

# THE SCOPE OF LIABILITY FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS: MAKING "THE PUNISHMENT FIT THE CRIME"

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My object all sublime  
I shall achieve in time—  
To let the punishment fit the crime—  
The punishment fit the crime.

GILBERT AND SULLIVAN, *THE MIKADO*

The difficulties that inhere in establishing the scope of liability<sup>1</sup> for harm-producing acts or omissions shiver the foundation of the House of Law. "Ad hocism" abounds.<sup>2</sup> Neither logic nor experience<sup>3</sup> furnishes much guidance for the resolution of scope of liability issues that grow out of new bases of liability<sup>4</sup> or new understandings of the causes and effects of harm.<sup>5</sup> Concepts that purport to resolve these issues are often so elastic as to be meaningless.<sup>6</sup> Of necessity the

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<sup>1</sup> By "scope of liability" I refer to the question of which persons who suffer adverse consequences as a result of another's actionable acts or omissions will be permitted to recover and for what. I prefer this phrase to "scope of duty," "proximate cause," or "legal cause" because it is sufficiently descriptive for my immediate purposes but does not include the implications for how the difficulties should be resolved that infect the latter terms.

<sup>2</sup> See, e.g., *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974) (plaintiff fisherman permitted to recover prospective economic losses suffered as a result of defendant's alleged negligence in polluting the Santa Barbara Channel), and compare *Petition of Kinsman Transit Co.* (Kinsman No. 1), 308 F.2d 708 (2d Cir. 1964) with *Petition of Kinsman Transit Co.* (Kinsman No. 2), 388 F.2d 821 (2d Cir. 1968). (Plaintiffs in both cases sought damages for losses suffered in a bizarre series of events that followed when some defendants negligently allowed a ship to float downstream and defendant City of Buffalo negligently failed to raise a drawbridge, causing collisions and the jamming of the Buffalo River. In deciding that plaintiffs in *Kinsman No. 1* could recover but that plaintiffs in *Kinsman No. 2* could not, Judges Friendly and Kaufman, respectively, both ultimately took refuge in Judge Andrews' statement in *Palsgraf*: "It is all a question of expediency, . . . it is all a question of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind." *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 354-55, 162 N.E. 99, 104 (1928) (Andrews, J., dissenting).

<sup>3</sup> The reference is, of course, to Holmes' famous statement:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. O. W. HOLMES, *THE COMMON LAW* 1 (1881).

<sup>4</sup> See Maleson, *Negligence is Dead but Its Doctrines Rule Us from the Grave: A Proposal to Limit Defendants' Responsibility in Strict Products Liability Actions without Resort to Proximate Cause*, 51 *TEMP. L.Q.* 1 (1978).

<sup>5</sup> See Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 *GEO. L.J.* 1237 (1971).

<sup>6</sup> See *Chun v. Park*, 51 Haw. 462, 466, 462 P.2d 905, 908 (1969), and cases there cited. See

torts process grinds out decisions, but they are based, usually, on ill-articulated conceptions of "practical politics" or "expediency" and do not necessarily comport with either equal justice or sound policy. Little wonder that the problem has become a favorite of law professors<sup>7</sup> and the *bête noire* of law students.

Nowhere has the problem of scope of liability been more clearly exposed than in the courts' treatment of negligently inflicted mental distress.<sup>8</sup> On the one hand, general principles of negligence law and the policy of compensating victims deemed to be "deserving" under those principles pull in the direction of expanded liability. On the other hand, visions of shockingly burdensome liability and lingering fears of feigned claims lead to the imposition of arbitrary liability-limiting rules. An approach that would satisfy all of these conflicting concerns and comfortably resolve concrete cases has yet to be devised, notwithstanding the fact that the issues have been before American courts at least since 1890.<sup>9</sup>

Thus, for example, in 1970 the Hawaii Supreme Court, in *Rodrigues v. State*,<sup>10</sup> gave birth to a lusty new and independent cause of action for negligent infliction of emotional distress. Although it imposed a requirement that the distress (both that which was foreseeable to defendant and that which plaintiff actually suffered) be "serious," the court was satisfied to allow general principles of liability for negligence to determine who should recover and who should not. Thus the court moved beyond other American courts, which had long imposed arbitrary barriers upon the scope of liability, and, by imposing the seriousness requirements, seemingly arrived at a fair compromise of the competing concerns.

For a while the cause of action in Hawaii was allowed to flourish and grow along lines consistent with its bountiful origins.<sup>11</sup> Then, in 1975, in *Kelley v. Kokua Sales and Supply, Ltd.*,<sup>12</sup> the court stunted its growth by denying recovery to plaintiffs who, when they suffered the distress, were not "located within a reasonable distance from the scene of the accident."<sup>13</sup> Thus, the fear of imposing

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generally, W. PROSSER, HANDBOOK OF THE LAW OF TORTS, §842, 43 (4th ed. 1971) [hereinafter cited as PROSSER].

<sup>7</sup> "The importance of the proximate cause issue in most litigation is surprisingly small, but few topics have been so much the darling of the academic mind. Almost every tort scholar has tried at some time to make his peace with the issue, and its doctrinal fascination continues." C. GREGORY, H. KALVEN, R. EPSTEIN, CASES AND MATERIALS ON TORTS 250 (3rd ed. 1977) [hereinafter cited as GREGORY, KALVEN & EPSTEIN]. The major books and articles are cited *id.* at 250-51.

<sup>8</sup> See *id.* at 256; PROSSER, *supra* note 6, §54 at 327-35.

<sup>9</sup> See *Hill v. Kimball*, 13 S.W. 59 (Tex. 1890), discussed in Hallen, *Hill v. Kimball—A Milepost in the Law*, 12 TEX. L. REV. 1 (1933). The concerns were clearly identified in *Spade v. Lynn & Boston R. Co.*, 168 Mass. 285, 47 N.E. 88 (1897), the leading case imposing the "impact" rule.

<sup>10</sup> 52 Haw. 156, 472 P.2d 509 (1970), facts stated in text *infra* at 6. Perceptive discussions of *Rodrigues* are contained in Koshiba, *Negligent Infliction of Mental Distress: Rodrigues v. State and Leong v. Takasaki*, 11 HAW. B.J. 29 (1974) and Brott, *Negligent Infliction of Emotional Harm*, 7 *Id.* 148 (1971).

<sup>11</sup> See *Leong v. Takasaki*, 55 Haw. 398, 520 P.2d 758 (1974), facts stated in text *infra* at pp. 7-8 and discussed in Koshiba, *supra* note 10. *Cf.* *Dold v. Outrigger Hotel*, 54 Haw. 18, 22, 501 P.2d 368, 374 (1972) (plaintiff entitled to recover for mental distress "where a contract is breached in a wanton or reckless manner as to result in a tortious injury . . ."), and *Farrior v. Payton*, 57 Haw. 620, 632, 562 P.2d 779, 787 (1977) (citing *Rodrigues* to support proposition that defendant who seriously frightens plaintiffs, causing them to suffer physical injuries, in the attempt to escape danger may have breached a duty to refrain from the negligent infliction of serious mental distress).

<sup>12</sup> 56 Haw. 204, 532 P.2d 673 (1975), facts stated in text *infra* at p. 9.

<sup>13</sup> *Id.*, 56 Haw. at 209, 532 P.2d at 676.

"an undue measure of responsibility upon those who are guilty only of unintentional negligence"<sup>14</sup> again manifested itself.

The question thus arises whether it is possible for the judicial process to produce an approach to recovery for mental-distress-without-impact that will satisfy the competing concerns of justice and policy. In my view, which I will develop in considerable detail in this article, the answer is "yes," but only if the courts are willing to couple the application of ordinary negligence principles for determining the issue of liability with a significant reduction in the damages available if liability is imposed. In this way the "punishment can be made to fit the crime" and other important policies will be served as well.

My analysis will proceed in the following way: In Part I<sup>15</sup> I will examine the general trend of decisions with respect to the negligent infliction of emotional distress and will engage in a fairly conventional analysis of the likely impact of *Rodrigues* and its progeny on future emotional distress cases in Hawaii. In Part II<sup>16</sup> I will explore the implications of the Hawaii cases in terms of relevant tort goals and public policy. In Part III<sup>17</sup> I will discuss issues of "legal process" raised by the majority opinion in *Kelley* and by the competing approaches—duty vs. proximate cause—of the majority and dissenting opinions. In Part IV<sup>18</sup> I will identify and describe the principal key to the search for a satisfactory solution—the need for proportionality, and in Part V<sup>19</sup> I will suggest and compare alternative approaches to dealing with the problem and set forth my own recommendation. In Part VI<sup>20</sup> I will suggest reasons why judicial decision-making is the appropriate way to implement my recommendation and in the conclusion<sup>21</sup> I will advance additional important reasons why the suggested reform should be undertaken.<sup>22</sup>

## I. TRENDS OF DECISION

### A. General

Except perhaps in cases where mental distress is unaccompanied by serious physical harm, the limitation of recovery for mental distress to cases where plaintiff suffers an impact no longer enjoys wide support among American courts.<sup>23</sup> On the other hand, most American courts limit recovery for negligent

<sup>14</sup> *Spade v. Lynn & Boston R. Co.*, 168 Mass. 285, 289, 47 N.E. 88, 89 (1897).

<sup>15</sup> *Infra*, pp. 3–16.

<sup>16</sup> *Infra*, pp. 16–28.

<sup>17</sup> *Infra*, pp. 28–33.

<sup>18</sup> *Infra*, pp. 33–36.

<sup>19</sup> *Infra*, pp. 36–43.

<sup>20</sup> *Infra*, pp. 43–44.

<sup>21</sup> *Infra*, pp. 44–47.

<sup>22</sup> I have focussed heavily on the Hawaii cases both because they are regarded as important by leading tort scholars and because they are well-suited to illuminate the general problem.

<sup>23</sup> GREGORY, KALVEN & EPSTEIN, *supra* note 7, at 957. See generally Annot., 29 A.L.R.3d 1337 (1970), and Note, *Negligent Infliction of Mental Distress: Reaction to Dillon v. Legg in California and Other States*, 25 HASTINGS L.J. 1248 (1974). But see *Gilliam v. Stewart*, 291 So.2d 593 (Fla. 1974) (no recovery for emotional distress in absence of impact unless defendant's conduct was wilful).

The English courts have long rejected the "impact" requirement. *Hambrook v. Stokes Bros.*, [1925] 1 K.B. 141 (C.A. 1924). In its stead they have only required that plaintiff be within the foreseeable zone of mental shock. *Boardman v. Sanderson*, [1964] 1 W.L.R. 1317 (C.A. 1961). Mental distress suffered by "the ordinary frequenter of the streets" who witnesses an accident, however, has been held not to be reasonably foreseeable by a driver. *Bourhill v. Young* [1943] A.C. 92, 117 (H.L. 1942). A summary of the English cases is contained in Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute Between New York and California*, 51 ST. JOHN'S L. REV. 1, 17–22 (1976).

infliction of mental distress to plaintiffs who suffer distress as a consequence of fear for their own physical safety—plaintiffs located within the “zone of danger”<sup>24</sup>—and to cases in which the mental distress results in physical harm.<sup>25</sup>

In *Dillon v. Legg*,<sup>26</sup> however, the California Supreme Court was confronted with a situation in which the arbitrariness and unfairness of the zone of danger rule was palpable: A child within the zone of personal danger would have been allowed to recover for mental distress produced principally by witnessing the death of her sister, but her mother, only a few feet away but outside the zone of personal danger, would have been denied recovery for her own mental distress. In response, the court rejected the zone of danger rule and determined instead to apply “the general rules of tort law, including the concept of negligence, proximate cause, and foreseeability.”<sup>27</sup>

Its intention aside, however, the court fell far short of creating an independent cause of action for mental distress based on general negligence principles: In the first place, the court indicated that plaintiff's right to recover was conditioned upon the liability of defendant for injury to the “primary” victim; the contributory negligence of the primary victim would thus defeat recovery by the plaintiff who suffered distress as a result of fear for the safety of the primary victim.<sup>28</sup> This requirement, of course, is inconsistent with general principles of causation.<sup>29</sup>

Secondly, the court confined its ruling to the cases in which plaintiff's shock results in “physical injury.”<sup>30</sup> Widely accepted damage rules, applied in ordi-

<sup>24</sup> *Id. Accord*, RESTATEMENT (SECOND) OF TORTS §436 at 166 (1966).

<sup>25</sup> PROSSER, *supra* note 6, §54 at 328–30; Annot., 29 A.L.R.3d 1337 (1970). *Accord*, RESTATEMENT (SECOND) OF TORTS §436A (1966).

<sup>26</sup> 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

<sup>27</sup> *Id.* at 746, 441 P.2d at 924, 69 Cal. Rptr. at 84.

<sup>28</sup> *Id.* at 733, 441 P.2d at 916, 69 Cal. Rptr. at 76.

<sup>29</sup> The situation is analogous to that which occurs when plaintiff, a passenger in car A driven by driver A, is injured as a result of a collision produced by the combined negligence of driver A and driver B in car B. Even if plaintiff were precluded from recovering from driver A because of a host-guest statute or intrafamily immunity, he could still proceed to recover from driver B. (At least he could unless some mischievous and arguably erroneous application of the “both ways” test imputed the negligence of driver A to plaintiff and recovery was then barred by contributory negligence.) See *Kalechman v. Drew Auto Rental, Inc.*, 33 N.Y.2d 397, 308 N.E.2d 886, 353 N.Y.S.2d 414 (1973), and see generally PROSSER, *supra* note 6, §74 at 488–91, and RESTATEMENT (SECOND) OF TORTS §§432, 433A(2), 439, comment b. If plaintiff is allowed to recover under “the general rules of tort law,” he should be able to proceed against either the actor who negligently threatened the person the concern for whose safety gave rise to plaintiff's distress or the person whose safety was threatened if that person negligently exposed himself to danger, or both. *Id.*

Another variation from general principles is the implication in the *Dillon* court's language that plaintiff could not recover for her own mental distress unless the person for whose safety she was concerned actually suffered actionable injury: “In the absence of the primary liability of the tort-feasor for the death of the child, we see no ground for an independent and secondary liability for claims for injuries by third parties. The basis for such claims must be *adjudicated liability* and fault of defendant; that liability and fault must be the foundation for the tort-feasor's duty of due care to third parties who, as a consequence of such negligence, sustain emotional trauma.” 68 Cal.2d at 733, 441 P.2d at 916, 69 Cal. Rptr. at 76. (Emphasis added.) This requirement would seem to preclude recovery when defendant negligently creates a situation where plaintiff develops great concern for another's safety and consequently suffers serious distress, but the other somehow escapes injury.

Consistent with the general rules of negligence applicable in a jurisdiction adhering to the common law rule of contributory negligence, the court noted that plaintiff's contributory negligence would bar her recovery. *Id.* In a comparative negligence jurisdiction such as Hawaii, however, the negligence of the plaintiff should not entirely bar recovery unless plaintiff's negligence exceeds that of defendant, HAW. REV. STAT. §663–31 (1976).

<sup>30</sup> 68 Cal.2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80. This limitation was affirmed in *Krouse v. Graham*, 19 Cal.3d 59, 75–76, 562 P.2d 1022, 1030, 137 Cal. Rptr. 863, 871 (1977). However, the

nary negligence cases where plaintiff suffers impact, comprehend no such limitation.<sup>31</sup>

Finally, the court in *Dillon* articulated a series of factors of a sort that the courts were to consider "on a case-to-case basis"<sup>32</sup> to determine whether the shock resulting in injury to plaintiff was reasonably foreseeable, *i.e.*, whether defendant owed a duty to plaintiff. These were:

- (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it;
- (2) Whether the shock was from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence;
- (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.<sup>33</sup>

While factors such as these seem clearly to be relevant to the determination of foreseeability under general principles of negligence, the fact is that, as subsequent California decisions make clear, these factors have tended to be converted into *requirements* of foreseeability, imposed with only slight flexibility and used to deny recovery as a matter of law in cases where, under ordinary negligence principles, a court could reasonably find that the risk of emotional shock to plaintiff was reasonably foreseeable.<sup>34</sup>

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court there held that physical injury includes a serious shock to the nervous system that produces physical manifestations such as gastric disturbance. *Accord*, *Borer v. American Airlines*, 19 Cal.3d 441, 450, 563 P.2d 858, 864-65, 138 Cal. Rptr. 302, 308-09 (1977) (rule extended to support denial of recovery for intangible injuries in action for loss of parental consortium). See also note 34 *infra*.

<sup>31</sup> That is, there is no requirement in such cases that plaintiff's pain and suffering, grief, humiliation, and the like produce physical consequences in order to be compensable.

<sup>32</sup> 68 Cal.2d at 741, 441 P.2d at 920, 69 Cal. Rptr. at 80.

<sup>33</sup> *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80. In *D'Ambra v. United States*, 354 F. Supp. 810 (D.R.I. 1973), modified, 481 F.2d 14 (1st Cir. 1973), the U. S. District Court, purporting to apply Rhode Island law, adopted the *Dillon* approach but added that the presence of plaintiff must also be foreseeable. Subsequently, the Supreme Court of Rhode Island, in responding to a question certified from the First Circuit Court of Appeals in an appeal from the District Court's decision, questioned the rationality and fairness of the requirement that plaintiff's presence be reasonably foreseeable to defendant. *D'Ambra v. United States*, 114 R.I. 643, 656 n.7, 338 A.2d 524, 531 n.7 (1975) (dictum).

<sup>34</sup> Thus, for example, recovery has been denied to a wife who first witnessed her paralyzed husband in the hospital emergency room but did not witness the accident that caused the paralysis, *Deboe v. Horn*, 16 Cal. App.3d 221, 94 Cal. Rptr. 77 (1971); to a mother who witnessed in the hospital the painful death of her child caused by a negligent diagnosis, *Jansen v. Children's Hosp. Medical Center*, 31 Cal. App.3d 22, 106 Cal. Rptr. 883 (1973); to a mother who arrived on the scene within five minutes of the collision that caused her son's injury, *Arauz v. Gerhardt*, 68 Cal. App.3d 937, 137 Cal. Rptr. 619 (1977); to fathers who witnessed the childbirths that resulted in the deaths of the infants but did not actually witness the deaths, *Justus v. Atchison*, 19 Cal.3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); and to parents who rounded a bend and came upon the scene of an accident in which their daughters were killed "before the dust had settled," *Parsons v. Superior Court*, 81 Cal. App.3d 506, 146 Cal. Rptr. 495 (1978).

In effect, the California courts have imposed a new "impact" requirement by turning the second listed factor, "direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident," into a requirement for recovery rather than an element to be considered. Thus, shock produced by learning from others of an accident's prior occurrence will not support an action under *Dillon* and, although recovery may be allowed where plaintiff does not actually see the accident, plaintiff must perceive the event through his or her senses—must be a "percipient witness." *Justus v. Atchison*, 19 Cal.3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); *Krouse v. Graham*, 19 Cal.3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977). Furthermore, recovery will be limited to distress produced by the shock of sensing the accident and may not compensate for "such improper elements as grief, sorrow, anger and retribution." *Id.* at 78, 562 P.2d at 1032, 137 Cal. Rptr. at 873.

In short, the promise of *Dillon*, except in cases virtually on all fours with its facts, is as dead as

The Hawaii Supreme Court, although believed by some commentators to have "adopted" the rule of *Dillon v. Legg*,<sup>35</sup> took a much bolder approach. In *Rodrigues v. State*,<sup>36</sup> plaintiffs had won an award in the trial court for property damage and mental suffering produced by the negligent failure of state employees to prevent flooding that damaged plaintiffs' new home.<sup>37</sup> On defendant's appeal, the court sustained the right of the plaintiffs to seek damages for the mental distress produced by the injury to their home. Rejecting the opportunity to hold that such damages would be allowed if "parasitic" to an actionable claim for negligent injury to property,<sup>38</sup> the court instead decided to give "independent legal protection" to "the interest in freedom from negligent infliction of serious mental distress" and to recognize the separate existence of a duty to refrain from such infliction.<sup>39</sup> "[T]he question of whether the defendant is liable to the plaintiff in any particular case," the court stated, "will be solved most justly by the application of general tort principles."<sup>40</sup>

The concerns about fraudulent claims and unlimited liability that had been expressed by other courts, as well as the dissenters' "disagreement with the policy of recognizing emotional ties to material objects" and concern about

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the hopes of the many plaintiffs whose claims have been rejected. The California cases are collected and discussed in *Parsons v. Superior Court*, 81 Cal. App.3d 506, 146 Cal. Rptr. 495 (1978).

