has the option to prove his case through expert medical testimony\textsuperscript{179} or lacking such evidence, prove the defendant’s conduct and the plaintiff’s injury to the jurors, who rely upon their own experience to determine if a reasonable person would have been emotionally injured by the defendant’s act.\textsuperscript{180} The jury may consider other judicially recognized guarantees of genuineness, such as physical injury or outrageous conduct accompanying intentional infliction of mental distress.\textsuperscript{181}

The use of the reasonable man standard to determine the genuineness of the plaintiff’s mental distress has serious shortcomings.\textsuperscript{182} The standard was not intended to measure the injuries a plaintiff would reasonably experience; it was meant to determine if a particular defendant was negligent.\textsuperscript{183} Secondly, "[b]y ignoring the predisposition of the plaintiff, the reasonable man standard conflicts with the general rule that ‘the defendant who is negligent must take his victim as he finds him.’"\textsuperscript{184}

Medical science has provided the courts with more appealing methods of measuring the severity of the mental distress than the reasonable man standard. Mental distress caused by negligence is essentially a reaction to a traumatic stimulus which "may be defined as an impact, force, or event which acts upon an individual for a brief or extended period of time and can be either physical or purely psychic."\textsuperscript{185} These stimuli can trigger either primary or sec-

\begin{footnotes}
\textsuperscript{177} Id. at 838.
\textsuperscript{178} Rodrigues, 472 P.2d at 520.
\textsuperscript{179} Molien, 167 Cal. Rptr. at 839.
\textsuperscript{180} Id.
\textsuperscript{181} Id. at 837.
\textsuperscript{183} Id. at 196.
\textsuperscript{184} Id. at 197.
\textsuperscript{185} Comment, Independent Tort, supra note 157, at 1248 (citing Brickner, The Psychology of Disability, in TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY 65 (P. Cantor ed. Supp. 1964); Laughlin, Neuroses Following Trauma, in 6 TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY 76, 77 (P. Cantor ed. 1962); Cantor, Psychosomatic Injury, Traumatic Psychoneurosis, And Law, 6 CLEV.-MAR. L. REV. 428, 430 (1957)).
\end{footnotes}
secondary emotional reactions. The primary reaction occurs automatically and instinctively as the individual confronts the stress he experiences from the defendant’s negligence. It “is exemplified by such emotional responses as fear, anger, grief, shock, humiliation, or embarrassment.” The effects of primary reactions can be quite transient. The medical expert would have to resort to conjecture to establish a causal connection between the emotional distress and the defendant’s negligence because the symptoms are generalized. Additionally, the hypothetical nature of the proof required increases the possibility of fraudulent claims.

Secondary reactions are traumatic neuroses which develop from the primary reactions as the affected individual demonstrates “continued inability to adequately adjust to a traumatic event.” These reactions are comparatively more serious than primary reactions and they produce symptoms that are real and identifiable and which may be severely disabling. One solution may be to classify these secondary reactions as physical injuries and permit recovery. That view ignores the fact that these reactions are clearly emotion-based; they must “be distinguished from true physical injuries since they cannot be explained by an actual physical impairment.” As secondary reactions can be objectively measured, the burden of proof is greatly eased because the court need only determine what the plaintiff actually suffered.

It may be argued that the primary-secondary approach will lead to a battle of the medical experts as each side presents expert opinion classifying a reaction as either primary or secondary. This kind of conflict is common in the judicial system, and the courts in other areas of law have been able to resolve it. Given the objective differences between the categories, the courts will find the classification of an emotional injury as either primary or secondary

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186. Id. at 1249.
187. Id.
188. Id.
190. Comment, Independent Tort, supra note 157, at 1250.
191. Id. Secondary reactions may result in nervousness, nausea, weight loss, pains in the stomach, genito-urinary distress, emotional fatigue, weakness, headaches and backaches. Id.
192. Id.
193. Id. at 1251.
much easier than attempting to cling to the artificial physical-emotional dichotomy.

Secondary reaction emotional distress should be recognized by the courts. The court in Champion gave little attention to the physical injury requirement because it was not at issue in the case. It merely cited language from Dziokonski requiring a substantial physical injury in addition to the foreseeability approach.\footnote{Champion, 420 So. 2d at 353 (citing Dziokonski, 380 N.E. 2d at 1302).} The physical injury requirement is vulnerable to many of the same criticisms the Champion court leveled at the impact and zone of danger tests. Should it be confronted with the physical injury requirement issue in the future, the Florida Supreme Court should recognize that granting recovery for the secondary reactions of pure emotional distress would be a timely improvement.

**CONCLUSION**

The court in Champion v. Gray should be lauded for its attempt to abolish Florida's outmoded impact rule. The reasons supporting the rule have become so weak that serious debate no longer focuses on the merits of the rule itself. Rather, the attention of courts, as in Champion, should turn to the standard that will replace the impact rule.

The Florida Supreme Court has the opportunity to choose from many variations on the foreseeability approach that have been created over the last fifteen years. The most troubling aspect of the Champion decision is its failure to look beyond Dillon to other formulations of foreseeability that provide recovery for the negligent infliction of mental distress in factual scenarios closer to Champion.

If the court adopts an unaltered version of Dillon, there is no assurance that our courts will not follow California's example and transfer the contemporaneous sensory observation guideline into an artificial barrier. Such a development would preclude any future Mrs. Champions from recovery which is a result the Champion court would surely wish to avoid.

The Champion court makes a reading of its decision much more difficult by combining the mutually exclusive tests of Dziokonski and Dillon in its opinion. Hopefully, the Supreme Court will give less consideration to Dillon, as the Dziokonski analysis provides a better approach to compensating plaintiffs who arrive after the
accident.

The Supreme Court should expand Champion's determination of duty to include more than simply foreseeability. By referring to the policy considerations that traditionally determine duty, the courts can more equitably assess liabilities and damages.

Ultimately, the supreme court may wish to consider recognizing the negligent infliction of mental distress as an independent tort and eliminate the physical injury requirement. The court should provide recovery for pure mental distress which can be classified as secondary reactions and can be objectively measured.

DAVID RICHARD LENOX