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Torts - Wyoming Recognizes a Cause of Action for Negligent Infliction of Emotional Distress - Gates v. Richardson

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TORTS—Wyoming Recognizes a Cause of Action for Negligent Infliction of Emotional Distress. *Gates v. Richardson,* 719 P.2d 193 (Wyo. 1986).

In September, 1982, a vehicle struck six-year-old Johnny Gates while he rode his bicycle in a school zone.[1] As a result of the accident, Johnny suffered massive brain injury and will require hospitalization the rest of his life. Johnny's brother Joseph witnessed the entire accident and its subsequent injuries.[2] Johnny's mother and sister arrived at the scene of the accident before the position or condition of Johnny had changed.[3] Johnny Gates, his two minor siblings, his mother, his father, and his stepfather brought suit[4] against the driver of the vehicle, Kelly Richardson.[5] Johnny's two siblings and mother sought recovery for severe emotional suffering.[6] The lower court dismissed each of these counts for the reason that they failed to state a claim upon which relief could be granted. The plaintiffs appealed from this ruling.

In *Gates v. Richardson,*[7] the Wyoming Supreme Court held that the tort of negligent infliction of emotional distress[8] in bystander cases[9] is actionable in Wyoming.[10] The decision is worthy of note, not only because it adopts a tort action in Wyoming which is relatively progressive,[11] but more importantly because it utilizes a unique combination of criteria[12] for determining the potential liability of a defendant.

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1. Appellant's Brief at 3, Gates v. Richardson, 719 P.2d 193 (Wyo. 1986) (No. 84-21).
2. *Id.* at 4.
3. *Id.*
4. The complaint was filed on May 27, 1983, with District Judge Kenneth G. Hamm. *Id.* at 1.
5. *Id.*
6. Besides claims for negligent infliction of emotional distress, a claim was filed on behalf of Johnny Lee Gates for injuries sustained; a claim was filed for medical expenses incurred and loss of care, comfort, and companionship by Johnny's mother and stepfather; and a claim was filed by Johnny's father for the same. *Id.* at 4-6. The scope of this note is limited to a discussion of the three claims for relief for emotional distress. Plaintiffs Joseph Gates, Peggy Merryman, and Kristina Gates each claimed that as a direct and proximate result of witnessing the accident or its aftermath, they had "suffered emotionally and will continue to do so for the indefinite future." *Id.* at 4-5.
7. 719 P.2d 193 (Wyo. 1986).
8. The scope of this note is limited to an analysis of negligently inflicted emotional distress, as opposed to intentionally inflicted emotional distress.
9. Although the *Gates* court holds that negligent infliction of emotional distress is now an actionable tort, the limitations placed on it, *see infra* notes 80-133, are specific to bystander cases. These limitations may be applied to some extent under other circumstances which may justify an action for this new tort. This note, however, will be limited in scope to discussing the restrictions adopted as they apply to bystander cases, as the *Gates* court itself does.

Bystander cases generally follow a common fact pattern: A negligent act causes injury to a primary victim, a bystander observes either the actual act or its consequences, and the observation causes the bystander to suffer emotional distress. Note, *Negligent Infliction of Emotional Distress: Liberalizing Recovery Beyond the Zone of Danger Rule,* 60 CHI.[-]KENT L. REV. 735 (1984).
10. *Gates,* 719 P.2d at 198.
11. *See* Winter, *A Tort in Transition: Negligent Infliction of Mental Distress,* A.B.A.J., March 1984, p. 62. See *infra* notes 13-53 for the historical analysis of the tort.
12. None of the criteria established by the court, *infra* notes 67-71 and accompanying text, is of itself unique. However, this particular combination of the four criteria is not used by any other jurisdiction.

BACKGROUND

The Impact and Zone of Danger Rules

Early decisions in American courts required a plaintiff to show some physical injury or impact to recover for mental injury.[13] The courts based the so-called "impact rule" on three public policy concerns.[14] First, because mental injury was so easily feigned, courts devised the impact rule to prevent fraudulent claims. Second, the rule placed limitations on what courts viewed as potentially unlimited liability.[15] Finally, several courts believed that abolition of an impact requirement would greatly increase the amount of litigation.[16]

Courts began to realize, however, that a strict mechanical application of the impact rule drew arbitrary and unfair distinctions between classes of plaintiffs.[17] Several courts remedied this perceived harshness by relaxing the rule, allowing recovery where only a trivial impact had occurred.[18] Courts slowly began to reject the rule as an unfair and ineffective way of achieving limitations on liability and genuine claims of mental distress,[19] although the reasons used to justify the impact rule are still used to limit plaintiffs' classes today.[20]

In response to the need for new guidelines, courts developed the "zone of danger" rule, based on Justice Cardozo's landmark decision in *Pals-*

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13. *See* Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896); Spade v. Lynn & B.R.R., 168 Mass. 285, 47 N.E. 88 (1897); Cleveland, C.C. & St. L. Ry. v. Stewart, 24 Ind. App. 374, 56 N.E. 917 (1900); Morris v. Lackawanna & W.V.R.R., 228 Pa. 198, 77 A. 445 (1910). These are the leading American cases on the establishment and application of the impact rule.

14. PROSSER AND KEETON ON THE LAW OF TORTS § 54, at 360-61 (5th ed. 1984) [hereinafter PROSSER].

15. Note that these two criteria are specifically used by the *Gates* court to justify some of its limitations on plaintiffs' class. *See infra* notes 76-77, 83-85, 105-107, 122-23 and accompanying text for further discussion of their application.

16. For a discussion of these policy concerns as opposed to the policy concerns for recovery for emotional distress when the infliction is wilful or malicious, see Millard, *Intentionally and Negligently Inflicted Emotional Distress: Toward a Coherent Reconciliation*, 15 IND. L. REV. 617, 626-29 (1982).

17. 3 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 18.4, at 686-87 (2d ed. 1986).

18. Many of the claimed impacts did not even proceed directly from defendant to plaintiff. *Id.* at 686. *See, e.g.*, Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931) (impact satisfied when plaintiff fainted from fright of a loud noise and fell); Morton v. Stack, 122 Ohio St. 155, 170 N.E. 869 (1930) (inhaling smoke satisfied impact); Homans v. Boston Elevated Ry., 180 Mass. 456, 62 N.E. 737 (1902) (slight bump against a seat was considered impact); Clark v. Choctawhatchee Elec. Coop., 107 So. 2d 609 (Fla. 1958) (plaintiff experienced brief contact with an electric current); Plummer v. United States, 580 F.2d 72 (3d Cir. 1978) (contact with tubercle bacilli satisfied impact).

A favorite among commentators is Christy Bros. Circus v. Tusnage, 38 Ga. App. 581, 144 S.E. 680 (1928), where plaintiff was allowed to recover when defendant's horse "evacuated his bowels" on her lap.

19. Note that at least 39 jurisdictions, not including Wyoming, have abolished the impact rule. Comment, *The Twilight Zone of Danger: Negligent Infliction of Emotional Distress as an Actionable Tort*, 15 CUMB. L. REV. 519, 522 n.23 (1985) (citing noted authority A. Russell Smith). One commentator suggests that there are currently only eight states which still adhere to the impact rule: Arkansas, Florida, Georgia, Idaho, Indiana, Kentucky, Mississippi and North Carolina. Winter, *supra* note 11, at 62.

20. *See* PROSSER, *supra* note 14, at 361. *See also, supra* note 17 and accompanying text.

graff v. Long Island Railroad.[21] This decision marked a new trend in determining a negligent defendant's liability, extending a duty to those plaintiffs whose injuries were reasonably foreseeable.[22]

Although the *Palsgraff* facts and holding were limited to physical injury,[23] the decision's reasoning has been extended to cases of mental injury in courts adhering to the zone of danger rule[24] so that a plaintiff may only recover for mental injury if within the physical zone of danger. This rule is based on the traditional view that a defendant has a duty not to unreasonably endanger the plaintiff's physical safety.[25] If a defendant breaches this duty, the plaintiff should be allowed to recover for all damages sustained.[26] Foreseeability limits the defendant's duty by outlining a physical area where the plaintiff must be located in order to recover.[27] As defined by *Palsgraff,* this is the area within which a plaintiff could foreseeably be physically injured by the defendant's negligent act.