<sup>35</sup> E.g., GREGORY, KALVEN & EPSTEIN, *supra* note 7, at 970.

<sup>36</sup> 52 Haw. 156, 472 P.2d 509 (1970).

<sup>37</sup> Plaintiffs had planned to move into their new home on the same day that the flooding occurred. The supreme court described the circumstances that produced the mental distress as follows:

The Rodrigues' home was flooded to a height of six inches, the water causing extensive damage to the house and furnishings. Mr. Rodrigues reported that he was "heartbroken" and "couldn't stand to look at it" and Mrs. Rodrigues testified that she was "shocked" and cried because they had waited fifteen years to build their own home.

In addition to other repairs they made on their home, the Rodrigueses spent approximately six weeks scraping damaged rubber carpets off the floor of the house with razor blades. The Rodrigueses took out a loan to pay for repairs and incurred interest charges on the loan as an additional expense.

*Id.* at 159-60, 472 P.2d at 513.

The negligence found to exist by the supreme court was the negligent failure of the state to inspect and clear its culverts of sand in violation of its duty to prevent unreasonable interference to neighboring lands when taking measures to protect its highways from the hazards of surface waters. *Id.* at 162-67, 472 P.2d at 515-17.

<sup>38</sup> *Id.* at 171, 472 P.2d at 519. The court noted that allowing recovery for mental distress only when it is associated with another actionable wrong represents "law in a developing stage," quoting STREET, I FOUNDATIONS OF LEGAL LIABILITY 470 (1906). It then expressed disapproval of the unevenness and inconsistency of the current scheme for protection against negligently inflicted emotional distress, stating: "We find little virtue in such a scheme." *Id.*

This portion of the court's opinion raises the interesting question whether the court was including within its disapproval the *entire* current scheme of awarding damages for mental distress (including shock, grief, anxiety, humiliation, and perhaps even physical pain and suffering) *even when associated with negligently inflicted physical injuries*. If so, the logical next step would have been to treat such claims as independent of the claim for physical injuries and to impose the same requirements of foreseeability and seriousness as the court imposed in the *Rodrigues* situation and in the pure mental distress cases. See text at notes 42 and 43 *infra*. Such an approach might tend to reduce significantly or even eliminate general damages in many cases where they are now routinely allowed. However, there has been no further indication since the decision in *Rodrigues* that the court intended to make such a revolutionary change in the well-accepted rule that, as to pain and suffering and other psychic effects, we "take our victims as we find them" and award damages accordingly. PROSSER, *supra* note 6, §43 at 261-63.

<sup>39</sup> 52 Haw. at 174, 472 P.2d at 520. The court remanded the question of damages for mental distress to the trial court to allow it to apply the rule newly announced. It further instructed the trial court to exclude from damages any award for future "disruption of home and family life" or for "etc.," both of which had been erroneously included in the award below. *Id.* at 175, 472 P.2d at 521.

<sup>40</sup> *Id.* at 174, 472 P.2d at 520.

"vast potential for abuse inherent in such a theory of recovery,"<sup>41</sup> were met, first, by imposing a requirement of seriousness: Serious mental distress to the plaintiff must have been "a reasonably foreseeable consequence of the defendant's act"<sup>42</sup> and recovery was to be limited to cases "where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."<sup>43</sup>

Secondly, the court shifted to the trier of fact, in its function of applying the "ability to cope" test, the responsibility for determining whether any of these concerns should limit liability in a particular case.<sup>44</sup> In regard to mental distress occasioned by negligent injury to property, the court expressed its faith that "the jury, representing a cross section of the community is in a better position to consider under what particular circumstances society should or should not recognize recovery for mental distress."<sup>45</sup>

Subsequently, in *Leong v. Takasaki*,<sup>46</sup> the Hawaii Supreme Court reaffirmed both the general principles set forth in *Rodrigues*<sup>47</sup> and the independence of its approach from that of the Supreme Court of California. In *Leong*, the ten-year-

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<sup>41</sup> *Id.* at 178, 472 P.2d at 522.

<sup>42</sup> *Id.* at 174, 472 P.2d at 521.

<sup>43</sup> *Id.* at 173, 472 P.2d at 520. In adopting this requirement the court adopted a standard similar to that applied to actions for intentional infliction of mental distress. *Id.* See RESTATEMENT (SECOND) OF TORTS §46, comment j (1965).

<sup>44</sup> 52 Haw. at 173, 472 P.2d at 520.

<sup>45</sup> *Id.* at 175, n.8, 472 P.2d at 521, n.8.

<sup>46</sup> 55 Haw. 398, 520 P.2d 758 (1974).

<sup>47</sup> The holding in *Leong* differed somewhat from that of *Rodrigues* but the full significance of the difference is not entirely clear. In *Rodrigues* the court had required that serious mental distress to plaintiffs be reasonably foreseeable and also held "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." 52 Haw. at 173, 174, 472 P.2d at 520. This latter requirement seemed to require a *post hoc* judgment based on the actual facts of the case as they turned out. In *Leong*, however, the court stated, after repeating the foreseeability test of *Rodrigues*: "However, our analysis in that case also focused on the foreseeability of the plaintiff's reaction. We now hold that when a reasonable plaintiff-witness to an accident would not be able to cope with the mental stress engendered by such circumstances, the trial court should conclude that defendant's conduct is the proximate cause of plaintiff's injury and impose liability on the defendant for any damages arising from the consequences of his negligent act." 55 Haw. at 399, 520 P.2d at 758-59.

It is not clear whether the court was merely compressing the foreseeability-of-serious-mental-distress test and the ability-to-cope test of *Rodrigues* into a single foreseeability test, or whether, in addition, the court was adding the requirement that plaintiff must have been a witness to the accident.

The likely answer is that the court was merely trying to clarify the somewhat vague relationship between the two tests of *Rodrigues*. In *Leong* the court expressly stated: "[T]he standard of duty established in *Rodrigues* should be applied in the instant case on remand to determine defendant's liability." *Id.* The court's reference to a "plaintiff-witness" merely reflected the fact that in *Leong* itself the plaintiff was a witness to the accident. The lengthy discussion of the history of the mental-distress-without-impact cases, and the relevant policy concerns, which seemed to repeat the reasoning of *Rodrigues*, was probably a response to the comment by Justice Levinson in his dissent in *Rodrigues* that since the majority in that case was composed of only one regular supreme court justice and two circuit judges sitting as substitutes, while the dissent was the product of two regular justices, the law of the case in *Rodrigues* would remain uncertain "until the full court sits and rules on another case of this nature." 52 Haw. at 180, 472 P.2d at 523 (Levinson, J., dissenting). The opinion in *Leong* had the concurrence of the five regular justices.

Finally, the court's somewhat confusing references to proximate cause in connection with the foreseeability issue seem to have been included for the purpose of preventing the trial courts from doing what the trial court did in *Leong* itself and what California courts are now doing: Treating the factors in *Dillon* as requirements for recovery and dismissing claims for mental-distress-without-impact when one of the factors is missing, rather than merely taking these factors into account along with other circumstances in the case to determine whether the required degree of serious distress was reasonably foreseeable.

old plaintiff, apparently not personally within the zone of danger, witnessed the negligent running-down and killing of his step-grandmother.<sup>48</sup> Plaintiff alleged nervous shock and permanent injury to his psyche, but no physical injuries.<sup>49</sup> On appeal from a summary judgment for defendant, the supreme court reversed. The court asserted its disapproval of the requirement of physical injury "as yet another of the artificial devices to guarantee the genuineness of the claim"<sup>50</sup> and held that plaintiff could recover for mental distress alone, at least if evidence of medical or psychiatric witnesses were produced to support the claim.<sup>51</sup> In addition, the court made clear that factors such as those set forth in *Dillon v. Legg* to determine foreseeability and duty<sup>52</sup> were not to be used by the trial court to bar recovery, but would be relevant only to determine the degree of mental stress suffered for the purpose of determining whether the amount of stress engendered was beyond that with which a reasonable person could be expected to cope.<sup>53</sup>

While only a small minority of courts have followed *Dillon* or *Rodrigues*,<sup>54</sup> and most continue to apply the zone of physical danger limitation in cases where plaintiff claims mental suffering produced by negligently caused physical injury to third persons,<sup>55</sup> courts seem to be less reticent to permit recovery in cases where defendant's negligence occurs when dealing directly with plaintiff. Such cases seem consistent with two recognized exceptions to the old rule that denied recovery for mental suffering in the absence of impact: negligence in transmitting a telegraph message that, on its face, gave warning that mental distress was especially likely, and negligent mishandling of a corpse.<sup>56</sup>

Thus, for example, in *Johnson v. State*,<sup>57</sup> the Court of Appeals of New York, which had refused in *Tobin v. Grossman*<sup>58</sup> to expand liability by adopting

<sup>48</sup> The court expressly rejected the requirement that there be a blood relationship between the victim and the plaintiff: "[T]he plaintiff should be permitted to prove the nature of his relationship to the victim and the extent of damages he has suffered because of this relationship." *Id.* at 411, 520 P.2d at 766. *Cf.*, *Mobaldi v. Board of Regents*, 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976) (foster mother allowed to recover for mental distress caused by witnessing injury to foster child).

<sup>49</sup> Plaintiff claimed that his grades in school dropped immediately after the accident and that he thought about the accident at times. 55 Haw. at 401, 520 P.2d at 761.

<sup>50</sup> *Id.* at 404, 520 P.2d at 763.

<sup>51</sup> *Id.* at 413, 520 P.2d at 767.

<sup>52</sup> See text p. 5 *supra*.

<sup>53</sup> 55 Haw. at 410, 520 P.2d at 765-66. The court also included the foreseeability of the plaintiff's and the victim's presence to the defendant as one of these factors. In *D'Ambra v. United States*, 354 F. Supp. 810 (D.R.I. 1973), *modified*, 481 F.2d 14 (1st Cir. 1973), the District Court added this factor to the factors listed in *Dillon*. The U. S. Court of Appeals certified the question of liability to the Rhode Island Supreme Court. That court, in turn, expressed disapproval of the requirement that the presence of plaintiff-mother who witnessed the death of her child be foreseeable. *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975). In its opinion, the Rhode Island Supreme Court quoted *Rodrigues* approvingly. *Id.* at 652, 338 A.2d at 529.

<sup>54</sup> See, e.g., *Hunsley v. Giard*, 87 Wash. 2d 424, 553 P.2d 1096 (1976) (citing *Rodrigues* and *Leong* with approval). See generally Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute between California and New York*, 51 ST. JOHN'S L. REV. 1, 29-32 (1976) (reporting the decisions that approved *Dillon*. Unfortunately, the author credited the Hawaii Supreme Court with adopting the "requirement" of the foreseeability of plaintiff's presence that had been adopted by the U. S. District Court in *D'Ambra*, see note 53 *supra*, but had only been mentioned as a factor for determining the degree of mental distress suffered in *Leong*).

<sup>55</sup> See generally Annot., 29 A.L.R.3d 1337 (1970).

<sup>56</sup> See PROSSER, *supra* note 6, §54 at 328-30. "What all of these cases appear to have in common is an especial likelihood of genuine and serious mental distress, arising from special circumstances, which serves as a guarantee that the claim is not spurious." *Id.* at 330.

<sup>57</sup> 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975).

<sup>58</sup> 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969) (mother denied recovery for her own mental distress produced when her two-year-old son was seriously injured in an automobile



*Dillon*,<sup>59</sup> nevertheless allowed plaintiff to recover for mental suffering occasioned when defendant's hospital erroneously informed her by telegram that her mother had died. Though the court of appeals distinguished *Tobin* on the ground that a bystander to an accident was only injured "indirectly," while the recipient of the telegram in *Johnson* was "directly" injured, it is likely that the more important difference was that the potential scope of liability—the number of plaintiffs—was limited in *Johnson*, but not in *Tobin*, to a pre-identified plaintiff.<sup>60</sup> There was thus significantly less danger of unlimited liability in the situation posed in *Johnson*.

*B. Kelley v. Kokua Sales and Supply, Ltd.*

Based upon *Rodrigues* and *Leong*, the facts alleged by plaintiffs in *Kelley v. Kokua Sales and Supply, Ltd.*<sup>61</sup> presented a most appealing case for recovery: Plaintiffs' decedent, Mr. Kelley, suffered a heart attack and died shortly after being informed of the tragic deaths of his daughter and granddaughter and critical injuries to another granddaughter resulting from a collision between the automobile in which they were riding and a trailer truck. The fatal collision occurred when the truck's brakes failed and the driver was unable to stop the speeding vehicle on the Likelike Highway, a mountain road, as the truck was being driven towards Honolulu. Plaintiffs alleged that the various defendants<sup>62</sup> were negligent in manufacturing, maintaining, repairing, and inspecting the truck and its braking system, in issuing a safety sticker, in driving the truck, and in licensing the driver.

Though plaintiffs' decedent suffered no impact from the collision, he allegedly suffered serious mental distress produced by shock in learning of the deaths and critical injury of his own close blood relatives. Indeed, that distress allegedly produced his heart attack and death.

On the other hand, although decedent learned of the accident on the day it occurred, he learned of it by telephone while he was present and residing in California. Thus, he did not witness the accident, he was not within the zone of personal physical danger from the collision, and he never personally saw the accident's gory consequences.

Based on these facts, however, plaintiffs would seem to have stated a good cause of action under *Rodrigues* and *Leong*. If any of the defendants, by their

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accident occurring out of mother's presence but only a few feet away). Justice Breitell's opinion refusing to extend the scope of liability is an extremely articulate and well-reasoned expression of the difficulties involved in allowing recovery in such a case.

<sup>59</sup> Although the mother did not actually see the accident in *Tobin*, she would probably have been allowed to recover under *Dillon*. See *Archibald v. Braverman*, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969).

<sup>60</sup> "[Plaintiff] was the one to whom a duty was directly owed by the hospital, and the one who was directly injured by the hospital's breach of that duty. Thus, the rationale underlying the *Tobin* case, namely, the real danger of extending recovery for harm to others than those directly involved, is inapplicable to the instant case . . . ." *Johnson v. State*, 37 N.Y.2d 378, 383, 334 N.E.2d 590, 593, 372 N.Y.S. 2d 638, 643 (1975).

<sup>61</sup> 56 Haw. 204, 532 P.2d 664 (1975).

<sup>62</sup> Defendants were the owner and operator of the truck, the manufacturer of the truck, the lessor of the truck's trailer, the mechanic for the truck, the estate of the deceased truck driver, a company on whose business the truck was involved, the owner of the service station that inspected the truck and issued a safety sticker, and the City and County of Honolulu and the State of Hawaii who issued the driver a license to operate the type of truck involved. *Id.* at 205, 532 P.2d at 674.

actionable negligence, had created an unreasonable and foreseeable risk of collision between the trailer truck and a passenger automobile under the circumstances alleged, it would seem to follow that such defendants could also be found to have created an unreasonable and foreseeable risk of serious mental distress, of a sort with which normally constituted persons would not be able to cope, to the very close relatives of victims who might be mangled in such a collision.<sup>63</sup> At the very least, the facts as alleged seemed to present an issue for the trier of fact. The absence of plaintiffs' decedent from the scene of the accident seemed more than balanced by the high degree and serious nature of the risk foreseeably created.<sup>64</sup>

The court, however, chose to impose an additional limitation on recovery for emotional distress. It held "[T]he duty of care enunciated in *Rodrigues* and *Leong*. . . applies to plaintiffs meeting the standards stated in said cases, *and who were located within a reasonable distance from the scene of the accident*."<sup>65</sup>

Since Mr. Kelly was more than 2,500 miles from the scene of the accident, plaintiffs could not recover. Summary judgments for defendants were therefore affirmed.

Because "reasonable distance from the scene of the accident" is expressly stated to be the only new requirement for recovery added by the court in *Kelley*, it behooves us to inquire what effect that requirement will have on future cases. "Reasonableness" is an overworked and nebulous concept. Like the Shadow, it has "the power to cloud men's minds." When used to determine whether a person's conduct has been negligent, its meaning and utility are pretty well understood: It is a measure by which the trier of fact can prescribe an appropriate standard of conduct. In that familiar context, reasonableness is measured by reference to a specific quality, prudence, which we all have a right

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<sup>63</sup> See *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969). In denying liability to a mother who witnesses the negligently caused death of a child, Justice Breitel said: "[F]oreseeability, once recognized, is not so easily limited. Relatives, other than the mother, such as fathers and grandparents, or even other caretakers, equally sensitive and as easily harmed, may be just as foreseeably affected." *Id.* 24 N.Y.2d at 615, 249 N.E.2d at 422, 301 N.Y.S.2d at 558. With respect to the difficulty of circumscribing liability "within tolerable limits of public policy," he stated: "Every parent who loses a child or whose child of any age suffers an injury is likely to sustain grievous psychological trauma, with the added risk of consequential serious harm. Any rule based solely on eyewitnessing the accident could stand only until the first case comes along in which the parent is in the immediate vicinity but did not see the accident. Moreover, the instant advice that one's child has been killed or injured, by telephone, word of mouth, or by whatever means, even if delayed, will have in most cases the same impact. The sight of gore and exposed bones is not necessary to provide special impact on a parent. Again, the logical difficulty of excluding the grandparent, the relatives, or others *in loco parentis*, and even the conscientious and sensitive caretaker, from a right to recover, if in fact the accident had the grave consequences claimed, raises subtle and elusive hazards in devising a sound rule in this field." *Id.* at 617, 249 N.E.2d at 423, 301 N.Y.S.2d at 560.

<sup>64</sup> *Id.*

<sup>65</sup> 56 Haw. at 209, 532 P.2d at 676. (Emphasis added.) The court held that defendants did not owe a duty to plaintiffs' decedent and stated: "[W]e hold that the appellees could not reasonably foresee the consequences to Mr. Kelley. Clearly, Mr. Kelley's location from the scene of the accident was too remote." *Id.*

The court also stated: "We further conclude, based on the facts of the case, that the proper law applicable herein is Hawaii law." *Id.* It seems unfortunate that in deciding the interesting conflict of laws issue the court did not further elucidate its reasons for applying the forum's substantive law rather than California's, or cite any authority to support its decision. It is by no means clear that application of Hawaii law was called for in a case like this under current approaches to conflict of laws. Cf. RESTATEMENT (SECOND) CONFLICT OF LAWS §146, 175-80 (1971) and R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 219-24 (1971).

to expect from one another when we engage in activities that have a potential for causing harm.<sup>66</sup>

In the absence of a reference point capable of being ascertained or established, however, reasonableness becomes an unworkable standard: Reasonable in relation to what? This, of course, is the difficulty with the court's "reasonable distance from the scene of the accident" requirement.<sup>67</sup> Against what criterion will the reasonableness of the plaintiff's distance from the accident be measured? If 2,500 miles is unreasonable, will one, two, or ten miles be reasonable? All other factors being equal, a person who witnesses an accident may suffer greater emotional distress than one who does not, but for those who do not witness the accident or its immediate aftermath, there seems to be no significant difference between 2,500 miles and 250 feet.<sup>68</sup>

Thus, the import of the "reasonable distance from the scene of the accident" requirement, and indeed the impact of *Kelley* on future cases, can only be determined by reference to the court's purpose in imposing the new limitation on the scope of duty. That purpose, as the court made clear, was to avoid "unmanageable, unbearable and totally unpredictable liability" upon defendants.<sup>69</sup> Unfortunately, however, *any* restriction on the scope of liability permitted by *Rodrigues* and *Leong* will tend to serve that vague purpose; and the shorter the distance deemed reasonable, the greater the likelihood that the defendant-protective objective will be served. On the other hand, the court in *Kelley* explicitly reaffirmed the independent duty of care it had created in *Rodrigues* and *Leong*, subject only to the newly imposed distance limitation.<sup>70</sup> A fair conclusion is that the court is not inclined to reimpose restrictions, with respect to distance or other factors, that it has already specifically rejected based upon the facts of those cases.<sup>71</sup> At least, the court will probably not do so unless it determines that other limitations are insufficient to achieve its defendant-protective objective.

