
In Molien v. Kaiser Foundation Hospitals\(^1\) a divided California Supreme Court\(^2\) declared that severe and debilitating emotional injury will be compensable when a plaintiff suffers such injury directly and foreseeably as a result of a defendant's negligent conduct,\(^3\) or when a plaintiff suffers loss of marital consortium because his or her spouse was subjected to severe emotional distress.\(^4\) The decision repudiated the requirement of physical injury in suits claiming either negligent infliction of emotional distress or loss of consortium. However, both actions require the plaintiff to corroborate claims by producing expert or eyewitness testimony of serious emotional disturbance or by showing that the circumstances of the case justify the inference that severe distress ensued.\(^5\)

Part I of this Note will present the case. Part II will summarize the majority and minority opinions. Part III will outline prior law on recovery for emotional distress absent physical impact or injury and for loss of consortium both in California and more generally in the common law tradition. Part IV will analyze the elements of actions for negligent infliction of emotional distress and for loss of consortium in

\(^1\) 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (Mosk, J.).
\(^2\) Chief Justice Bird and Justices Tobriner and Newman concurred in the Mosk opinion, Justice Manuel “concurred in the judgment,” and Justices Clark and Richardson dissented. \textit{Id.} at 917, 616 P.2d at 813, 167 Cal. Rptr. at 831.
\(^3\) \textit{Id.} at 923, 928, 930-31, 616 P.2d at 817, 819-21, 167 Cal. Rptr. at 835, 837-39.
\(^4\) \textit{Id.} at 931-33, 616 P.2d at 821-23, 167 Cal. Rptr. at 839-41.
\(^5\) The concept of emotional distress as used in \textit{Molien} and generally in tort law is a broad one. It refers to any highly unpleasant mental reaction, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, or anxiety. \textit{See} \textit{Restatement (Second) of Torts} § 46, Comment \(j\) (1965) [hereinafter cited as \textit{Restatement (1965)}]; \textit{4 B. Witkin, Summary of California Law} § 887 (8th ed. 1974). The term emotional distress is used interchangeably with “mental distress,” “mental disturbance,” “emotional harm,” “mental suffering,” and “mental anguish.” \textit{Id.} The significance of the \textit{Molien} court's addition of adjectives such as “serious” and “severe” to the term emotional distress will be discussed below. \textit{See} notes 84, 108-26 and accompanying text infra.

\(^5\) \textit{See} 27 Cal. 3d at 926, 930, 616 P.2d at 818, 821, 167 Cal. Rptr. at 836, 839. \textit{See also} notes 112-14 and accompanying text infra.
California after *Molien*, and explore how those elements might be defined to make both actions more manageable and fair. The analysis also will discuss the validity of *Molien*'s classification of emotional injuries as either direct or derivative and the different treatment accorded to each.

The Note will suggest that standards of proof based on medical, psychological, and behavioral evidence can support recovery for emotional harm that is truly severe and debilitating. However, supporting evidence should amount to more than a generalized inference based on the foreseeability of the defendant's conduct in a negligence action. The Note also will conclude (1) that the distinction *Molien* attempts to make between emotional disturbance caused by acts directed toward plaintiffs and emotional distress deriving from the negligent injury of another person is unnecessary and unworkable, and (2) that the law on recovery for mental distress would be more fair and more uniform if "indirectly" harmed plaintiffs were treated similarly to those directly injured under the rules of *Molien*.

I

THE CASE

The plaintiff Stephen Molien and his wife Valerie were members of the Kaiser Health Plan. Following a routine physical examination at a Kaiser hospital, Dr. Kilbridge, a staff physician, informed Mrs. Molien that she had contracted syphilis. She was treated with massive doses of penicillin and was advised to instruct her husband, a suspected carrier, to be tested for the disease.

Mr. Molien's blood test revealed that he did not have syphilis. Further, the hospital discovered that the diagnosis concerning Mrs. Molien was incorrect, allegedly because of Dr. Kilbridge's negligence. By then, Mrs. Molien had undergone unnecessary treatment and had suffered, according to the complaint, nervous shock and anxiety as well as suspicion that caused "a break-up of their marriage and the initiation of dissolution proceedings."

Mr. Molien sued Kaiser and Dr. Kilbridge for personal injuries, stating two causes of action: one for negligent infliction of "extreme

---

6. *Id.* at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.
Because the appeal in *Molien* follows dismissal of the plaintiff's complaint upon demurrer, *Id.* at 918-19, 616 P.2d at 814, 167 Cal. Rptr. at 832, the facts are incomplete and recited as though established for purposes of reviewing the dismissal.
7. *Id.* at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.
8. *Id.*
9. *Id.* at 919, 923, 616 P.2d at 814, 817, 167 Cal. Rptr. at 832, 835.
10. *Id.* at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.
11. *Id.* at 919-20, 616 P.2d at 814, 167 Cal. Rptr. at 832.
12. *Id.* at 919-20, 616 P.2d at 814-15, 167 Cal. Rptr. at 832-33.
emotional distress” and subsequent expenses incurred for counseling in an effort to save his marriage, and another for loss of consortium—the deprivation of his wife’s “love, companionship, affection, society, sexual relations, solace, support, and services.”

The trial court sustained demurrers to both causes of action, dismissing the complaint when the plaintiff failed to amend. The First District Court of Appeal upheld this judgment, finding that the harm to Mr. Molien was not foreseeable and that recoveries for mental distress and for loss of consortium both required proof of physical injury, except in limited circumstances not met here. Justice Poché, dissenting, disagreed with this analysis and expressed the view subsequently adopted by the supreme court: a duty of care existed because the injury was foreseeable, and a cause of action for emotional distress or loss of consortium could be based on objectifiable circumstances other than evidence of physical injury.

II

THE OPINIONS

A. The Majority Opinion

Justice Mosk, writing for the majority, had to overrule or distinguish earlier California case law to clear the way for the negligent infliction of emotional distress action defined in Molien. The general rule had been to deny such claims absent physical injury. Tacitly overruled.

13. Id. at 920, 616 P.2d at 815, 167 Cal. Rptr. at 823.
14. Id. Actually, the trial court sustained the demurrer to the second cause of action based on loss of consortium without leave to amend, yet failed to include that action in its subsequent order of dismissal. For this reason defendants asserted that the consortium claim had not been disposed of by a final judgment and so could not be appealed. The supreme court, reiterating a concern over unnecessary delay expressed in Bellah v. Greenson, 81 Cal. App. 3d 614, 146 Cal. Rptr. 535 (1st Dist. 1978), exercised its discretion to deem the order sustaining the demurrer to “incorporate a judgment of dismissal.” 27 Cal. 3d at 920-21, 616 P.2d at 815, 167 Cal. Rptr. at 833. The court affirmed its intention, previously announced in Tenhet v. Boswell, 18 Cal. 3d 150, 554 P.2d 330, 133 Cal. Rptr. 10 (1976), to amend trial court judgments when the trial court’s failure to dispose of a cause of action resulted from inadvertence rather than from a continuing interest in that portion of the litigation. 27 Cal. 3d at 921, 616 P.2d at 815, 167 Cal. Rptr. at 833.
15. See former opinion, superseded upon grant of hearing by the supreme court pursuant to CAL. R. CT. 976(d), found at 158 Cal. Rptr. 107 (1st Dist. 1979). See also notes 45-71 and accompanying text infra (state of the prior law on exceptions to the physical injury rule).
16. Id. at 111 (Poché, J., dissenting).
17. See 27 Cal. 3d at 925, 616 P.2d at 818, 167 Cal. Rptr. at 836 (physical injury requirement in prior law). In Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), the court rejected the prior rule that the plaintiff, if not contemporaneously subjected to physical impact or injury, must have been within the zone of physical danger, reasonably anticipating impact to herself, in order to recover. Id. at 732-33, 748, 441 P.2d at 915-16, 925, 69 Cal. Rptr. at 75-76, 85 (overruling California’s zone-of-danger doctrine as pronounced in Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963)). Dillon considered that the area of danger encompassed not merely the area of likely physical impact but “the area of those exposed to emotional injury,” 68 Cal. 2d at 740 n.5, 441 P.2d at 920 n.5, 69 Cal. Rptr. at 80 n.5 (emphasis in original), but limited that area of risk to plaintiffs closely related to accident victims.
ing a line of cases that had exemplified this doctrine and that had provided the language used in California's pattern jury instruction on emotional recovery,\textsuperscript{18} Justice Mosk asserted the reality of purely psychic or nonphysical injuries\textsuperscript{19} and denounced the contrived pleading devices traditionally employed to circumvent the spirit of the physical injury rule.\textsuperscript{20} The impact or injury and zone-of-danger rules were erected, Justice Mosk noted, as artificial barriers to recovery for harms whose injury they personally witnessed. \textit{id.} at 740-41, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81. Although Dillon expanded the concept of the zone of danger, it still dealt with events resulting in physical injury to the plaintiff following upon emotional shock. \textit{id.} at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

18. In California the supreme court first stated the principle that mental distress could not be recovered absent physical injury in Sloan v. Southern Cal. Ry., 111 Cal. 668, 679-80, 44 P. 320, 322 (1896), where the "nervous paroxysm" suffered by a railway passenger wrongfully removed from a train was deemed to be a physical injury, as distinct from uncompensable "mental anguish." This principle was reaffirmed in two court of appeal decisions which provided the model for California's pattern jury instruction. \textit{See} Vanoni v. Western Airlines, 247 Cal. App. 2d 793, 56 Cal. Rptr. 115 (1st Dist. 1967) (passengers frightened by negligent operation of aircraft successfully alleged definite nervous disorders sufficient to maintain a cause of action); Espinosa v. Beverly Hosp., 114 Cal. App. 2d 232, 249 P.2d 843 (2d Dist. 1952) (symptoms insufficient to state a cause of action where parents given the wrong newborn baby in the hospital alleged anxiety, loss of sleep, stomach and back pains). \textit{See also} CALIFORNIA JURY INSTRUCTIONS—CIVIL (BAJI) No. 12.80 (6th ed. 1977):

\begin{quote}
Unintentional Emotional Distress

There can be no recovery of damages for emotional distress unaccompanied by physical injury where such emotional distress arises only from negligent conduct.

However, if a plaintiff has suffered a shock to the nervous system or other physical harm which was proximately caused by negligent conduct of a defendant, then such a plaintiff is entitled to recover damages from such a defendant for any resulting physical harm and emotional distress.

This pattern instruction epitomizes a common American approach to physical injury as a requirement for recovery of mental distress damages. \textit{See} W. PROSSER, THE LAW OF TORTS § 54, at 329 (4th ed. 1971); \textit{RESTATEMENT} (1965), supra note 4, § 436A.
\end{quote}

Following \textit{Molien}, the pattern instruction was rewritten as follows:

\begin{quote}
A plaintiff is entitled to recover damages for serious emotional distress alone, without any accompanying physical harm, if a [proximate legal] cause of such serious emotional distress was the negligent conduct of the defendant. The law does not permit recovery of damages for transitory and trivial emotional distress alone.
\end{quote}


19. 27 Cal. 3d at 930-31, 616 P.2d at 821, 167 Cal. Rptr. at 839.

The complaint in \textit{Molien} mentioned "medical expenses," but these were apparently incurred for marital or psychological counseling. \textit{See id.} at 920, 616 P.2d at 815, 167 Cal. Rptr. at 833. Hence, the court treated the deliberately unamended complaint as alleging no physical injuries to Mr. Molien. \textit{See id.} at 918, 923, 616 P.2d at 814, 817, 167 Cal. Rptr. at 832, 835. Although the penicillin injections given Mrs. Molien might be considered physical impact or injury, her discomfort in receiving them hardly caused the divorce or Mr. Molien's mental anguish; rather, the anxiety, suspicion, and hostility engendered by the misdiagnosis of syphilis allegedly brought about the breakdown in the Moliens' marital relationship. Because the court decided that physical injury to the spouse was not required for Mr. Molien's consortium action and that his emotional distress was a direct result of the misdiagnosis rather than dependent on negligence toward his wife, the court did not have to reverse the demurrer on the ground that blood tests and injections constituted physical injury sufficient to support a claim for mental suffering under the traditional rule. \textit{Id.} at 931 n.2, 616 P.2d at 822 n.2, 167 Cal. Rptr. at 840 n.2.

20. \textit{Id.} at 928-29, 616 P.2d at 820, 167 Cal. Rptr. at 838.
that were feared to be too trivial, too difficult to prove, or too easily simulated to merit legal relief. But, he added, "guarantees of genuineness" other than physical injury could corroborate a kind of emotional harm already compensable as general damages when that harm accompanied physical injury or other tortious invasions of protected interests. Justice Mosk suggested that medical testimony or the circumstances of the case also might sufficiently credit claims of mental distress.