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21. 248 N.Y. 339, 162 N.E. 99 (1928).

22. The *Palsgraff* court established the notion of reasonable foreseeability in creating a legal duty to any individual plaintiff within the zone of danger. The court defined the duty of a negligent actor in terms of the potential risks of harm to the plaintiff which can be reasonably perceived. *Id.* 162 N.E. at 101. According to *Palsgraff,* a duty cannot be established to a plaintiff outside the realm of foreseeable consequences. *Id.*

23. In *Palsgraff,* two guards on a railroad car were assisting a man boarding a train when a package dislodged from his grasp and fell. The package contained fireworks, and on impact with the ground it exploded, throwing down some scales at the other end of the platform. The scales struck the plaintiff and caused physical injury. *Id.* at 99.

24. *See infra* note 37.

25. Bovsun v. Sanperi, 61 N.Y.2d 219, 461 N.E.2d 843, 847 (1984).

26. *Id.* 461 N.E.2d at 847.

This rationale points out why the zone of danger rule is an arbitrary limitation on the plaintiff class. The rule does not require a physical impact on the plaintiff, nor does it require the resulting mental distress to be caused by being in the zone of danger. The duty owed the plaintiff by the defendant is freedom from bodily injury, but the causation of the mental distress does not have to be a breach of *that* duty. In fact, the cause of injury is the breach of duty owed the close relative who is injured. The New York court in *Bovsun* made this apparent. "Additionally, the compensable emotional distress must be tied, as a matter of proximate causation, to the observation of the serious injury or death of the family member and such injury or death must have been caused by the conduct of the defendant." *Id.* at 849.

To allow recovery for mental distress which is not *caused* by the breach of duty to the plaintiff appears to run counter to basic negligence principles.

But see Waube v. Warrington, 216 Wis. 603, 258 N.W. 497, 501 (1935), where the Wisconsin Supreme Court, aware of this inconsistency, also required that the plaintiff fear for his own safety in order to recover.

A more sensible approach is found in those jurisdictions which recognize an independent duty of defendants to refrain from negligent infliction of emotional distress. *See* Rodrigues v. State, 52 Haw. 156, 472 P.2d 509, 520 (1970). The freedom from negligent infliction of emotional distress is protected in Hawaii. Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758, 764 (1974). If mental distress to a plaintiff is reasonably foreseeable, the defendant is liable applying general tort principles. *Id.*, 520 P.2d at 764-65.

27. Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute between California and New York,* 51 ST. JOHN'S L. REV. 1, 9 (1976).

See also Palsgraff, 162 N.E. at 100, where Cardozo said "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."

The leading American case on the judicial exodus from the impact rule to the zone of danger rule[28] is *Waube v. Warrington.*[29] In *Waube,* a mother witnessed her daughter being struck by a negligent motorist. The Wisconsin court held that a plaintiff may recover for emotional distress only where the injury was within the zone of physical risk, where the emotional injury manifests itself physically,[30] and where there is fear for the plaintiff's own safety, not just the safety of another.[31]

Some courts have recognized that by applying this test mechanically injured parties are wrongfully denied the right to recover if they are outside the zone of physical danger, even if their mental injuries are genuine and foreseeable.[32] The fundamental unfairness of the zone of danger rule thus lies in its *Palsgraff* origin.[33] The *Palsgraff* parameter is a physical zone of danger, which in many cases will not equate with the psychic zone of danger.[34] At least one court has agreed that the foreseeable zone of *physical* danger is demonstrably different and perceptively smaller than the foreseeable zone of *psychic* danger.[35]

Although the zone of danger test is still employed in a number of jurisdictions,[36] courts have begun to realize the inherent unfairness of its strict application in mental distress cases.[37] Instead of remedying the injustices of the impact rule, the zone of danger rule merely established another arbitrary and arguably less consistent standard for compensating mental injury.[38]

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28. *See supra* note 19.

29. 216 Wis. 603, 258 N.W. 497 (1935).

30. For a discussion of the physical manifestation concept, see *infra* notes 136-52 and accompanying text.

31. *Waube,* 258 N.W. at 499-501.

32. *See, e.g.,* Whetham v. Bismarck Hosp., 197 N.W.2d 678, 684 (N.D. 1972), where a mother was denied recovery for severe mental and emotional distress based on the zone of danger rule. Her injuries were provable and readily foreseeable.

33. Simons, *supra* note 27, at 9.

34. *Id.* at 9-10.

35. *Id.* at 9. Professor Simons notes that the effect of this readily manifest impracticality is that several deserving plaintiffs suffering real and serious mental injuries produced by a contemporaneous perception of a negligent act were denied recovery. *See, e.g., Whetham,* 197 N.W. 2d at 678.

36. *See, e.g.,* Stadler v. Gross, 295 N.W.2d 552 (Minn. 1980); James v. Harris, 729 P.2d 986 (Colo. App. 1986).

37. Winter, *supra* note 11, at 64, lists a mere nine states that still adhere to the zone of danger rule: Colorado, Delaware, Illinois, Maryland, Minnesota, Nebraska, Tennessee, Vermont and Wisconsin.

But see Case Comment, *DES and Emotional Distress: Payton v. Abbott Labs,* 37 U. MIAMI L. REV. 151 (1982), suggesting that the zone of danger test is now the majority viewpoint. *Id.* at 157. The author cites the RESTATEMENT (SECOND) OF TORTS § 436 (1965) for the general rule:

> (2) If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to another otherwise than by subjecting him to fright, shock, or other similar and immediate emotional disturbance, the fact that such harm results solely from the internal operation of fright or other emotional disturbance does not protect the actor from liability.

Case Comment, *supra,* at 157.

See also *Bovsun,* 461 N.E.2d at 847, also suggesting the rule is in the majority and listing 12 jurisdictions which follow it.

38. *See* Simons, *supra* note 27, at 10.

The Foreseeability Test

In *Dillon v. Legg*,[39] the California Supreme Court became the first American court[40] to recognize a cause of action for negligent infliction of emotional distress by an individual not physically impacted nor within the zone of physical danger.[41] *Dillon* concerned a claim by a mother and a sister of a young girl killed by a negligent driver while crossing a street. Although both plaintiffs personally witnessed the collision, neither was within the zone of danger.[42] The *Dillon* court held that harm to a bystander may be foreseeable[43] if (1) the bystander is located near the scene of the accident, (2) the shock to the bystander resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observation of the accident, and (3) the victim and the plaintiff had a close relationship.[44] Since this 1968 decision, many jurisdictions have followed *Dillon* in establishing similar standards by which to decide bystander cases.[45]

The court in *Dillon* dismissed the threat of unlimited liability and vexatious suits as inadequate reasons to deny recovery to plaintiffs who obviously suffer real injuries.[46] These considerations, the court reasoned, were best served by depending on the efficacy of the judicial process to ferret out meritorious from fraudulent claims.[47] The court stressed that "no

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39. 68 Cal.2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

40. Although *Dillon* is almost universally viewed by commentators and courts as the first decision recognizing a cause of action where the plaintiff was neither in the zone of danger nor impacted by the negligent act, this is not entirely true. In Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890), the Texas Supreme Court allowed a woman to recover for emotional distress resulting in miscarriage. The plaintiff witnessed her landlord assaulting two men in her front yard, even though he was aware of her pregnancy. She was neither physically impacted by the event, nor in the zone of physical danger. *Id.*

41. *Dillon*, 441 P.2d at 914-15, 69 Cal. Rptr. at 74-75.