It also seems highly unlikely that the court intended to have the question of what constitutes a reasonable distance from the scene of the accident turned

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<sup>66</sup> See generally PROSSER, *supra* note 6, §32 at 149-51.

<sup>67</sup> A similar problem may be discerned in the court's use of the phrase "reasonable man" in the test it set down to determine whether plaintiff might recover for mental distress: "[W]here a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Rodrigues v. State*, 52 Haw. 156, 173, 472 P.2d 509, 520 (1970). Here, "reasonable" obviously refers not to prudence but presumably to the degree of phlegm one possesses. Perhaps the better word would have been "ordinary" or "average." However, any confusion created seems to have been dispelled by the addition of the words "normally constituted." See Brott, *supra* note 10, at 151. Cf. Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1257-58 (1971), where the author urges that defendant be liable "to a 'normal' plaintiff who possesses a reasonable degree of pre-existing susceptibility to injury."

<sup>68</sup> See note 63 *supra*. Where two plaintiffs each get the news by telephone, it is possible that the one who is more distant from the accident might suffer greater distress because the distance could prevent him from supervising the care of and providing comfort to the injured person. Thus, feelings of guilt and anxiety as well as grief, horror, and shock would be created.

<sup>69</sup> 56 Haw. at 209, 532 P.2d at 676.

<sup>70</sup> *Id.* The court's language is quoted at p. 10 *supra*. The court also indicated that in "the factual context" of *Rodrigues* and *Leong* allowing relief only for serious mental distress sufficiently limited defendant's liability. *Id.* at 208, 532 P.2d at 676.

<sup>71</sup> These include requirements that plaintiff suffer a physical impact, that plaintiff be within the zone of physical danger, that plaintiff suffer distress produced by fear for his own safety, that the distress be produced by concern for the safety of human beings rather than property, that plaintiff be related by blood to the victim, and that the distress produce physical harm.

over to the jury to decide on a case-by-case basis. In *Kelley* itself the court treated the question as one of policy to be decided by the court under the rubric of the duty issue. Moreover, the vagueness of the test provides no clue that would assist the jury in determining what considerations it should take into account in determining what distance is reasonable. And even if the court informed the jury of the purpose it intended to serve by imposing the reasonable distance requirement, it would be grossly unfair to allow the decision in each case to turn on the question of whether the jury believed that liability arising out of the particular accident might be unmanageable, unbearable, or greater than the defendant could have predicted. Outcomes would then turn on such irrelevant matters as the amount of damage suffered by the physical injury victims, the number of close relatives and witnesses who might claim mental distress, and the amount of mental distress damages claimed in the particular case. The greater the likely damages the accident in question might produce, the closer the distance that would be deemed unreasonable—a curious result, indeed.

Thus, it is inevitable that the reasonable distance rule will have to be clarified or changed by the supreme court if uniformity of application is to be achieved in the state's trial courts. Assuming the court continues to manipulate the distance requirement, rather than other factors, the clarified rule could extend recovery to plaintiffs located in Hawaii when the accident occurred within the state, at the most liberal extreme; could restrict recovery to plaintiffs close enough to the accident, or its immediate aftermath, to suffer a "contemporaneous impact upon the senses,"<sup>72</sup> at the most restrictive extreme; or could place the distance limit somewhere in between these extremes, as, for example, by requiring plaintiff to be present on the island on which the accident occurred or within a distance that would permit plaintiff to arrive at the accident scene before the wreckage was cleared away or the "dust had settled."<sup>73</sup>

The only clues provided by the court as to where it might draw the line are ambiguous, at best: In *Ajirogi v. State*,<sup>74</sup> the author of the *Kelley* majority opinion, explaining the court's handling of the duty question in the latter opinion, said: "In *Kelley*, if this court did not limit the 'scope of the duty of care,' the liability of the actor could have been premised on a world-wide basis."<sup>75</sup> This statement may suggest a geographical limitation such as requiring the plaintiff to be located within the state, although other interpretations are possible. In the *Kelley* opinion the court quoted Prosser with approval.<sup>76</sup>

<sup>72</sup> The current California rule requires such an impact. *Justus v. Atchison*, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977), and see generally note 34 *supra*. The attempt to translate this rule into a distance requirement demonstrates the anomalies produced by focusing on distance alone. For example, a deaf and blind plaintiff close enough to suffer a contemporaneous impact on his senses but who suffers none because of his condition would be eligible to recover under the suggested rule if he experiences serious distress when the facts of the accident are communicated to him hours later.

<sup>73</sup> Recovery has been denied in California in a case where plaintiffs did not arrive at the scene until after the accident but before the dust had settled. *Parsons v. Superior Court*, 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978).

<sup>74</sup> 59 Haw. 515, 583 P.2d 980 (1978).

<sup>75</sup> *Id.* at 532, 583 P.2d at 990 (Kobayashi, J., dissenting). (Emphasis added.) In *Kelley* itself the court expressed concern that language in *Leong* "could very well be construed to mean that the appellees owe a duty of care from [sic] the negligent infliction of serious mental distress upon a person located in any part of the world." 56 Haw. at 208, 532 P.2d at 676.

<sup>76</sup> 56 Haw. at 209, 532 P.2d at 676.

Perhaps this can be taken as an indication that the limitations suggested by Prosser,<sup>77</sup> which are unfortunately not confined to distance but include other factors such as relationship to the accident victim and the time it takes for the news of the accident to be brought home to plaintiff, are to be adapted to the distance requirement. Prosser's approach would seem consistent with the more restrictive rule, since he suggests that "it might be required that plaintiff be present at the time of the accident or peril, or at least that the shock be fairly contemporaneous with it. . . ."<sup>78</sup>

In view of the large number of tourists, armed services personnel, and recent in-migrants in Hawaii with close relatives overseas, limiting recovery for mental distress without impact to plaintiffs located within the state when the precipitating accident or event occurs here would substantially reduce the potential number of mental distress awards. While in practical effect such a rule would probably have a parochial and exclusive effect since it would tend to favor relatives of longer-term Hawaii residents whose entire families live within the state, it would nevertheless operate evenhandedly to protect both local and nonlocal defendants, to benefit nonresident close relatives of accident victims who happened to be present in the state when the precipitating accident occurred, and to deny recovery to Hawaii residents who happened to be overseas when their loved ones were injured or killed in Hawaii. Furthermore, the drawing of such a line might be justified on the ground that persons located within the state, even on islands other than the one on which the accident occurred, are ordinarily in a good position to get to the accident scene, to the hospital, or to the morgue within at least a few hours after the accident occurs, and are thus able to observe the carnage wrought by the accident or the immediate after-effects while the emergency is still fresh. Overseas relatives, on the other hand, would not ordinarily be able to reach Hawaii until community resources that deal with such tragedies already had been marshalled to conceal the more horrible aspects of the accident from view and to provide the spiritual comfort and psychological counselling designed to reduce or cushion the shock.

Unfortunately, however, this justification for the in-state/out-of-state dichotomy would not apply to specific factual situations where factors other than distance might affect the length of time it takes plaintiff to arrive at the scene of the accident nor take into account either the manner in which the facts of the accident are communicated to plaintiff or the shock-producing capacity of those facts. Consider, for example, the possibility of a negligently produced airplane crash involving an inter-island flight. Close relatives and loved ones of the passengers and crew might be located anywhere in the world. Of those outside of Hawaii, some, learning of the crash by radio or telephone, might secure transportation that would bring them to Hawaii within hours of the accident. Others might actually see the aftermath of the accident on television within hours of its occurrence. And still others might even have been en route to Hawaii by plane when the crash occurred and would thus receive the tragic news and witness the accident's effects shortly after landing. On the other hand, those relatives located in Hawaii might be inaccessible and not learn of the crash until days after it occurs; or they might be unable, for a variety of reasons, to travel to the crash scene or to observe the injured victim, or his remains, at

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<sup>77</sup> *Supra* note 6, §55 at 335.

<sup>78</sup> *Id.*

all; or, like Mr. Kelley, they might die or become immobilized as the result of shock immediately after hearing the tragic news.

Thus, even assuming that a rule adopting the in-state/out-of-state dichotomy would, in the court's view, be sufficiently restrictive to avoid "unmanageable, unbearable and totally unpredictable liability," such a rule could only operate capriciously. The only "pure" distance rule that has any possibility of operating fairly and even-handedly in these cases would be one that requires distress-without-impact plaintiffs to be close enough to the accident to suffer a contemporaneous or near-contemporaneous impact upon their senses,<sup>79</sup> the more restrictive rule suggested by Prosser.

It would seem to follow, therefore, that if the court is really determined, as it said it is, to apply the duty of care set forth in *Rodrigues* and *Leong* to plaintiffs "meeting the standards stated in said cases," subject only to their being "located within a reasonable distance from the scene of the accident," and if the court wishes to avoid invidious and indefensible distinctions between plaintiffs, it can hardly avoid adopting a distance rule located at the more restrictive end of the continuum.

Indeed, the court will surely come to see that only a very restrictive approach—whether based upon distance alone or combined with other factors—is capable of achieving the court's objective of avoiding untrammelled liability. This recognition will follow because the potential for such liability exists in almost every case in which defendant negligently produces serious injury or death to accident victims. Where such serious consequences are reasonably foreseeable,<sup>80</sup> serious distress to all close relatives and loved ones of the victims,<sup>81</sup> to eyewitnesses,<sup>82</sup> and possibly even to rescuers is also foreseeable.<sup>83</sup> Even though in some cases the victim's close relatives and loved ones may be located outside the state, there are likely to be many cases where most or all of them will be present in Hawaii, perhaps even present on the island where the accident occurs and only minutes away from the scene. The prospect of extensive and excessive liability in these cases is produced by the likelihood that huge damages to the accident victim or victims will be combined with substantial awards to those who suffer serious distress and its attendant consequences.<sup>84</sup> Only by

<sup>79</sup> But see note 72 *supra*.

<sup>80</sup> There will be cases in which the accident victims themselves will be allowed to recover for serious injuries even though the risk reasonably foreseeable to the defendant did not include injuries of such seriousness. See, e.g., *Pease v. Sinclair Refining Co.*, 104 F.2d 183 (2d Cir. 1939) (plaintiff teacher received from Sinclair an exhibit of petroleum products in which the bottle labeled kerosene actually contained water. Plaintiff suffered severe burns and lost an eye when, knowing that kerosene may be used to preserve raw sodium, he poured the contents of the bottle onto a piece of sodium metal). Accord, *RESTATEMENT (SECOND) OF TORTS* §§435, 454 (1966). In these cases, risk of serious mental distress to third persons is arguably not reasonably foreseeable to defendants and, therefore, defendants will not be deemed to have breached their duty of care to third persons under the *Rodrigues* and *Leong* standards.

<sup>81</sup> See note 63 *supra*.

<sup>82</sup> See, e.g., *Chadwick v. British Railways Bd.* [1967] 1 W.L.R. 912 (widow of man who suffered serious psychoneurotic symptoms as a result of his experience while serving as a rescuer at a gruesome train wreck permitted to recover).

<sup>83</sup> *Id.* Also cf. *Wagner v. International Ry. Co.*, 232 N.Y. 176, 133 N.E. 437 (1921) ("Danger invites rescue."). In such cases, the court might invoke a doctrine analogous to assumption of risk to deny recovery. See, e.g., *Justus v. Atchison*, 19 Cal. 3d 564, 585, 565 P.2d 122, 136, 139 Cal. Rptr. 97, 111 (1977), where the California Supreme Court suggested that only involuntary witnesses to an accident should be entitled to recover.

<sup>84</sup> Damages might include the following: (1) awards for reasonable medical, surgical, and hospital expenses and related costs, for lost earnings and earning capacity, and for pain and suffering to the

narrowly and arbitrarily limiting the number of plaintiffs able to qualify for mental distress awards in *all* cases can the court allay its principal concerns.<sup>85</sup>

However, in cases where defendant would be liable *only* for negligently inflicted mental distress and its consequences, the court has significantly less reason for concern.<sup>86</sup> In these cases recovery for mental distress would not be heaped upon primary recovery for other damages, and both the seriousness and the foreseeability requirements would narrowly limit the number of potential plaintiffs in all but the most unusual cases.<sup>87</sup> Thus, except where an independent liability-limiting policy is discerned,<sup>88</sup> the court should allow the plaintiffs in these cases to proceed on the general principles enunciated in *Rodrigues* and *Leong* without further restrictions produced by the concerns that moved the court to restrict the scope of liability in *Kelley*.

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physical-injury victims who survived; (2) awards to the estates and the wrongful-death-act beneficiaries of physical-injury victims who did not survive for damages permitted under the survival statute and wrongful death act, HAW. REV. STAT. §§663-3, 663-7, 663-8 (1976); (3) awards to the estates and to the wrongful-death-act beneficiaries of serious-mental-distress victims who, like Mr. Kelley, die from the shock engendered by the accident for damages permitted under the survival statute and the wrongful death act, *id.*; and, (4) awards to close surviving relatives and loved ones, such as spouses, fiancés, caretakers, and those with whom the victims were living in intimate relation, of the physical-injury victims, as well as to bystander witnesses, for all the damages, as in (1), above, produced by their serious mental distress.

In Hawaii, where death ensues, the estate may recover the damages listed in (1), above, suffered by the decedent until the time of his death plus "the future earnings of the decedent in excess of the probable cost of the decedent's own maintenance and the provision decedent would have made for his or her actual or probable family and dependents during the period of time decedent would have likely lived but for the accident." HAW. REV. STAT. §663-8 (1976). In addition, the legal representative may recover the "reasonable expenses of the deceased's last illness and burial," and the wrongful death beneficiaries—the surviving spouse, children, father, mother, and any person wholly or partly dependent on the deceased person—may recover "fair and just compensation, with reference to the pecuniary injury and loss of love and affection," which includes items normally allowed in an action for loss of consortium as well as amounts that the beneficiaries would have received from the decedent during his lifetime. HAW. REV. STAT. §663-3 (1976).

<sup>85</sup> Unless an entirely different approach is taken. See Part V, pp. 36-43 *infra*.

<sup>86</sup> Such situations would include those where defendant's negligence consists of words or conduct that create fear for safety of self, *see, e.g.,* *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 45 N.E. 354 (1896) (plaintiff claimed to have suffered fright and subsequent miscarriage when defendant's driver of a horse-drawn car pulled up to her and, when the horses stopped, plaintiff found herself standing between them); fear for the lives or safety of loved ones, *see, e.g.,* *Johnson v. State*, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975), *discussed* pp. 8-9 *supra*; concern for plaintiff's property or financial interests, *see, e.g.,* *First Nat'l Bank v. Langley*, 314 So. 2d 324 (Miss., 1975) (plaintiff suffered mental distress when defendant bank negligently delayed retrieving the deposit that plaintiff had placed in defendant's night depository and that had become stuck in the mechanism); or that threaten harm to other important interests of plaintiff, *see, e.g.,* *Corrigal v. Ball and Dodd Funeral Home, Inc.*, 89 Wash. 2d 959, 577 P.2d 580 (1978) (defendant funeral home was alleged to have contracted with mother to deliver ashes of her son in an urn. Plaintiff received box from funeral home and opened it, expecting to find the urn containing the ashes. Instead, she found a package that seemed to contain packing material. She sifted through the material looking for the urn and then suddenly realized that the material was her son's ashes), but where the subject of plaintiff's concern suffers no actionable injury.

<sup>87</sup> Such as negligent conduct that causes a bus or theatre full of people to fear for their own safety, or where all the members of a large family receive erroneous information reporting serious harm to a loved one as a result of defendant's negligence in transmitting a message. Such situations could present the "hard cases," which might impel courts to make further inroads into the right to recover for emotional distress even in cases where there are no "primary" victims.

<sup>88</sup> It is unlikely that courts will allow the independent tort of negligent infliction of emotional distress to be used to circumvent requirements for, limitations to, or defenses against other torts where such requirements, limitations, or defenses are seen to serve important objectives. Thus, for example, aggrieved medical malpractice defendants have not succeeded in by-passing the stringent requirements of the tort of malicious prosecution, which serve the purpose of protecting honest litigants who are seeking justice, *see generally* PROSSER, *supra* note 6, at 851, by suing for negligent infliction of mental distress. See 3 PROF. LIAB. REP. 137 (1979) and authorities there cited. See

The *Rodrigues*-type situation, in which plaintiffs claim emotional distress occasioned by injury to property, presents an interesting hybrid. In general, the potential liability for property damage and for mental distress produced thereby is not nearly so great as in personal injury cases. Furthermore, the court's seriousness and foreseeability requirements would tend to impose significant limits on the number and range of plaintiffs who might recover for emotional distress produced by injury to property. Thus the potential for untrammelled and unreasonably burdensome liability in property damage cases is low compared to that in personal injury cases. Nevertheless, it would be surprising if the court in the future permits recovery for mental suffering occasioned by injury to property in situations where such recovery will not be allowed if occasioned by injury to the person. Were it to do so, the court might be perceived as giving *greater* protection to emotional attachment to property than to concern for human life.<sup>89</sup>

The post-*Kelley* prognosis, therefore, is that in cases of mental distress occasioned by injury to third persons and property, the Hawaii Supreme Court seems destined to adopt a more restrictive approach, similar to if not quite as limiting as California's "contemporaneous impact on the senses" rule, and thus to retreat further from the more principled and more generous approach of *Rodrigues* and *Leong*.

Whether such a retreat is either necessary or appropriate, however, remains to be seen.

## II. CONSIDERATIONS OF LOGIC, FAIRNESS, AND POLICY

As many courts have noted—often when rejecting an expansion of liability—once an independent interest in freedom from negligently inflicted mental suffering is recognized, there is no logical stopping-place.<sup>90</sup> There seems not to

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generally Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 *FORD L. REV.* 1003, 1066-74 (1977). Similarly, it is unlikely that defenses and burdens developed under the first amendment to protect the public media in the defamation and privacy area will be lightly set aside when plaintiff includes a claim for negligent infliction of mental distress. *Cf.*, *Gertz v. Robert Welch, Inc.*, 418 U. S. 323 (1974) (defamation), and *Time, Inc. v. Hill*, 385 U. S. 374 (1967) (privacy). There is an interesting question whether publication of a piece of news or a picture that neither defames nor invades the plaintiff's privacy when the publisher knew or should have known that there was an unreasonable risk of serious distress to some readers or viewers (as where a particularly gory accident is depicted and the victims are identified on television before the next of kin have been notified) should be privileged, but it is beyond the scope of this article.

The reaction of judges to claims that expansion of recovery for negligence be allowed to overcome restrictions on other pre-existing torts has never been more clearly expressed than by Justice Cardozo:

If this action [for negligence] is well conceived, all these principles and distinctions [in actions for deceit], so nicely wrought and formulated, have been a waste of time and effort. They have been a snare, entrapping litigants and lawyers into an abandonment of the true remedy lying ready to call. The suitors thrown out of court because they proved negligence, and nothing else, in an action for deceit, might have ridden to triumphant victory if they had proved the selfsame facts, but had given the wrong another label . . . So to hold is near to saying that we have been paltering with justice." *Ultramares Corp. v. Touche*, 255 N.Y. 170, 186-87, 174 N.E. 441, 447 (1931).

<sup>89</sup> *Cf.*, *Rodrigues v. State*, 52 Haw. 156, 178-80, 472 P.2d 509, 522-23 (1970) (Levinson, J., dissenting).