The barrier limiting recovery for mental distress to cases of physical impact or injury or to plaintiffs within a zone of danger had already been partially breached in California in Dillon v. Legg, which focused on the foreseeability of shock to a bystander related to an accident victim. The court overthrew the old impact and zone-of-physical-peril restrictions in that case by awarding recovery to a mother who became emotionally disturbed after her child was killed before her eyes by a negligent motorist. However, the Dillon court imposed new controls to limit the otherwise "potentially infinite" liability of negligent defendants toward emotionally affected third persons. Guidelines for recovery restricted compensation to closely related plaintiffs who were percipient witnesses to the accident and sufficiently close to it in time and space to suffer sudden and intense shock. Because Mr. Molien was not in the laboratory or the consulting room when his wife was erroneously diagnosed, the defendants argued that the emotional impact on him was indirect and distant, and, therefore, that he could not recover under the Dillon rules. Justice Mosk dismissed this argument and distinguished Dillon as applying only to indirect, derivative actions brought by injured third parties where the greater likelihood of trivial or fraudulent claims required stricter limits. By contrast, according to the court, Molien was a direct action because the doctor contemplated Mr. Molien's examination and because the nature of the diagnosis of venereal disease itself foreseeably implicated the husband and the mar-

21. Id. at 925-26, 616 P.2d at 818, 167 Cal. Rptr. at 836.
22. See id. at 928-29, 616 P.2d at 820, 167 Cal. Rptr. at 838. Mental suffering is broadly compensable when it accompanies other injuries recognized in tort law, because the general rule holds that defendants must take their victims as they find them, thin-skulled or not, and pay for all their consequential injuries. See Cal. Civ. Code § 3333 (West Supp. 1981); W. Prosser, supra note 18, § 43.
23. 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.
24. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); see note 17 supra.
25. 68 Cal. 2d at 739-40, 441 P.2d at 919-20, 60 Cal. Rptr. at 79-80.
26. Id. at 739, 441 P.2d at 919, 60 Cal. Rptr. at 79.
27. Id. at 740-41, 441 P.2d at 920-21, 60 Cal. Rptr. at 80-81.
28. 27 Cal. 3d at 921, 616 P.2d at 815, 167 Cal. Rptr. at 833.
29. Id. at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834.
Therefore, the court held, as an action for direct emotional harm, Mr. Molien's complaint need not allege physical injury or fall within the proximity guidelines set out in *Dillon* for derivative actions.

The court then turned to the necessarily derivative cause of action for loss of consortium due to the tortious injury of Mr. Molien's spouse. This action has never been subject to proximity restrictions such as *Dillon*'s, although the chief element of recovery is emotional disturbance from harm to a loved one. Hence, the only novel question facing the court was whether an injury to the nonplaintiff spouse that allegedly impaired the plaintiff's interests in his marital relationship could be a nonphysical injury. Having just denounced the physical injury requirement for negligent infliction of emotional distress, the court did not hesitate to pronounce that requirement equally inappropriate to actions for loss of consortium. In both situations, according to *Molien*, other kinds of evidence can validate a claim of purely emotional disturbance, including emotional disturbance sufficiently severe to affect the marriage relationship.

### B. The Dissenting Opinion

Justice Clark, in a dissent joined by Justice Richardson, concentrated upon the majority's expansion of liability for emotional distress. The dissent is essentially correct in asserting that the majority

30. *Id.* at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.
31. *Id.* at 931, 616 P.2d at 821-22, 167 Cal. Rptr. at 839-40.
32. *See* Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 401, 525 P.2d 669, 681, 115 Cal. Rptr. 765, 777 (1974) ("Although loss of consortium may have physical consequences, it is principally a form of mental suffering.").
33. 27 Cal. 3d at 931-32, 616 P.2d at 822, 167 Cal. Rptr. at 840. The court determined that physical injury was not a requirement for allegations of either negligent infliction of emotional distress or loss of consortium. Hence, it found no need to determine whether the medical treatment of Mrs. Molien constituted physical injury on which Mr. Molien's claim of impaired consortium could be based. *See* note 19 supra.
34. *Id.* at 932-33, 616 P.2d at 823, 167 Cal. Rptr. at 841.
35. *Id.*
36. *See id.* at 933-37, 616 P.2d at 823-26, 167 Cal. Rptr. at 841-44 (Clark, J., dissenting).

The dissent virtually ignored the loss of consortium claim. It also failed to discuss the desirability of a legislative as opposed to a judicial solution to the problem of defining liability for emotional distress, despite a statement at the beginning of the opinion that this factor has been the main reason why the court has not previously expanded recovery for mental suffering. *See id.* at 933, 616 P.2d at 823, 167 Cal. Rptr. at 841 (Clark, J., dissenting). But the argument for legislative primacy in this context is misplaced. The legislature has passed very broad and vaguely worded civil obligations statutes, *see* CAL. CIV. CODE §§ 1714 (West Supp. 1981), 3333 (West 1970), but has not interfered with judicial development of common law torts. The legislature can forbid a cause of action (as it did the actions for alienation of affections, criminal conversation, seduction, and breach of promise to marry), *see* CAL. CIV. CODE § 43.5 (West 1954), and it can enact schemes, such as workers' compensation, that largely ignore or exclude recovery for emotional distress. But it has not thus far broadly replaced the common law tort system for emotional dis-
defined a new tort expanding recovery for negligently inflicted emotional disturbance which previously had been confined almost wholly to parasitic damages.\(^{37}\) The minority justices objected to liability for "commonplace" disturbances that cannot be observed or objectively measured.\(^{38}\)

Justice Clark noted that the requirement of concurrent physical injury safeguarded the courts against many spurious claims of mental distress, the obvious danger in legally recognizing an injury that often no one but the plaintiff can perceive and that can be simulated easily.\(^{39}\) The dissent denounced \textit{Molien}'s standards for recovery—medical evidence or some other guarantee of genuineness in the circumstances of the case—as nonstandards that offered juries little guidance.\(^{40}\) Justice Clark observed that juries after \textit{Molien} will have to decide medically dubious questions of causation and degree,\(^{41}\) and that they will tend to...
infer a duty too readily: hindsight—the perspective encouraged by a "foreseeability" test—sees too well. Thus, plaintiffs will too easily make out cases that defendants will have great difficulty refuting. According to Justice Clark, the court has taken another long step on the journey into the "fantastic realm" of infinite liability begun in Dillon.

The opinions in *Molien* embody a classic conflict of values encompassed by tort law. The majority opinion tears down artificial, generalized barriers to recovery for a form of negligently caused personal injury; the dissent worries about overburdening everyday activity and rewarding unworthy claimants.

Neither opinion addresses the points serious that, in the words of Justice Clark's dissent, it amounts to a traumatic effect. But the process of inference from the jurors' own experience is similar, and fairness requires that a jury should have to infer a higher degree of disturbance to justify liability for negligent rather than intentional conduct, so the difference Justice Clark points out is not really a liability.

42. See id. at 936, 616 P.2d at 825, 167 Cal. Rptr. at 843 (Clark, J., dissenting). See also Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 24 (1953), which Justice Clark cited.

43. Id. at 934, 616 P.2d at 824, 167 Cal. Rptr. at 842 (Clark, J., dissenting). The quoted phrase is from Dillon v. Legg, 68 Cal. 2d at 751, 441 P.2d at 928, 69 Cal. Rptr. at 88 (Burke, J., dissenting).

The *Molien* dissent raised three additional issues beyond limiting liability and compensating only those who suffer demonstrable injuries. First, the dissent worried that the tort of intentional infliction of emotional distress, which requires extreme or outrageous conduct, might now be supplanted by the easier *Molien* negligence action that requires only foreseeable results. See 27 Cal. 3d at 936, 616 P.2d at 825, 167 Cal. Rptr. at 843. But see note 41 supra, indicating that it may be harder for a jury to infer serious distress from negligence. Second, casting a disapproving glance at the loss of consortium action in *Molien*, Justice Clark voiced his fears that expanding this action beyond claims following on severe physical injury to the spouse is tantamount to reestablishing recovery for the kind of loss encompassed by the old intentional tort of alienation of affections. Id. at 936 n.3, 616 P.2d at 825 n.3, 167 Cal. Rptr. at 843 n.3. That cause of action was eliminated more than three decades ago because of its potential for fraud, blackmail, and collusion. See Cal. CIV. CODE § 43.5 (West 1954); Ikuta v. Ikuta, 97 Cal. App. 2d 787, 218 P.2d 854 (2d Dist. 1950); see also note 73 infra, suggesting that Justice Clark's point is not well taken.

Finally, the dissent feared that defamation actions now strictly conditioned to avoid burdening candid speech may be too easily prosecuted in a *Molien*-type action for negligent verbal conduct. 27 Cal. 3d at 936 n.3, 616 P.2d at 825 n.3, 167 Cal. Rptr. at 843 n.3 (Clark, J., dissenting). *Molien* could indeed cast some confusion over defamation actions, where the verbal conduct was defamatory as well as negligently hurtful to the plaintiff's feelings. The claims and damages are somewhat different, though. Defamation looks both to injured reputation and injured feelings, and so encompasses pecuniary and nonpecuniary damages beyond those of emotional distress. See W. PROSSER, supra note 18, §§ 111-112 at 737, 760-62. Also, the mental suffering alleged in a defamation action need not be "severe," as it must be for recovery under a theory of negligently inflicted emotional distress after *Molien*.

Constitutionally, the state is apparently free to allow recovery under either theory within the bounds set by the Supreme Court. See Time, Inc. v. Firestone, 424 U.S. 448, 460 (1976) (in approving recovery by a plaintiff who dropped her claim for reputation damages prior to trial and won an award for mental anguish alone, the court noted that a state can set any standards short of strict liability for recovery for defamation of private figures). See also Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964) (public figure cannot recover for defamatory remarks in the press unless actual malice, a knowing or reckless disregard for the truth, can be demonstrated).

44. Compare, e.g., 27 Cal. 3d at 926, 930, 616 P.2d at 818-19, 821, 167 Cal. Rptr. at 836-37, 839 (Mosk, J.), with id. at 936, 616 P.2d at 825, 167 Cal. Rptr. at 843 (Clark, J., dissenting).
made in the other, and the majority does not articulate standards to minimize the concerns raised by Justice Clark.

III

PRIOR LAW

A. Mental or Emotional Distress

Until quite recently, precisely because of the concerns expressed by the dissenters in *Molien*, recovery for emotional distress was confined to instances where other, more demonstrable harms also had occurred. In these cases, awards for general damages were designed to assuage the feelings of the victim, buy him substitute comforts, vindicate his right not to be wrongfully injured, and, perhaps, leave him a considerable sum, even after deducting the costs of litigation. According to the accepted common law rule in California as elsewhere, mental or emotional suffering aggravates damages when it is a natural consequence of the act complained of, but such injury alone cannot be the foundation of a cause of action. Traditionally, however, a medically classifiable “shock to the nervous system” has been treated as a physical harm, and in the presence of this “physical” injury the plaintiff may recover for consequential emotional distress as an aggravation of damages.

According to the *Molien* court, the old physical injury requirement encouraged “extravagant pleading and distorted testimony” suggesting

45. See Jaffe, Damages for Personal Injury: The Impact of Insurance, 18 L. & CONTEMP. PROB. 219, 222-25, 234 (1953); cf. Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 402, 525 P.2d 669, 682, 115 Cal. Rptr. 765, 778 (1974) (although money cannot truly compensate a spouse for loss of consortium, “it is the only known means to compensate for the loss suffered and to symbolize society’s recognition that a culpable wrong—even if unintentional—has been done. . . . That the law cannot do enough, in short, is an unacceptable excuse for not doing anything at all.”).

46. 27 Cal. 3d at 924-25, 616 P.2d at 817-18, 167 Cal. Rptr. at 835-36. See note 18 supra.