42. *Id.*

43. Thus, defendant would consequently owe a duty. *Id.* at 920, 69 Cal. Rptr. at 80. "[T]he chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk, that factor will be of prime concern in every case." *Id.*

44. *Id.*

45. *See, e.g.*, D'Amicol v. Alvarez Shipping Co., 31 Conn. Supp. 164, 326 A.2d 129 (1973); Champion v. Gray, 478 So. 2d 17 (Fla. 1985); Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974); Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981); Culbert v. Sampson's Supermarkets, 444 A.2d 433 (Me. 1982); Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978); Toms v. McConnell, 45 Mich. App. 647, 207 N.W.2d 140 (1973); Entex v. McGuire, 414 So. 2d 437 (Miss. 1982); Versland v. Caron Transp., 206 Mont. 313, 671 P.2d 583 (1983); James v. Lieb, 221 Neb. 47, 375 N.W.2d 109 (1985); Nevada v. Eaton, 101 Nev. 705, 710 P.2d 1370 (1985); Corso v. Merrill, 119 N.H. 647, 406 A.2d 300 (1979); Portee v. Jaffee, 84 N.J. 88, 417 A.2d 521 (1980); Ramirez v. Armstrong, 100 N.M. 538, 673 P.2d 822 (1983); Paugh v. Hanks, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983); Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979); D'Ambra v. United States, 114 R.I. 642, 338 A.2d 524 (1975); Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985); Landreth v. Reed, 570 S.W.2d 486 (Tex. App. 1978); Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976).

46. *Dillon*, 441 P.2d at 918-19, 69 Cal. Rptr. at 78-79. The *Gates* court agrees and uses much the same reasoning in establishing the cause of action in the state of Wyoming. *Gates*, 719 P.2d at 198, 199-200.

See also infra note 145.

47. *Dillon*, 441 P.2d at 918, 69 Cal. Rptr. at 78. The *Dillon* court, in analogizing this issue throughout tort law said:

> Indubitably juries and trial courts, constantly called upon to distinguish the frivolous from the substantial and the fraudulent from the meritorious, reach

immutable rule can establish the extent of that obligation for every circumstance of the future."[48]

Taken in that light,[49] the decision stands for the development of a "psychic zone of danger,"[50] which in theory gives deserving plaintiffs the right to recover and limits a defendant's liability to those injuries which are reasonably foreseeable.[51] Since the inception of the *Dillon* guidelines, serious questions have been raised about their effectiveness. Most California courts have interpreted them as strict requirements[52] instead of the case-by-case guidelines the California court intended.[53]

> some erroneous results. But such fallibility, inherent in the judicial process, offers no reason for substituting for the case-by-case resolution of causes an artificial and indefensible barrier .... Indeed, we doubt that the problem of the fraudulent claim is substantially more pronounced in the case of a mother claiming physical injury resulting from seeing her child killed than in other areas of tort law in which the right to recover damages is well established in California.

Id.

This is especially true in bystander cases where the relation to the victim must be close. The relation requirement is seen as a further guarantee of genuineness. *Id.*

48. *Id.* at 920, 69 Cal. Rptr. at 80. Some commentators have suggested, however, that this case-by-case analysis of the *Dillon* guidelines may be no less arbitrary than the zone of danger criteria. Note, *Ochoa v. Superior Court: One Step Forward and Two Steps Back for Bystander Tort Law?*, 21 TORT INS. L.J. 672 (1985-86). The author notes that several lower courts, and perhaps even the California Supreme Court, tend to use the *Dillon* factors as "shibboleths rather than guidelines." *Id.* at 675.

49. Actually, the closest jurisdiction to approach bystander cases on a pure foreseeability basis, and use its guidelines as guidelines, is Hawaii. *See, e.g., Leong*, 520 P.2d 758.

50. *See* Simons, *supra* note 27.

51. *But see supra* note 48.

52. *See, e.g.*, Trapp v. Schuyler, 149 Cal. App. 3d 1140, 197 Cal. Rptr. 411 (1983); Hathaway v. Superior Court, 112 Cal. App. 3d 728, 169 Cal. Rptr. 435 (1980); Drew v. Drake, 110 Cal. App. 3d 555, 168 Cal. Rptr. 65 (1980); Parsons v. Superior Court, 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978); Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969).

But see Nazaroff v. Superior Court, 80 Cal. App. 3d 553, 145 Cal. Rptr. 657 (1978) (holding that summary judgment on the issue of contemporaneous perception was not proper merely because the mother had not directly witnessed her child's accident); Butcher v. Superior Court, 139 Cal. App. 3d 58, 188 Cal. Rptr. 503 (1983) (holding that an unmarried cohabitant may state a cause of action for loss of consortium if a showing is made that the nonmarital relationship was both significant and stable).

The Supreme Court of California, although at times applying the guidelines mechanically itself, has specifically rejected "a rote application of the guidelines." Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 923, 616 P.2d 813, 816, 167 Cal. Rptr. 831, 834 (1980). The significance of the *Dillon* guidelines, the court said, was in the application of "its general principle of foreseeability to the facts at hand." *Id.* The court noted that the same approach has been applied to other cases since *Dillon*. *Id.* at 816-17, 167 Cal. Rptr. at 834-35; *See* Tarasoff v. Regents of the Univ. of Cal., 17 Cal. App. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976); Rodriquez v. Bethlehem Steel Corp., 12 Cal. App. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974).

53. *See supra* note 48. *See also* Comment, *Dillon Revisited: Toward a Better Paradigm for Bystander Cases*, 43 OHIO ST. L.J. 931 (1982). That author represents the move toward formality of the guidelines as desirable. Some measure of formality, he argues, is necessary to assist attorneys in strategy and advising clients, to help judges control the trial process, and to allow persons a means of predicting their potential liabilities. *Id.* at 939.

THE PRINCIPAL CASE

In *Gates v. Richardson*, the Wyoming Supreme Court held that negligent infliction of emotional distress is an actionable tort in Wyoming.[54] Justice Cardine, speaking for the majority,[55] found the interests of the seriously mentally injured to be worthy of protection.[56] Noting that the Wyoming Constitution guarantees access to the courts for persons who are wrongly injured[57] and that the Wyoming courts adhere to a "general policy in favor of imposing the loss on the negligent tortfeasor rather than the innocent victim,"[58] the Wyoming Supreme Court adopted the tort.[59] The *Gates* court implicitly rejected both the impact and zone of danger rules,[60] agreeing with *Dillon*[61] that the duty of care should be extended to bystanders in certain circumstances.[62]

The court held that the make-up of the plaintiff class itself limits the threat of potentially unlimited liability[63] and the possibility of vexatious suits.[64] These policy concerns should not, the court reasoned, deny recovery to those plaintiffs actually injured.[65] Instead, the court established a three-part test to delineate those plaintiffs who would be allowed recovery. First, only those persons who would be permitted to bring wrongful death actions under Wyoming statutes have standing to sue.[66] Under these statutes, recovery is limited to spouses, children, parents and siblings of the victim.[67] Second, the primary victim in such cases must suffer serious bodily injury or death.[68] Finally, the plaintiff must have observed the

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54. *Gates*, 719 P.2d at 198.

55. The court's decision was 4-1, with Justice Rooney dissenting. The dissenting opinion argued that the change in Wyoming tort law should be applied only prospectively; that the plaintiff class should be limited to spouses, parents, and children of a seriously physically injured person; and that recovery should be granted only to persons actually at the scene of the accident. *Gates*, 719 P.2d at 202 (Rooney, J., dissenting).

Justice Cardine addresses himself only to the issue of retroactive application of the law. He stated that the law in Wyoming had not "changed," but the court was merely "pronouncing what has always been the law in Wyoming." *Id.* at 201 (majority opinion).

56. *Id.* at 197.

57. WYO. CONST. art. 1, § 8.

58. *Gates*, 719 P.2d at 198.

59. *Id.*

60. Although there is no indication that Wyoming has ever followed either rule, neither impact nor location within the zone of danger is a requirement to recovery after *Gates*. As Justice Cardine noted, there "may not have been such cases" decided in Wyoming and not appealed to the Supreme Court in which a rule of law applying either a threat of impact or impact rule was used. *Id.* at 201. He stated further that "we are not changing law or overriding any precedent, but merely pronouncing what has always been the law in Wyoming." *Id.*

61. *Id.* at 195.