<sup>90</sup> See, e.g., *Tobin v. Grossman*, 24 N.Y.2d 609, 618, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969) ("Assuming there are cogent reasons for extending liability in favor of victims of shock resulting from injury to others, there appears to be no rational way to limit the scope of liability.").



be any scientific basis upon which to draw the lines adopted in *Kelley* and in the California cases subsequent to *Dillon v. Legg*: In view of the unpredictable range of human reactions,<sup>91</sup> it is not possible to assert with any certitude that a parent who witnesses the running down of a child will foreseeably suffer greater distress than a parent who comes upon the scene moments later, or, for that matter, than a Mr. Kelley, thousands of miles from the accident, who learns by phone that a daughter and granddaughter have been killed and another granddaughter critically injured. In each of these cases the degree of mental suffering is probably going to be very great indeed.<sup>92</sup> And in each of these cases the precise nature and degree of the effect, whether mere primary response or traumatic neuroses,<sup>93</sup> will depend on many factors,<sup>94</sup> including the circumstances of the accident, the age of the victims, the nature of the relationship between the victims and the plaintiff, and the character, personality, and constitution of the plaintiff. However, what is reasonably foreseeable to the reasonably prudent person in modern society is that if he or she produces serious physical harm or death to a victim, the victim's loved ones are likely to suffer mental distress of a serious nature. Thus, to limit arbitrarily the class of plaintiffs who recover to percipient witnesses, to those who are located near the scene of the accident, to close relatives of the victim, or to those who will be foreseeably present at the scene, unfairly deprives deserving plaintiffs of recovery on grounds that cannot be sustained by logical analysis. Furthermore, to hold that defendants cannot "reasonably foresee" that plaintiffs such as Mr. Kelley, who are deemed to fall outside these categories, will suffer serious mental distress<sup>95</sup> is to ignore reality.<sup>96</sup>

But even if it be conceded that language, logic, and symmetry may sometimes be sacrificed on the altar of policy, the question remains as to whether sound policy requires the adoption of arbitrary cut-off lines.

In *Kelley*, the loss occasioned by Mr. Kelley's distress-produced death was allowed to lie where it fell—on those plaintiffs, including his widow, who suffered pecuniary and other losses consequent upon his untimely demise. In refusing to shift the loss back to the defendants, the court implicitly gave primacy to the recognized tort objective of not discouraging useful enterprise by saddling it with unduly burdensome liability.<sup>97</sup> Unfortunately, it did not

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and *Waube v. Warrington*, 216 Wis. 603, 613, 258 N.W. 497, 501 (1935) ("[T]he liability imposed by such a doctrine [allowing plaintiff not within zone of physical danger to recover] would . . . enter a field that has no sensible or just stopping point.").

<sup>91</sup> See Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1250 (1971).

<sup>92</sup> See the excerpts from Justice Breitel's opinion for the court in *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969), quoted in note 63, *supra*.

<sup>93</sup> See Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L. REV. 1237, 1249-51 (1971).

<sup>94</sup> *Id.* at 1257, n. 114.

<sup>95</sup> *Kelley v. Kokua Sales and Supply, Ltd.*, 56 Haw. 204, 209, 532 P.2d 673, 676 (1975).

<sup>96</sup> Indeed, the writer of the *Kelley* majority opinion subsequently stated: "In *Kelley* this court dealt with the matter of foreseeability only in connection with limiting 'the scope of the duty of care,' and only incidentally concluded that the consequence to Mr. Kelley was not foreseeable." *Ajirogi v. State*, 59 Haw. 515, 532, 583 P.2d 980, 990 (1978) (Kobayashi, J., dissenting) (emphasis added). He then went on to suggest that where there is no policy reason requiring a limitation on the scope of duty, and more than one inference can be drawn from the facts, foreseeability should be treated as a question of fact for the jury. *Id.* at 532, 583 P.2d at 990. See also note 171, *infra*.

<sup>97</sup> "[T]he courts frequently have been reluctant to saddle an industry with the entire burden of the harm it may cause, for fear that it may prove ruinously heavy. This is particularly true where

burden its conclusion that liability would be "unmanageable, unbearable and totally unpredictable" with any supporting arguments or data other than to quote a paragraph from Prosser<sup>98</sup> which is arguably inapposite to the facts of *Kelley*. It also failed to discuss other legitimate tort policies that might, on balance, have supported a different result. Although the court indicated that it had reevaluated "the various considerations pertinent to the question of an untrammelled liability,"<sup>99</sup> it did not expose the details of its reevaluation in its opinion. Its failure to do so is perhaps understandable:<sup>100</sup> Appellate courts are not as well-suited as legislative bodies to ferret out all the complex data that would provide the basis for rational policy-making in a case such as this.<sup>101</sup> Furthermore, gaps in the data, inconsistencies, and difficulties involved in assessing and balancing effects suggest that, ultimately, decisions such as this must necessarily be based less on rational analysis than on community attitudes and preferences—the felt needs of the times—as perceived by the justices.

Nevertheless, it will prove useful to consider whether other tort law objectives might have been served by allowing liability in *Kelley*, and, if so, whether they might have outweighed in importance the "negative" objective of not overburdening useful activity. These objectives include fairness in the distribution of losses, compensation to victims, and deterrence of accidents.

#### A. Fairness in the Distribution of Losses

If the line drawn to cut off Mr. Kelley's right to recover is arbitrary, as suggested above, then the goal of fairness in the distribution of losses was arguably ill-served by the decision. That is, that plaintiff's decedent was not located within a reasonable distance from the accident does not seem to be a satisfactory, principled answer to the question of why plaintiff Leong should be allowed to recover while Mr. Kelley and his beneficiaries should not. Recall that it was concern about unequal treatment of plaintiffs that led the California court, in *Dillon v. Legg*, to drop the requirement that plaintiff, in order to

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the liability may extend to an unlimited number of unknown persons, and is incapable of being estimated or insured against in advance." PROSSER, *supra* note 6, §4 at 22–23 (footnotes omitted).

<sup>98</sup> "It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one man were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as his friends." PROSSER, *supra* note 6, §54 at 334 (emphasis added), quoted in *Kelley v. Kokua Sales & Supply, Ltd.*, 56 Haw. 204, 209, 532 P.2d 673, 676 (1975). Mr. Kelley, of course, was not a mere bystander, a mere friend, or even a distant relative (although he was a relative some distance away). He was the grandfather of two and the father of one of the victims. Prosser would probably have supported a denial of recovery to Mr. Kelley, however, because Kelley learned of the accident some time after it had occurred, and because Prosser felt a line had to be drawn "somewhere short of undue liability." PROSSER, *supra* note 6, §54 at 335.

It is both interesting and suggestive to recall that similar concerns were expressed 137 years ago in another case involving the scope of liability for negligent conduct: "There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." *Winterbottom v. Wright*, 10 M. & W. 109 (Exch. 1842).

<sup>99</sup> 56 Haw. at 209, 532 P.2d at 676.

<sup>100</sup> But see note 249 *infra*.

<sup>101</sup> But see Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 308–09 (1963).

recover for mental distress, must personally be within the zone of danger of physical harm.<sup>102</sup> That California has subsequently imposed other arbitrary distinctions that tend to support the decision in *Kelley* does not satisfactorily dispose of the argument that plaintiffs in *Kelley* were denied fair and equal treatment vis-à-vis other equally deserving plaintiffs.<sup>103</sup>

On the other hand, if *Kelley* is viewed *in vacuo*, it is possible that the denial of liability would coincide with the sense of rightness or justice<sup>104</sup> of a significant segment of the community. In the first place, those who are inclined to accept the vicissitudes of life—the inevitability of accidents and the vagaries of fate—may feel that “a certain toughening of the mental hide is a better protection than the law could ever be.”<sup>105</sup> Such persons might deem it extravagant, unnecessary, and even unwise to seek to compensate victims of mental suffering, especially those whose injury does not result from direct sensory perception of the original tragedy. Their view would be supported, in the pure mental suffering cases, with findings of psychologists that the litigation itself and the possibility of recovery may actually contribute to and intensify the plaintiff’s mental reaction.<sup>106</sup> However, this attitude would seem more appropriate to the facts of *Rodrigues* and *Leong*, where plaintiffs claimed only mental suffering without attendant physical injury, than to the facts of *Kelley*, where plaintiffs’ decedent suffered a fatal heart attack.

Secondly, even those who are more sympathetic to compensating victims of mental distress may react negatively to the apparent disproportionality of damages in relation to defendant’s blameworthiness. Negligence is merely substandard conduct. It is no part of plaintiff’s case to prove that defendant was indifferent or inadvertent to consequences—that defendant possessed a negligent state of mind.<sup>107</sup> Thus, much of the behavior that is adjudged actionably negligent is merely the product of ordinary human fallibility—“deficiencies in knowledge, memory, observation, imagination, foresight, intelligence, judgment, quickness of reaction, deliberation, coolness, self-control, determination, courage or the like”—<sup>108</sup> in a complex and danger-laden environment. A defendant’s actionable conduct, therefore, may or may not be blameworthy in a moral sense.<sup>109</sup> Allowing enormous damages to flow from

<sup>102</sup> See p. 4 *supra*.

<sup>103</sup> Cf. G. CALABRESI, *THE COSTS OF ACCIDENTS* 294 (1970) (hereinafter cited as CALABRESI): “To the critic consistency, or apparent consistency, is not an absolute requirement . . . within accident law. . . . For example, unjust pressures or undue costs might be necessary to achieve consistency. But apparently inconsistent treatment is not easily accepted by the public and must be explained both rationally and emotionally if a community sense of fairness is to be preserved.”

<sup>104</sup> That is, the decision to deny recovery might be viewed as appropriate, fair, and consistent with community expectations.

<sup>105</sup> Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936). See also *Tobin v. Grossman*, 24 N.Y.2d 609, 619, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561–62 (1969): “The risks of indirect harm from the loss or injury of loved ones is pervasive and inevitably realized at one time or another. Only a very small part of that risk is brought about by the culpable acts of others. This is the risk of living and bearing children,” and Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 U. VA. L. REV. 193, 228 n. 128 (1944).

<sup>106</sup> See Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1261 (1971), and authorities there cited.

<sup>107</sup> PROSSER, *supra* note 6, §31 at 145, 146.

<sup>108</sup> Edgerton, *Negligence, Inadvertence, and Indifference; The Relation of Mental States to Negligence*, 39 HARV. L. REV. 849, 867 (1926).

<sup>109</sup> “It is now more or less generally recognized that the ‘fault’ upon which liability may rest is social fault, which may but does not necessarily coincide with personal immorality.” PROSSER, *supra*

merely negligent conduct runs the risk of unfairly penalizing a morally innocent defendant and of being perceived as grossly disproportionate to defendant's fault. It is for this reason, among others, that certain items of damage, such as lost profits, have traditionally been disallowed in negligence actions.<sup>110</sup> And, indeed, it may be the excessiveness of the potential damages in relation to the defendants' fault, rather than the possible unmanageability, unbearability, and unpredictability of the liability, that is the principal reason for the court's liability-limiting decision in *Kelley*, and that would justify denial of recovery to otherwise deserving plaintiffs on grounds of fairness.<sup>111</sup>

Since I believe that disproportionality is the key to the problem of extending the scope of liability for mental disturbance, I will have more to say about how to deal with it in a later section of this article.<sup>112</sup> For the present, however, it should be noted that there may be cases in which the facts warrant or even compel an inference that defendant's negligent conduct was morally blameworthy, and *Kelley* may be one of them: Where defendant's activity engenders a great risk of serious physical harm or death, where defendant is clearly chargeable with knowledge of this risk, and where defendant clearly has had ample opportunity to consider the risk and to develop feasible means of avoiding it, a failure to avoid it would seem to justify an inference of lack of care, if not outright recklessness.<sup>113</sup> Thus, for example, if plaintiffs in *Kelley* could have proved that defendant truck manufacturer had been negligent in failing to provide a safer or even a fail-safe braking system for the truck and that this failure was a substantial factor in producing the accident, then it is difficult to avoid the conclusion that such proof would also have established a significant degree of moral fault. In that event, the added liability produced by recovery for mental distress might not have seemed excessively burdensome, disproportionate to the culpability, or unfair.<sup>114</sup> It would seem to follow, therefore, that if the court's legitimate concern was disproportionality of liability to culpability, then a more well-informed decision, and perhaps a fairer one,

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note 6, §4 at 18. Holmes would have agreed: "[T]he standards of the law are external standards, and, however much it may take moral considerations into account, it does so only for the purpose of drawing a line between such bodily motions and rests as it permits, and such as it does not. What the law really forbids, and the only thing it forbids, is the act on the wrong side of the line, be that act blameworthy or otherwise." O.W. HOLMES, *THE COMMON LAW* 110 (1881).

<sup>110</sup> See, e.g., *Stevenson v. East Ohio Gas Co.*, 73 N.E. 2d 200 (Ohio App. 1946). See also James, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43 (1972) and Note, *Negligent Interference with Economic Expectancy: The Case for Recovery*, 16 STAN. L. REV. 664 (1964).

<sup>111</sup> That is, the unfairness of denying recovery to a plaintiff on grounds that are arbitrary in terms of principle may be outweighed by the perceived unfairness of imposing a burden on defendant that seems much greater than his fault would justify. See Part IV *infra* at pp. 33-36.

<sup>112</sup> *Id.*

<sup>113</sup> Posner even suggests that defendants' acts may be deemed "intentional" in such situations: "Most accidental injuries are intentional in the sense that the injurer knew that he could have reduced the probability of the accident by taking additional precautions. The element of intention is unmistakable when the tortfeasor is an enterprise which can predict from past experience that it will inflict a certain number of accidental injuries every year." R. POSNER, *ECONOMIC ANALYSIS OF LAW* 66 (1972). Indeed, it appears that knowledge of the predictable risk plus deliberate failure to reduce it, in order to reduce costs, provided the basis for the jury's award of compensatory and punitive damages amounting to \$128 million in the notorious California case involving the rupture and explosion of the fuel tank on a 1972 Pinto. *Why the Pinto Jury Felt Ford Deserved \$125 Million Penalty*, Wall St. J., Feb. 14, 1978, at 1, 31.

<sup>114</sup> And conversely, the failure to impose such liability might be seen to result in total damages that are disproportionately low.

could have been made as to the scope of liability after the facts were developed at trial rather than after a summary judgment in favor of the defendants.

### B. Compensation

While it has long been an article of faith that compensation for accident victims is a major objective of tort law,<sup>115</sup> commentators have recently pointed out that, since tort law does not compensate for all accidental injuries, its real objective "is to determine whether to compensate, and if so, how."<sup>116</sup> Under this view, "there is no presumptive injustice in the tort law solely because the plaintiff is denied compensation . . . ." <sup>117</sup> Rather, it becomes necessary, in order to determine whether justice has been served or disserved in any particular case in which compensation has been denied, to inquire whether other identifiable goals of tort law have themselves been served or disserved.

1. *Compensation as a means of achieving economic efficiency.* One such goal suggested by Judge Learned Hand's much-mooted formula for determining negligence<sup>118</sup> and further articulated by Professor Posner is, in the latter's words, "to generate rules of liability that if followed will bring about, at least approximately, the efficient—the cost-justified—level of accidents and safety."<sup>119</sup> If the costs of an accident are less than the costs of avoiding it, then the actor has no obligation to avoid it. Conversely, however, if the costs of an accident exceed the costs of avoiding it, the actor must pay for the accident. Under this theory the injured party is awarded his damages "as the price of enlisting [his] participation in the operation of the system."<sup>120</sup>

As Professor Posner points out, foreseeability plays an important role under this system:

If negligence is a failure to take precautions against a type of accident whose cost, discounted by the frequency of its occurrence, exceeds the cost of the precautions, it makes sense to require no precautions against accidents that occur so rarely that the benefit of accident prevention approaches zero. The truly freak accident isn't worth spending money to prevent. Moreover, estimation of the benefits of accident prevention implies foreseeability.<sup>121</sup>

It would seem to follow, therefore, that the goal of economic efficiency is disserved if reasonably foreseeable costs of accidents are not included in the calculation. In such event, actors would not be motivated to consider the real but excluded costs in deciding whether the costs to victims exceeded the cost of precautions. Since the Hawaii Supreme Court had already recognized serious mental distress as a cost of accidents, disallowing recovery for such distress in

<sup>115</sup> See, e.g. PROSSER, *supra* note 6, §2 at 6.

<sup>116</sup> R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 242 (1965), quoted in Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C. L. REV. 643, 644, n. 5 (1978).

<sup>117</sup> Epstein, *Products Liability: The Search for the Middle Ground*, *supra* note 116, at 645.

<sup>118</sup> "[I]f the probability [of the injury-producing event occurring] be called P; the [gravity of the resulting] injury, L; and the burden [of adequate precautions], B; liability depends upon whether B is less than L multiplied by P: i.e., whether  $B < PL$ ." United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

<sup>119</sup> Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972) [hereinafter cited as Posner].

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 42.

*Kelley* when, policy considerations aside,<sup>122</sup> reasonable persons could have decided as a matter of fact that Mr. Kelley's distress was reasonably foreseeable, seems inconsistent with the efficiency goal.

This criticism, however, is probably not a very serious one. In the first place, the cases are legion in which courts have denied recovery for consequences that judges deemed, for a variety of reasons, to be too "remote,"<sup>123</sup> but that economic theorists like Posner might deem to be foreseeable and non-"freaky" costs of the accidents that produced them. Denial of recovery in such cases seems inconsistent with the objective of economic efficiency as a theory of negligence law.

In the second place, there is serious question, as I will discuss,<sup>124</sup> whether heaping recovery for mental-distress victims upon damages already recoverable by physical-injury victims is likely, as a practical matter, to produce greater efficiency in cases like *Kelley*.

Finally, it must be noted that Professor Posner deduced the efficiency goal from the "Hand formula" and then, with the benefit of hindsight, tested it on cases decided in an era, 1875-1905, when the goal was not well-recognized.<sup>125</sup> During most of that period the principal expositor of the objectives of tort law was Holmes, in *The Common Law*.<sup>126</sup> As Posner himself concluded: "Holmes left unclear what he conceived the dominant purpose of the fault system to be, if it was not compensation."<sup>127</sup> Unclear as Holmes' views may have been, they did not explicitly or implicitly include economic efficiency as a major purpose of negligence law.<sup>128</sup> It may therefore be argued that economic efficiency, like

<sup>122</sup> See note 96 *supra*.

<sup>123</sup> See, e.g., *Ultramares Corp. v. Touche Niven & Co.*, 255 N.Y. 170, 174 N.E. 441 (1931) (plaintiffs who suffered losses from relying on financial statements negligently prepared by defendant for a client denied recovery); *Ryan v. New York Central R.R. Co.*, 35 N.Y. 210, 91 Am. Dec. 49 (1866) (defendant who negligently starts fire on own premises not liable to owner of adjacent premises to which fire spreads).

Conversely, and even more destructive of Posner's thesis, is the likelihood, illustrated by the Pinto case, *supra* note 113, that a calculated attempt to engage in a cost-benefit analysis, comparing the economic value of predictable injuries to persons with the cost of safety measures designed to prevent the injuries, may result in liability for heavy punitive damages as well as compensatory damages if the analysis leads to a decision that adoption of the safety measures is too expensive and if, for that reason, the measures are not taken and injury results.

<sup>124</sup> See pp. 25-27 *infra*.

<sup>125</sup> See Posner, *supra* note 119, at 34-36. But Cf. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 99 (1973) (Posner asserts that judges could hardly have failed to consider economic efficiency when searching for the standard of care).

<sup>126</sup> *Supra* note 3.

<sup>127</sup> Posner, *supra* note 119, at 31.

<sup>128</sup> See, e.g., O.W. HOLMES, *THE COMMON LAW* 108 (1881): "The standards of the law are standards of general application. . . . But a more satisfactory explanation [than the difficulties of measuring the capabilities of individual persons] is, that, when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare." (Emphasis added.)

The manner in which Holmes says the law will protect the general welfare seems inconsistent with the objective of economic efficiency. When persons who are incapable of making or acting upon a reasonably accurate cost-benefit analysis cause an inefficient accident, the inefficiency will be compounded by shifting the loss to them: The transaction costs will have to be added on to the already inefficient costs of the accident and, by definition, such persons cannot be deterred from causing similarly inefficient accidents in the future. This problem may be considerably more serious today than it was in Holmes' day because of the vastly increased complexity of modern equipment and of the environment in which such equipment is used coupled with a practical inability to shift to safer alternatives. See, e.g., D. KLEIN & J. WALLER, *CAUSATION, CULPABILITY AND DETERRENCE IN HIGHWAY CRASHES* 130-32, 140 (U. S. Dep't of Transportation, Auto. Ins. and Comp. Study, 1970).

compensation itself, is at best a salutary by-product of a system designed with still other purposes in mind.