47. See Sloan v. Southern Cal. Ry., 111 Cal. 668, 679-80, 44 P. 320, 322 (1896) (“nervous paroxysm” treated as a compensable physical injury as distinct from mere “mental anguish”); Vanoni v. Western Airlines, 247 Cal. App. 2d 793, 797, 56 Cal. Rptr. 115, 117 (1st Dist. 1967) (allegation of “severe shock” to the nervous system is sufficient to overcome a general demurrer); Espinosa v. Beverly Hosp., 114 Cal. App. 2d 232, 235-36, 249 P.2d 843, 845 (2d Dist. 1952) (a definite nervous disorder is a physiological injury, and in its presence mental suffering, anxiety, loss of sleep, and other symptoms are compensable as aggravation of damages, but absent nervous shock or disorder, mental suffering of a plaintiff cannot be the basis of a cause of action). See also CALIFORNIA JURY INSTRUCTIONS—CIVIL (BAJI) No. 12.80, para. 2 (6th ed. 1977) (rewritten after *Molien*; see note 18 supra). The exception for “nervous shock,” which was treated as a physical injury, was based on an assumption that all mental disturbances could be distinctly classified as either psychological or physical injury. 27 Cal. 3d at 924-25, 616 P.2d at 817-18, 167 Cal. Rptr. at 835-36. This classification may be outdated psychology; the distinction is surely overstated and possibly nonexistent. In any event, “physical” and “mental” consequences may be inseparable, and many mental or emotional disorders can be diagnosed in order to support a claim of injury. See id. at 926, 616 P.2d at 818, 167 Cal. Rptr. at 836; W. PROSSER, supra note 18, at 328.
some physical consequences, no matter how slight or improbable, in an effort to open the door to a more sizeable recovery for pain and suffering, mental anguish, humiliation or the like.\textsuperscript{48} Often even a slight degree of physical impact or injury has sustained damages for emotional suffering.\textsuperscript{49} Not surprisingly, then, the strict impact requirement has largely disappeared from Anglo-American jurisdictions\textsuperscript{50} and has been replaced by a more liberal requirement allowing mental distress recoveries for subsequent physical manifestations or in cases where the plaintiff was in the zone of danger at the time of the accident.\textsuperscript{51}

The physical impact, subsequent physical manifestation, and zone-of-danger tests require actual or imminent physical harm to the plaintiff, a condition which a plaintiff is unlikely to endure willingly and which he could not easily fabricate. Because mental harm can be inferred with some assurance in these contexts, recovery for mental distress was first allowed in actions now termed battery and assault.\textsuperscript{52} Gradually, courts also began to compensate plaintiffs for fright, humiliation, and anxiety when the emotional distress followed the tortious invasion of protected interests other than physical integrity, such

\textsuperscript{48} 27 Cal. 3d at 929, 616 P.2d at 820, 167 Cal. Rptr. at 838. The court suggested that nausea, headaches, and insomnia usually can be alleged as the physical concomitants of emotional distress, and these symptoms often allow a plaintiff to get past the pleading stage of litigation and take his case to court. \textit{Id.} Once there, the jury need not find much in the way of physical injury to recompense, since it can award a sizeable sum for mental suffering as general damages.


\textsuperscript{50} See I J. Dooley, \textit{Modern Tort Law} § 15.06 (1977). English courts rejected the impact rule quite early, see Hambrook v. Stokes Bros., [1925] 1 K.B. 141 (recovery for woman who saw runaway truck and then found that her child had just been struck by it); Dulieu v. White, [1901] 2 K.B. 669 (plaintiff had miscarriage after a van struck her husband's pub, not quite touching her), and settled on the rule that the plaintiff claiming physiological or psychological injuries resulting from shock must be within the foreseeable zone of risk of mental shock. See Mt. Isa Mines Ltd. v. Furse [1970] 125 C.L.R. 383 (plaintiff recovered for acute schizophrenia after he witnessed a co-worker in flames following a mine explosion); Boardman v. Sanderson, [1964] 1 W.L.R. 1317 (recovery by father, known by defendant to be nearby, who heard screams and ran to find his injured child). See also J. Fleming, \textit{The Law of Torts} 152-57 (5th ed. 1977). Casual, unrelated bystanders may not recover, however, because they are not foreseeably injured to a compensable degree by shock. See Bourhill v. Young [1943] A.C. 92, 117.


\textsuperscript{52} See W. Prosser, supra note 18, §§ 9, 10. The action for assault, or the apprehension of physical harm without actual contact, developed as a form of trespass to deter breaches of the peace. \textit{Id.} § 10, at 37-38. The earliest known case is very old indeed: I de S et ux. v. W de S, Y.B. Lib. Ass. 22 Edw. 3, f. 99, pl. 60 (1348) (tavernkeeper's wife recovered for fright under trespass theory after an irate customer narrowly missed her with his hatchet).
as property, personal liberty, privacy, or reputation. In California some cases of wrongful breach of contract or covenant of fair dealing, particularly concerning contracts to insure and defend or to perform other sensitive and personal services, have also resulted in recovery for emotional disturbance without a concomitant claim of physical injury. In these cases, courts found the breach and sensitive nature of

53. See generally, 1 J. Dooley, supra note 50, §§ 15.01 to .02; 2 F. Harper & F. James, Jr., THE LAW OF TORTS § 18.4, at 1031-33 (1956); W. Prosser, supra note 18, § 54, at 328-29; RESTATEMENT (1965), supra note 4, §§ 46, 312.

The RESTATEMENT (SECOND) OF TORTS § 905, Comments c, d (1979) [hereinafter cited as RESTATEMENT (1979)], dealing with compensatory damages for nonpecuniary harms, observes that the principal element of damages in actions for battery, assault, false imprisonment, defamation, malicious prosecution, and alienation of affections is often the disagreeable emotion engendered by the tort. In other tort actions emotional unpleasantness is usually compensated only when it accompanies trespass or nuisance.

The RESTATEMENT (1979) would allow liability for serious emotional distress only in limited cases: intentional, outrageous conduct calculated to engender severe distress, id. §§ 46-47; intentional or reckless conduct resulting in illness or bodily harm, id. §§ 312-313; negligent conduct involving an unreasonable risk of bodily harm where bodily harm does occur, but as a consequence of fright or shock rather than of impact (e.g., the cases where a woman narrowly missed by a runaway vehicle miscarries), id. § 436; negligence resulting in emotional disturbance, but only if accompanied by bodily harm, id. § 436A. The RESTATEMENT (1979) is careful to note, in Comment a to § 312 that there is no protection of "mental and emotional tranquility in itself. In general... there is no liability where the actor's conduct inflicts only emotional distress, without resulting bodily harm or any other invasion of the owner's interests."

54. The California Supreme Court broke new ground in this area by allowing a plaintiff to claim emotional distress when her insurance company failed to settle within her liability policy limits, so that her health and finances were ruined. See Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967); accord, Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974). Her other claims against the insurer for breach of covenants to insure and defend and for breach of covenant of good faith and fair dealing were considered adequate guarantees of the genuineness of the claim for emotional distress, especially considering the sensitive nature of an insurance contract, which is designed to protect the insured from crushing personal losses. 66 Cal. 2d at 434, 426 P.2d at 179, 58 Cal. Rptr. at 19.

The court of appeal followed Crisci in Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d 917, 122 Cal. Rptr. 470 (4th Dist. 1975), holding a title insurer liable for mental distress caused by a negligent title search and subsequent failure to defend. The actionable negligence of the defendant in conducting a careless title search and in refusing to defend the insured supplied a guarantee of genuineness for the emotional distress claim. Jarchow proposed that an invasion of any other substantial protected interest of the plaintiff, not only the interest in physical security, could support a claim for mental distress. See Tuohey, Negligent Infliction of Emotional Distress Arising from a Breach of Contract: Jarchow v. Transamerica Title Insurance Co., 8 SW. U.L. Rev. 655 (1976). This expansive doctrine was criticized in two subsequent court of appeal decisions, Quezada v. Hart, 67 Cal. App. 3d 754, 136 Cal. Rptr. 815 (2d Dist. 1977) (legal malpractice), and Fuentes v. Perez, 66 Cal. App. 3d 163, 136 Cal. Rptr. 275 (1st Dist. 1977) (contractor's tortious breach of contract resulting in loss of personal possessions and damage to home). Quezada and Fuentes singled out physical injury as the only validation of a mental distress claim.

California courts have granted recovery on claims of mental disturbance in other cases involving a special relationship between the parties and transactions that entailed obvious emotional risks. Thus, a jeweler—a bailee—was held liable for such damages when the plaintiff's rings, which, as the jeweler knew, had great sentimental value, were lost in the mail after the jeweler sent them to a factory for repair. Windeler v. Scheers Jewelers, 8 Cal. App. 3d 844, 88 Cal. Rptr. 39 (1st Dist. 1970). The plaintiff's emotional distress was a foreseeable consequence of a breach of
the transaction provided objective validation of the claim. Similarly, many jurisdictions have ordered compensation for exceptional classes of cases where emotional suffering is a highly probable consequence of negligence or breach, primarily cases of corpse mishandling and negligently transmitted death notices. The resulting physiological symptoms or incapacitating mental disorders have tended to corroborate

contract involving the personal happiness and welfare of the plaintiff. Similarly, corporate officers were allowed to recover for their mental distress after their bank wrongfully dishonored a company check, subjecting them to official investigation and creditor harassment. Kendall Yacht Corp. v. United Cal. Bank, 50 Cal. App. 3d 949, 123 Cal. Rptr. 848 (4th Dist. 1975). Finally, in another decision dealing with an insurer's alleged bad faith failure to defend and indemnify its insured, the supreme court relied on medical expenses and business losses incurred by the plaintiff to uphold a claim for mental distress. Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973). The court declared that the invasion of another substantial interest of the plaintiff, represented by the insurance contract and its implied duty of good faith performance, would support an emotional injury claim, even without extreme conduct or physical injury. Id. at 579-80, 510 P.2d at 1040-42, 108 Cal. Rptr. at 488-90.

Since these supreme court cases dealt only with insurers, a question remained whether the court would allow mental distress claims accompanying other tort or contract claims with a likelihood of serious emotional consequences. Also, the insurance cases dealt with parties in contractual relationships to one another. They might be explained as extending the contract notion of contemplated special damages. See Hadley v. Baxendale, [1854] 9 Ex. 341, 156 Eng. Rep. 145. But Molien allows claims for foreseeable emotional injury even when the claim is not tied to an invasion of another protected interest of the plaintiff. It clearly adopts a tort theory of broad liability for harm to a separate protected interest in freedom from serious mental disturbance.


56. See, e.g., W. PROSSER, supra note 18, § 54, at 328-30 ( corpse mishandling and negligent transmission of death notices treated in many states as actionable without physical manifestations of emotional distress); RESTATEMENT (1979), supra note 53, § 868 & Comment a ( interference with dead bodies gives rise to action for mental distress without proof of physical consequences). California cases of negligent corpse mishandling include Chelini v. Nieri, 32 Cal. 2d 480, 196 P.2d 915 (1948), and Carey v. Lima, Saltnon & Tully Mortuary, 168 Cal. App. 2d 42, 335 P.2d 181 (1st Dist. 1959). Most recently, the court of appeal in Allen v. Jones, 104 Cal. App. 3d 207, 163 Cal. Rptr. 445 (4th Dist. 1980), stated as a rule of law that “damages are recoverable for mental distress without physical injury for negligent mishandling of a corpse by a mortuary,” because mental distress is highly foreseeable. Furthermore, the court reasoned, monetary compensation may be the only available remedy, and thus such injuries must be compensable in order to maintain high standards of care in a profession that regularly affects human sensibilities. Id. at 214-15, 163 Cal. Rptr. at 450. In a colorful concurring opinion, Presiding Justice Gardner pleaded for a reconsideration of the usual physical injury requirement generally, not only as special treatment for mortuary defendants: “If as a result of someone's negligent conduct, I suffer the horrors of gut-wrenching, sleepless nights worrying about the well being of myself, my wife, and my children, I should be allowed to recover without having to dream up some foundational physical ailment.” Id. at 216-17, 163 Cal. Rptr. at 451. Presiding Justice Gardner speaks as though the factfinder knows the plaintiff has suffered such psychological trauma, but the difficulty of establishing this stress in novel fact circumstances is precisely the problem. The mortuary cases seem to create a rebuttable presumption that emotional injury has in fact occurred, because of the peculiarly high risk of such injury arising from mortuary negligence.

claims of mental distress in these cases.\textsuperscript{57}

Similarly, the courts have allowed recovery for severe emotional distress intentionally or recklessly inflicted, where the defendant's conduct is "extreme or outrageous."\textsuperscript{58} Such cases may not include physical injury, yet still support the strong likelihood of serious emotional disturbance to the victim. In granting recovery, courts also have been concerned about deterring antisocial behavior.\textsuperscript{59} In California the leading case for this tort is \textit{State Rubbish Collectors Association v. Siliznoff},\textsuperscript{60} in which Chief Justice Traynor explained that the threatening conduct designed to intimidate the plaintiff could serve as the objective basis for a jury inference of emotional distress. Under Justice Traynor's approach, the jury could draw on its experience of human nature to judge the alleged, but internal, consequences of extreme behavior to a person of normal sensibilities.\textsuperscript{61}

The state of the law on recovery for purely emotional injury is still undeveloped or nascent in other jurisdictions, although in several states\textsuperscript{62} recovery for emotional distress has gone beyond actions involving parasitic emotional damages or well-established mental or emotional injury actions, such as defamation, invasion of privacy, or intentional infliction of emotional distress. Twenty-three years before \textit{Molien}, the New York Court of Appeals announced that "freedom from mental disturbance is now a protected interest in this state."\textsuperscript{63}

\begin{footnotes}
\textsuperscript{57} Outside of corpse mishandling and death notice cases, see note 56 supra, physical symptoms after the event generally are pleaded in cases including emotional distress claims. However, in some cases those physical manifestations are relatively slight. \textit{E.g.}, Windeler v. Scheer's Jewelers, 8 Cal. App. 3d 844, 851, 88 Cal. Rptr. 39, 44 (1st Dist. 1970) ("general nervousness," loss of sleep, aches in the arms and head). For a discussion of the need for psychological if not physiological evidence of the actuality of mental suffering and its degree, see note 120 and accompanying text infra.