62. *See infra* notes 81-162 and accompanying text.

63. *Gates*, 719 P.2d at 197-98.

64. *Id.* at 197.

65. *Id.* at 198.

66. *Id.* at 198-99. See *infra* notes 80-101 and accompanying text, for discussion of this criterion.

67. *See infra* notes 86, 99.

68. *Gates*, 719 P.2d at 199. See *infra* notes 118-33 and accompanying text, for discussion of this criterion.

accident or arrived at the accident before there is a material change either in the location or condition of the victim.[69]

The court further held that once an injured party has established each of these criteria, that party may be compensated for the entire amount of mental damage.[70] Unlike the majority of jurisdictions, no minimal showing of severity of the injury is required.[71]

The court determined that the plaintiffs met all of the criteria. Each of the plaintiffs was closely related to Johnny. All had either witnessed Johnny's injury or the immediate unchanged aftermath, and Johnny's injuries were serious.[72] After applying the criteria to these facts, the court reversed the trial court's dismissal of the claims for emotional distress, and remanded for further proceedings.[73]

ANALYSIS

Wyoming courts have allowed compensation for emotional distress in several areas of tort law.[74] However, the narrow issue of negligent infliction of emotional distress had never been before the Wyoming Supreme Court until *Gates*.[75] The court expressed two overriding public policy interests in restricting the new tort. First, it expressed the "view that a negligent act should have some end to its legal consequences,"[76] and the concern that expanding the realm of compensable mental injuries increased the possibility of vexatious suits.[77] Although the *Gates* court held that a defendant's duty of care should be extended to include some wrongfully injured parties, it balanced this against policy interests and found it necessary to limit the possible class of plaintiffs.[78] The *Gates* court concluded that by implementing these criteria, Wyoming courts could fix limits on the potential liability when necessary.[79]

The Proper Plaintiff

The *Gates* court initially limited recovery for the negligent infliction of emotional distress by constricting the possible plaintiff class.[80] Some

69. *Gates*, 719 P.2d at 199. See *infra* notes 102-17 and accompanying text, for discussion of this criterion.

70. *Gates*, 719 P.2d at 200. See *infra* notes 134-61 and accompanying text, for discussion of this test.

71. *Gates*, 719 P.2d at 200.

72. *Id.* at 201.

73. *Id.*

74. As the *Gates* court noted, Wyoming has "permitted recovery for emotional harm caused by false imprisonment, [citations], malicious prosecution, [citations], and work-related stress, [citations]. We have discussed intentional infliction of emotional distress and have neither accepted nor rejected it as a tort." *Id.* at 194-95.

75. *Id.* at 195.

76. *Id.* at 196.

77. *Id.* at 197.

78. *Id.* at 198.

79. *Id.*

80. *Id.* at 198.

courts require only minimal limits on this class,[81] noting that juries can ferret out fraudulent claims.[82] The Wyoming court, however, felt that the public interest in limiting the number of potential suits was too great to allow juries to decide which plaintiffs have standing.[83] The court reasoned that "a plague of nuisance suits could ensue despite the competence of our juries,"[84] if any bystander witnessing a serious accident had standing to sue.[85]

The Wyoming court borrowed this limitation from Wyoming's Wrongful Death statute.[86] The interpretation of the statute cited by the Wyoming court in *Wetering v. Eisele*[87] limits recovery to spouses, children, siblings, and parents. There is no doubt, as the court admits,[88] that some deserving plaintiffs will be automatically barred from recovery,[89] though

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81. See *Leong*, 520 P.2d at 766, holding among other things that the absence of a blood-relationship between the victim and the witnessing plaintiff should not preclude recovery. The court noted extraordinary circumstances in its opinion. "Hawaiian and Asian families of this state have long-maintained strong ties among members of the same extended family group . . . . [T]he custom of giving children to grandparents, near relatives, and friends to raise whether legally or informally remains a strong one." *Id.*

See also Champion, 478 So. 2d at 20 (holding that a child, parent, or spouse has the right to recover, and others may or may not depending on their relationship to the injured person and the circumstances thereof); Ledger v. Tippitt, 164 Cal. App. 3d 625, 210 Cal. Rptr. 814 (1985) (holding unmarried and unrelated plaintiff could recover because it was foreseeable that plaintiff, sitting only a few feet away from the victim, was likely a loved one who would suffer extreme emotional distress; plaintiff and victim had lived together since plaintiff was 15-1/2 years old, and had a child together); Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir. 1985) (stepsons of victim stood in "close relationship" with victim and thus allowed to recover); Mobaldi v. Board of Regents, 55 Cal. App. 3d 573, 582, 127 Cal. Rptr. 720, 726 (1976) (where the court in holding a foster-mother had a right to recover, said "[t]he emotional attachments of the family relationship and not the legal status are those which are relevent to foreseeability").

82. *Molien*, 616 P.2d at 821, 167 Cal. Rptr. at 839. The court in *Molien* said:

> the jurors are best situated to determine whether and to what extent the defendant's conduct caused emotional distress, . . . To repeat: this is a matter of proof to be presented to the trier of fact. The screening of claims on this basis at the pleading stage is a usurpation of the jury's function.

Id.

The *Gates* court specifically rejected this rationale in favor of specific limitations. *See* S. SPEISER, C. KRAUSE & A. GANS, THE AMERICAN LAW OF TORTS § 16:26, at 1124 n.27 (1987) [hereinafter SPEISER].

83. *Gates*, 719 P.2d at 198.

84. *Id.*

85. *See* PROSSER, *supra* note 14, at 366.

> It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one person were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as all his friends. And probably the danger of fictitious claims, and the necessity of some guarantee of genuineness, are even greater here than before.

Id.

86. WYO. STAT. § 1-38-102 (1977 & Cum. Supp. 1987). This statute and WYO. STAT. § 2-4-101 (1977 & Cum. Supp. 1987) were interpreted to limit recovery to spouses, children, parents, and siblings in Wetering v. Eisele, 682 P.2d 1055, 1061-62 (Wyo. 1984).

87. 682 P.2d 1055, 1061-62 (Wyo. 1984).

88. *Gates*, 719 P.2d at 198.

89. *See supra* note 81.

their injuries may be actual and reasonably foreseeable.[90] Under the Wyoming test, relatives with a close relationship to the victim, but not included in the immediate family cannot recover. Friends or cohabitants cannot recover regardless of their relationship to the victim.[91]

Although the limitation seems arbitrary,[92] the court rationalized that such a limitation would ensure that mental injuries claimed were genuine[93] while decreasing the possibility of unlimited liability.[94] By limiting the class of potential plaintiffs to parents, siblings, children, and spouses, the court felt it also protected the "profound and abiding sentiment of parental love."[95] This interest, along with those of sibling, child, and spousal love, has been widely recognized as worthy of legal protection.[96]

The court's reasoning, however, is inconsistent with establishing such a rigid criterion. The *Gates* court exhibited an understanding that there are relationships besides those of a mother and child worthy of legal protection,[97] and that injuries to these interests were objectively determina-

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90. Using "reasonably foreseeable" in this context is virtually a misnomer. In its opinion, the *Gates* court specifically rejects the usual notion of "reasonable foreseeability" and instead sets the bounds on plaintiffs' classes within which it believes a plaintiff's injuries may be reasonably foreseeable. *Gates*, 719 P.2d at 198. This is obviously an adulteration of the tort concept of foreseeability, which inherently includes a case-by-case analysis of the facts to determine a defendant's duty. *See Dillon*, 441 P.2d at 912, 69 Cal. Rptr. at 72. The Wyoming court instead establishes its own idea of when an emotional injury will occur, and disallows suits not meeting this criteria, even if they may be more foreseeable than those within the criteria.

91. *But see supra* note 85.