2. *Compensation as a conditional objective of tort law.* Professor Posner's theory that compensation is not a goal of the fault system is not universally shared by legal scholars. Thus, for example, Professor Calabresi, in his monumental work, *The Costs of Accidents*, asserts that "compensation remains a fundamental aim of accident law."<sup>129</sup> Although the tort system does not purport to compensate victims of all accidents or all accident costs, the fact is that compensation produced by tort recoveries constitutes a major element in the total system our society has devised for reducing secondary costs<sup>130</sup> of accidents.<sup>131</sup> If the tort system were abolished, we would have to devise other systems to fill the gap in compensation left by its abolition. Therefore, it may be more accurate to say that compensation—shifting accident costs from accident causer to victim—is a "fundamental aim" of accident law where the victim can show, as by proving negligence or a defective product, that our sense of justice would not be offended by removing the loss from the victim and placing it on the accident causer. In short, compensation is a *conditional* objective of accident law.

Since the court in *Kelley* denied compensation to victims who might have proved that their losses were produced by defendants' fault, it is arguable that the conditional objective of tort law was disserved by the decision. It is evident, however, that the ability to prove negligence, causation, and damage does not exhaust the factors that are relevant to the question whether shifting the loss to defendants in this class of cases will offend our sense of justice. Considerations of fairness and considerations relating to other tort law goals, such as deterrence, that may be affected by the decision also seem to bear on the question. Nevertheless, assuming it is correct that compensation of victims is an important aim of tort law, if the victim is capable of establishing a *prima facie* case of negligence and causation under general principles of tort law, the court would seem to bear a heavy responsibility to explain convincingly why such a deserving victim should go uncompensated.

### C. Deterrence of Accidents

The objective of reducing accident costs, in the language of the economists,<sup>132</sup> or of enhancing human dignity by reducing value deprivations occasioned by

<sup>129</sup> CALABRESI, *supra* note 103, at 44.

<sup>130</sup> Calabresi has divided accident cost reduction into three categories: Primary cost reduction is reduction in the number and severity of accidents, *i.e.*, prevention of accidents or mitigation of their severity. Secondary cost reduction is concerned with reducing the societal costs produced by accidents, *i.e.*, compensation, loss spreading, rehabilitation, and the like. And tertiary cost reduction involves reduction of the administrative costs of primary and secondary cost reduction. CALABRESI, *supra* note 103, at 27–28.

<sup>131</sup> Thus, for example, a study of recovery of losses suffered by persons injured in automobile accidents in the Washington, D. C., metropolitan area from April 1, 1964, through March 31, 1965, revealed that of a total economic loss of \$22,448,908, \$9,624,799, or 42.9 percent, was recovered from automobile insurance. U. S. DEP'T OF TRANSPORTATION, COMPENSATION FOR MOTOR VEHICLE ACCIDENT LOSSES IN THE METROPOLITAN AREA OF WASHINGTON, D.C. 29, Table 14 (AUTO. INS. AND COMPENSATION STUDY 1970). While some of the losses recovered may have come from nonliability, first-party automobile insurance, it is fair to assume that the greatest proportion of the \$9,624,799 was paid as a result of liability insurance.

<sup>132</sup> See CALABRESI, *supra* note 103.

accidents, in the language of "policy-oriented" scholars,<sup>133</sup> is clearly a major feature of community policy in the United States today. The recent development of an enormous body of statutory law directly regulating accident-causing behavior<sup>134</sup> and the rapid growth of liability for injury produced by defective products<sup>135</sup> are obviously reflective of such policy.

Thus, to the extent that serious mental distress is legitimately included as an accident cost and considered as a deprivation of well-being, community policy would seem to support special efforts by the courts to deter the events that produce it.

Imposing liability for mental distress on those who negligently produce it may achieve deterrence in two ways: First, it would create fear of the consequences of liability—e.g., a civil suit and its attendant effects, a large judgment, an increase in insurance premiums or perhaps being rendered uninsurable (direct deterrence), and, second, it would raise the price of the distress-producing activity and thus encourage those engaged in it, or those using its product, to shift to less expensive alternatives through the operation of market forces (indirect deterrence).<sup>136</sup> Realistically, direct and indirect deterrence are not likely to be enhanced by imposing liability for mental distress unless certain conditions are present:

*Direct deterrence:* In order to be deterred effectively by fear of the consequences of liability, the actor obviously must be aware of those consequences<sup>137</sup> and the consequences must be perceived as adding significantly to the negative consequences already perceived to follow in the absence of such liability. Thus, for example, the driver of the truck in *Kelley*, who is not likely to understand fully the extent of his liability for negligence and who presumably already has sufficiently strong reasons for avoiding accidents—the preservation of his own

<sup>133</sup> See generally McDougal, *Jurisprudence for a Free Society*, 1 GEO. L. REV. 1, 15-16 (1966). An effort to compare the Calabresian approach, the law, science, and policy approach, and the conventional approach to judicial decisionmaking to the resolution of a hypothetical case is set forth in McClellan, *Clarification of Tort Policy: A Comparison of the Common Law, Calabresian, and Lasswell-McDougal Approaches to the Resolution of Tort Claims*, 23 WAYNE L. REV. 995 (1977).

<sup>134</sup> See, e.g., Consumer Prod. Safety Act, 15 U.S.C. §§2051-81 (Supp. II 1972); Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§1381-431 (1970); and Occ. Safety & Health Act, 29 U.S.C. §§651-78 (1970). See also SPEC. COMM. ON AUTOMOBILE INSURANCE LEGISLATION, AMERICAN BAR ASS'N, AUTOMOBILE NO-FAULT INSURANCE 22-25 (1978).

<sup>135</sup> See generally *Symposium on Products Liability Law: The Need for Statutory Reform*, 56 N.C. L. REV. 623 (1978); Prosser, *The Assault upon the Citadel*, 69 YALE L.J. 1099 (1960).

<sup>136</sup> For the purposes of realistically examining the deterrent effects of specific scope of liability rules, I believe a distinction between "direct" and "indirect" deterrence, as set forth in the text, is more useful than the distinction between "specific" and "general" deterrence used by Calabresi to describe the two approaches society uses to control the level of accidents. By specific deterrence Calabresi meant "collective" decisions as to "the degree to which we want any given activity, who should participate in it, and how we want it done. . . . The collective decisions are enforced by penalties on those who violate them." CALABRESI, *supra* note 103, at 68-69. Collective decisions would include regulatory schemes like OSHA and liability rules of courts. By general deterrence Calabresi meant "letting the market determine the degree to which, and the ways in which, activities are desired. . . . The general deterrence approach would let the free market or price system tally the choices." *Id.* at 69.

Both direct and indirect deterrence, as I have defined them, would seem to fall within Calabresi's definition of general deterrence since even an actor's "direct" fear of liability or of increases in insurance premiums involves an estimate of consequences that have an economic "cost" that would produce a market decision. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 3-4 (1973). This is true even though the cost itself is imposed collectively, by the legislature or the courts. See CALABRESI, *supra* note 103, at 95.

<sup>137</sup> See J. HENDERSON & R. PEARSON, *THE TORTS PROCESS* 85 (1975).



life and possibly the loss of his job if he survives and is found guilty of negligent behavior—is not likely to be further deterred to a significant degree by the imposition of liability for third persons' mental suffering. He will probably not be made to pay the judgment and whatever fear of the economic consequences to his employer that may be generated is probably exhausted by his awareness that his employer will be liable for negligently produced physical injuries.

On the other hand, the enterprisers who are involved—the truck manufacturer, the owner of the truck, the lessor of the trailer, the company charged with the truck's maintenance and repair, the driver's employer, the city and state that licensed the driver, and possibly the service station that inspected the truck—are, in varying degrees, more likely to have access to legal advice and are thus more likely to be aware of the expanded consequences of their negligence and to take greater precautions to avoid them.

Realistically, however, it is probably only the larger corporate defendants, such as the manufacturer and lessors of the truck and trailer, who will see the danger of extended liability as of sufficient importance to increase their efforts to guard against future brake failure. The other defendants, if they are potentially liable at all,<sup>138</sup> are likely to realize that they have little ability, by increasing their safety precautions to avoid added liability for mental distress, to influence their own insurance rates. And it is even questionable whether the large manufacturer or lessor will be influenced, since its potential liability for negligence and for strict liability to physical injury victims is already enormous.<sup>139</sup> If the fear of that liability and its potential consequences has not already driven it to develop a fail-safe braking system, it is hard to see how the addition of liability for mental suffering could motivate it to do more.

The lesson may be that extending liability to include third-persons' mental suffering, where the actor is already subject to heavy liability for negligently caused physical injuries, is not likely to be very effective in achieving direct deterrence.

*Indirect deterrence.* In economic theory, loading the costs of accidents on the activities that produce them will raise the prices of those activities and affect market decisions about whether and how to engage in them.<sup>140</sup> So-called "market deterrence" will be produced when rational consumers choose cheaper and, presumably, safer alternatives.<sup>141</sup>

In theory, therefore, adding the cost of third persons' mental suffering to the liability of negligent defendants ought to result in considerable deterrence since virtually every negligently caused serious or fatal accident is likely to produce

<sup>138</sup> It is not settled whether the city or state could be held liable to third persons for negligently issuing a driver's license to the truck driver or whether the service station operator who issued a safety sticker for the truck could be held liable for his negligence. Cf. M. SHAPO, *THE DUTY TO ACT: TORT LAW, POWER, AND PUBLIC POLICY* 34-37, 95-96 (1977).

<sup>139</sup> The recent much-publicized \$128 million verdict against Ford Motor Company in the Pinto case, *supra* note 113, is illustrative, even though the trial judge deemed the verdict excessive and ordered a new trial unless plaintiff accepted a judgment of \$6.6 million. See J. HENDERSON & R. PEARSON, *THE TORTS PROCESS* 7-8 (Supp. 1978).

<sup>140</sup> See generally CALABRESI, *supra* note 103. For a skeptical view of the relevance of theoretical economic analysis of risk allocation, see Gilmore, *Products Liability: A Commentary* 38 U. CHI. L. REV. 103 (1970).

<sup>141</sup> This description of the theory articulated by Professor Calabresi is grossly oversimplified but should suffice for the purposes of this analysis. For a more comprehensive description of his theory, see ROSS, *Book Review* (G. CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970)), 84 HARV. L. REV. 1322 (1971).

one or more close relatives or bystanders who can legitimately claim damages for serious mental distress.<sup>142</sup> The costs of activities that negligently cause such accidents should therefore increase appreciably and this increase, in a rational market, should produce more "decisions for safety."

Theory aside, however, there is serious doubt whether a decision to impose liability in a *Kelley*-type situation would achieve sufficient market deterrence to be worth considering. The ability of a single small state such as Hawaii, by expanding liability, to influence market decisions in any significant way with respect to the products of a major national manufacturer or the goods and services of a multinational corporation is, to say the least, questionable. Unless other states were to join with Hawaii—and the trend is clearly running in the other direction—<sup>143</sup> the general market effect of Hawaii's action likely would be *de minimis*.

It is true, of course, that the potential of having to pay larger judgments in Hawaii courts might lead to higher costs in Hawaii for all activities potentially subject to expanded liability. Large self-insurers might increase their prices or try to reduce their activities in Hawaii. For the smaller companies, casualty insurance rate-making is not fine-tuned to reflect with accuracy the safety records or accident potential of each insured. Rather, it is usually based on past experience of an entire class of insureds and adjusted for trends as to claim frequency and size. Specific rules of tort law and their potential effects are not separately factored into the computation of rates.<sup>144</sup> But where the frequency and size of future claims cannot be predicted, either because of the relatively small size of the universe for statistical purposes or because of expansion of liability into uncharted areas, the actuaries may hedge their bets by adopting trend factors produced by statistics drawn from other states, often those with a higher incidence of accidents than Hawaii.<sup>145</sup> Thus it is to be expected that expanding the scope of liability to include plaintiffs such as Mr. Kelley will eventually produce higher casualty insurance rates throughout the state and that these rates are likely to result in premiums that exceed the actual increased cost of accidents.

Ultimately, these costs will be paid for by the Hawaii consumer, either through increased automobile insurance rates or through the increases in the prices of goods and services that result when enterprisers pass on their increased costs through the pricing mechanism. Whereas in theory this increased cost should produce market deterrence—more perhaps than would be justified if the actual rather than the actuarially inflated costs of accidents were passed on—in fact the short range effect within Hawaii would probably be merely to inflate prices further without effecting shifts to safer activities. This unfortunate consequence would seem to follow because as to many of the affected enterprises there do not seem to be in Hawaii viable safer alternatives and the functions performed by these enterprises are essential. For example, in the foreseeable

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<sup>142</sup> See p. 14 *supra*.

<sup>143</sup> See Part I, pp. 3–16, *supra*.

<sup>144</sup> See Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554, 560–74 (1961).

<sup>145</sup> This is what occurred in Hawaii with respect to the setting of rates for medical malpractice liability insurance. See DEP'T OF REGULATORY AGENCIES, STATE OF HAWAII, MEDICAL MALPRACTICE: ISSUES, DISCUSSIONS AND PROPOSALS FOR CHANGE 117–36 (1976). See also Morris, *supra* note 144, at 567, n. 37.

future truck transportation will undoubtedly continue to be the only practical means of moving goods within each island; shifting to rail or plane or barge or moving sources of supply closer to the market, within each island, is not practicable. Further, demand for passenger car transportation seems to be relatively inelastic and not noticeably responsive to rising insurance costs.

Internalizing the costs of negligently inflicted mental distress is therefore not likely to achieve desired marked deterrence within the state in the short run but might produce undesirable effects by further increasing the prices of goods and services produced or sold in Hawaii and by putting Hawaii enterprises competing for mainland markets at a competitive disadvantage beyond that which they already suffer.<sup>146</sup>

While the competitive disadvantage cannot be avoided unless, contrary to the trend, a parallel expansion of liability occurs in other states, increases in passenger car insurance rates resulting from expansion of liability in Hawaii could at some future point combine with higher fuel prices generated by energy shortages and higher auto prices generated by inflation to hasten the day when Hawaii citizens, in spite of their strong preference for the passenger car, would be compelled to shift to cheaper and safer modes of public transportation.<sup>147</sup> Thus some long-range market deterrence might be served by expanding liability, but the significance of this factor, when compared with general inflation and energy shortages, seems marginal at best.

#### *D. Summary*

The foregoing analysis has yielded conflicting answers to the question whether recovery for mental distress should be granted in cases like *Kelley*.

Fairness, in the sense of equal treatment for those plaintiffs who cannot be distinguished on logical grounds from others who could recover for mental distress, argues in favor of recovery.

In addition, the "conditional" tort law objective of compensation seems to have been disserved by refusal to allow recovery, since plaintiffs might have established the existence of the conditions—negligence, causation, and serious injury—on which it is premised. On the other hand, it is arguable—though the argument is weak where the mental distress victim dies of shock produced by the distress—that the sense of justice of a significant segment of the community would be offended by giving effect to the compensation objective and saddling the defendant with liability for mental distress in a case like *Kelley*. Of course, we really do not know what the community reaction to allowing recovery would be. In the absence of such knowledge, it would seem preferable to allow

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<sup>146</sup> This competitive disadvantage is the result of high shipping costs plus generally higher costs for labor and land use in Hawaii than on the mainland.

Since liability insurance premiums, compensatory damage awards, and related legal fees are deductible business expenses, however, at least a portion of the costs shifted to enterprisers by increased liability will be "externalized," i.e., it will be passed on to general taxpayers and shared through the federal and state income tax. See I.R.C. 26 U.S.C. §172 (b) (1954), as amended by Revenue Act of 1978, Pub. L. No. 95-600, §371, 92 Stat. 2859.

<sup>147</sup> See *Car to Take Back Seat to Other Transport*, Honolulu Star-Bulletin & Advertiser, Mar. 11, 1979, at A-1, col. 2 (final ed.) (reporting conclusions of report of the Office of Technology Assessment that energy shortages, highway carnage, and rising costs will start to restrict America's reliance on the private automobile).

compensation when the general principles of tort law, which are already presumed to incorporate the general sense of justice of the community, would require it. That is, compensation should be allowed unless other policies, more important than fairness and compensation, clearly call for a different result.

Applied from a perspective of pure theory, policies favoring economic efficiency and deterrence of accidents would also seem to favor recovery. When viewed more realistically, however, giving due weight to the limits of Hawaii's ability to affect large national and international enterprises or to find safer alternatives as well as to the fact that we are dealing with a situation in which potential defendants are already at risk of enormous liability for negligence or strict liability in tort to the primary accident victims, it appears that not much by way of economic efficiency, direct deterrence, or indirect deterrence will be added by holding defendants liable for mental distress in the *Kelley* situation. On the contrary, it is arguable that imposing liability could cause enterprisers and insurers to overreact and to impose higher prices for goods and insurance in Hawaii than the increase in liability would warrant. The practical result for the state, at least in the short run, could be to exacerbate a difficult economic situation without significantly reducing accidents or accident costs.

### III. LEGAL PROCESS CONSIDERATIONS

The preceding analysis of the factors that are relevant to the question of how far the right to recover for negligently inflicted mental distress should extend does not yield a very clear answer to that question. The possible benefits and disadvantages of allowing or denying recovery are clarified but they cannot be evaluated or quantified and then placed on a scale that will automatically yield a satisfactory solution, *deus ex machina*. Although some limitation of liability seems justified, it is by no means clear that the "reasonable distance" rule of *Kelley* and the retreat to other arbitrary stopping places that seem likely to follow in *Kelley's* wake<sup>148</sup> are appropriate ways to achieve the desired contraction.

In view of the difficulty of evaluating the various factors and arriving at a judicially imposed solution by objective criteria, might not the best solution be to treat the issue as a question of proximate cause in each case and send it to the jury? An otherwise "deserving" plaintiff<sup>149</sup> might more readily accept the rejection of his claim by his peers after having had his day in court than accept being barred from the courthouse entirely by fiat of the supreme court.

The solution of treating the issue as one of proximate cause lurks behind the approach originally taken in *Rodrigues* and *Leong* and urged upon the court by the dissenting justice in *Kelley* itself.<sup>150</sup> Indeed, the dissenter in *Kelley* charac-

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<sup>148</sup> See pp. 12-16 *supra*.

<sup>149</sup> I.e., a plaintiff capable of proving that defendant's negligence was a substantial factor in producing plaintiff's serious mental distress.

<sup>150</sup> Taken at face value, the language of the court in *Rodrigues* and *Leong* and Chief Justice Richardson's dissent in *Kelley* seem to adopt the position that if the foreseeability test is satisfied (i.e., that "serious mental distress to the plaintiff was a reasonably foreseeable consequence of defendant's act," *Rodrigues v. State*, 52 Haw. 156, 174, 472 P.2d 509, 521 (1970)), then the only remaining question is whether "a reasonable man, normally constituted, would be unable to adequately cope with the mental distress engendered by the circumstances of the case." *Id.* at 173, 472 P.2d at 520. Under this view, whatever policy reasons there may be for limiting liability of defendants for mental-distress-without-impact are satisfied by affirmative answers to both tests.

terized Justice Andrews' dissenting opinion in *Palsgraf*<sup>151</sup> as "the better reasoning" in that case.<sup>152</sup> Justice Andrews' view of proximate cause, it will be recalled, was:

that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.

and

It is all a question of expediency. There are no fixed rules to govern our judgment. There are simply matters of which we may take account. . . . There is in truth little to guide us other than common sense.<sup>153</sup>

If the jury were invested with the task of deciding the scope of liability issue in each mental distress case, presumably they could achieve whatever contraction of liability their "rough sense of justice" would seem to require based both upon the facts of the particular case and the possible societal consequences of

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Presumably the only role left for a proximate cause analysis would be if defendant claimed there was a "superseding" cause. See RESTATEMENT (SECOND) OF TORTS §440 (1965).

Yet in each of the three opinions there are intimations that more than mere foreseeability of serious mental distress and the reasonable person's ability to cope adequately with the mental stress engendered by the circumstances are to be factored into the decision. Thus, in *Rodriguez*, the court stated that the compelling reasons for limiting recovery to claims of serious distress, including the policy that the law should not penalize the "prime mover," are to be taken into account by the jury and the court in applying the "ability to cope" test, 52 Haw. at 172-173, 472 P.2d at 520. With respect to the claim that injury to material possessions should not give rise to damages for mental distress, the court stated that "the jury, representing a cross section of the community is in a better position to consider under what particular circumstances society should or should not recognize recovery for mental distress." *Id.* at 175 n. 8, 472 P.2d at 521 n. 8 (1970). In *Leong* the court intimated that the issue is one of proximate cause, 55 Haw. at 410, 520 P.2d at 765. And in *Kelley*, the author of the earlier two opinions expressly approved the approach of Justice Andrews in *Palsgraf* which, as the excerpts quoted from Andrews' opinion clearly demonstrate (See p. 29, *infra*), would bring a number of policy considerations into the test for proximate cause. 56 Haw. at 214, 532 P.2d at 679 (Richardson, C.J., dissenting).