\textsuperscript{58} See W. Prosser, supra note 18, § 12, at 55-62. This test is the subject of \textit{Restatement} (1965), supra note 4, § 46, which defines outrageous conduct causing severe emotional distress: "(1) one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Further provisions extend liability for distress resulting from outrageous conduct, intentional or "reckless," directed at a third person, if the plaintiff is closely related and present at the time, or if the plaintiff is unrelated to the victim but suffers bodily harm from the emotional distress. \textit{Id.} § 46(2).

\textsuperscript{59} See \textit{State Rubbish Collectors Ass'n v. Siliznoff}, 38 Cal. 2d at 330, 240 P.2d at 285.

\textsuperscript{60} 38 Cal. 2d 330, 240 P.2d 282 (1952).

\textsuperscript{61} \textit{Id.} at 338, 240 P.2d at 286.

\textsuperscript{62} New York and Hawaii have more fully developed their common law on recovery for emotional injuries, but other states have also liberalized recovery for emotional distress in a few scattered cases that have yet to be expanded upon. \textit{See} Wallace v. Coca-Cola Bottling Plants, 269 A.2d 116 (Maine 1970) (recovery for plaintiff who discovered a foreign object in a soft drink bottle but was not physically injured by the object); Daley v. LaCroix, 384 Mich. 4, 179 N.W.2d 390 (1970) (children frightened by negligently caused electrical explosion).

\textsuperscript{63} Ferrara v. Galluchio, 5 N.Y.2d 16, 21, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 999 (1958). The court adopted Professor Prosser's criteria for recovery: medical corroboration or a
Few reported appellate decisions in New York have treated this type of action thus far, however, and the results have been mixed. In 1970, the Hawaii Supreme Court also made a leap into something like a Prosserian universe in Rodrigues v. State by holding that “the interest in freedom from negligent infliction of serious mental distress is entitled to independent legal protection.” Hawaii subsequently combined this expansive view of the plaintiff's emotional interest with its adoption of the Dillon bystander recovery rule in Leong v. Takasaki to produce the most inclusive liability anywhere for emotional injury per se. More recently, the Hawaii court seems to have withdrawn somewhat from this expansive view.

guarantee of genuineness in the circumstances of the case. Id. at 21, 152 N.E.2d at 252, 176 N.Y.S.2d at 1000, discussing W. PROSSER, supra note 18, § 54.


66. Id. at 174, 472 P.2d at 520. Moreover, Rodrigues contemplated recovery without physical manifestations of distress or medically classifiable disorder; the jury could infer from the objective circumstances of the misconduct the likelihood that a normally constituted plaintiff could not “cope with the mental stress engendered by the circumstances of the case.” Id. at 173, 472 P.2d at 520. But this inference may only establish causation and strengthen the proof of actual damages. See Leong v. Takasaki, 55 Hawaii 398, 413, 520 P.2d 758, 767 (1974) (medical or psychiatric testimony is necessary to support a claim of mental injury). Thus, the Hawaii court adopted in negligence actions the approach previously taken in cases of intentional infliction of emotional distress, allowing the jury to infer emotional injury from the circumstances of the negligent conduct. See notes 58-61 and accompanying text supra. The plaintiffs in Rodrigues had suffered property damage as well as mental anguish from the flooding of their home, but the Hawaii court explicitly granted an action for the latter whether or not the former could be proven, concluding that “there is a duty to refrain from the negligent infliction of serious mental distress.” Id. at 174, 472 P.2d at 520.

67. 55 Hawaii at 173, 472 P.2d at 520.

68. In Kelly v. Kokua Sales & Supply Ltd., 56 Hawaii 204, 532 P.2d 673 (1975), the court denied recovery to plaintiffs whose decedent suffered a heart attack upon learning, by telephone, of a fatal accident involving his daughter and two granddaughters in another state. The court decided that a plaintiff claiming under the doctrine of Rodrigues and Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974) (Hawaii's Dillon case) must be “located within a reasonable distance from the scene of the accident,” 56 Hawaii at 209, 532 P.2d at 676, an artificial restriction that seems to push the doctrine back toward the zone-of-danger rule.
Before *Molien* the California Supreme Court had not recognized a broad protected interest in mental tranquility, although *Dillon v. Legg* did significantly expand recovery for emotional distress for closely related bystanders.69 At least seven other states have endorsed *Dillon* by allowing recovery for shock and distress to plaintiffs who witnessed the injury or death of a loved one.70 Those states typically have adopted *Dillon*’s limiting guidelines as well, though, and require that the plaintiff be close in time and place to the accident as well as closely related to the victim,71 thereby stopping short of recognizing a generally protected interest in emotional security.

### B. Loss of Consortium

At common law a husband’s rights to his wife’s services, companionship, affection, and sexual relations were combined in a single concept of consortium, which was a protected interest in the marital relationship.72 In California, the court’s growing sensitivity to the obvious inequality of making the action available to husbands but not to wives led it to bar loss of consortium claims altogether, leaving both spouses equally deprived of a cause of action for negligent interference with the marital relationship.73 However, in 1974 the California

---

69. *See* note 24 and accompanying text *supra*.


71. *See*, e.g., Kelley v. Kokua Sales & Supply, 56 Hawaii 204, 532 P.2d 673 (1975) (denying recovery to the estate of a man who died in Hawaii when he was informed of his daughter's and granddaughter’s accidental deaths in California, for lack of his physical proximity to the accident).


73. In West v. City of San Diego, 54 Cal. 2d 469, 353 P.2d 929, 6 Cal. Rptr. 289 (1960), the court firmly declared that neither husband nor wife could maintain an action for loss of consor-
Supreme Court restored the action for loss of consortium based on negligent and severe injury to either spouse. In Rodriguez v. Bethlehem Steel Corp., a case brought by a woman whose husband was paralyzed in an occupational injury, the court acknowledged the fundamentally emotional nature of the claim. An action for loss of consortium, the court announced, would henceforth be available to the spouse of a severely injured person when the plaintiff was deprived of the services, society, and sexual companionship of the spouse to a serious extent and for a significant period. Before Molien, California courts had not decided a case involving a claim of emotional distress arising from non-physical injury to a plaintiff's spouse, however, although the high court of Massachusetts had granted recovery to the husband of a woman who became neurotic after she was wrongfully discharged from employment.

The Rodriguez court cited Dillon as acknowledging the intensity of emotional loss that accompanies an accident to a loved one and also for the proposition that foreseeability of the harm should guide the court in finding a duty to prevent such loss to the plaintiff. In our society, the court asserted, it can be foreseen that an injured person is likely to be married and that a serious injury will affect the victim's spouse. Despite a similar foreseeability of loss of society implicated in parent-child cases, the supreme court limited the duty to spouses in two subsequent decisions.
The law in California and elsewhere reveals a gradual liberalization of recovery for mental distress but also a reluctance to put mental and emotional harms on the same legal footing as physical injuries. The cautious approach of the common law is paralleled by the limited recognition accorded emotional disturbance in statutory schemes for accident compensation. The slow pace of change reflects concern over proof and genuineness and over the costs of compensating nonphysical injuries whose impacts are generally considered less severe than death or maiming.

The classic objection to recovery for mental or emotional suffering lies in the difficulty of proof. When physical pain and emotional distress accompany a bodily injury, jurors can analogize from their own experiences that bodily injury hurts. Without physical injury, courts are forced to address the more speculative questions of the extent and even the existence of any lasting emotional injury.

Still, difficulty of proof is not always insurmountable. Emotional harm to spouses can be quite severe, and it is often verifiable by expert

79. See Jaffe, Damages for Personal Injury: The Impact of Insurance, 18 L. & CONTEMP. PROB. 219, 235-40 (1952). Workers' Compensation statutes and decisions typically exclude recovery for nonphysical injuries. This constraint has engendered much litigation by parties attempting to avoid the exclusive remedy provisions and to sue the employers in tort for nonphysical injuries. See, e.g., Unruh v. Truck Ins. Exch., 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972); Larson, Nonphysical Torts and Workmen's Compensation, 12 CAL. W.L. REV. 1, 1 (1975). In California the concern with large damages awards for mental anguish led to the legislative imposition of a $250,000 limit on awards for noneconomic loss (including pain and suffering) in medical malpractice suits, CAL. CIV. CODE § 3333.2(b) (West Supp. 1981), although questions have been raised concerning the vulnerability of the malpractice regulation scheme to a constitutional equal protection attack. See, e.g., Note, California's Medical Injury Compensation Reform Act: An Equal Protection Challenge, 52 So. CAL. L. REV. 829 (1979). Similar limits appear in some no-fault auto insurance schemes. See Alexander, An Update: State and Federal No-Fault, 3 INCL BRIEF, No. 2 (1973). Interestingly, Professor Fleming reports on the liberal statutes of New Zealand and the two Australian territories that allow recovery for mental shock due to the death or injury of a child or spouse or the personally witnessed death or injury of any other family member. See J. FLEMING, supra note 50, at 157-58 & nn.7-8. These statutes seem to be unique in Anglo-American jurisdictions in recognizing emotional distress to such a degree.

80. See Jaffe, supra note 79, at 235-40. Indeed, one commentator has suggested that legal remedies designed to deter the careless disruption of mental tranquility and to compensate victims who are incapacitated by emotional distress are a luxury of wealthy states. See P. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW 69 (1970).

81. A prayer for general damages for "pain and suffering" or mental anguish is considered legitimately to include such elements as shock, grief, anxiety, or other mental disturbance, as well as "physical pain." See C. MCCORMICK, HANDBOOK OF THE LAW OF DAMAGES § 88 (1935); W. PROSSER, supra note 18, § 54, at 330.
witnesses. Furthermore, courts regularly allow juries to make estimates of the psychic effects of wrongdoing as the chief element of general damages, when physical injury or harm to another interest is present.\footnote{See Molien, 27 Cal. 3d at 928-29, 616 P.2d at 820, 167 Cal. Rptr. at 838; Capelouto v. Kaiser Foundation Hosps., 7 Cal. 3d 889, 893, 500 P.2d 880, 883, 103 Cal. Rptr. 856, 859 (1972).} Before Molien, negligence law on mental disturbance was characterized by such exceptions and inconsistencies. Molien is an important effort to generalize the interest in mental tranquility and to rationalize its protection within common principles of tort law.

Molien abolishes the traditional bar against claims for emotional distress that do not accompany physical harm or danger, injury to another witnessed by the plaintiff, or invasions of privacy, reputation, or other recognized interests. This section will examine the elements of the Molien actions for negligently caused emotional disturbance and loss of consortium. It will suggest how these elements might be pleaded and proved, and particularly how evidentiary standards for the proof of actual damages can provide the key to judicial management of these actions. This section will then examine the scope of Dillon after Molien and the validity of the distinction made by the Molien court between direct and derivative claims of emotional injury.

\section{The Elements and Proof of a Molien Action for Mental Distress}

The elements of an ordinary cause of action for negligence are traditionally itemized as (1) a duty to conform one's conduct to a standard of care to protect others from unreasonable risks, (2) a failure to meet that duty of care, (3) a proximate causal connection between the deficient conduct and the plaintiff's injuries, and (4) proof of damages, establishing actual loss or injury to the plaintiff's interests.\footnote{See, e.g., W. Prosser, supra note 18, § 30, at 143-44; Restatement (1965), supra note 4, § 281.} This list provides a framework for examining how a Molien negligence action for emotional distress must be pleaded and proved.