92. *See generally* Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477 (1982) (advocating a return to the zone of danger test). The Massachusetts Supreme Court said in *Dziokonski* "[e]very effort must be made to avoid arbitrary guidelines which 'unnecessarily produce incongruous and indefensible results.' [citations] The focus should be on underlying principles." *Dziokonski*, 380 N.E.2d at 1302 (quoting Mone v. Greyhound Lines, Inc., 368 Mass. 354, 365, 331 N.E.2d 916, 922 (1975) (Braucher, J., dissenting)).

93. *Gates*, 719 P.2d at 197. Justice Cardine for the majority, stated:

> It is hard to imagine a mental injury that is more believable than one suffered by a person who witnessed the serious injury or death of a family member. As the relationship between the victim and the person witnessing the accident becomes more attenuated, the mental harm to that person becomes less plausible.

Id.

In *D'Ambra*, 338 A.2d at 531, the Rhode Island Supreme Court held that the personal relationship was the most important of the criteria for determining the scope of potential liability. The court reasoned that the stronger the emotional ties between the plaintiff and the victim, there mother and child, the greater the parameters of liability set by the zone of danger. *Id. See also Ramirez*, 673 P.2d at 825.

94. *Gates*, 719 P.2d at 198-99.

95. *Id.* at 198 (quoting Portee v. Jaffee, 84 N.J. 88, 417 A.2d 521, 526 (1980)). *See also Ramirez*, 673 P.2d at 825. The New Mexico Supreme Court also agreed with *Portee*, stating "[t]he existence of a marital or intimate familial relationship is the nucleus of personal interest to be protected. The tort of negligent infliction of emotional distress is a tort against the integrity of the family unit." *Id.*

96. PROSSER, *supra* note 14, at 366, states the position succinctly: "It seems sufficiently obvious that the shock of a mother at danger or harm to her child may be both a real and a serious injury. All ordinary human feelings are in favor of her action against the negligent defendant."

97. The relationship between spouses and siblings also meets the requirements for recovery. *See supra* notes 86-87.

ble.[98] The question remains, then, whether an arbitrary line drawn at "close relatives," can sufficiently serve all legitimate interests involved.[99] There is no doubt that the rule will fulfill the court's goal of limiting the class of plaintiffs. Placing the line where it does will provide a convenient, clear, and easily interpreted standard for future litigation before the Wyoming courts.[100] It will, however, necessarily exclude persons with legitimate claims from relief.[101]

The Scene of the Accident or its Aftermath

The second limitation outlined by the *Gates* court concerns temporal and geographical proximity. Plaintiffs may not recover for negligent infliction of emotional distress unless they either observed the infliction of serious bodily injury or death or soon arrived on the scene, observing the victim in an unaltered condition and location.[102] Most courts agree that

98. *Gates*, 719 P.2d at 197.

99. The Wyoming rule limits the apparently broad language of WYO. STAT. § 1-38-102 (1977 & Cum. Supp. 1987) to the specific language of WYO. STAT. § 2-4-101 (1977 & Cum. Supp. 1987). The language of section 1-38-102 says in pertinent part: "(c) . . . Every person for whose benefit such action is brought may prove his respective damages . . . ." WYO. STAT. § 1-38-102 (1977 & Cum. Supp. 1987).

The court in *Wetering*, 682 P.2d at 1062, interpreted this as follows:

> [T]he reference to every person for whose benefit such action is brought must continue to invoke the intestacy provisions of the probate code. The applicable provision in this instance is found in § 2-4-101, W.S. 1977 (Cum. Supp. 1983), as follows: '(c) Except in cases above enumerated, the estate of any intestate shall descend and be distributed as follows: . . . (ii) If there are no children, nor their descendants, then to his father, mother, brothers and sisters who are dead, and the descendants collectively taking the share which their parents would have taken if living, in equal parts.'

100. *But see Dillon*, 441 P.2d at 918, 69 Cal. Rptr. at 78, where the court aptly notes that the interests of meritorious plaintiffs should be allowed to prevail over mere alleged administrative difficulties.

101. Some courts have adopted an ad hoc approach to these tort claims. In *Dillon*, 441 P.2d at 920, 69 Cal. Rptr. at 80, the court held that the victim and the plaintiff had to be closely related, but contrasted this with "absence of *any relationship* or the presence of only a *distant relationship*." *Id.* (emphasis added). This suggests, as some more recent California decisions have held, that a blood relationship should not be necessary for recovery. This determination, the *Dillon* court suggested, should be on a case-by-case basis. *See, e.g., Mobaldi*, 127 Cal. Rptr. at 726 ("The 'close relationship' element of *Dillon* is expressed as one test of foreseeability that negligent infliction of injury upon one person will cause emotional distress and consequent physical harm to another. The emotional attachments of the family relationship and not legal status are those which are relevant to foreseeability."); *Toms*, 207 N.W.2d at 144-45 ("[D]evising one hard and fast rule for limiting bystander recovery in mental suffering cases would be difficult and complex if not impossible . . . . The problem of limiting liability will be best surmounted and will be more justly resolved for all concerned by treating each case on its own facts."); *Butcher*, 139 Cal. App. at 58, 188 Cal. Rptr. at 503 (holding that an unmarried spouse may have a claim fulfilling the *Dillon* requirements). *But see* Hendrix v. General Motors Corp., 146 Cal. App. 3d 296, 193 Cal. Rptr. 922 (1983). *See generally* Comment, *The Right of an Unmarried Cohabitant to an Action for Negligent Infliction of Emotional Distress in California*, 15 PAC. L.J. 925 (1984). The author argues that the right to state a claim for negligent infliction of emotional distress should extend to cohabitants, both heterosexual and homosexual, who have a significant and stable relationship. *Id.*

102. *Gates*, 719 P.2d at 199.

The *Gates* court contends to follow the rule set down by the Massachusetts Supreme Court in *Dziokonski*, 380 N.E.2d at 1295. The *Dziokonski* court held:

> [A]llegations concerning a parent who sustains substantial physical harm as a result of severe mental distress over some peril or harm to his minor child

persons not present at the scene of injury nor arriving at the scene shortly after the injury do not have standing to recover for negligent infliction of emotional distress.[103]

As adopted by the Wyoming court, this rule is not as strict as requirements adopted by other jurisdictions requiring that the plaintiff must have a contemporaneous sensory perception of the accident.[104] Courts adopting a stricter approach reason that limiting the class of plaintiffs to those who actually or contemporaneously perceive a negligent act which results in serious bodily injury or death will both save defendants from poten-

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caused by the defendant's negligence state a claim for which relief might be granted, where the parent either witnesses the accident or soon comes on the scene while the child is there.

Id. at 1302.

As opposed to the strict requirements placed on the familial relationship between the primary victim and plaintiff requiring presence at the accident, *supra* notes 80-101, this rule will allow for plaintiffs arriving at the scene shortly after a negligently inflicted injury has occurred to recover under certain circumstances.

The Wyoming court's adoption of this standard, however, is not consistent with the reasoning of the Massachusetts court. In *Dziokonski*, the court noted that "reasonable foreseeability" was the standard when allowing or disallowing recovery. *Dziokonski*, 380 N.E.2d at 1302. Although some commentators have suggested that this indicates a "pure reasonable foreseeability" standard, *see* Note, *Negligent Infliction of Emotional Distress in Accident Cases—The Expanding Definition of Liability*, 1 W. NEW ENG. L. REV. 795 (1979), discussed *infra* at note 108, it really appears to be somewhere between these two interpretations. The Massachusetts court suggested that reasonable foreseeability be the standard, and in cases of this character it *must* be tempered with when, where, and how the plaintiff perceived the injury, and that degree of relationship existed between plaintiff and victim. *Dziokonski*, 380 N.E.2d at 1302. This does not, as the *Gates* court believes, adopt a strict requirement that a plaintiff *must* witness or come upon the scene of the tortious conduct soon afterward. It merely notes that in these circumstances, psychic injury is reasonably foreseeable. *Id.* at 1302-03.