Thus it is arguable that the real question in these cases is not whether a reasonable person would be able to cope, but whether plaintiff, for compelling reasons, *should be made to cope* with the mental distress. This is a typical proximate-cause-type issue.

<sup>151</sup> *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 347-56, 162 N.E. 99, 101-105 (1928) (Andrews, J., dissenting).

<sup>152</sup> 56 Haw. at 214, 532 P.2d at 679. Chief Justice Richardson's reaffirmation of the rules of *Rodriguez* and *Leong* in his dissent in *Kelley* seems, at first blush, inconsistent with his statement in that dissent that he concurs with the view of negligence espoused by Justice Andrews in *Palsgraf*. *id.* The *Rodriguez-Leong* approach seems more consistent with Justice Cardozo's approach in *Palsgraf*: "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation: it is risk to another or to others within the range of apprehension." 248 N.Y. at 344, 162 N.E. at 100. By creating an independent duty to refrain from the negligent infliction of serious mental distress, the Hawaii Supreme Court had extended the right to recover to all whom defendant's negligence foreseeably exposed to such serious distress. Andrews, on the other hand, while not insisting that plaintiff be within the zone of foreseeable danger, would have considered foreseeability, along with other factors such as *remoteness in time and space*, to determine whether it was "expedient" to allow recovery. 248 N.Y. at 354-56, 162 N.E. 104-105. It is by no means clear that Andrews would have permitted recovery in a case like *Kelley* where decedent's injury was so remote in time and space from defendant's negligent acts. On the other hand, the logic of Cardozo's position would have required recovery if decedent was found to be within the zone of foreseeable danger of serious mental distress.

The apparent inconsistency may be explained by noting that the language from Andrews' dissenting opinion quoted with approval by Chief Justice Richardson, when viewed without reference to the rest of that opinion, seems to suggest that the geographical distance would not be a barrier to a recovery.

<sup>153</sup> *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 352, 162 N.E. 99, 103 (1929) (Andrews, J., dissenting).

imposing liability. The jury, with its broad discretion to "adjust" damages to suit the justice of the case<sup>154</sup> as well as to deny liability altogether, could make the necessary Solomonic judgments on a case-by-case basis. When questions become too "political," too amorphous, and too open-ended to yield sensibly to arbitrary lines drawn by nonelected judges, is there not something to be said for permitting the democracy of the jury room to flourish?

Something, perhaps, but not much. In the first place, under the rule as set down in *Rodrigues* and *Leong* the difficult issues would be buried under the trappings of the "ability to cope" test, which focuses on only one aspect of the problem.<sup>155</sup> Even if the jury were specifically instructed that the issue was one of proximate cause, the usual instruction is so vague and obfuscatory as to leave the jury with no real understanding of what is at stake.<sup>156</sup> Under either this instruction or an ability-to-cope instruction, there is little assurance that the jury would understand what they were really being called upon to decide.

Then why not clarify the instructions? Why not read the jury a relevant excerpt or two from the *Andrews*' opinion or, even better, tell them precisely what the problem is, as well. For example:

Ladies and gentlemen of the jury, this is a case where defendant's negligence may be found to have produced plaintiff's mental distress and its consequences, for which plaintiff is seeking damages. The question for you to decide is whether you, being representative of the wider community, believe defendant should pay plaintiff for those damages. In making your decision you should consider whether the distress suffered was so serious that a reasonable person, normally constituted, could not be expected adequately to cope with it and whether distress of such seriousness was reasonably foreseeable to a person in defendant's position. But that is not the end of your inquiry. In addition, you should consider whether the distress suffered by plaintiff was just a part and parcel of everyday life in our community, which each of us has to bear, and whether allowing plaintiffs to recover their damages in cases like this will impose unduly burdensome liability on defendants, discourage useful enterprise, raise liability insurance rates too much, add excessively to inflation, and the like. You, of course, are to decide how much weight, if any, to give each of these factors. As you engage in your deliberations, please keep in mind that all close relatives and friends of seriously injured accident victims, as well as the by-standers who witness gory accidents, may also sue to recover for their mental distress in this and other accident cases.<sup>157</sup>

The difficulties with this approach are evident: The jurors would be set adrift on a sea of complexity; their common sense would not help them to measure

<sup>154</sup> "Allowing juries to reach general verdicts gives them wide latitude, especially in negligence cases, to apply their collective common sense, or popular prejudice, in reaching results." J. HENDERSON & R. PEARSON, *THE TORTS PROCESS* 302 (1975).

<sup>155</sup> See note 150 *supra*.

<sup>156</sup> See, e.g., *Stryker v. Queen's Medical Center*, 60 Adv. 5866, n. 4, 587 P.2d 1229, 1231-32, n. 4 (1978): The trial court instructed: "The 'proximate cause' of an injury is that cause which in direct, unbroken sequence, produces the injury, and without which the injury would not have occurred.

"The law does not say that there can be only one proximate cause of an injury, consisting of only one factor or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of more than one person, may operate either independently or together to cause injury; and in such [a] case, each may be a proximate cause of the injury."

<sup>157</sup> This instruction would follow instructions on duty, breach of duty, and cause in fact or the "substantial factor" test and likely would be followed by instruction on damages. Its relative clarity and candor seem preferable to the technicality of the usual proximate cause instruction. See, e.g., note 156 *supra*. In this respect, it seems to be consistent with the popular movement, now incorporated in the Hawaii Constitution, HAW. CONST. art. XVI, §13, to translate technical "legalese" into common English.

and weigh the incommensurables. The court can tell the jury *what* to think about but, unlike the situation with respect to the issue of negligence itself, it cannot provide a workable model, such as the reasonably prudent person, to suggest *how* to think about it.<sup>158</sup>

Professor James Henderson has argued that complex issues of the kind involved here, produced by the desire of courts to "purify" the negligence principle, are beyond the limits of adjudication.<sup>159</sup> He defines adjudication as

a social process of decisionmaking in which the affected parties are guaranteed the opportunity of presenting proofs and arguments to an impartial tribunal which is bound to find the relevant facts and to apply recognized rules to reach a reasoned result. . . . The dominant mood in which a judicial tribunal approaches its task of decision is that of seeking, in accordance with applicable rules, the single right result in each case.<sup>160</sup>

Allowing juries to decide "open-ended" or "polycentric" problems,<sup>161</sup> such as fashioning the scope of liability in a mental-distress case, Henderson argues, creates "decision-by-discretion" instead of "decision-by-rule."<sup>162</sup> While even "decision-by-rule" may require the exercise of some discretion,<sup>163</sup> allowing juries to resolve "problems which tend toward the extreme on the scale of open-ended polycentricity" will deny parties affected by the decision "the opportunity to participate meaningfully in the decision process."<sup>164</sup> Such a process, he believes, is "not adjudication, but an elaborate, expensive masquerade."<sup>165</sup> If courts persist in the folly of trying "to confront problems which are beyond their capacity to solve," the entire negligence system is in serious danger of being replaced by some other simpler and less expensive, but less just, method of compensating accident victims.<sup>166</sup>

Henderson asserts that in the run-of-the-mill negligence case, the polycentricity of the negligence issue and the proximate cause issue has not proved intolerable, but that "complicating factors," which are present in many situations in which courts have in recent years rejected formalistic rules and tried to apply the general principles of negligence law, have vested unacceptable levels of open-endedness or discretion in the jury.<sup>167</sup>

<sup>158</sup> See text at note 155 *supra*.

<sup>159</sup> Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L. J. 467 (1976) (hereinafter cited as Henderson).

<sup>160</sup> *Id.* at 469.

<sup>161</sup> *Id.* at 475. Henderson acknowledges that he borrowed the term "polycentric" from Professor Lon Fuller, who may have borrowed it from Michael Polanyi. *Id.* at 475 n. 23. Henderson uses the term to refer to decisions, such as planning the family vacation, that involve multiple factors and as to which no clear rules of decision are laid down. Appeals can be made to the head of the family by individual family members, but "in the end, bound by no legal rule of decision, [the head of the family] would be left to decide the case largely on his own, employing common sense, or instinct, or intuition." *Id.* at 472. "Instead of being arranged in an essentially linear manner, as are issues in a classically legal problem, the issues, or elements, in these problems are interrelated in such a way that sensible consideration of any issue, or element, requires the simultaneous consideration of most, or all, of the others." *Id.* at 471. See also Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973).

<sup>162</sup> Henderson, *supra* note 159, at 476.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 477.

<sup>166</sup> *Id.* at 525.

<sup>167</sup> *Id.* at 479. The complicating factors fall within three categories: "(1) the evaluation of a particular defendant's conduct may require an unusually complex, highly technical analysis; (2) the parties may be in a special relationship which must be taken into account by modifying the duties

The complicating factor in the mental-distress-without-impact cases, he argues, is that "practical considerations may compel courts to place limits upon the extent of potential liability for certain types of conduct."<sup>168</sup> These considerations require the court "to plan social relations on a case-by-case basis," making "meaningful adversary argument . . . difficult, if not impossible."<sup>169</sup>

Because of these concerns, Henderson has been extremely critical of cases such as *Dillon*, *Rodrigues*, and *Leong*.<sup>170</sup> On the other hand, he sees *Kelley* as a ray of hope "that a more formal and manageable, albeit more liberal, limitation on liability in these cases will eventually be worked out."<sup>171</sup>

Henderson's criticism, I believe, deserves serious consideration. It hearkens back to Holmes' view that "any legal standard must, in theory, be one which would apply to all men, not specially excepted, under the same circumstances. It is not intended that the public force should fall upon an individual accidentally, or at the whim of any body of men."<sup>172</sup> However, the problem presented by open-endedness or jury whimsy in the mental-distress-without-impact cases does not seem to be as devastating to the objectives of the rule of law as it is in other areas of law.

We are not dealing primarily with cases, such as property or contract,<sup>173</sup> where ability to plan one's conduct and predict the legal consequences is crucial. And the issue is not *what* conduct is likely to engender liability—the standard of conduct is known in advance—but *how much* liability will be produced if an actor's conduct is of the sort that is likely to produce some liability if harm ensues. In view of the "thin-skull" rule<sup>174</sup> and the absence of a market for pain and suffering, personal injury damages have never been predictable by the individual defendant, but have traditionally been subject to chance and the sympathies and generosity of the jury.<sup>175</sup>

Yet it must be conceded that the scope-of-liability issue in the cases under

each owes to the other; and (3) practical considerations may compel courts to place limits upon the extent of potential liability for certain types of conduct." *Id.*

<sup>168</sup> *Id.* at 515, 516.

<sup>169</sup> *Id.* at 479, 480.

<sup>170</sup> *Id.* at 518, n. 192, and 519. Henderson directed his main criticism at *Dillon v. Legg*, the California case, and erroneously treated *Rodrigues* and *Leong* as if they had followed *Dillon*. If, however, the decisions in *Rodrigues* and *Leong* are taken at face value, see note 150 *supra*, they do not seem to be excessively open-ended or polycentric at all; the question for the jury becomes a relatively straightforward one. Only if the "ability to cope" test conceals a variety of proximate-cause-type issues do the decisions become subject to criticism on the grounds urged by Henderson. *Id.*

On the other hand, *Kelley's* vague "reasonable distance from the scene of the accident" rule is expressly intended, in Henderson's words, to take into account "practical considerations" that "may compel the courts to place limits upon the extent of potential liability . . . ." Yet Henderson seems to approve of *Kelley* in spite of its obvious "polycentricity." *Id.* at 519, n. 195. One is therefore entitled to wonder whether Henderson's real concern is for the health of the "rule of law" or for the economic impact if defendants' liability is actually based on general principles of tort law.

<sup>171</sup> Henderson, *supra* note 159, at 519. Henderson adds: "I submit that the court is using foreseeability in some special, though as yet unarticulated, manner, and that several more cases should suffice to reveal the new limits on liability for fright without impact in that jurisdiction." *Id.* Compare my analysis *supra* at pp. 9–16.

<sup>172</sup> O.W. HOLMES, THE COMMON LAW 110 (1881) (emphasis added).

<sup>173</sup> But cf. *Dold v. Outrigger Hotel*, 54 Haw. 18, 501 P.2d 368 (1972) (damages allowed for mental distress and disappointment where contract is breached in a wanton or reckless manner).

<sup>174</sup> See note 200 *infra*.

<sup>175</sup> Indeed, the setting of damages for pain and suffering and related psychic injuries bears some of the characteristics that Henderson would say attaches to polycentric decisions. See Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219 (1953).



discussion seems unsuitable for resolution by the usual techniques of the adversary system; the elaborate and expensive judicial machinery we have created to perform the function of application of law can contribute little to assure a reasonably sensible, even-handed, and fair resolution of the issue from one case to the next. The "legislative facts" that, as the earlier discussion of policy suggests,<sup>176</sup> are relevant to determination of the issue would rarely be presented, if they were presented at all, to the jury in a form they could comprehend and utilize. The opposing counsel would have to appeal to the jurors' sympathies, prejudices, and emotions, rather than to their reason as illuminated by the evidence. Indeed, the issue might as well be sent to the jury with just the admonition: "Consider everything! Be fair!"

Nevertheless, if the issue is sent to the jury, the dispute will be resolved and a decision will be made. The court can impose some control on totally untrammelled jury discretion through use of additur or remittitur or by granting a new trial. The other issues in the case—duty, breach of duty, and cause-in-fact—can be subjected to reasonable judicial control in the usual way. And the outcome will be a product of a judgment of the parties' peers, representing a community sense of justice, however visceral it may be.

In the interest of preserving the rule of law, however, Henderson would seem to prefer almost any judge-made formal rule, even if arbitrary, that will avoid polycentricity to open-ended jury discretion.<sup>177</sup> I confess to being unsure whether "equal injustice under law" is preferable to the "rule of jurors" and which of the two approaches is likely to bring the judicial system into greater disrepute. I do believe, however, that when faced with such an unsavory choice, courts bear an exceptionally heavy responsibility to engage systematically in a search for a response that will avoid, to the extent feasible, both horns of the dilemma.<sup>178</sup> This search entails a careful policy analysis designed to identify the concerns that must be satisfied and a willingness to engage in creative manipulation of strategies and sanctions that have the potential for satisfying those concerns.

That such a search can yield a satisfying, if not a perfect, solution, I will try to demonstrate in the next three parts of this article.

#### IV. IDENTIFYING THE PROBLEM: THE NEED FOR PROPORTIONALITY

Professor Henderson is clearly correct when he asserts that the barrier to application of ordinary negligence principles in the mental-distress-without-impact cases is the complicating factor that "practical considerations may compel courts to place limits upon the extent of potential liability for certain types of conduct."<sup>179</sup> If a fair and durable solution to the problems presented by these cases is to be developed, however, a sophisticated analysis of just what

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<sup>176</sup> See pp. 25–27 *supra*.

<sup>177</sup> See Henderson, *supra* note 159, at 474.

<sup>178</sup> It seems to me that while the Hawaii Supreme Court in *Kelley* was trying to steer a course between "the Scylla of unlimited liability and the Charybdis of no liability," Comment, *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases*, 35. U. CHI. L. REV. 512, 517 (1968), the compromise adopted—the "reasonable distance from the scene of the accident" rule—unnecessarily combined both arbitrariness and open-endedness.

<sup>179</sup> Henderson, *supra* note 168, at 515, 516.

these "practical considerations" really seems essential; what the courts say they are cannot necessarily be taken at face value.

Some of the concerns that once led the courts to deny recovery can be excluded at the outset: Fears of fraudulent claims and opening the floodgates to litigation are today rejected as valid reasons for denying claims even by courts that refuse to extend liability beyond the zone-of-physical-danger rule.<sup>180</sup> Lingering doubts can be overcome by limiting liability to cases in which the distress produces physical injury<sup>181</sup> or by requiring medical evidence to prove the genuineness of the distress suffered.<sup>182</sup> Essentially, however, the courts deem it inappropriate to close the courthouse door on valid claims simply because some invalid ones may slip through or because the volume of claims might increase.<sup>183</sup>

Although concerns about allowing recovery for mental distress that is "part and parcel of everyday life in a community" and that might better be dealt with by "toughening the mental hide" may still remain,<sup>184</sup> they can adequately be met, as the Hawaii Supreme Court demonstrated in *Rodrigues*,<sup>185</sup> by imposing "seriousness" requirements with respect to the nature and degree of mental distress that must be foreseen and that must actually be suffered.

The remaining concerns, which can be taken to be the courts' genuine concerns as they see them, seem to fall within the categories described as "the potential of unlimited and indefinite liability..." and "the imposition of burdensome and disproportionate liability on the tortfeasor in relation to his culpability."<sup>186</sup>

While there is no reason to question the sincerity of courts that respond to these concerns by restricting liability, there is good reason to investigate an apparent inconsistency: Why do these concerns lead to denial or severe restriction of liability in the mental-distress-without-impact cases but do not do so in those cases where defendant negligently causes physical injury to the plaintiff? Does not the "thin-skull" rule as it is almost universally applied also generate great potential for unlimited, indefinite, and burdensome liability disproportionate to the tortfeasor's culpability?<sup>187</sup> In applying this rule, why do the courts focus upon the justice of requiring a negligent defendant to compensate an injured plaintiff for all his damages<sup>188</sup> while downplaying or ignoring these other concerns? One would assume that the same tort goals of justice, deterrence, and compensation, as well as the goal of not unduly burdening useful activity, should be applicable in both situations.

If it is assumed that there is a rational explanation for the different treatment, a likely answer, both interesting and potentially useful in the search for a

<sup>180</sup> See, e.g., *Tobin v. Grossman*, 24 N.Y.2d 609, 616, 249 N.E. 2d 419, 423, 301 N.Y.S.2d 554, 559 (1969).

<sup>181</sup> *Id.* at 617, 249 N.E.2d at 423, 301 N.Y.S.2d at 560.

<sup>182</sup> See, e.g., *Leong v. Takasaki*, 55 Haw. 398, 412-13, 520 P.2d 758, 767 (1974).

<sup>183</sup> See PROSSER, *supra* note 6, §54 at 328.

<sup>184</sup> See, e.g., *Tobin v. Grossman*, 24 N.Y.2d 609, 619, 249 N.E. 2d 419, 424, 301 N.Y.S.2d 554, 561-62 (1969).

<sup>185</sup> *Rodrigues v. State*, 52 Haw. 156, 172-73, 472 P.2d 509, 520 (1970).

<sup>186</sup> *Leong v. Takasaki*, 55 Haw. 398, 402, 520 P.2d 758, 761 (1974).

<sup>187</sup> See PROSSER, *supra* note 6, §43 at 260-63. The "thin skull" rule allows plaintiff to recover damages for unforeseeable consequences produced by interaction between defendant's negligent impact on plaintiff and plaintiff's peculiar susceptibility to loss. *Id.*

<sup>188</sup> *Id.* at 263.

solution, emerges: As was pointed out earlier,<sup>189</sup> it will often be the serious physical-injury cases that will generate independent claims for mental distress without impact. Because of the "thin-skull" rule, damages awarded to the physical-injury victims are likely to be enormously burdensome to defendant and disproportionate to defendant's fault, but full compensation to plaintiffs is tolerated in the interest of doing justice to them. The courts' reaction is best characterized by Prosser: "If the result is out of all proportion to the defendant's fault, it can be no less out of proportion to the plaintiff's entire innocence."<sup>190</sup> But the problem of undue burden and disproportionality would be compounded and increased enormously if recovery were also extended in the same cases to mental-distress-without-impact claimants who would also receive the benefit of the "thin-skull" rule. What would make such an increase in liability seem intolerable to the courts is their perception that the negative consequences of compounding the disproportionality would outweigh in importance the considerations of justice that would otherwise call for full recovery. These negative consequences would seem to be that the disproportionate recoveries, individually and in the aggregate, would be unfairly punitive and grossly overdeter useful, often nonblameworthy, enterprise.