\subsection{The Duty of Care to Avoid Subjecting Others to the Risk of Emotional Disturbance}

The average person probably cannot live through a day without hurting the feelings of another in some small way either unwittingly or by design. Thus, the "reasonable person" standard of care to avoid subjecting others to emotional distress cannot be made unrealistically burdensome. The Molien court identifies a duty to avoid inflicting "serious mental distress," that is, to avoid exposing the plaintiff to circumstances involving such foreseeable mental stress that the "normally
constituted” person could not “cope” with it.84

Even after Molien, then, the interest in emotional tranquility has lower priority than the interest in physical integrity. Any physical contact or injury is actionable,85 but only severe or debilitating emotional injury can support a lawsuit. This distinction is defensible: society deems one who commits the more obvious, more avoidable harm as more culpable. Regulating one’s conduct to avoid causing bodily harm is far less burdensome than regulating one’s conduct to avoid causing shock, offense, fear, or anxiety. Limiting the duty to “serious” emotional distress, as the Molien court admonishes, also reduces the likelihood of cluttering the courts with trivial or fraudulent claims and of imposing immense costs for compensation on society. Moreover, the court-imposed constraint suggests that something more than ordinary grief or anxiety—a threshold that would quickly bankrupt any compensatory system—is required. Plaintiff’s emotional injury must rise to the level of debilitating impact, shown by serious illness, inability to work or to carry on normal activities, or by a need for treatment and counseling.86

In order for a court to hold a defendant liable for breaching a duty of care, the harm envisioned by Molien—serious, debilitating emotional distress—must be a foreseeable risk of the defendant’s conduct to a foreseeable plaintiff.87 In California, foreseeability has recently been treated as the essence of duty. A judge must leave to the jury the question of whether the harm to the plaintiff was foreseeable, so long as the judge believes that a reasonable juror might consider the harm foreseeable.88 Thus, policy concerns once considered within the province of

84. See 27 Cal. 3d at 928, 930, 616 P.2d at 819-21, 167 Cal. Rptr. at 837-39. Note the similar language in 2 F. Harper & F. James, Jr., supra note 53, at 1035-36: “Under general principles recovery should be had in such a case if defendant should foresee fright or shock severe enough to cause substantial injury in a person normally constituted.” The “substantial injury” contemplated by Harper and James seems to have been bodily injury or sickness, but Molien extends the notion to inferred or classifiable mental disorders or disturbance. See notes 112-16 and accompanying text infra. The unreasonable risk associated with the failure to conform to this duty is that of bringing about “serious” or “severe and debilitating” emotional injury. 27 Cal. 3d at 919, 928, 930, 616 P.2d at 814, 819-20, 821, 167 Cal. Rptr. at 832, 837-38, 839. If the defendant could reasonably be expected to foresee that such injury would result from his conduct, then he has a duty to refrain from so acting. See 2 F. Harper & F. James, Jr., supra note 53, at 1018.

85. See Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968).

86. See notes 109-11 and accompanying text infra.

87. 27 Cal. 3d at 922, 616 P.2d at 816, 167 Cal. Rptr. at 834. See 2 F. Harper & F. James, Jr., supra note 53, at 1018.

the court in defining duty\footnote{Such concerns include the administrability of an action, the capacity of the parties to bear the loss, the probable deterrent effect of liability, the moral blame attached to the defendant's conduct, and the likelihood and severity of harm balanced against the costs of avoiding it. \textit{See} W. Prosser, \textit{supra} note 18, § 53; note 90 \textit{infra}. The existence of a duty is traditionally a question of law for the judge to decide. \textit{See} W. Prosser, \textit{supra} note 18, § 37, at 206; Prosser, \textit{Proximate Cause in California}, 38 Calif. L. Rev. 369, 423 (1950).} are not explicitly treated as part of duty analysis in individual cases. These policy concerns include the weighing of the risk and degree of harm against the burdens imposed upon conduct and the cost of compensation.\footnote{Judge Learned Hand reduced the balancing of the burdens imposed on useful activity against the probability and degree of harm to this well-known formula. \textit{See} United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).} By equating duty with foreseeability, California courts have given up much of their former ability to weigh these policy factors. Instead, the only policy-oriented duty analysis occurs when courts create a general cause of action as the supreme court did in \textit{Molien}. \textit{Dillon}, by contrast, imposed proximity restrictions as a way of limiting the duty of care and suggested that future courts could impose other requirements as part of the duty analysis in other fact situations. However, the \textit{Molien} court ignored this invitation.\footnote{\textit{See} 27 Cal. 3d at 923, 616 P.2d at 816, 167 Cal. Rptr. at 834. \textit{Dillon} observed the "primary importance" of the foreseeability of risk in establishing duty, but recognized that it might be displaced by "overriding policy considerations," such as the concern over indefinite liability. \textit{Dillon} v. Legg, 68 Cal. 2d 728, 739, 441 P.2d 912, 919, 69 Cal. Rptr. 72, 79 (1968).} With foreseeability as the touchstone of duty, the trial court on remand, for instance, can not weigh the burdens imposed upon medical diagnoses by an expanded action for negligent infliction of emotional distress. Duty will be determined solely by the jury's assessment of whether the emotional harm to the plaintiff was foreseeable and whether a doctor was unduly careless in exposing the plaintiff to this harm.

Jury verdicts do not create a body of precedential law. Therefore, making duty hinge on jury determinations of foreseeability engenders considerable uncertainty and thus increases insurance and litigation costs. Predictably, a careless diagnosis of infectious syphilis will affect a married woman and her spouse with peculiar emotional intensity. Severe emotional distress may also be a predictable result of an adverse credit report, a mistake in scheduling a wedding or funeral, or an idle threat to poison a neighbor's straying cat. In many cases, the issues will not be so clear, yet judges will feel compelled to find that a reasonable juror might believe that a defendant should have foreseen that serious mental distress would result from his conduct. The matter must then be left for ad hoc decision at the hands of the jury.

In defining tort duties, California has resolved the tension between the advantages of generalization and certainty and those of individual-
ized decision and flexibility by emphasizing the latter and sacrificing
the former. Yet the Molien action cries out for more control than bare
reliance on ad hoc determinations of foreseeability. Common experi-
ence provides some ready guidelines for assessing the kinds of conduct
that create a risk of physical impact. But people vary widely in their
emotional tolerance to hurtful words and events and in their ability to
understand how and why their actions may cause mental distress in
others. Therefore, assessing the risk of inflicting emotional distress
through various kinds of conduct becomes highly problematical. Even
though the risk might be "foreseeable" after the fact, many actors will
not recognize the likelihood of serious harm arising from their conduct.
Deciding when actors ought to be encouraged to consider the potential
emotional harms and to take care to prevent them is a policy question,
but one that the courts, by judicial pronouncement and precedent will
have little to do with answering. Rather, juries will respond to that
question, case by case.

Under present notions of duty, courts can do little to restrict the
Molien action to particular plaintiffs. Foreseeability alone defines
those to whom the defendant is liable. But Molien has at least quali-

fied the harm encompassed by this duty: it is not defined as grief or
sorrow or anxiety, but as a severe and debilitating distress with which
the normally constituted person would have trouble coping. It is in the
proof of actual injury, then, another element of negligence actions, that
the courts have an opportunity to manage the action for negligent in-
fliction of emotional distress.

2. Breach of Duty or Failure to Exercise Due Care

Even if a defendant's conduct foreseeably threatens serious emo-
tional disturbance, it must be unreasonable in order to create liability
for the emotional consequences to the plaintiff.\textsuperscript{94} To assess the reason-
ableness of a defendant's conduct, a jury weighs the utility and accepta-
bility of the act complained of against the risk of its causing harm.\textsuperscript{95} In
professional negligence cases such as Molien, professional standards of
practice are relevant in determining whether a doctor exercised due
care in his diagnosis.\textsuperscript{96} Medical testimony can explain the profession's
understanding of the public health hazards of syphilis or the propriety

\textsuperscript{92} 27 Cal. 3d at 928, 930, 616 P.2d at 819-20, 821, 167 Cal. Rptr. at 837-38, 839.
\textsuperscript{93} See notes 108-26 and accompanying text infra.
\textsuperscript{94} See W. Prosser, supra note 18, § 30.
\textsuperscript{95} See id. § 37, at 206-07.
\textsuperscript{96} See id. § 33. California cases agree that a physician is generally required to exercise that
degree of knowledge, skill, and care ordinarily practiced by members of his profession in similar
circumstances. See, e.g., Bardessono v. Michels, 3 Cal. 3d 780, 478 P.2d 480, 91 Cal. Rptr. 760
of the methods employed by the physician or the laboratory, but a jury ultimately will decide whether the defendants were too careless.\(^9\)

After *Molien*, professionals who deal in emotionally sensitive matters with their clients will need to evaluate emotional risks entailed by their actions and consider the acceptable burdens of care within which they can do their job. This consideration, expressed in custom and canons of responsibility, may help to establish standards of reasonable care in many professions or activities, thereby introducing some certainty into *Molien*’s broad new duty to avoid subjecting others to the risk of emotional disturbance. The re-evaluation also may have some deterrence value, because *Molien* imposes a new duty of care to avoid inflicting serious emotional harm. Drivers, for example, have always been liable to pedestrians and other motorists hurt by their carelessness. *Dillon* simply expanded that pre-existing liability to third parties emotionally affected by accidents. By contrast, the liability extended by *Molien* for speech or conduct that has purely emotional impact is innovative: it classifies as unreasonable conduct that was not necessarily actionable before and affects actors who often are in a longer-term professional relationship with plaintiffs and their families, and are thus more likely to be able to plan their professional conduct so as to minimize the risk of emotional distress.

3. Proximate Cause

In some cases, such as miscarriage, heart attack, or catatonia following immediately upon a shocking event, the causal link between injury and negligent conduct is obvious.\(^9\) In many emotional distress cases, the connection will not be so clear; *Molien* is one such case.\(^9\) A

97. *See* W. Prosser, *supra* note 18, § 37, at 207.

98. The relative ease of proving causation in such cases, as well as the magnitude of the injury, may explain why so many of the early shock or fright cases involved pregnant women who miscarried or persons who suffered heart failure. *See*, *e.g.*, the leading English cases, Hambrook v. Stokes Bros., [1925] 1 K.B. 141 (woman and fetus died after incident where she saw runaway truck and then learned it had struck one of her children), and Dulieu v. White, [1901] 2 K.B. 669 (miscarriage promptly following shock). *See also* W. Prosser, *supra* note 18, § 54, at 330-31.

99. *See* Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978), for another example of difficult causal problems. The Massachusetts Supreme Judicial Court overruled its prior impact rule and allowed two claims that alleged emotional distress for both parents of a minor child injured in an automobile accident to proceed to proof. The mother arrived on the scene shortly after the accident and died of a heart attack while riding in the ambulance with her injured daughter. *Id.* at 556, 380 N.E.2d at 1296. The court was confident that the claim for her wrongful death should be entertained. *Id.* at 569, 380 N.E.2d at 1303. But the court expressed doubts about the father’s injuries: the administratrix alleged that he suffered an ulcer, and ultimately a fatal heart attack, because of his shock and distress over the events. *Id.* at 556, 569, 380 N.E.2d at 1296, 1303. Clearly, he did not die immediately after receiving the tragic news, and the court cautiously remanded for more evidence on the circumstances and timing of the father’s reactions. *Id.* at 569, 380 N.E.2d at 1303. A gradually developing gastric ulcer and a coronary occlusion some time
jury might find the requisite causation, but it also could be persuaded that if the Moliens’ marriage could not survive the shock and suspicion engendered by a subsequently corrected diagnosis of syphilis, the marriage was already in trouble.

The Molien court found that the negligent examination of Mrs. Molien, her treatment, and the instruction to have her husband tested are “objectively verifiable actions” with foreseeable emotional consequences. Thus, the defendant’s conduct is treated as an objective base from which a jury might infer the validity and cause of the plaintiff’s asserted suffering. Moreover, the law recognizes the gravity of a “false imputation of syphilis,” making it slander per se; a divorce action, according to the court, could reasonably flow from the imputation of venereal disease.

Causation typically will be left to the jury to infer from the events that gave rise to the plaintiff’s claim, particularly if medical testimony is indecisive. The state of medical and psychiatric knowledge is not far enough advanced to readily assist jurors in tracing the various causes of psychic disorders immediately following a dramatic event. The problem is similar to, but probably even more subtle than, that of weighing pre-existing medical conditions in personal injury litigation. Probably the less obvious the connection between the misconduct and the alleged suffering or incapacity, the more likely that a jury will properly discount any alleged link. The requirement of proximate cause, in short, serves as another filter for tenuous claims, allowing jurors to express their disbelief of an extraordinary claim of emotional injury. The requirement somewhat reduces the likelihood that this new cause of action will burden society with a flood of costly, spurious litigation.

Allowing juries to infer causation from a sequence of events involves a somewhat different use of the concept of foreseeability than its use in determining the duty of care. In the latter instance, a judge asks whether a reasonable juror might believe the alleged harm to the plaintiff was foreseeable at the time the defendant acted. In establishing

later would raise questions about when and how certain health problems began. These questions might be even more difficult when neurosis or other psychic disorders are alleged.