In fact, the imposition of arbitrary lines such as these is specifically attacked in *Dziokonski*. *See supra* note 92.

103. SPEISER, *supra* note 82, at § 16:28, at 1134:

> In so far as it is possible to generalize broadly, it may be said that with regard to negligent acts by the defendant, only a few jurisdictions recognize the right of the plaintiff witness who did not suffer an impact, was not in fear of his own safety, or was not within the zone of danger to recover, and those jurisdictions require that the severe emotional distress to the plaintiff result from the direct and contemporaneous observance of the accident or conduct.

See also Shelton v. Russell Pipe & Foundry Co., 570 S.W.2d 861 (Tenn. 1978) (parent denied recovery who did not audibly or visually witness an injury to his child, but heard of it later); McClellan v. Boehmer, 700 S.W.2d 687 (Tex. App. 1985) (widow denied recovery due to no contemporaneous perception of the victim's injuries); Saunders v. Air Florida, Inc., 558 F. Supp. 1233 (D.C. 1983) (father denied recovery where his perception of the accident in which his son was killed was from television); Crenshaw v. Sarasota County Pub. Hosp., 466 So. 2d 427 (Fla. App. 1985) (mother of stillborn child denied recovery where child was negligently mutilated by a commercial launderer, but mother was not at the scene nor did she later view the body); Caparco v. Lambert, 121 R.I. 710, 402 A.2d 1180 (1979) (mother denied recovery where she did not witness injury to her four-year-old daughter).

But see City of Austin v. Davis, 693 S.W.2d 31 (Tex. App. 1985) (father's discovery of his son's body at the base of an air shaft brought the father so close to the reality of the accident as to make his experience an integral part of the accident).

104. *See Ramirez*, 673 P.2d at 825-26 (requiring that the plaintiff's emotional injury must "result from a direct emotional impact . . . caused by the contemporaneous sensory perception of the accident, *as contrasted with learning of the accident by means other than contemporaneous sensory perception*, or *by learning of the accident after its occurrence*" (emphasis added)); Marzolf v. Hoover, 596 F. Supp. 596 (D.C. Mont. 1984) (holding a mother could not

tially unlimited liability[105] and ensure the genuineness of claims.[106] In *Gates*, the Wyoming court also addressed these concerns.[107] It found that the adoption of the more liberal observation requirement[108] would undoubt-

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recover where she did not witness the accidental injury of her child, but arrived at the scene soon afterward); Brooks v. Decker, 343 Pa. Super. 497, 495 A.2d 575 (1985), *appeal granted*, 508 Pa. 621, 500 A.2d 417 (1985) (denying recovery to a father where he had not witnessed an accident injuring his son, but arrived at the scene and observed his son before he was removed from the accident scene by ambulance); Hathaway v. Superior Court, 112 Cal. App. 3d 728, 169 Cal. Rptr. 435 (1980) (strictly construing the *Dillon* "contemporaneous perception" criterion and denying recovery to a father and mother who, although not witnessing the actual electrocution of their son, arrived within minutes of the accident and observed their son dying).

105. *See, e.g.*, Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969). In that case, similar to *Gates*, a mother heard the screech of automobile tires and was immediately on the scene of the accident which injured her child. *Id.* Although the *Gates* criteria would clearly allow an action in this circumstance, the New York Court of Appeals said that the risks of unlimited liability would be drastically increased if recovery for harm were extended to persons beyond those "directly involved in the accident." According to the court, "once liability is extended the logic of the principle would not and could not remain confined." *Tobin*, 249 N.E.2d at 423, 301 N.Y.S.2d at 559.

But see Ramirez, 673 P.2d at 826, where the New Mexico Supreme Court, although adopting a rule requiring more stringent criteria than Wyoming's, said:

> [A]rguments concerning the dire consequences of recognizing this type of cause of action have been unpersuasive in light of the development of bystander recovery in California following *Dillon*. No flood of litigation has resulted, no unlimited liability has been placed on defendants, and this type of action has not proven to be unmanageable to the California courts . . . . This fear has not materialized in jurisdictions accepting the *Dillon* rule.

106. *See Portee*, 417 A.2d at 527; Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime"*, 1 U. HAW. L. REV. 1, 11-13 (1979) (an excellent discussion of the factors involved in establishing a "distance rule").

107. *See supra* notes 93-94.

108. For a criticism of the more liberal rule adopted in *Dziokonski*, *see* Note, *supra* note 102, at 795. That author advocates the institution of arbitrary guidelines allowing plaintiffs' standing who were actually present at and witnessed the accident. *Id.* at 807-09.

This criticism of the temporal and geographical proximity requirements set forth by the Massachusetts court is based on two faulty assumptions. First, that author contends that the tort implemented is a "pure reasonable foreseeability test." *Id.* at 807. Although *Dziokonski* agrees that "reasonable foreseeability is a proper starting point in determining whether an actor is to be liable for the consequences of his negligence," *Dziokionski*, 380 N.E.2d at 1302, the court then posits several initial considerations to be met in determining what is reasonably foreseeable.

> [T]he determination whether there should be liability for the injury sustained depends on a number of factors, such as where, when, and how the injury to the third person entered into the consciousness of the claimant, and what degree there was of familial or other relationship between the claimant and the third person . . . . The fact is that, in cases of this character, such factors are relevant in measuring the limits of liability for emotionally based injuries resulting from a defendant's negligence . . . . With these considerations in mind, we conclude that the allegations concerning a parent who sustains substantial physical harm as a result of severe mental distress over some peril or harm to his minor child caused by the defendant's negligence state a claim for which relief might be granted, where the parent either witnesses the accident or soon comes on the scene while the child is still there.

Id.

The note also reasons that because the court did not deny recovery to the father in that case, who never appeared at the scene of the accident but merely learned of it from a third party, there is a "greatly increased . . . potential liability of a defendant far beyond that existing in California or any other jurisdiction." Note, *supra* note 102, at 807. The court, on the contrary, stated that it did not know where, when, or how Mr. Dziokonski came to know of the injury to his daughter or the death of his wife. The court merely conceded that

edly still limit a defendant's liability. With regard to genuineness of claims, however, this standard is as inadequate as the familial relationship requirement.[109]

In adopting this standard, the Wyoming court contended to follow the Massachusetts rule set down in *Dziokonski v. Babineau.*[110] The *Dziokonski* rule, however, relies fully on the application of reasonable foreseeability to the criteria,[111] which the *Gates* court specifically takes out of the jury's hands.[112] Under the *Dziokonski* rule, a finding that plaintiffs witnessed an accident or arrived on the scene shortly afterward is used by the jury to determine whether the mental injury to the plaintiff was reasonably foreseeable. Under the *Gates* rule, a finding of the same facts automatically satisfies one criterion and a finding that these circumstances did not exist automatically excludes a person from the potential plaintiff class.

Therefore, though the Wyoming court adopted the language of *Dziokonski,* it did not adopt the more liberal interpretation given it by the Massachusetts court.[113] Instead, the Wyoming rule should be read to allow standing to only those plaintiffs who meet the specific language of the *Dziokonski* court, and not as a factor indicating the reasonable foreseeability requirement.[114] The Wyoming court's criterion will, just as the familial relationship requirement, exclude recovery for persons genuinely and foreseeably injured,[115] in this instance because the persons did not arrive at the scene of the accident before anything had changed.

The *Gates* court places itself in the position of apparently adopting one of the more liberal *Dillon* approaches,[116] yet interprets it in a much more restrictive manner. The misreading of the *Dziokonski* standard results in a standard which should fulfill the court's policy consideration of limiting a defendant's liability[117] and yet is more expansive, even if not any less arbitrary, than most jurisdictions apply today.

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it could not, as a matter of law, conclude that the allegations in his complaint should be dismissed. *Dziokonski,* 380 N.E.2d at 1303. Given the above factors the court presented to evaluate foreseeability, it is doubtful that given the note author's statement of facts, Mr. Dziokonski could recover.

109. *See supra* notes 92-101.