Thus, the critical problem that seems to have prevented the courts from unloosing liability for mental distress without impact is their inability through rule or principle to match defendants' conduct—its dangerousness, its blameworthiness, and even its utility—with the consequences the law imposes or refuses to impose. The courts seem unable either in individual cases or in general to adjust "the punishment to fit the crime."

It is important to note, however, that when the overall scheme the courts have adopted is viewed from this perspective, the complete denial of recovery to any mental-distress-without-impact claimants who might otherwise recover under ordinary principles of negligence seems grossly unjust. That is, the considerations of justice that impel the courts to grant full recoveries to some claimants and to ignore disproportionality and overdeterrence in those cases are completely overlooked in those distress cases that are held to be outside the orbit of liability, regardless of the seriousness of plaintiff's injuries.

Furthermore, courts, by totally denying recovery to any class of mental-distress-without-impact claimants, run a serious risk of denying recovery to deserving plaintiffs even in cases where there need be no concern with disproportionality and consequent overdeterrence. For example, as was earlier suggested,<sup>191</sup> it is possible that in a case like *Kelley* proof that certain of the defendants were negligent might be tantamount to proof of considerable blameworthiness on their part. In such a case the danger that total damages to all claimants would be disproportional to defendant's culpability would be slight and, if the courts are to be at all consistent, should be held to be outweighed by the justice of allowing innocent plaintiffs to recover from blameworthy defendants.

Nevertheless, the problem produced by disproportionality and its consequences is a real one. And if recovery for mental distress without impact is also

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<sup>189</sup> See p. 14 *supra*.

<sup>190</sup> PROSSER, *supra* note 6, §43 at 257.

<sup>191</sup> See p. 20 *supra*.

extended to cases of strict liability,<sup>192</sup> the problem will be greatly increased. It is difficult enough to justify large awards for pain and suffering to the primary physically injured victims of defective products in cases in which defendant's negligence or other culpability has not been proven.<sup>193</sup> It would be much more difficult to rationalize huge damage awards based only upon mental distress and its effects.

The need to build proportionality into the system, therefore, seems essential if an independent right to recover for losses engendered by serious mental distress is to survive. In the next section I will explore the means by which more proportional outcomes might be achieved.

## V. ALTERNATIVE APPROACHES

The failure of common law courts to recognize and utilize their ability to change procedural rules and to adjust remedies may contribute significantly to the difficulties they encounter when called upon to expand or contract substantive rights. In such situations they tend to act as if their only choice is between full recovery or none at all, with the burden of proof remaining the same as in most other civil actions. The effect may well be to retard needed reform, to prevent the courts from experimenting with techniques designed to allay fears of the catastrophes changes might bring, and sometimes, as in the case of *Rodrigues* and *Kelley*, to replace old problems with equally troubling new ones.<sup>194</sup>

With respect to the scope of liability for mental distress, however, it seems clear that unless the courts can adjust the process or the remedy in order to achieve proportionality, as discussed above, the problem, though it is clearly appropriate for judicial resolution,<sup>195</sup> will never be satisfactorily resolved. On the other hand, there are a number of alternative approaches that, when coupled with the requirement of foreseeability of serious distress and the application of general principles of negligence,<sup>196</sup> could assure more propor-

<sup>192</sup> See *Shepard v. Superior Court*, 76 Cal. App.3d 16, 142 Cal. Rptr. 612 (1977), discussed in *Tuohy, Strict Liability for Emotional Distress*, 7 INCL BRIEF 24 (No. 4 Aug. 1978). See also GREGORY, KALVEN & EPSTEIN, *supra* note 7, at 972.

<sup>193</sup> See Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 376 (1965): "[O]nce adequate compensation for economic loss is assured [through enterprise liability or social insurance], consideration might well be given to establishing curbs on such inflationary damages as those for pain and suffering. Otherwise the cost of assured compensation could become prohibitive." (Citations omitted.)

<sup>194</sup> Another useful technique for mitigating the negative effects of changes in substantive law, often overlooked by courts, is prospective overruling. Legal scholars have long urged courts to utilize this device more creatively to avoid upsetting reliance interests. See Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 486-93 (1962); Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960).

<sup>195</sup> See Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 308 (1963).

<sup>196</sup> That is, liability could be established, as in any other negligence case, by the conventional use of foreseeability to establish duty, by proof of breach of duty, and by fulfilling other requirements of legal or proximate cause, as where intervening factors are present, without using any of these concepts artificially to serve policy concerns created because the case is a mental-distress-without-impact case. The only concessions to the special nature of the case would be the requirement that "serious" mental distress be foreseeable and the damage limitations recommended *infra* in the text.

The requirement that plaintiff has been within the zone of risk of serious distress is necessary in order to avoid recoveries where the risk foreseeably created is only trivial. If "serious" is deemed

tional results. All involve a reduction in damages available either to mental-distress plaintiffs as a class or to individual mental-distress plaintiffs based on the facts of each case.

### A. The Case-by-Case Approach

In each case involving the independent tort of mental distress, damages might be limited (1) to the serious distress and its effects that were reasonably foreseeable by defendant,<sup>197</sup> (2) to that distress and its effects that an average person could be expected to suffer under the circumstances,<sup>198</sup> or (3) to an amount that, when taken together with all the damages imposed upon the defendant, would not render the total award excessive in relation to the culpability of the conduct and the nature and magnitude of the risk that engendered liability.

All three approaches have a surface appeal. All three would permit the jury to participate in the decision and to bring their community sense of what is fair and just to bear, *sub rosa* in the first two cases and explicitly in the third, on their decision.<sup>199</sup> The first two approaches would, of course, encroach upon the general damages rule that "we take our victims as we find them."<sup>200</sup> If damages were limited, as in the first case, to mental-distress effects that were reasonably foreseeable to defendant, then a jury could find in a case like *Kelley* that though some distress and temporary consequences to Mr. Kelley were foreseeable, his death was not, and they could then award reduced damages. Under the second approach, if a successful plaintiff, because of abnormal sensitivity, suffered distress and consequent effects in excess of those a "reasonable person, normally constituted" would have suffered, the jury would not award damages for the excess. Again, in a case like *Kelley* the jury could find that Mr. Kelley's death was an abnormal reaction to the tragic accident that produced it, deny recovery for the death, and allow recovery only for what they find would have been a more "normal" reaction.

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too vague, it would not seem objectionable to require foreseeability of a degree of distress beyond that with which the average person should be expected to cope. Applying either test, the courts could be expected to find that a duty to very close relatives of accident victims, regardless of their location, exists in any case where defendant foreseeably created an unreasonable risk of death or serious bodily harm to such victims. *Cf.*, *Leong v. Takasaki*, 55 Haw. 398, 410-11, 520 P.2d 758, 765 (1974) (court held that requirements of proximate cause would be satisfied if plaintiff proved that it was "reasonably foreseeable that a reasonable plaintiff-witness to an accident would not be able to cope with the mental stress engendered by such circumstances. . . ."). Where foreseeability of such distress is unclear, as where plaintiff is a bystander, a close friend, or a not-so-close relative—*i.e.*, where "varying inferences" are possible—the duty issue should be sent to the jury. *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 345, 162 N.E. 99, 101 (1928).

<sup>197</sup> This approach may be best described by altering Cardozo's famous rule to read: "The risk reasonably to be perceived defines the damages to be paid." *Cf.* *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928) ("The risk reasonably to be perceived defines the duty to be obeyed. . . ."). See Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 303 (1944) (questioning the merit of the general rule that would allow recovery for plaintiff's more extensive and idiosyncratic injuries where defendant's liability rests on creating a likelihood of causing "nervous shock" in a test person of average resistance).

<sup>198</sup> Or, in the language of the Hawaii Supreme Court in *Rodrigues*, "a reasonable man, normally constituted." *Rodrigues v. State*, 52 Haw. 156, 173, 472 P.2d 509, 520 (1970).

<sup>199</sup> See pp. 19-20 *supra*.

<sup>200</sup> Also referred to as the "thin skull" or "eggshell skull" rule. See PROSSER, *supra* note 6, §43 at 260-63, and Comment, *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases*, 35 U. CHI. L. REV. 512, 519 n. 31 (1968).

The difficulty with both these approaches is not that they deviate from the "thin-skull" rule: While that rule may produce just results in cases involving physical injury, it is not so sacrosanct that it might not be sacrificed in order to yield greater justice in the mental-distress cases.<sup>201</sup> Rather, the difficulty is that the range of what is "foreseeable" and what is "normal" is so elastic that such rules would be difficult to apply and would turn the trial of the damages issue into even more of a guessing game than it now is, reducing the likelihood that a significant reduction in damages to achieve greater proportionality would be achieved.<sup>202</sup> Further, under the second approach the need for proof of what distress and what effects a normal person would suffer could produce an esoteric battle of experts on the effects of mental distress on normal persons, with an attendant increase in costs.<sup>203</sup>

The third alternative, explicitly charging the jury to produce a damage award proportioned to defendant's fault is fraught with even greater difficulties. Since jurors would have to be aware of defendant's total liability, serious problems of joinder and proof of related claims would arise in cases where all the claims arising out of a single accident were not consolidated for trial. But worse, the open-endedness of the task<sup>204</sup> and the absence of clear criteria for decision would raise justified objections to the "lawlessness" of the process even more serious than those raised by sending the scope of liability issue to the jury.<sup>205</sup> Those objections would not be satisfactorily answered by pointing out that on occasion juries, acting on their own, adjust damages to match defendant's conduct.<sup>206</sup>

### *B. General Limitation of Damages in Mental-Distress Cases*

If the practical disadvantages of adjusting mental-distress-related damages by special rules on a case-by-case basis seem to be formidable, a simpler approach is available to assure the achievement of the goal of greater proportionality: Damages in mental-distress cases might simply be limited in a manner

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<sup>201</sup> Under Posner's economic efficiency rationale, it might be argued that defendants should not be made to pay for freaky and unforeseeable results of accidents. See Posner, *supra* note 119, at 42.

<sup>202</sup> However, neither using reasonable foreseeability of serious distress as a test to determine duty nor requiring that a normal person be unable to cope with the stress engendered by the circumstances as a condition of liability would seem to create as many problems as using either of them as a measure of damages; only a "yes" or "no" answer is required to resolve the issues of duty and liability.

<sup>203</sup> Such as expert witness fees, lawyers fees, and costs of administering the judicial system.

<sup>204</sup> Including the likelihood that in cases of multiple defendants, as in *Kelley*, the blameworthiness of different defendants would require individualized verdicts if the damages were to be made proportional to each defendant's fault. Such verdicts would create problems in the area of contribution among joint tortfeasors that would make the problems created by comparative negligence pale in comparison. Cf. HAW. REV. STAT. §§663-12, 663-17 (1976) (making provision for disproportionate fault in allowing contribution).

<sup>205</sup> See pp. 29-33 *supra*.

<sup>206</sup> There is here an instructive analogy to the criminal law process: Although most judges recognize that juries have the power, which they occasionally exercise, to nullify the criminal law by finding a defendant innocent in a case where on the proof he is guilty, and although many judges may applaud the existence of this escape valve from the rigors of the law in cases where justice cries out for its use, the suggestion that juries be explicitly instructed that they have the power to do justice by nullifying the law has evoked the most vociferous protests from the judiciary. See J. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 235-48 (1977).

that permits easy calculation. Thus, dollar limits might be imposed on total awards or upon amounts recoverable for pain and suffering; awards for pain and suffering could be limited by formula to a percentage of tangible economic losses; or pain and suffering in such cases might be disallowed entirely, leaving plaintiff to recover only for past and future out-of-pocket economic losses.<sup>207</sup> Except for limiting pain and suffering to a percentage of tangible losses,<sup>208</sup> each of the other approaches has in fact been tried in other contexts where limitation of damages seemed necessary.<sup>209</sup> If the courts themselves are to effect the limitation, however, then only the last solution—denying recovery for pain and suffering—is available; the others all involve drawing arbitrary lines involving dollar figures or percentages, clearly an inappropriate task for the judiciary. Furthermore, damage rules that disallow recovery for pain and suffering have a venerable common-law history, as in property damage cases, deceit cases, and contract actions.<sup>210</sup> Such rules may be out of step with modern trends but they seem preferable to fixed dollar limitations that unduly favor smaller claims or percentage formulas that assume a relationship between tangible losses and pain and suffering that does not necessarily exist.

Thus, among the various alternatives,<sup>211</sup> restricting damages to tangible losses in most mental-distress cases where plaintiff's claim sounds in negligence or strict liability seems to be the fairest<sup>212</sup> and most amenable to judicial adoption. It also seems to be the approach that has the strongest chance of resolving the problem of excessive and disproportionate damages in a durable way. The restriction would not merely reduce damages for negligent infliction of mental suffering in cases where recovery is now permitted, but would involve an

<sup>207</sup> I use the phrase "pain and suffering" here to distinguish the element of damages that might be reduced or eliminated from damages that would otherwise be allowed if defendant were held liable for the tort of negligent infliction of mental distress. Pain and suffering includes shock, grief, anxiety, humiliation, and other mental disturbance, as well as physical pain, that would be compensable in a normal negligence action where plaintiff suffers physical impact. See PROSSER, *supra* note 6, §54 at 330; MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES §88 (1935).

<sup>208</sup> Once recommended as a partial solution to the rising costs of automobile accident insurance. See, e.g., AMERICAN INSURANCE ASS'N, REPORT OF SPECIAL COMMITTEE TO STUDY AND EVALUATE THE KEETON-O'CONNELL BASIC PROTECTION PLAN AND AUTOMOBILE ACCIDENT REPARATIONS 5 (1968).

<sup>209</sup> For example, dollar limits have been placed upon recoveries for wrongful death damages in somewhat less than one-third of the states' death acts, PROSSER, *supra* note 6, §127 at 910; see also IND. CODE ANN. §16-9.5-2-2(a) (Supp. 1978) (limiting liability in medical malpractice actions to \$500,000); recovery for pain and suffering has been restricted in certain cases in states which have adopted no-fault laws, see e.g., HAW. REV. STAT. §294-6 (1976) and see generally Alexander, *An Update: State and Federal No-Fault*, 3 INCL BRIEF, No. 2 (1973); and damages in actions such as deceit, contract, and negligent injury to property have generally been limited to tangible economic losses and benefits. See PROSSER, *supra* note 6, §110 at 733-36 (deceit); MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES §145 at 592-98 (1935) (contract); *Id.*, §124 at 470-77, Annot., 28 A.L.R.2d 1070 (1953) (negligent injury to property).

<sup>210</sup> See authorities cited in note 209 *supra*.

<sup>211</sup> Eliminating the "thin-skull" rule, i.e., limiting damages to those that are reasonably foreseeable, in all negligence actions might generally produce greater proportionality but discussion of the issues which would be raised if such a major change in tort law were contemplated is beyond the scope of this article. Reducing damages by eliminating the application of the collateral-source rule in mental-distress-without-impact cases is another possibility. In conjunction with the elimination of pain and suffering it might provide additional assurance to courts that the effect of allowing recovery for mental distress without impact would not be disproportionately burdensome. See generally 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1343-54 (1956). However, discussion of the complicated issues involved in the abolition of the collateral source rule is also beyond the scope of this article. See Lambert, *The Case for the Collateral-Source Rule*, 3 TRIAL LAW. Q. 52 (1965).

<sup>212</sup> Cf. note 193 *supra*.

important tradeoff: The arbitrary barriers to liability imposed by cases such as *Kelley* and the California cases would be removed subject only to traditional scope-of-liability limitations applied in all negligence cases.<sup>213</sup> Predictably, many more victims of mental distress would be allowed to recover than are able to do so under existing restrictions,<sup>214</sup> but awards would likely be significantly lower than those now available.

It may smack of irony to suggest that plaintiff should go uncompensated for pure mental distress when that distress is the gravamen of his action, but the approach suggested here nevertheless seems justified on grounds of reason and policy.

Even though damages are restricted to economic losses, the action could still produce significant awards in many cases. Traumatic neurosis resulting from mental distress may produce temporary or permanent disability<sup>215</sup> resulting in loss of earnings and future earning capacity and the need for hospitalization, nursing care, psychiatric assistance, and special drugs. Even the primary response to mental distress, such as "fear, anger, grief, and shock,"<sup>216</sup> might produce inability to function and require psychiatric or other medical attention or, as *Kelley* dramatically illustrates, even cause death. All of the economic losses engendered by these conditions would be compensable. Thus, the justice of the view "that as between an innocent plaintiff and a negligent wrongdoer, . . . the latter should bear the loss"<sup>217</sup> will be given reasonable, if not full, effect: No plaintiff qualified to recover under general principles of negligence will have to suffer the full brunt of economic losses produced by defendant's negligence.<sup>218</sup>

On the other hand, denial of recovery for the mental distress itself gives fair recognition to the concern, described earlier, that it is beyond the capacity of the law to protect us from all of the mental stress produced by the fateful occurrences of life in a complex mechanized society. But when in fact the stress turns out to be serious enough to prevent the plaintiff from adequately coping, the tangible economic losses thereby produced will be compensated. Such an approach will also serve to allay the fear of fraudulent claims, to the extent it

<sup>213</sup> See note 196 *supra*.

<sup>214</sup> See *Tobin v. Grossman*, 24 N.Y.2d 609, 616, 249 N.E.2d 419, 423, 301 N.Y.S.2d 554, 559 (1969).

<sup>215</sup> See Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO L.J. 1237, 1250 (1971) and authorities there cited.

<sup>216</sup> *Id.* at 1249. "In all instances this initial mental reaction is subjective in nature and of relatively short duration, although its precise form and seriousness will vary according to the individual and the particular traumatic stimulus." *Id.* at 1249-50 (footnotes omitted).

<sup>217</sup> *Kelley v. Kokua Sales & Supply, Ltd.*, 56 Haw. 204, 213, 532 P.2d 673, 678 (1975) (Richardson, C.J., dissenting). See also PROSSER, *supra* note 6, §43 at 263.

<sup>218</sup> Attorney's fees would have to be paid out of the award, just as they are when pain and suffering is allowed. Thus it might make sense to legislate an allowance for attorneys' fees in such cases (*Cf.* CAL. [CIV.] CODE §1717 (West) (1973) (provides that attorney's fees may be awarded "in any action on a contract")), or to pass a statute adopting the formula approach, suggested above, which would award plaintiffs a percentage of their economic losses, roughly equivalent to the going rate for contingent fees, to compensate for "pain and suffering." However, every increase in allowable damages beyond tangible economic losses would risk retriggering the courts' fear of disproportionate liability.

If mental-distress-without-impact claims arising out of motor vehicle accidents were covered by no fault insurance, as they well might be, see, e.g., the Hawaii No-Fault Law, HAW. REV. STAT. §294-3, 294-4, 294-10 (1976), then the no-fault benefits would ordinarily not be diminished by attorney's fees. *Id.*, §294-30.



still exists, by requiring the plaintiff to prove tangible losses and by removing the added incentive that damages for pain and suffering might represent to an unscrupulous plaintiff. Mainly, of course, the limitation of damages will serve the purpose of permitting even-handed treatment of deserving plaintiffs while minimizing the chances that damages for mental distress plaintiffs, when combined with full damages for defendants' physical injury victims, will produce awards that are excessively burdensome and disproportionate to defendants' fault.

From a policy perspective the recommended solution also seems sound: Actors, in order to avoid liability for negligence, will have to take account of the foreseeable economic losses to mental-distress victims as well as the total losses to foreseeable physical-injury victims in determining how much safety to provide. Greater direct deterrence will thus be provided, but not more than is justified by considerations of economic efficiency. In addition, secondary accident costs will be reduced<sup>219</sup> if economic losses to mental-distress victims are restored in whole or in part and are spread through the insurance or pricing mechanism. Furthermore, although indirect deterrence will be served over the long run by increasing the costs of activities likely to produce serious mental distress, the increases are likely to be significantly lower than they would be if general damages were allowed. Inflationary and anticompetitive effects should be minimized since compensation for economic losses to victims who might not recover under existing doctrine is likely to be offset to a fair degree by a significant reduction in damages to mental-distress victims who are permitted to recover under present law. Finally, any residual anticompetitive effects of allowing recovery for mental distress upon an isolated or insular state such as Hawaii might be avoided if the state adopts the rule here recommended, which minimizes the concerns that have hitherto inhibited the expansion of the tort of negligent infliction of mental distress in other states, and if such other states follow suit.