100. See W. Prosser, supra note 18, § 45. The jury would be expected to determine causation-in-fact, but proximate cause is a legal conclusion reached after weighing policy concerns similar or identical to those involved in determining duty. Id. § 42. Where the issue of duty is primarily a matter of foreseeability, however, the jury will usually decide this aspect of proximate cause as well as that of factual causation. The tendency is to leave the question of proximate cause to the jury entirely. See notes 88-91 and accompanying text supra.

101. 27 Cal. 3d at 930-31, 616 P.2d at 821, 167 Cal. Rptr. at 839.

102. Id.

103. Id. at 931, 616 P.2d at 821, 167 Cal. Rptr. at 839.

104. See note 41 supra.

105. See note 88 and accompanying text supra.
causation, the *Molien* court indicated that the jury may find that, in fact, the defendant's conduct did cause the plaintiff's injury if such an injury was foreseeable. Liability, then, is founded on likelihood, with the attendant danger that the likelihood will seem stronger in hindsight. Furthermore, a defendant cannot readily disprove the simple foreseeability of the harm. A defendant may deserve this heavy burden if his conduct was intentional or reckless, yet it seems too harsh for negligence. But if causation may not be medically demonstrable in many cases, and if recovery is allowed for negligent infliction of emotional distress standing alone, the courts probably must accept jurors' commonsense judgments on the likelihood that such injury followed a defendant's misconduct. This conclusion is further evidence of the need to redress the burden of litigation by insisting upon corroboration in considering the final element of negligence—actual injury.

4. Actual Damages

*Molien* defined a duty not to inflict serious mental distress. In these cases, then, producing evidence of serious emotional harm is necessary not only to demonstrate an actual loss and to enlarge the recovery, but simply to maintain an action. Thus, plaintiffs must plead emotional distress with some specificity and prove more than incidental or speculative injury.

The *Molien* court did not elaborate on its concept of a "severe and debilitating" injury, but it arguably is one that interferes with ordi-

106. 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

107. The minority opinion in *Molien* takes exception to the majority's scheme for submitting to the jury the question of whether the defendant's conduct, simply by its nature, has probably resulted in a traumatic emotional effect on plaintiff. Challenging the majority's use of Chief Justice Traynor's opinion in State Rubbish Collectors Ass'n v. Siliznoff, 28 Cal. 2d 330, 240 P.2d 282 (1952), Justice Clark pointed out that Siliznoff concerned intentional infliction of emotional distress. Siliznoff's person and property were threatened if he did not abide by a trade association's allocation of territory. *Id.* at 335, 240 P.2d at 284. In that case, the *Molien* minority pointed out, the jury could infer fright and distress from the defendant's outrageous conduct. 27 Cal. 3d at 935, 616 P.2d at 824, 167 Cal. Rptr. at 842. In *Molien* the jury will be asked to infer serious distress resulting from more mundane, merely negligent behavior.

108. *Rodrigues* sought to define and limit recovery for emotional distress by saying that the harm must be serious enough to overcome the concern with unlimited liability for trivial and transient claims. See 52 Hawaii 156, 173, 472 P.2d 509, 520 (1970). See also 27 Cal. 3d at 928, 616 P.2d at 819, 167 Cal. Rptr. at 837; Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making the Punishment Fit the Crime,* 1 U. HAWAI'I L. REV. 1, 6-7 (1979). The California court adopted the same adjective in *Molien*: "we hold that a cause of action may be stated for the negligent infliction of serious emotional distress." 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839 (emphasis added). And Justice Mosk quoted the *Rodrigues* standard that "serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Id.* at 928, 616 P.2d at 819-20, 167 Cal. Rptr. at 837-38.

109. 27 Cal. 3d at 919, 928, 930, 616 P.2d at 814, 819-20, 821, 167 Cal. Rptr. at 832, 837-39.
nary life functions for a considerable time and that painfully preoccupies the plaintiff.\textsuperscript{110} Psychic disturbances as well as physical injury can have these impacts. Future cases with differing fact situations will flesh out the definition of a debilitating emotional injury. Juries pondering the severity of emotional injury should consider the type and expense of required treatment, the frequency and intensity of resulting physical symptoms, and the seriousness and duration of any curtailment of a plaintiff's normal activities.\textsuperscript{111}

\textit{Molien}’s assertion that emotional injuries are often medically verifiable\textsuperscript{112} is most supportable where observable physical and behavioral symptoms are present, yet \textit{Molien} also relies on the second method suggested by Professor Prosser for validating a claim of emotional distress: some peculiar guarantee of genuineness arising out of the circumstances of the case.\textsuperscript{113} Under this line of reasoning jurors, presented with evidence of circumstances for which they can readily imagine serious emotional consequences, are allowed to find that the circumstances themselves corroborate a plaintiff's bald assertion of subjective suffering.\textsuperscript{114}

Jurors could infer or analogize from their own experience that a diagnosis of syphilis would cause grave marital and emotional problems. They may add personal beliefs to their impressions of a plaintiff's testimony in deciding that the actuality of such suffering in the plaintiff's case is likelier than not, and so grant recovery. But normally, proof of actual damages requires more than guesswork. A plaintiff must prove his injury objectively so that the jury can decide how much the injury is worth.\textsuperscript{115} Recoveries for physical injuries are frequently quite speculative, especially when the effects must be projected into the future. A boy with a skull fracture uses his day in court to collect damages based on a jury's estimation of the likelihood that consequent brain damage will limit his occupational and social horizons. But the brain damage, like the back injury that defies verifica-

\textsuperscript{110} See note 18 supra for the new pattern jury instruction, which bars recovery for "transitory and trivial emotional distress alone."

\textsuperscript{111} See Comment, \textit{Negligently Inflicted Mental Distress: The Case for an Independent Tort,} 59 GEO. L.J. 1237, 1248-53, 1259 (1971), which is optimistic about the value of medical testimony in proving actual emotional injury.

\textsuperscript{112} 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

\textsuperscript{113} Id.; see W. PROSSER, supra note 18, § 54, at 329-30.

\textsuperscript{114} See 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

\textsuperscript{115} See Budd v. Nixen, 6 Cal. 3d 195, 491 P.2d 433, 98 Cal. Rptr. 849 (1971) (legal malpractice; breach of professional duty causing only nominal damages or speculative harm does not create a negligence action); Fields v. Napa Milling Co., 164 Cal. App. 2d 442, 447-48, 330 P.2d 459, 462 (1st Dist. 1958) (no damages award without proof of "compensable injuries" or "appreciable detriment").
tion, involves medical probabilities that can be argued by experts. A greater difficulty may come when Mr. Molien takes the stand and says he has suffered serious mental stress, and his attorney tells the jury that a diagnosis of syphilis is so shocking that it will cause severe emotional consequences in any human being of normal sensibilities. That approach would leave the defendant few practical responses. As the previous section pointed out in the context of causation, there may be no symptomatology to test and criticize, and an average person may well suffer serious mental disturbance in such circumstances. The defendant can do little but suggest that the generalization does not fit this particular plaintiff.

The Molien court may have given short shrift to the defendant’s difficulties in refuting the plaintiff’s claim of actual damages because the harm involved something akin to a false imputation of syphilis, a matter so emotionally sensitive that it is slander per se in defamation law. Here the law may rightly presume emotional consequences severe enough to be actionable. Many jurisdictions make analogous presumptions involving corpse mishandling and negligent transmission of death messages. According to Prosser, some instances are charged with psychic impact because of “an especial likelihood of genuine and serious mental distress... which serves as a guarantee that the claim is not spurious.” For these rare circumstances, the courts could develop generalizations in the form of rebuttable presumptions about the likelihood of emotional harm.

But not all cases following Molien will involve conduct so universally viewed as emotionally dangerous, and yet a plaintiff could adduce other corroboration of emotional injury. Absent such legally neat pigeonholes as death notices or syphilis diagnoses, a plaintiff should be required to adduce corroborating evidence in fairness to a negligent, as opposed to a willful, defendant. A jury should be presented not only

118. W. PROSSER, supra note 18, § 54, at 330. For instances of this presumption in California corpse handling cases, see note 56 supra.
119. Justice Mosk was perhaps overly sanguine in quoting Rodrigues v. State concerning the feasibility of judicial determinations of the genuineness of emotional distress claims: “Courts which have administered claims of mental distress incident to an independent cause of action are just as competent to administer such claims when they are raised as an independent ground for damages.” 27 Cal. 3d at 928, 616 P.2d at 819, 167 Cal. Rptr. at 837 (quoting Rodrigues, 52 Hawaii 156, 172, 472 P.2d 509, 519 (1970)). Courts may often find it difficult to determine whether an alleged subjective injury has occurred at all, or is sufficiently serious to warrant liability, unless standards of objective proof are set.
120. Hawaii, which broadly recognizes an interest in mental tranquility, see notes 65-68 and accompanying text supra and note 152 and accompanying text infra, seems to require medical or psychiatric testimony to support a claim of purely mental suffering. See Leong v. Takasaki, 55
with a plaintiff's account of suffering, but with eyewitness accounts of
the plaintiff's behavior, testimony about any medical tests or treatment,
including psychological counseling; and expert testimony comparing
the plaintiff's observed or claimed responses with known medical gen-
eralizations. Since the harm claimed in a Molien action must have a
severe, debilitating effect, some symptomatology should normally be
present. As a general proposition, the more compelling the plaintiff's
case, the less need for the plaintiff to substitute inference for actual
corroboratio

Justice Mosk's willingness to allow not only duty and causation to
rest on an inference of foreseeability, but also proof of actual injury is
not easily reconciled with the court's requirement of severe and
debilitating injury. While physical injuries need not be "serious" in
order to be actionable, this higher standard seems appropriate for inju-
ries that are more common in their less severe form and that are almost
always more difficult to disprove. Thus, even the tort of intentional
infliction of emotional distress requires "severe" distress. The empha-
sis on debilitating, serious injury—a phrase repeated several times in
Molien—is drawn from the Rodrigues opinion, where the Hawaii
Supreme Court used the language in a deliberate attempt to prevent
trivial and fraudulent recoveries. Unless objective evidence of
debilitating harm is adduced, the serious and debilitating requirement
will have little effect in ensuring that recovery is not available for grief,
embarrassment, or anxiety not compensable in other negligence con-
texts, including wrongful death actions in which grief would be a logi-

Hawaii 398, 413, 520 P.2d 758, 767 (1974). Maine, which has rejected the contemporaneous physi-
cal injury rule, still requires objective proof of actual injury:

We adopt the rule that in those cases where it is established by a fair preponderance of
the evidence [that] there is a proximate causal relationship between an act of negligence
and reasonably foreseeable mental and emotional suffering by a reasonably foreseeable
plaintiff, such proven damages are compensable even though there is no discernible
trauma from external causes. The mental and emotional suffering, to be compensable,
must be substantial and manifested by objective symptomatology.


Professor Prosser likewise concluded that "there must necessarily be, in lieu of impact, some
requirement of satisfactory proof, and at least in the absence of knowledge of the plaintiff's unu-
sual susceptibility, there should be no recovery for hypersensitive mental disturbance where a
normal individual would not be affected under the circumstances." W. PROSSER, supra note 18,
§ 54, at 332-33 (footnotes omitted). Prosser quotes with approval an older article on the subject
that recommended a distinction between "likely" effects of fright or shock such as miscarriage and
"those obscure nervous disorders as to which even medical experts may and do not agree." See
Bohlen & Polikoff, Liability in New York for the Physical Consequences of Emotional Distress, 32
COLUM. L. REV. 409, 417 (1932).

121. See Comment, supra note 111, at 1259.
122. See, e.g., Kinnamon v. Staitman & Snyder, 66 Cal. App. 3d 893, 136 Cal. Rptr. 321 (2d
Dist. 1977); RESTATEMENT (1965), supra note 4, § 46.
123. See note 109 and accompanying text supra.
124. See note 108 supra.
TORTS

1169

Therefore, inferences drawn from circumstances foreseeably endangering a plaintiff's mental tranquility should be limited to duty and causation. Proof of actual damages almost always should require corroboration of serious and debilitating injury, and the courts should take pains in directed verdicts and jury instructions to develop a body of law on the validity and weight of various kinds of corroborating evidence.

B. The Elements and Proof of an Action for Loss of Consortium After Molien

The defendants in Molien cited Rodriguez v. Bethlehem Steel Corp., the 1974 decision that recreated the loss of consortium action in California, in asserting that only a severe, disabling physical injury to the spouse could support recovery. But Justice Mosk readily dismissed this constraint upon the loss of consortium action by observing that "obviously a person may become 'severely disabled' mentally no less than physically." Damage to the mental health of one spouse could well deprive the other of the "'companionship and moral support that marriage provides no less than its sexual side.'"