110. 375 Mass. 555, 380 N.E.2d 1295 (1978).

111. *See supra* notes 102, 107.

112. *Gates,* 719 P.2d at 199.

113. *See supra* notes 102, 107.

114. *Dziokonski,* 380 N.E.2d at 1301-03. *See also supra* note 107.

115. For a discussion favoring arbitrary implementation of this criterion, see Note, *supra* note 102, at 807-10.

116. *See supra* note 102.

117. Although there will undoubtedly be litigation about whether the plaintiff arrived at an accident scene "shortly after" the tortious occurrence, the additional requirement that the scene must be "without material change in the condition and location of the victim," will stifle unlimited litigation. *Gates,* 719 P.2d at 199.

The Wyoming court also believes that claims made by persons under these circumstances will maintain a presumption of genuineness.

> The kind of shock the tort requires is the result of the immediate aftermath of an accident. It may be the crushed body, the bleeding, the cries of pain, and in some cases, the dying words which are really a continuation of the event. The immediate aftermath may be more shocking than the actual impact.

Id.

Severity of Injury to the Primary Victim

In most jurisdictions where bystander recovery is allowed, courts generally agree that the plaintiff must have witnessed a serious accident or its undisturbed aftermath.[118] The Wyoming court again borrowed the definition of "serious bodily injury"[119] from the Wyoming criminal code.[120] For a Wyoming court to allow recovery, the primary victim must suffer "bodily injury which creates a substantial risk of death or which causes miscarriage, severe disfigurement or protracted loss or impairment of the function of any bodily member or organ."[121] This requirement serves the same purpose of limiting the class of plaintiffs[122] and ensuring genuine claims.[123] Oddly enough, there is no such requirement in *Dillon*.[124] This has been explained in a number of ways. One commentator[125] suggests that the lack of such criteria is in response to the staunch dissent in *Dillon*.[126] It seems more likely, however, that the *Dillon* court merely assumed this was incorporated into its reasonable foreseeability guidelines.[127] It would indeed stretch the concept to allow a close relative to recover for severe emotional distress after they had discovered there was little or no harm to the primary victim.[128]

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118. *Id.*

See also Portee, 417 A.2d at 527-28 (court held that an observation of death or serious injury is necessary to allow recovery); *Eaton*, 710 P.2d at 1379 (holding the cause of action for serious emotional distress requires, among other things, apprehension of the death or serious injury of a loved one); *Ramirez*, 673 P.2d at 826 (listing among the criteria necessary for actions for this tort that the accident must result in the serious physical injury or death of the victim); *Versland*, 671 P.2d at 587 (where the court noted, "we do not intend that bystanders be allowed to recover even when there is severe emotional distress when the victim is not seriously injured").

See generally SPEISER, *supra* note 82, at § 16:24.

119. *But see infra* note 122.

120. WYO. STAT. § 6-1-104(a)(x) (1977 & Cum. Supp. 1987).

121. *Id.*

122. *Gates* uses this criteria "[a]s an assurance of genuine shock." *Gates*, 719 P.2d at 199. *Portee*, 417 A.2d at 527-28, uses similar reasoning.

See also Comment, *supra* note 53, at 946, where the author discusses the policy reasons for this particular limitation. He advocates drawing the line at "serious bodily harm or death," *id.*, as defined in the RESTATEMENT (SECOND) OF TORTS § 63, comment b (1965).

> The phrase "serious bodily harm" is used to describe a bodily harm the consequence of which is so grave or serious that it is regarded as differing in kind, and not merely in degree, from other bodily harm. A harm which creates a substantial risk of fatal consequences is a "serious bodily harm," as is a harm the infliction of which constitutes the crime of mayhem.

Id.

123. *Supra* note 122.

124. *Dillon*, 441 P.2d at 920, 69 Cal. Rptr. at 80.

125. Note, *New Mexico Establishes a Cause of Action for Negligent Infliction of Emotional Distress to a Bystander*, 15 N. MEX. L. REV. 523 (1985).

126. *Dillon*, 441 P.2d at 926, 69 Cal. Rptr. at 86 (Burke, J., dissenting). "As we asked in *Amaya:* What if the plaintiff was honestly *mistaken* in believing the third person to be in danger or to be seriously injured?" (emphasis original). *Id.*

127. The initial determination made by the *Dillon* court was whether a defendant should reasonably foresee the injury to the plaintiff, or whether defendant owes plaintiff a duty of due care under the circumstances. *Id.* at 920, 69 Cal. Rptr. at 80.

128. The Wyoming court based this conclusion on the "common sense" notion that a witness should be expected to recover quickly if the accident involved this misperception. *Gates*, 719 P.2d at 199.

Although such an event can undoubtedly cause a genuine mental injury, this limitation is necessary to protect the interests of defendants.[129] A defendant's duty of care may extend to persons beyond those actually impacted or in the zone of danger.[130] However, the burden on the defendant would be immense[131] if the duty extended to all persons suffering mental distress when there was no other tortious conduct involved,[132] or if the tortious conduct involved would not evoke mental distress in the reasonably situated man.[133] This criterion appears to be based on the reasonable extent of a negligent defendant's duty of care, and not on arbitrary distinctions made merely to limit the size of potential plaintiff classes.

Although this restriction also purports to ensure the genuineness of a mental injury, this is clearly not always the case. A plaintiff may suffer objectively provable injuries from seeing a non-serious accident. A plaintiff may observe a serious accident and not be mentally distressed. The proper rationale for this rule should be limited to restricting the defendant's duty of care. Taken in that light, the criterion effectively achieves its goals.

Damages

The majority of jurisdictions which allow recovery for the tort require proof of an ensuing physical harm.[134] As the Wyoming court noted, however, a limit on the amount of damages allowed a plaintiff would more

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129. A limitation of this type ensures that a defendant who does not negligently injure another will not be held liable for damages to persons *believing* there was serious bodily injury. Comment, *supra* note 53, at 946.

130. *Gates*, 719 P.2d at 195. See *supra* notes 13-38 and accompanying text for discussion of these two concepts.

131. See *Tarasoff*, 551 P.2d at 342, 131 Cal. Rptr. at 22-23, where the Supreme Court of California included among its criteria for determining the extent of a defendant's duty in these types of cases, the question of the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach.

132. See Note, *supra* note 125, at 531, where the author aptly suggests that this type of criteria indicates the cause of action for negligent infliction of emotional distress to a bystander is not an independent tort, but one which is derivative of the liability concerning the victim.

133. *Hunsley*, 553 P.2d at 1103. In assessing liability to defendants in these cases, the Supreme Court of Washington said:

> Inherent in the formula is the principle that the plaintiff's mental distress must be the reaction of a normally constituted person, absent defendant's knowledge of some peculiar characteristic or condition of plaintiff. In other words, was plaintiff's reaction that of a reasonable man? [citation] This principle goes to the standard of liability, not the extent of recovery once liability is established.

Id.

See Rodrigues, 472 P.2d at 521 (1970).

Although the Wyoming court rejects pure reasonable foreseeability as a criteria for determining whether a cause of action exists, its analysis of the policy principles involved indicates that the less foreseeable a harmful consequence of a defendant's act, the more likely the court is to conclude that this harm does not fall within a legal duty owed by the defendant. *Gates*, 719 P.2d at 196. See *supra* note 90, for a discussion of the *Gates* analysis of reasonable foreseeability.