Questions remain as to whether the restriction of damages in mental-distress cases to economic losses should apply to cases in which defendant's conduct only produces mental distress and does not also cause actionable physical injury through impact to persons or property, whether general damages should be allowed in mental-distress actions where defendant's conduct justifies punitive damages, and how the recommended limitation should apply in wrongful death cases such as *Kelley* or in actions for loss of consortium. I will try to set forth briefly some of the considerations pertinent to the resolution of these questions.

1. Cases in which plaintiff may seek recovery for mental distress but where no physical injury to person or property is associated with the claim may fall into two categories—those in which the mental distress is produced by conduct that endangers the safety of persons, including plaintiff himself,<sup>220</sup> or property but where the object of plaintiff's concern does not actually suffer injury through impact, and those in which the mental distress is produced by conduct, often mere words, either directed to plaintiff or of the kind that defendant

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<sup>219</sup> Importantly, the more serious effects of economic dislocations upon the families of mental-distress victims who die, become disabled, or require extensive psychiatric care will be mitigated. Cf., CALABRESI, *supra* note 103, at 42–45 (noting the importance of avoiding adverse economic effects on a victim's family through secondary cost reduction).

<sup>220</sup> See, e.g., *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 45 N.E. 354 (1896).

knows will affect plaintiff or someone in his position. In the first category is the situation where defendant negligently allows his truck to roll down a hill toward plaintiff's children while plaintiff looks on helplessly, but where by some miracle the truck narrowly misses the children. In the second category are the "telegraph cases"<sup>221</sup> and cases like *Johnson v. State*<sup>222</sup> where defendant negligently sends erroneous distress-producing information to plaintiff. In neither category is there a danger of excessive and disproportionate damages produced by heaping damages for physical injuries to person or property upon mental-distress damages.<sup>223</sup> And in neither category will deterrence policies be served unless the mental-distress plaintiff is allowed to recover damages. Thus the factors that incline us to limit damages to economic losses in the cases that involve physical injuries seem less significant in these cases. Although general damages might therefore be allowed in the second category, to do so in the first category would create a serious anomaly: The plaintiff in the hypothetical, for example, would be allowed to recover pain and suffering if her children *were not* injured by defendant's conduct, but would not be allowed to recover such damage if her children *were* injured. While this anomaly might be justified on theoretical grounds, it would be terribly difficult to justify on grounds of fairness. For this reason it seems preferable to limit damages in cases in the first category to economic losses.

2. In cases in which defendant's conduct is reckless or wilful, thus justifying punitive damages,<sup>224</sup> or even where it is grossly negligent, the award of general damages to mental-distress plaintiffs seems less likely to result in total damages that will be excessive in relation to defendant's culpability. In cases such as these, mental-distress plaintiffs should therefore be deemed eligible to recover damages for pain and suffering as well as economic losses.<sup>225</sup>

3. In cases such as *Kelley* where distress produces death, existing wrongful death statutes may allow beneficiaries to recover for intangible losses as well as for pecuniary losses. Thus, for example, the Hawaii Wrongful Death Act allows compensation for:

loss of love and affection, including loss of society, companionship, comfort, consortium, or protection, (2) loss of marital care, attention, advice, or counsel, (3) loss of filial care or attention, or (4) loss of parental care, training, guidance, or education, suffered as a result of the death of the person by the surviving spouse, children, father, mother, and by any person wholly or partly dependent upon the deceased person.<sup>226</sup>

While such items of damage tend to embrace intangible losses rather than economic losses, they are of a quality different from pure pain and suffering.<sup>227</sup> On the other hand, they are losses suffered by third persons even more remote than the decedent in the chain of causation, and recovery by these people for such losses has as much, if not a greater, potential for expanding damages to disproportionately large amounts as does allowing pain-and-suffering damages to the immediate distress victim. A similar problem also exists if an action for

<sup>221</sup> See PROSSER, *supra* note 6, §54 at 329 n. 47.

<sup>222</sup> 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975).

<sup>223</sup> See pp. 14-15 *supra*.

<sup>224</sup> See PROSSER, *supra* note 6, §2 at 9.

<sup>225</sup> See p. 20 *supra*.

<sup>226</sup> HAW. REV. STAT. §663-3 (1976).

<sup>227</sup> See *Borer v. American Airlines, Inc.*, 19 Cal.3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977).

loss of consortium is permitted by the spouse of a mental-distress victim. The appropriate response may be to exclude the intangible elements of such damages<sup>228</sup> except in those few cases, mentioned above, where a victim of mental distress would himself be entitled to recover pain and suffering. Secondary accident costs of an economic nature would thus be avoided but the possibility of disproportionate damages and the courts' related concerns would be minimized.

## VI. IMPLEMENTATION

Appellate courts clearly possess the authority to prescribe rules of damages for the remedies they create.<sup>229</sup> While in recent years the tendency has been to expand recovery to allow full tort-type damages, including pain and suffering, in cases in which the former remedy was limited to specified economic losses,<sup>230</sup> there seems to be no reason why recovery, in newly created causes of action at least, may not be limited to economic losses where such limitation is justified by reason and policy. Where, as in the case of negligent infliction of mental distress, the choice is between drawing a perpendicular line that arbitrarily and capriciously separates those who may recover from those who may not or drawing a horizontal line that evenhandedly allows all "deserving" plaintiffs to recover but limits their recovery, for good reason, to economic losses, the latter could hardly be faulted as exceeding the judicial prerogative or as an unconstitutional deprivation of property or as discrimination.<sup>231</sup>

While common law appellate courts possess the authority to adjust the remedies with respect to court-created rights, they have generally been reluctant to do so, especially when the effect is to modify the traditional "all-or-nothing" approach.<sup>232</sup> This reluctance may be understandable where, as has been the case with the adoption of comparative negligence, a variety of relatively complex approaches is available, no one approach is clearly preferable to the others, no common law precedent exists to guide choice,<sup>233</sup> and a change would necessarily leave a series of difficult questions to be answered by future

<sup>228</sup> *Id.* See generally R. Keeton, *Statutes, Gaps, and Values in Tort Law*, 44 J. AIR L. & COM. 1 (1978), discussing how courts should interpret statutes affecting tort law.

<sup>229</sup> See generally GREGORY, KALVEN & EPSTEIN, *supra* note 7, at Ch. 11.

<sup>230</sup> See, e.g., *Dold v. Outrigger Hotel*, 54 Haw. 18, 501 P.2d 368 (1972); *Crisci v. Security Insurance Co.*, 66 Cal.2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967). The expansion of damages is achieved in these cases by emphasizing the tort aspects of the case rather than the contract aspects. See generally Gilmore, *Products Liability: A Commentary*, 38 U. CHI. L. REV. 103 (1970), for a description of how courts move between contract and tort theories to shift the law into conformity with current theories of risk allocation.

<sup>231</sup> Cf. *Pinnick v. Cleary*, 360 Mass. 1, 271 N.E.2d 592 (1971) (upholding constitutionality of Massachusetts no-fault law which deprives some injured persons compensation for pain and suffering). But cf. *Grace v. Howlett*, 51 Ill. 2d 478, 283 N.E.2d 474 (1972) (holding Illinois no-fault statute unconstitutional because it denied pain and suffering both to persons required to have first-party protection and those not so required, thus denying equal protection to the latter group).

<sup>232</sup> Compare *Maki v. Frelk*, 40 Ill.2d 193, 239 N.E.2d 445 (1968) with *Li v. Yellow Cab Co. of California*, 13 Cal.3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). Cf. *Bissen v. Fujii*, 51 Haw. 636, 466 P.2d 429 (1970) (court refused to apply comparative negligence to period before comparative negligence statute became effective). For a provocative discussion of the philosophical issues raised when the "all or nothing" rule is departed from by compromise, see *A Symposium on Philosophy from Law: Compromise and Decision Making in the Resolution of Controversies*, 58 N.W. L. REV. 731 (1964).

<sup>233</sup> Forms of comparative negligence had been judicially adopted at various times in different jurisdictions, see generally GREGORY, KALVEN & EPSTEIN, *supra* note 7, at 433-35, but they tended to be sufficiently different so that a court deciding whether to adopt some form of comparative

litigation.<sup>234</sup> But unwillingness to consider alternatives for which there is ample common law experience and that are not likely to generate confusion and litigation simply deprives the courts of the ability to mitigate the effect of the more serious misallocations that may occur when they create new substantive rights or decide to cut back on old ones. The United States Supreme Court, however, has exhibited no such reluctance to adjust remedies and even features of the trial process itself when to do so seems the best way to optimize important constitutional policies while preserving basic common law rights. Thus, for example, in order to make the law of defamation conform to the requirements of the first amendment, the Court has not just changed the substantive requirements for recovery but has adjusted the burden of proof and the rules of damages.<sup>235</sup> The Supreme Court's creativity stands as a model for state supreme courts when they feel the need to change the law to achieve objectives they deem important.<sup>236</sup>

Thus the change recommended in this article seems appropriate and ripe for judicial decisionmaking.<sup>237</sup>

## VII. CONCLUSION

Whether and in what form the present negligence/strict liability/insurance system for dealing with personal-injury claims will survive the twentieth century

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negligence could not argue convincingly that it had arrived at the one "right" answer suggested by the precedents. See V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* §1.5, at 25 (1974).

<sup>234</sup> In this regard the Florida experience is instructive. See *Hoffman v. Jones*, 280 S.2d 431 (Fla. Sup. Ct. 1973) (judicially creating pure comparative negligence and requiring principles of set-off to apply to awards of injured parties held liable to each other) with *Stuyvesant Ins. Co. v. Bournazian*, 342 So. 2d 471 (Fla. Sup. Ct. 1977) (set-off not to apply to extent injured parties are covered by liability insurance). See generally V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* (1974).

<sup>235</sup> See *Gertz v. Robert Welch, Inc.*, 418 U. S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964).

<sup>236</sup> The Supreme Court of Hawaii has demonstrated a willingness to adjust the burden of proof in order to serve important policy objectives. *Medeiros v. Kondo*, 55 Haw. 499, 522 P.2d 1269 (1974) (plaintiff must adduce "clear and convincing proof" of malice to recover against a public official charged with harassing a civil service employee into relinquishing his position).

It has been suggested that the burden of proof in cases of negligent infliction of mental distress should be increased by requiring plaintiff to prove his case by "more than a mere 'preponderance of the evidence.'" Koshiba, *Negligent Infliction of Mental Distress: Rodrigues v. State and Leong v. Takasaki*, 11 HAW. B.J. 29, 31 (1974). A more demanding burden of proof might provide greater protection against fraudulent claims and might also tend to reduce both the number of recoveries and the amounts awarded in settlement of doubtful cases.

<sup>237</sup> While the amendment to the wrongful death statutes suggested in the last section calls for legislative action, even here it may not be beyond the bounds of judicial competence to adjust the remedy without legislative action. Since recovery for negligently produced mental distress, in the absence of impact, was not permitted when most wrongful death statutes were passed, it is arguable that those statutes should not be interpreted to cover death produced by mental distress, absent impact, unless and until the legislature affirmatively acquiesces in the extension. See R. Keeton, *Statutes, Gaps, and Values in Tort Law*, 44 J. AIR L. & COM. 1, (1978), where Professor Keeton discusses the appropriate approach to judicial interpretation of statutes that deal with or affect tort law.

The effect of such interpretation in a state like Hawaii, if coupled with a judicial extension of the scope of liability in mental distress cases and limitation of damages in such cases to economic losses, likely would be to limit the estate of the deceased mental-distress victim to recovery of tangible economic losses in an action under the survival statute, HAW. REV. STAT. §663-7, 663-8 (1976)—somewhat less generous than the solution suggested above.

True, the survival statute was adopted before recovery for mental distress without impact was allowed. However, it may be argued that the statute was intended to be far more general in scope than the wrongful death act and that the legislature intended to permit broad categories of causes of actions, unless specifically excluded, to survive. See the illuminating discussion of the court's role in statutory interpretation in *Yoshizaki v. Hilo Hospital*, 50 Haw. 150, 433 P.2d 220 (1967).

is very much in doubt.<sup>238</sup> Powerful interests, such as product manufacturers and distributors, the medical profession, and the insurance industry, have added their considerable clout, manifested in well-organized propaganda and lobbying campaigns, to the ever-increasing volume of well-reasoned theoretical attacks on the existing system and recommendations for change propounded by scholars of high reputation and unquestioned probity and sincerity.<sup>239</sup> The public probably has great difficulty comprehending the more subtle aspects of the debate and is unusually susceptible because of inflationary conditions to real or imaginary "horribles" that purport to demonstrate how the existing system imposes excessively high transaction costs, increases insurance premiums and product costs, and, in the case of large judgments and settlements, inefficiently allocates scarce resources. The conditions that produced a "Proposition 13"<sup>240</sup> could also produce the overthrow of the liability system. True, the trial bar has so far been successful in defeating the most comprehensive proposals, such as complete replacement of the tort system in automobile accident cases by no-fault, but the tide clearly seems to be running in favor of the reformers.

The unspoken assumption of this article has been that, notwithstanding the need for improvement, the existing system of liability based upon negligence and strict responsibility for losses occasioned by defective products well serves important goals that would not be served in its absence. The system provides important incentives for safety in situations such as medical malpractice<sup>241</sup> where substitute incentives of even near-equal efficacy are not now available. Even in situations where the deterrence capability of the current system is questionable—as in the automobile accident context—<sup>242</sup> the liability system, when it functions as it should, fills important gaps in compensation, thus reducing secondary accident costs that would otherwise have to be borne by individual accident victims.<sup>243</sup> Furthermore, the system seems to establish behavior and performance standards for individuals and enterprises which, over time, are capable of being communicated to and internalized by the public at large.<sup>244</sup> It is by no means clear what the effects would be if compensation for injuries and standards for liability were dissociated. The need that led to the adoption of OSHA<sup>245</sup>—a full-blown scheme for regulating safety and health in the workplace—to operate in tandem with nonfault compensation for

<sup>238</sup> See R. Keeton, *Statutes, Gaps, and Values in Tort Law*, 44 J. AIR L. & COM. 1, 2 (1978). Professor Keeton notes that proposals for legislative reforms of tort law have substantially increased since the decade of the sixties, that the activists seeking reform range across a wide spectrum of philosophies, and that the demand for reform is likely to continue to increase as we move toward the year 2000.

<sup>239</sup> See, e.g., J. O'CONNELL & R. HENDERSON, *TORT LAW, NO-FAULT AND BEYOND*, Ch. V (1975).

<sup>240</sup> CAL. CONST. art. XIII A (limiting maximum ad valorem tax on real property to one percent of "full cash value" of the property).

<sup>241</sup> See Chittenden, *The Designated Compensable Event in Medical Malpractice 4* (Speech prepared for presentation to the A.B.A. National Institute Program in Minneapolis on June 5, 1977) reprinted in A.B.A. NATIONAL INSTITUTE, *THE TORT LIABILITY SYSTEM—IS IT TIME FOR CHANGE?* (1977); Torrey, *Doctors Don't Police Own Ills: Unethical, Incompetent and Disabled Physicians Continue to Practice*, Wash. Post, July 9, 1978, § B (Outlook), at 1; Halberstam, *The Doctor's New Dilemma—Will I Be Sued?*, N.Y. Times, Feb. 14, 1971, §6 (Magazine), at 8, 39.

<sup>242</sup> See Keeton, *The Case for No-Fault Insurance*, 44 MISS. L.J. 1, 12-13 (1973).

<sup>243</sup> See CALABRESI, *supra* note 103, at 45.

<sup>244</sup> "Rules may be said to affect behavior indirectly insofar as they help to reinforce the general moral climate in society which encourages people, unconsciously perhaps, to avoid socially destructive conduct." J. HENDERSON & R. PEARSON, *THE TORTS PROCESS* 85 n. 15 (1975).

<sup>245</sup> The Occupational Safety and Health Act of 1970, 29 U.S.C. §§651-78 (1970).

accidents under workers' compensation, however, does not inspire confidence that safety would be served by the separation.<sup>246</sup>

If the current system is to survive, however, its rules will have to be adjusted to insure that the results it produces can be defended as comporting with community views of fairness and as serving important social goals with reasonable efficiency.<sup>247</sup> I have attempted to show with respect to the negligent infliction of mental distress (which is, of course, a paradigm of the larger problem facing the tort system) that it is possible, without affronting the rule of law, for the courts to make such adjustments.

If courts are to respond with any degree of effectiveness to the challenges to the liability system they have fashioned, they must become more willing to engage in comprehensive policy analysis and to consider creative alternatives. The Hawaii Supreme Court in *Rodrigues*, like the California Supreme Court in *Dillon*, wrote a well-reasoned opinion that took current scientific understanding of the causes, effects, and manifestations of mental distress into account and focussed upon the victims' needs and equality of treatment. The opinion did not even come close to exceeding the limits of judicial propriety: The arbitrary limitations on liability imposed in other jurisdictions were seriously inconsistent with the requirements of justice, as demonstrated by the application of the "thin-skull" rule, in ordinary accident cases. Yet the opinion planted the seeds of its own destruction because it failed adequately to consider the effects of untrammelled liability for mental distress in cases where the potential for multiple recoveries could increase damages to shocking levels in relation to the conduct that produced them. When *Kelley* came along, the majority, now focussing primarily on the economic burden on defendants, responded in a predictable way by creating a new restriction nearly as arbitrary and unfair as the old ones. Unfortunately, since the court adopted a rule that on its face cannot be easily applied and also failed to articulate with reasonable clarity the considerations that are likely to govern its application, the effect was one of vacillation, unfairness, and uncertainty.

If judicial decisionmaking is to retain its viability as an expositor and interpreter of policy in the face of the present-day cynical attitude toward power, questioning of the courts, and demands for candor from public officials, the innovative prescriptions of appellate courts in cases like *Dillon*, *Rodrigues*, and *Kelley*, which "count for the future,"<sup>248</sup> should be accompanied by as sophisticated and imaginative a consideration of policy goals, relevant societal conditions, decisional trends, likely outcomes, wider effects, and alternative approaches as judicial ingenuity and resources will permit.<sup>249</sup>

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<sup>246</sup> Cf. Miller, *The Occupational Safety and Health Act of 1970 and the Law of Torts*, 1974 LAW & CONTEMP. PROB. 612, 613: "The principal significance of the utilization by Congress of such a punitive system of deterrence [as OSHA] is that it constitutes another compelling piece of evidence of widespread recognition by policy-makers that systems which were designed to provide compensation or individual justice for accident victims have not provided adequate deterrence against accidents."

<sup>247</sup> See generally, SPECIAL COMMITTEE ON AUTOMOBILE INSURANCE LEGISLATION, AMERICAN BAR ASSOCIATION, AUTOMOBILE NO-FAULT INSURANCE (1978).

<sup>248</sup> B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 165 (1921).

<sup>249</sup> See McDougal, *Jurisprudence for a Free Society*, 1 GEO. L. REV. 1, 9, 19 (1966). Cf. Keeton, *Statutes, Gaps, and Values in Tort Law*, 44 J. AIR L. & COM. 1, 20 (1978): "When courts are engaged in the inevitable enterprise of filling gaps in statutes, the value choices they make as legitimate representatives of society will be wiser as they are better informed by advocacy addressed explicitly

What this article has tried to demonstrate is how, with respect to the scope of liability for negligently inflicted mental distress, a problem that has long defied sensible resolution by the courts, such analysis can yield a solution that has the potential for maximizing the achievement of conflicting policy goals while avoiding recurrent appeals to the court for clarification. The specific solution suggested here—allowing recovery for mental distress to extend to foreseeable victims of serious distress but limiting their damages in most cases to their tangible economic losses—seems to serve considerations of justice, policy, and the rule of law considerably better than retreating, step by step, back toward the arbitrary “zone of danger” rule.

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to the competing principles, policies, and values at stake *and as they are openly explained in judicial opinions.*” (Emphasis added.) Prof. Keeton suggests that the same approach should be taken in any case in which the courts “are engaged in value-laden choices,” not just when statutes are being interpreted. *Id.* at 19. Also cf. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 497 (1962) (discussing the characteristics of a decision which can be examined to determine the “serviceability” of a doctrinal formulation set forth in the decision).