Accordingly, the Molien court held that a cause of action for loss of consortium is available when an injury to the nonplaintiff spouse is "sufficiently serious and disabling to raise the inference that the conjugal relationship is more than superficially or temporarily impaired." Psychological injuries, resulting in "neurosis, psychosis, chronic depres-

125. See W. Prosser, supra note 18, § 127, at 907-08. For example, the California survivors' action authorized by CAL. CIV. PROC. CODE § 277 (West Supp. 1981) has been interpreted to preclude recovery for any nonpecuniary losses suffered by the survivors. See, e.g., Dickinson v. Southern Pac. Co., 172 Cal. 727, 158 P. 183 (1916); Reyna v. City & County of San Francisco, 69 Cal. App. 3d 876, 138 Cal. Rptr. 504 (1st Dist. 1977).
126. But see note 56 supra; note 118 and accompanying text supra.
127. 27 Cal. 3d at 931, 167 Cal. Rptr. 765 (1974).
128. 27 Cal. 3d at 931, 167 Cal. Rptr. 765 (1974).
129. 27 Cal. 3d at 931, 167 Cal. Rptr. 765 (1974).
130. Id. at 932, 167 Cal. Rptr. 765 (1974).
131. 27 Cal. 3d at 932-33, 167 Cal. Rptr. 765 (1974).
sion, or phobia,” can meet this test.\textsuperscript{132} Claims for loss of consortium, like the new action for negligent infliction of emotional distress, are properly resolved by the jury as a question of proof, not by the judge employing a legal screening device. A plaintiff may have difficulty “proving negligence, causation, and the requisite degree of harm,” but these are jury questions that should not be avoided by demurrer.\textsuperscript{133}

\textit{Molien} is quite clear, then, that the duty to avoid impairing a spouse’s consortium extends to conduct that neither culminates in physical injury nor involves a risk of physical injury. In \textit{Molien} the plaintiff must prove that the defendant behaved unreasonably toward his wife, causing her such foreseeable emotional distress that the plaintiff in turn suffered a serious, sustained loss of consortium. The reasonableness of the defendant’s conduct, as in the “direct” action for negligent infliction of emotional distress, might be established in part by comparison with accepted professional standards.

The causal link for the loss of consortium might be difficult to establish on the facts of \textit{Molien}. Apparently the jury would be allowed to infer that the misdiagnosis triggered the divorce action based on the foreseeability of the diagnosis causing marital tension and dissolution. But the jury might not be persuaded that the diagnosis itself would cause serious and \textit{sustained} loss of consortium, especially after the error was discovered.

Finally, the element of actual damages in a loss of consortium action requires proof of “severe disability,” an echo of the “serious and debilitating” harm required for the action of negligent infliction of emotional distress. The parallel is not surprising, given the similar concerns in both negligence actions: subjective injuries that are difficult to prove—and to disprove—and the cost and burden of liability for relatively commonplace hurts if recoveries are not limited to those who suffer debilitating injury.

The logic for developing evidentiary standards for corroboration of actual injury in the negligent infliction of emotional distress action applies with equal or greater force to the loss of consortium action because the action does little to deter tortious conduct. As in the \textit{Dillon} bystander cases, the wrongdoer is already liable to the injured non-plaintiff spouse, and liability for the husband’s or wife’s impaired consortium is added solely to compensate a separate loss. Thus, there is good reason to require medical or behavioral corroboration of actual,

\begin{itemize}
\item \textsuperscript{132} \textit{Id.} at 933, 616 P.2d at 823, 167 Cal. Rptr. at 841.
\item \textsuperscript{133} \textit{Id.} The court does not discuss the potential difficulties in Mr. Molien’s proceeding to trial on two causes of action with interrelated emotional damages, but the jury could be so cautioned as to avoid double recovery.
\end{itemize}
serious emotional harm to the spouse before allowing the plaintiff to argue the degree to which his or her consortium has been impaired.

A *Molien* action for loss of consortium without physical injury bears some resemblance to the *Dillon* type of action. Both are concerned chiefly with emotional harms to the plaintiff resulting from the negligent injury of a closely related person. *Molien* and its predecessors have not, however, imposed the *Dillon* restrictions requiring close and contemporaneous perception of the tortious event in the loss of consortium context, because artificial liability limits are not needed to keep down the number of potential plaintiffs. The consortium action is self-limiting since it applies only to spouses. Moreover, the loss of society, services, and sexual relations is more objective than the asserted mental suffering alone, and easier for a jury to determine. While the derivative action for loss of consortium does not fall within the *Dillon* strictures for third-party mental distress actions, the scope of duty is also limited by more than simple foreseeability: Parent-child loss of companionship and services is often foreseeable, but only spousal loss of consortium is compensable at law. This narrowly defined duty saves this action from the need for *Dillon's* limiting proximity requirements and allows the courts instead to treat this claim for indirect emotional harm in a manner parallel to a direct claim for negligent infliction of emotional distress.

C. *Molien* and *Dillon*: Different Treatment for Direct and Derivative Claims of Emotional Distress

Justice Mosk observed that the actions in *Molien* for negligent infliction of emotional distress and for loss of consortium pose the same question in two different contexts: To what extent should the law afford relief for negligently caused mental distress unaccompanied by physical injury to the plaintiff? *Molien* had to distinguish *Dillon* and look to it for guidance at the same time, because *Dillon* was the first decision dealing with the emotional injury of accident bystanders who witness the death or injury of a loved one, but are not themselves within the zone of physical danger.

In the bystander context, the *Dillon* court determined that the defendant's duty extended to avoiding "reasonably foreseeable" injuries, including emotional injuries and the physical consequences of them. But unlike the *Molien* court, the *Dillon* court imposed restrictions or "guidelines" for the duty that was created beyond mere foreseeability

---

134. See notes 74-78 and accompanying text supra.
135. 27 Cal. 3d at 918, 616 P.2d at 814, 167 Cal. Rptr. at 832.
137. Id. at 739-40 & n.5, 441 P.2d at 920 & n.5, 69 Cal. Rptr. at 808 & n.5.
of injury. In order to limit liability to those most likely to have suffered a great and sudden shock, the Dillon court insisted that the plaintiff be closely related to the victim and be close to the event in time and space. While Mr. Molien was closely related to the alleged victim of professional malpractice, he was not present in the laboratory or the consulting room when the actionable mistake was made. But applying the Dillon proximity guidelines in this instance would offend common sense. Mr. Molien was no less affected by the diagnosis because he learned of it when his wife came home and informed him of the supposed medical problem with its indicia of infidelity; the potential shock and distress at the homecoming was as “foreseeable” as the trauma of the initial conversation between Mrs. Molien and her doctor. Emphasizing the foreseeability of Mr. Molien’s distress and the factual dissimilarity between Molien and the cases of plaintiffs who witness an accident on the road or in an operating theater, Justice Mosk decided that Dillon was “apposite but not controlling.” The distinction Justice Mosk drew was based upon the directness of Mr. Molien’s injury as opposed to the indirect injury suffered by the accident bystander.

In characterizing Molien as a direct action for emotional injury, Justice Mosk mentioned the doctor’s instruction to have Mr. Molien tested for syphilis, but this fact alone was probably not decisive. The

138. See id. at 740-41, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81.
139. 27 Cal. 3d at 921, 616 P.2d at 815, 167 Cal. Rptr. at 833.
140. Id.
141. Id. at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834. Justice Mosk cited dicta in Justus v. Atchison, 19 Cal. 3d 564, 582-85, 565 P.2d 122, 134-36, 139 Cal. Rptr. 97, 109-11 (1977), in support of the proposition that the Dillon guidelines apply only to relief sought by a “percipient witness to the injury of a third person.” 27 Cal. 3d at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834. Justus denied recovery to plaintiff fathers present in the delivery room but unsure until informed “after the fact” that their children were stillborn, because the emotional shock was not the result of their being “percipient witnesses” to the event. Justus would seem to counsel a narrow application of Dillon, suggesting that the court was willing to compensate only percipient shock (although certainly people may suffer emotional shock in other circumstances). But Justice Mosk’s approach in Molien confines Dillon’s restrictive guidelines. This approach makes sense so long as the court can, in new factual contexts, satisfy Dillon’s concern about opening up “infinite liability” by fash-
court probably would not have felt much differently about the complaint if the doctor had not suggested that the husband be examined. The distressing nature of a diagnosis of venereal disease convinced the court that the plaintiff was directly implicated: "It is easily predictable that an erroneous diagnosis of syphilis and its probable source would produce marital discord and resultant emotional distress to a married patient's spouse." In short, the court agreed with Mr. Molien that "the alleged tortious conduct of defendant was directed to him as well as to his wife," because it was so foreseeable that the wife's diagnosis would affect the husband. Yet this reasoning sounds much like *Dillon*, where the court held it foreseeable that a parent will be nearby to witness the accidental injury of a young child and will suffer as a consequence.

*Molien*'s recognition of a derivative loss of consortium claim based on the same events that gave rise to a "direct" action for emotional distress strengthens the impression that the line between "direct" and "derivative" claims of emotional injury is not nearly as definite as Justice Mosk implied. The facts of *Molien*, where a husband suffers because a doctor misdiagnoses his wife, suggest a somewhat indirect, if not wholly derivative, chain of events leading to Mr. Molien's injury. The *Molien* situation points up what might become a frequently litigated difficulty over characterization of the facts in cases where the transaction from which the claim arises is not exclusively between a plaintiff and a defendant.

Beyond the problem of deciding what constitutes direct as opposed to derivative harm, there remains the question of whether different treatment is warranted for cases in which the plaintiff suffers because of the injury or distress of another, as opposed to cases in which the plaintiff suffers from the defendant's conduct directed at the plaintiff alone. If the court had thought that proof problems were insur-

---

act . . . Dr. Kilbridge's advice to Mrs. Molien to have her husband examined for the disease confirms that plaintiff was a foreseeable victim of the negligent diagnosis." 27 Cal. 3d at 923, 616 P.2d at 816-17, 167 Cal. Rptr. at 834-35.
143. *Id.* at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.
144. *Id.*
145. The idea of directness as a natural limit to the number of plaintiffs affected recurs in the earlier insurance or other contract cases in California, see note 54 *supra*, as well as in actions for negligently inflicted emotional distress in other states. *See, e.g.*, Johnson v. State, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975). In *Johnson* a state hospital had erroneously informed plaintiff that her mother, a patient, had died; in fact, another woman with the same surname had died. The daughter claimed emotional distress after the shock she experienced in discovering the error in the funeral home. Because New York had already rejected *Dillon* in Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969), the *Johnson* court had to distinguish the plaintiff's claim from that of a relative affected emotionally by the accidental death of a loved one. It did so on the ground that the hospital had a direct duty to properly inform relatives, as opposed to an indirect duty to protect the sensibilities of an indefinite number of persons whose emotions
mountable when the emotional shock was not sudden and immediate, it would have upheld the trial court's sustaining of the demurrer in *Molien*. Instead, the court decided that corroboration for the injury might be found. The possibility of proving this harm, however, could be equally true in many cases where a parent, for example, learns of a child's injury soon after the event and becomes acutely distressed for a long period thereafter. The court, therefore, must have been concerned with more than proof problems when it announced in *Molien* that *Dillon* would continue to rule "indirect" emotional distress cases where proximity requirements would be imposed even when a distant shock is serious and readily foreseeable. The stricter treatment of claims based on harm to another seems to arise from the court's concern about indefinite liability to bystanders and other collaterally affected persons.\(^{146}\)

Where only two parties are involved, as would often be the case when a professional deals with a client in a sensitive matter, liability is naturally limited to one person. The loss of consortium action increases the exposure of risk for negligence, but only to one person—the spouse. But many relatives, friends, and concerned individuals might be affected by the negligent injury of a person, and the courts are wary about extending the burden of liability for mere negligence to so many potential plaintiffs.\(^{147}\) The *Dillon* restriction, undisturbed by *Molien*, limits liability by requiring that plaintiffs claiming distress over the injury of another be closely related to the victim; it relies upon a generalization that closely related persons are more likely to suffer severe shock or distress than unrelated persons, unless the latter are unusually sensitive.\(^{148}\) The court-imposed assessment of the probability of serious emotional distress makes proof of emotional injury less troublesome

---

\(^{146}\) *See* *Dillon v. Legg*, 68 Cal. 2d at 739-41, 441 P.2d at 919-21, 69 Cal. Rptr. at 79-81.

\(^{147}\) *See, e.g.*, *id.* at 739, 441 P.2d at 919, 69 Cal. Rptr. at 79.

\(^{148}\) *See* *Bourhill v. Young* [1943] A.C. 92 (Lord Porter):

The driver of a car or vehicle, even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, including the noise of a collision and the sight of injuries to others, and is not to be considered negligent towards one who does not possess the customary phlegm.

*Id.* at 117.