134. *See* Payton v. Abbott Labs, 386 Mass. 540, 437 N.E.2d 171 (1981). The Massachusetts court lists jurisdictions which specifically require a showing of physical harm as

likely injure that plaintiff than defeat a meritless claim.[135] This is true first because emotional harm may not manifest itself "physically."[136] Second, a plaintiff who has established the elements of negligence and an amount of damages should be compensated for the entire amount of damages "so that he is made whole."[137] In fact, by requiring a physical manifestation of an emotional injury, courts may be prompting plaintiffs to fabricate physical harms in order to recover.[138]

Courts which do require physical manifestation usually do so to prevent fraudulent claims[139] or to limit the potential liability of a defendant to consequences which are not remote from his negligent act.[140] In *Molien v. Kaiser Foundation Hospital*,[141] the California Supreme Court questioned the efficacy of preventing fraudulent claims using the ensuing physical injury rule.[142] The court found such a requirement overinclusive because it allowed a plaintiff with any physical manifestation to recover, no matter how trivial the injury.[143] The court reasoned that the requirement was

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a precondition to recovery for emotional distress. *Id.* 437 N.E.2d at 175 n.5. Twenty-three jurisdictions require proof while six require emotional distress to be physically manifested in order to be compensable. The court cites five jurisdictions as still adhering to the "impact rule." *Id.* at 176 n.6.

135. *Gates*, 719 P.2d at 200.

136. *See generally*, Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237 (1971).

137. *Gates*, 719 P.2d at 200 (citing Hollon v. McComb, 636 P.2d 513, 516 (Wyo. 1981)).

138. Note, *The Death of the Ensuing Physical Injury Rule: Validating Claims for Negligent Infliction of Emotional Harm*, 10 HOFSTRA L. REV. 213 (1981). That author suggests that these administrative rules will achieve exactly the opposite result of their purpose. Arbitrary rules requiring a physical injury to recover will reward unscrupulous plaintiffs willing to create physical symptoms to recover damages. *Id.* at 223-24.

See also Magruder, *Mental and Emotional Disturbances in the law of Torts*, 49 HARV. L. REV. 1033 (1936). Professor Magruder suggests that if the law does not abandon the physical harm rule, victims would tend to "exaggerate symptoms of sick headaches, nausea, insomnia, etc., to make out a technical basis of bodily injury, upon which to predicate a parasitic recovery or the more grievous disturbance, the mental and emotional distress she endured." *Id.* at 1059.

139. *See, e.g., Payton*, 437 N.E.2d at 174-81. That court stated:

> The most common justification for denying recovery for emotional distress in negligence cases absent physical harms is that that rule is necessary to prevent fraud and vexatious lawsuits . . . . It is in recognition of the tricks that the human mind can play upon itself, as much as of the deception that people are capable of perpetrating upon one another, that we continue to rely upon traditional indicia of harm to provide objective evidence that a plaintiff actually has suffered emotional distress.

Id. at 175.

PROSSER has noted:

> There are at least three principal concerns, however, that continue to foster judical [sic] caution and doctrinal limitations on recovery for emotional distress: (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. These problems are very real, and they must be met.

PROSSER, *supra* note 14, at 360-61.

140. *Id.* at 361.

141. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

142. 616 P.2d at 819-20, 167 Cal. Rptr. at 837-38.

143. *Id.* at 820, 167 Cal. Rptr. at 838.

underinclusive as well, for it "mechanically denies court access to claims that may well be valid and could be proved if the plaintiffs were permitted to go to trial."[144] A plaintiff with a demonstrable, yet purely mental injury would be denied recovery. The *Molien* court concluded that as a means of ensuring mental injury claims, the requirement cannot be considered effective.[145] Progressive commentators[146] and courts[147] have agreed with the reasoning of this decision.[148]

The courts which maintain the ensuing physical injury rule are also concerned with limiting the liability of the defendant. This concern is more easily justified. The court in *Molien* followed the reasoning of the Hawaii Supreme Court in *Rodrigues v. State.*[149] To stem the tide of potentially unlimited liability, the Hawaii court allowed compensation for only "serious mental distress."[150] Serious mental distress is found whenever "a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."[151]

The *Gates* court rejects this limitation, reasoning that the restrictions on the plaintiff class achieve the goals of ferreting out fraudulent claims and limiting defendant liability.[152] Instead, Wyoming now allows recovery for damages with no minimum showing of severity.[153] The court emphasizes that juries can assess reasonable damages for emotional harms[154] and that undue influences upon these juries can be controlled by the courts.[155] It noted further that the goal of limiting liability is achieved by the three chosen restrictions already placed on the tort.[156]

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144. *Id.*

145. *Id.*

146. PROSSER notes that several types of mental injury are marked by detectable physical symptoms which can be objectively proven. Since it is possible to allow recovery only when there has been an adequate corroboration of the claim, it is not necessary to deny a remedy in all cases of this type. PROSSER, *supra* note 14, at 361.

147. *See, e.g., Rodrigues,* 472 P.2d at 519; Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117, 121 (Me. 1970).

See also Note, *supra* note 138, at 224 n.58 (that author suggests courts in Maryland, Massachusetts, Pennsylvania, and Washington appear ready to do the same).

148. *But see supra* note 134.

149. 52 Haw. 156, 472 P.2d 509 (1970).

150. *Rodriguez,* 472 P.2d at 519.

151. *Id.* at 520.

152. *Gates,* 719 P.2d at 200.

153. *Id.* This is the approach taken in Hawaii, the most liberal jurisdiction in terms of defining mental injury. In *Leong,* 520 P.2d at 767, the court stated:

> Thus, calculation of damages becomes a simpler matter when the primary response is coupled with a secondary one, because damages may be assessed by more objective standards. Nevertheless, the absence of secondary response and its resulting physical injury should not foreclose relief. In either event plaintiff should be permitted to prove medically the damages occasioned by his mental response to defendant's negligent act, and the trial court should instruct the jury accordingly.

For an analysis of the nature, severity, and proof of mental distress from a medical standpoint, see Comment, *supra* note 136, at 1248-62.

154. *Gates,* 719 P.2d at 200.

155. *Id.* (citing Cates v. Eddy, 669 P.2d 912, 920-21 (Wyo. 1983)).

156. *Id.*

Contrast the reasoning of the Wyoming Supreme Court here with the reasoning applied to limiting claims with close familial relationship. There, the court agreed that "juries can recognize the frauds, but we also realize that the longer a nuisance suit survives the greater the illegitimate settlement value it acquires."[157] When assessing the physical and temporal proximity of a potential plaintiff, the *Gates* court drew strict lines,[158] instead of allowing juries to determine whether the proximity was such that an injury was genuine and foreseeable.[159] The reasoning used by the Wyoming court to justify no minimum severity for mental injury to recover is plainly inconsistent with this rationale. If juries are competent enough to determine both causation and damages in these cases,[160] then juries are likewise capable of limiting liability by analyzing the genuineness of claims and the foreseeability of injuries.[161] Instead, the *Gates* court implicitly admits that limitations on the tort are required because juries are either incapable or unwilling to limit recovery.

CONCLUSION

In *Gates v. Richardson*, the Wyoming Supreme Court recognized for the first time a cause of action in tort for the negligent infliction of emotional distress. In so doing, the court agreed that persons who are wrongfully injured due to another's negligence have the right to be compensated, whether that injury is physical or mental. Instead of limiting the plaintiff's class in bystander cases to persons who are physically impacted or within the zone of physical danger, the court will allow persons to recover if their injuries are genuine, and they meet the court's three requirements. This holding by the Wyoming court points Wyoming tort law in the proper direction. It will allow more persons who are seriously and genuinely injured compensation.

What the Wyoming court fails to do, however, is to establish guidelines which are based upon the foreseeability of the plaintiff's injury. Arguably, this type of restriction would keep defendant's liability within limits prescribed by public policy. The Wyoming court adopts two standards, required familial relationship and proximity to the accident site, which are admittedly arbitrary, yet justified using this public policy consideration. Although the decision contemplates the necessity of compensating genuinely injured parties, it constrains the holding to stifle unlimited liability. The court's analysis of the jury's ability to assess the degree of mental injury to assess damages should extend beyond the consideration of damages to the foreseeability of injury and the limiting of plaintiffs' classes in this manner.

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157. *Id.* at 198.
158. *See supra* notes 91, 113-14 and accompanying text.
159. *Gates*, 719 P.2d at 199.
160. The *Gates* court contends they are. *Id.* at 200.
161. *See Leong*, 520 P.2d at 766-67.