The definition of a closely related plaintiff may involve some difficulties today, when relationships are often not as definite as they once were. *See* *Drew v. Drake*, 110 Cal. App. 3d 555, 168 Cal. Rptr. 65 (1st Dist. 1980) ("housemate" of opposite sex not closely related for *Dillon* purposes).
than it would be if mere acquaintances could try to establish that they, too, suffered acutely.

While degree of relationship remains a valid criterion, little justification supports the proximity restrictions of Dillon. Molien compensates any severe and debilitating emotional distress, not just sudden shock, and it relies on guarantees of genuineness other than eyewitness presence. Distant shock upon learning of a tragic event affecting a loved one can cause heart failure, traumatic psychopathology, or long-term depression; often such consequences are medically verifiable. Molien does not clarify why such foreseeable harm is not compensable upon proof of injury, unless the court has simply decided to retain some artificial barriers of the precise sort it decries in the Molien opinion to limit indefinite recovery.

Already the consequences of the proximity restrictions have been seen in California cases where recovery hinged on the passage of a few moments between accident and discovery by the plaintiff, or where the plaintiff was poorly placed to grasp immediately the fact of negligent injury. These arbitrary distinctions between claimants may be

149. See 27 Cal. 3d at 926, 616 P.2d at 818, 167 Cal. Rptr. at 836.
150. California courts have drawn some exceedingly fine lines to grant or refuse recovery sought under the Dillon theory, treating Dillon's "guidelines" as though they were absolute requirements. Where a mother arrived at the poolside quickly enough to make an unsuccessful attempt to resuscitate her drowned son, the appellate court considered she had been sufficiently close to the event to recover for her shock and distress. See Nazaroff v. Superior Court, 80 Cal. App. 3d 553, 145 Cal. Rptr. 657 (1st Dist. 1978). Similarly, a mother who arrived "within moments" of her son's injury in an explosion was allowed to proceed to trial in Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (4th Dist. 1969). Conversely, the court of appeal rejected the claims of several other women who alleged shock due to the injury of a loved one: a wife who first saw her husband's injuries in the emergency hospital to which he had been taken after his accident (DeBoe v. Horn, 16 Cal. App. 3d 221, 94 Cal. Rptr. 77 (2d Dist. 1971)), a mother who did not see her injured daughter until 30 to 60 minutes after the auto accident occurred in which the daughter was injured (Powers v. Sissoev, 39 Cal. App. 3d 865, 114 Cal. Rptr. 868 (2d Dist. 1974)), and a mother who, by coincidence, arrived on the scene a few minutes after a car struck her child (Arauz v. Gerhardt, 68 Cal. App. 3d 937, 137 Cal. Rptr. 619 (2d Dist. 1977)). The court explained in Arauz that contemporaneous sensory perception of the accident is required under the Dillon rules. See 68 Cal. App. 3d at 949, 137 Cal. Rptr. at 627. Following that reasoning, the court denied recovery for parents who, rounding a curve while following the car their daughters were driving, arrived upon the daughters' accident literally before the dust had settled. Parsons v. Superior Court, 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1st Dist. 1978). The disappointed plaintiffs in these cases are not easily distinguished from those who prevailed, either in terms of real suffering to be compensated or according to a need to artificially limit foreseeable plaintiffs to avoid indeterminate liability.

151. The courts have introduced this consideration by requiring a knowledgeable, contemporaneous apprehension of negligent injury. In Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977), the supreme court denied the claims of two fathers who each had a child delivered stillborn after allegedly negligent efforts by medical personnel to perform Caesarian deliveries. Although the fathers were present in the delivery room, they were not aware of the medical crisis until after the fact. Id. at 582-83, 565 P.2d at 134-36, 139 Cal. Rptr. at 109-11; cf. Mobaldi v. Regents of Univ. of Cal., 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (2d Dist. 1976) (mother was treated as a " percipient witness" when she held her child as it suffered convulsions
less supportable than a complete denial of recovery for purely emotional injury. Certainly the latter approach avoids the results of palpable unfairness and unequal treatment. Perhaps Dillon should be reconsidered in light of Molien. Plaintiffs still could be held to a close relationship with the third-party victim, but with courts accepting sufficient proof of actual debilitating emotional injury according to the standards evolved under Molien to ensure the validity and seriousness of the claim, rather than relying upon the proximity restrictions. The Dillon guidelines should be treated as a noninclusive list of factors that can lend validity to a claim of emotional distress, not as a talisman barring third-party recoveries by persons at a distance from the event.\textsuperscript{152} As long as the Dillon guidelines are treated as an absolute formula in indirect or derivative claims for emotional distress, there will be disputes and judicial straining over characterization of events as well as unpopular and unprincipled distinctions in the treatment afforded plaintiffs who present a sympathetic picture of foreseeable suf-

\textsuperscript{152} Justus uses language reminiscent of the doctrine of assumption of risk. The court explained that persons who voluntarily witnessed surgical or natal procedures should be prepared for harrowing scenes. \textit{See} 19 Cal. 3d at 585, 565 P.2d at 136, 139 Cal. Rptr. at 111. Justice Jefferson suggested that Justus added a fourth requirement to the Dillon guidelines, restricting recovery to plaintiffs involuntarily present at the harmful event. \textit{See} Austin v. Regents of Univ. of Cal., 89 Cal. App. 3d 354, 361, 152 Cal. Rptr. 420, 423 (2d Dist. 1979) (Jefferson, J., concurring and dissenting).

Other courts have concentrated on the suddenness of injury or death as a guarantee of shock effect. In Jansen v. Children's Hosp. Medical Center, 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1st Dist. 1973), the court decided that the mother who witnessed the death of her daughter in the hospital over a period of hours had not suffered a sufficiently sudden shock. Similar reasoning prompted the court to reject the claim of a mother whose daughter allegedly suffered negligent oral surgery on the other side of a wall while the mother sat in the waiting room. Hair v. County of Monterey, 45 Cal. App. 3d 538, 119 Cal. Rptr. 639 (1st Dist. 1975). Again, a mother who left her dying child's bedside to pay the hospital bill and returned to find the child dead could not recover for emotional distress. Cortez v. Macias, 110 Cal. App. 3d 640, 167 Cal. Rptr. 905 (4th Dist. 1980) (hearing denied Nov. 26, 1980). \textit{See} note 153 infra.

In these cases and in those discussed in note 150 \textit{supra}, the likelihood of real and serious emotional shock is not diminished by the lapse of a short time before discovery of the casualty or its negligent cause. The courts simply are limiting liability in a mechanical way to reduce the number of potential plaintiffs, but not in a manner that will deter carelessness, provide compensation to seriously injured plaintiffs, or appear fair to parties or observers.

\textsuperscript{152} Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974), the Hawaiian counterpart of Dillon, came after Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970), which had announced a separate protected interest in mental tranquility. Hence, although Leong cites Dillon and its guidelines, it uses those guidelines only as relevant considerations in determining the degree of stress suffered by the claimant, not as absolute requirements for recovery. \textit{See} 55 Hawaii at 410, 520 P.2d at 765-66; Miller, \textit{supra} note 108. However, at least in the context of distress over injury to another, Hawaii recently introduced a "reasonable distance" rule in Kelly v. Kokua Sales & Supply, Ltd., 56 Hawaii 204, 532 P.2d 673 (1975). That limitation, like the Dillon guidelines, protects defendants from extensive liability, but not on grounds that are psychologically defensible or that have much to do with foreseeability. \textit{See} Miller, \textit{supra} note 108, at 16-18.
fering.\textsuperscript{153} If \textit{Dillon} actions can be managed without the artificial proximity restrictions, courts should avoid according disparate treatment to direct and derivative claims.

\textbf{CONCLUSION}

The common law treatment of psychic disturbance resulting from negligent behavior has been somewhat arbitrary in allowing recovery when distress is accompanied by certain other kinds of injury, and yet denying relief in the face of what are often equally compelling and predictable instances of suffering. The opinions of jurists do not reveal, on the whole, a lack of compassion, but rather a fear of creating illimitable lawsuits and disproportionate consequences for unintended harms that are also susceptible of fraud. \textit{Molien} hardly allays those fears, since it relies on ad hoc jury decisionmaking based on foreseeability to balance the burdens and risks of the conduct in question. And \textit{Molien}’s distinction between “direct” and “derivative” injury may prove as artificial and as difficult to justify on grounds of fairness as the older requirements of concurrent physical injury, accompanying injury to contract or property interests, or the proximity restrictions of the \textit{Dillon} bystander rule.

Still, \textit{Molien} recognizes a broad cause of action for negligent infliction of serious emotional disturbance alone, a form of injury largely

\textsuperscript{153} One reported appellate opinion after \textit{Molien} demonstrates some of the difficulties lower courts may have with \textit{Molien} because of its attempt to preserve and distinguish the \textit{Dillon} line of cases. In Cortez v. Macias, 110 Cal. App. 3d 640, 167 Cal. Rptr. 905 (4th Dist. 1980) (hearing denied Nov. 26, 1980), a doctor, after repeated pleas, failed to come to the hospital to follow up on critical but ineffective treatment prescribed over the telephone for plaintiff’s ailing two-week-old baby. When the child stopped crying for a time, Mr. and Mrs. Cortez left momentarily to pay the emergency room bill. \textit{Id.} at 645, 167 Cal. Rptr. at 903. Upon returning, Mrs. Cortez reached for her baby. Her husband told her the child was dead, not asleep; whereupon Mrs. Cortez became hysterical and had to be ushered out of the emergency room. \textit{Id.} In denying Mrs. Cortez’s claim for damages due to a resulting nervous condition for which she was medically treated, the court of appeal noted that she was an “indirectly” injured plaintiff under the \textit{Dillon} model. The court discussed \textit{Molien} but concluded that the present case was still controlled by \textit{Dillon} and \textit{Justus}:

\textit{The language in \textit{Molien} is sufficiently broad, it would appear, to permit similar reasoning to be applied to the facts of the case before us. However, in its discussion in \textit{Molien}, the Supreme Court refers, by citation, to its 1977 \textit{Justus} decision, without overruling, modifying or distinguishing that decision beyond the degree that that court distinguished \textit{Dillon}.}

\textit{Id.} at 649, 167 Cal. Rptr. at 909. Because Mrs. Cortez was informed that the child was dead but was not present at the moment of death, the court considered her outside the \textit{Dillon} rule for recovery. This decision illustrates the artificiality of the direct/indirect distinction made in \textit{Molien} and the separate rules for recovery depending on characterization. Mrs. Cortez’s momentary absence does not make her distress less plausible. Her shock was not less foreseeable. If a plaintiff like Mr. Molien, affected by the misdiagnosis of his wife, can recover for mental suffering on a rather strained theory of directness, fairness requires that recovery not be denied to Mrs. Cortez, another closely related plaintiff in even more dramatic and desperate circumstances, simply because she barely missed the actual moment of death.
uncompensated under prior law, and it attempts to deter conduct that unnecessarily subjects others to the risk of such injury.

This Note suggests that *Molien* actions for negligent infliction of emotional distress and for loss of consortium resulting from the emotional distress of one’s spouse should be managed by emphasizing *Molien*’s requirement of “serious” and “debilitating” injury in the proof of actual damages. Some commentators have suggested that only the tangible consequences of purely emotional injury, such as counseling fees and lost time from work, should be compensated. But where psychological suffering is “severe and debilitating” it ought to be manifest, at least to the trained eye, and there is no good reason to deny recovery for manifest consequential damages. The courts will need to broaden their view of evidence that establishes mental suffering to include behavioral and psychological testimony as well as medical evidence of physical consequences. Requiring such proof of actual injury would remove some of the uncertainty and perhaps lessen the disproportionate defense burden inherent in an approach that leaves the jury to determine whether injury due to unreasonable conduct was likely and whether it occurred, with few guidelines or standards on reasonableness and causation. Evidentiary standards for proof of actual injury might also help to validate *Dillon* claims by close relations who have suffered emotional harms from the injury of another, thus removing the need to litigate the directness of harm to the plaintiff as *Molien* requires. Perhaps these standards would ultimately influence the concept of general damages in other tort actions where mental anguish is now compensable, and thereby contribute to a more consistent, and thus more fair, approach to emotional disturbance wherever it is an actionable injury or an element of damages.

*W. Scott Blackmer*

---

154. See Miller, *supra* note 108, at 38-44 (proposing that nonphysically injured mental distress claimants be restricted to compensation for measurable, out-of-pocket losses, except where gross negligence or recklessness justifies a larger award for deterrence). Dollar limits on damages have been legislatively imposed on several legal actions. See note 79 *supra*. See also W. Prosser, *supra* note 18, § 127, at 910 (reporting that many states have imposed damages ceilings in wrongful death actions); Alexander, *supra* note 79.

* B.A. 1975, University of Nevada, Las Vegas; J.D. 1981, Boalt Hall School of Law, University of California, Berkeley.